

SOME ISSUES ON THE LEGAL PROTECTION OF COMPUTER PROGRAMS

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ABSTRACT

The issue of conciliating the copyright belonging to the author of a work to have protection over the material and moral interests deriving from his work and the society interest to have access to the work has made the subject of much debate. Scientific progress and the development of computer science are accompanied by issues related to the legal protection of computer software. Both internationally and regionally, regulations have been drafted that were also implemented (in one form or another) in national legislations. However, there are still several aspects that need further consideration.

Keywords: computer programs, legal protection, copyright, infringements, sanctions.

1. LEGAL PROTECTION OF COMPUTER PROGRAMS IN INTERNATIONAL AND REGIONAL REGULATIONS

I. The Universal Declaration of Human Rights

In accordance with the provisions of the Universal Declaration of Human Rightsⁱ, everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits; as well, everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the authorⁱⁱ.

II. The Berne Convention for the Protection of Literary and Artistic Works

In accordance with the provisions of the Berne Convention for the Protection of Literary and Artistic Worksⁱⁱⁱ, the expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science^{iv}.

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III. The Agreement on Trade-Related Aspects of Intellectual Property Rights

The Agreement on Trade-Related Aspects of Intellectual Property Rights („the TRIPs Agreement”)^v was set out in Annex 1C to the Marrakech Agreement establishing the World Trade Organisation.

In accordance with the provisions of this Agreement, computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself^{vi}.

IV. The World Intellectual Property Organization Copyright Treaty

The World Intellectual Property Organization Copyright Treaty^{vii} is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention^{viii}.

In accordance with the provisions of this Treaty, copyright protection extends to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such^{ix}.

Also, computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention and such protection applies to computer programs, whatever may be the mode or form of their expression^x.

V. The Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs

In accordance with the provisions of the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs^{xi}, Member States shall protect computer programs by copyright.

Computer programs should be protected as literary works, within the meaning of the Berne Convention for the Protection of Literary and Artistic Works.

The term "computer programs" (for the purposes of this Directive), shall include their preparatory design material^{xii} and protection (in accordance with this Directive) shall apply to the expression in any form of a computer program^{xiii}.

A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation^{xiv} and protection shall be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works^{xv}.

The exclusive rights of the rightholder (subject to the provisions of Articles 5 and 6) shall include the right to do or to authorise^{xvi}:

- - the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole; in so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorisation by the rightholder;
- - the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program;
- - any form of distribution to the public, including the rental, of the original computer program or of copies thereof.

Anyway, the first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof^{xvii}.

Exceptions to the restricted acts^{xviii}:

- - in the absence of specific contractual provisions, the acts referred to in points (a) and (b) of Article 4 (1) shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction;
- - the making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use;
- - the person having a right to use a copy of a computer program shall be entitled, without the authorisation of the rightholder, to 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 of loading, displaying, running, transmitting or storing the program which he is entitled to do.

As well, the authorisation of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of points (a) and (b) of Article 4(1) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met^{xix}:

- - those acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorised to do so;
- - the information necessary to achieve interoperability has not previously been readily available to the persons referred to in point (a); and
- - those acts are confined to the parts of the original program which are necessary in order to achieve interoperability

Anyway, the provisions of paragraph 1 shall not permit the information obtained through its application^{xx}:

- - to be used for goals other than to achieve the interoperability of the independently created computer program;

- - to be given to others, except when necessary for the interoperability of the independently created computer program; or
- - to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright

Are cautioned^{xxi} that in accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with a normal exploitation of the computer program.

In this respect, it is stated^{xxii} that Member States (without prejudice to the provisions of Articles 4, 5 and 6) shall provide, in accordance with their national legislation, appropriate remedies against a person committing any of the following acts:

- - any act of putting into circulation a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;
- -the possession, for commercial purposes, of a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;
- - 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 unauthorised removal or circumvention of any technical device which may have been applied to protect a computer program.

Besides, any infringing copy of a computer program shall be liable to seizure in accordance with the legislation of the Member State concerned^{xxiii}.

2. LEGAL PROTECTION OF COMPUTER PROGRAMS IN NATIONAL REGULATIONS

The copyright in a literary, artistic or scientific work and in any similar work of intellectual creation shall be recognized and guaranteed as provided in the Law on Copyright and Neighboring Rights no. 8/1996^{xxiv}.

The subject matter of copyright shall be original works of intellectual creation in the literary, artistic, or scientific field, regardless of their manner of creation, specific form or mode of expression and independently of their merit and purpose, such as literary and journalistic writings, lectures, sermons, pleadings, addresses and any other written or oral works, and also computer programs^{xxv}.

The protection of computer programs (under Law no. 8/1996) includes any expression of a program, application programs and operating systems expressed in any kind of language, whether in source code or object code, the preparatory design material and the manuals^{xxvi}.

Anyway, the procedures, operating methods, mathematical concepts and principles underlying any element in a computer program, including those underlying its interfaces, are not protected^{xxvii}.

The author of a computer program shall enjoy by analogy the rights provided for in Part I of the present Title of this Law, and especially the exclusive right to do and authorize the following^{xxviii}:

- - temporary or permanent reproduction of a program in its entirety or in part, by any means and in any form, including where the reproduction is necessitated by the loading, display, transmission or storage of the program;
- - translation, adaptation, arrangement and any other transformation of a computer program, including the reproduction of the result of those operations, without prejudice to the rights of the person who transforms the program;
- - distribution and rental of the original or copies of a computer program in any form.

Anyway, the first sale of a computer program copy, on the domestic market, by the owner of the rights or the one made with his consent, shall exhaust the exclusive right for the authorization of the distribution of such copy on the domestic market^{xxix}.

Unless otherwise agreed, the economic rights in computer programs created by one or more employees in the course of their duties or on instructions from their employer shall belong to the latter^{xxx}.

Unless otherwise agreed