

British Copyright Council / WIPO Copyright Course

Rights in Software and Computer Programs

Autumn 2022

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Rights in Software and Computer Programs

- Primarily from an EU & UK perspective
 - UK law in this area is currently identical to that in the EU-27
 - But the laws may diverge in the future as the UK is no longer bound by the EU acquis
- Computer program protection
 - By copyright
 - History
 - Directive on legal protection of computer programs
 - By other means

Situation in Europe before the 1991 Directive on the Legal Protection of Computer Programs



- Disparities in protection for computer programs in Europe
 - Protected by copyright as literary works in UK, France etc
 - But Germany 1985 *Inkassoprogram* (German Federal Supreme Court)
 - Computer program protected by copyright only if it demonstrates an order of creativity which surpasses the general average of ability present in works of that kind
 - Therefore most German computer programs were not protected by copyright at the time
 - European Commission identified the need to harmonise the law to remove such disparities
 - As a result it proposed in 1989 what became the 1991 Directive, the first EU measure to harmonise any aspect of copyright

Copyright & Computer Programs in Europe - History of the Directive



- 1989 - Original European Commission proposal for Directive
- 1991 - Directive 91/250/EEC on the legal protection of computer programs adopted
- 1994 - TRIPS Agreement ...
- 1996 - Directive 96/9/EC on the legal protection of databases
- 1996 - WIPO Copyright Treaty ...
- 2000 - European Commission Report on implementation and effects
 - Recommends no change
- 2001 - Copyright in the Information Society Directive adopted
 - Harmonises EU copyright laws other than for computer programs and databases
 - Different approach to exceptions and reservations to that for computer programs and databases
- 2009 - Directive 2009/24/EC on the legal protection of computer programs (codified version, replacing 91/250/EEC) adopted



Development of Copyright Law for Computer Programs - TRIPS (1994) & WCT (1996)

- *Article 9(2) TRIPS - Relation to the Berne Convention*
 - Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such
- *Article 10(1) TRIPS - Computer Programs and Compilations of Data*
 - Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)
- *Article 2 WCT - Scope of Copyright Protection*
 - Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such
- *Article 4 WCT - Computer Programs*
 - Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression



Features of EU & UK Law on Copyright in Computer Programs

- What is protected (and what is not)?
- Who owns it?
- Has a restricted act been undertaken?
 - Nature of restricted acts
 - Substantiality
- Any specific defence?
 - Exhaustion of rights
 - Exceptions & Reservations
 - Competition law
 - Article 102 Treaty on Functioning of EU & Refusal to Licence



What is Protected under the Computer Program Directive?

- Article 1(1)
 - ... Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention ...
 - For the purposes of this Directive, the term 'computer programs' shall include their preparatory design material
- Article 1(2)
 - Protection ... shall apply to the expression in any form of a computer program. ...
- Article 1(3)
 - A computer program shall be protected if it is original in the sense that is the author's own intellectual creation.
 - No other criteria shall be applied to determine its eligibility for protection



What is not Protected (under the Directive)?

- Article 1(2)
 - Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected ...
- Recital 13
 - Whereas, for the avoidance of doubt, it has to be made clear that only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected ...
- Recital 14
 - Whereas, in accordance with this principle of copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected ...



What is and What is not Protected?

- Case C-406/10 *SAS Institute v World Programming* (CJEU 2 May 2012)
 - 1. Article 1(2) of [the computer program Directive means] that neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program and, as such, are not protected by copyright in computer programs for the purposes of that directive.



Who is the Author & Who owns Copyright?

- 2(1) The author of a **computer program** shall be the natural person or group of natural persons who has **created** the program,
 - ... or where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation.
 - Where collective works are recognized by the legislation of a Member State, the person considered by the legislation of the Member State to have created the work shall be deemed to be its author.
 - 2(2) ...
- 2(3) Where a computer program is created by an **employee** in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.
 - NB – No provision equivalent to 2(3) in other EU copyright legislation



What are the Restricted Acts under Article 4?

- **Reproduction ...**
 - permanent or temporary, by any means and in any form, in part or in whole
 - including "loading, displaying, running, transmission or storage of the computer program necessitate such reproduction"
- **Adaptation ...**
 - eg source code to object code
- **Distribution ...**
 - Including
 - Rental
 - [Communication to the Public]
 - 1991 Directive preceded 1996 WIPO Copyright Treaty and so has no explicit right of "communication to the public"
 - Commission has suggested it is included within the concept of "Distribution" in the Directive which in this context alone is not limited to distribution of physical articles
 - NB In other EU Directives that harmonise copyright "distribution" is limited to physical articles



Issues as to the Scope of the Restricted Act of Reproduction

- Application other than to “bit for bit” copying
- Copying the “look and feel”
- Is this reproduction of a substantial part?
- The problems of assessing “substantiality “ in relation to a utilitarian work
- The “idea-expression” conflict and the tendency to conflate
 - the scope of the copyright subject matter
 - the substantiality of the reproduction
- Addressed in US case law in the 1980s
 - Before it became easier (for a while) to patent computer programs in the USA
 - Adopted “abstraction-filtration-comparison” test
- English case law ...

Scope of the Restricted Act of Reproduction - English Case Law



- English case law concerning infringement of copyright in computer programs
 - *John Richardson Computers v Flanders and anr* [1993] FSR 497
 - *Ibcos Computers v Barclays Mercantile Finance & anr* [1994] FSR 275]
 - *Cantor Fitzgerald International & anr v Tradition (UK) & ors* [2000] RPC 95
 - *Navitaire v Easyjet* - [2004] EWHC 1725 (Ch)
 - *Nova Productions v Mazooma Games* – [2006] EWHC 24 (Ch), [2006] EWCA Civ 1044
 - *SAS Institute v World Programming* – [2010] EWHC 1829, [2010] EWHC 3012, [2013] EWHC 69
 - *Navitaire, Nova* and *SAS* (and other UK cases since 2000) at <http://www.bailii.org/>
- All concern non-literal copying
- Not easy to derive legal principles given their differing fact situations, but generally
 - Resist influence of old US case law and “abstraction-filtration-comparison” test
 - Rely less and less on old UK case law on compilations and book plots
 - Trend to exclude from protection interfaces, programming languages etc
 - eg Case C-406/10 *SAS Institute v World Programming* (CJEU 2 May 2012)

The Restricted Act of Distribution



- “... any form of distribution to the public, including the rental, of the original computer program or of copies thereof.”
- “First sale in the [EU/EEA] of a copy of a program by the rightholder or with his consent
 - shall exhaust the distribution right within the [EU/EEA] of that copy,
 - with the exception of the right to control further rental of the program or a copy thereof.”
- Therefore exception does not apply to unauthorised parallel imports from outside the EU/EEA which accordingly infringe
 - (cf in trade marks *Silhouette, Davidoff*, confirmed as to copyright in Case C-479/04 *Laserdisken ApS v Kulturministeriet* – all CJEU cases)
- Extends also to computer programs that have been the subject of an authorised download onto a carrier under a licence for the full term of copyright, equating this to distribution on a physical carrier
 - Case C-128/11 *UsedSoft v Oracle International* (CJEU 3 July 2012)
 - Case C-166/15 *Ranks & Vasilevics* (CJEU 16 October 2016)

Exceptions to the Restricted Acts - Overview



- Art 5 - Exceptions (only for lawful users)
 - 5(1) ... necessary for the use of the computer program ... in accordance with its intended purpose, including for error correction.
 - Case C-13/20 *Top System v Belgian State* (CJEU 6 October 2021)
 - 5(2) ... making a back-up copy
 - 5(3) ... observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts ... which he is entitled to do
 - Case C-406/10 *SAS Institute v World Programming* (CJEU 2 May 2012)
- Art 6 - Decompilation (also only for lawful users) ...
 - Effectively permits reverse engineering to derive interface information
 - But determined by Commission in *Microsoft* investigation to be of limited value as evidence was that it took too long to decompile
 - Commission imposed “compulsory licence” of interoperability information upheld by CJEU GC in October 2007
- Art 9(1) ... Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) shall be null and void.



Measures against Circumventing Technical Protection

- Article 7(1)(c) Computer Program Directive
 - “... any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program”.
- cf Article 6 Copyright in the Information Society Directive
 - Which is much more detailed – Case C-355/12 *Nintendo v PC Box* (CJEU 23 January 2014)
- No corresponding provision in Computer Program Directive as to Rights Management Information
 - cf Article 7 Copyright in the Information Society Directive as to Rights Management Info
- Hence Article 7, but not Article 6, Copyright in the Information Society Directive applies also to computer programs



Computer Program Licensing Practices – Constraints on Licensing in Europe

- Article 9 – Computer Program Directive
 - 1. ... Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) shall be null and void.
- Competition Law (Article 101 Treaty on Functioning of EU)
 - Provisions in licences that would be contrary to this by analogy with other areas of IP licensing in Europe
 - Exclusive grant backs
 - Contrast effective use of non-exclusive grant back in certain types of “open source” license
 - “No challenge” provisions
 - Computer software licences now (along with licences of patents and of know-how) subject to Technology Transfer Block Exemption
- National consumer and other “unfair contract terms” laws

Protection for Computer Programs other than by

Literary Copyright in the Program Itself

- Copyright in associated copyright works
 - Such as copyright in screen displays - useful in computer games cases
- Technical protection
 - Protection against circumvention of technical means of protection - eg Article 7(c) of Directive
- Contractual protection - in the context of licences
- Collateral commercial protection - eg support availability etc
- Confidential information
 - But information accessible through reverse engineering is not confidential - *Mars v Tecknowledge* 1999 & Article 3(1)(b) EU Trade Secrets Directive
- Trade marks - especially for piracy and counterfeiting
 - Used for example by Microsoft in the UK
- Patents (and in some countries other than the UK) utility models
 - As to the principles underlying the program that cannot be protected by copyright but can be protected by patent if they make a technical contribution beyond mere operation of the computer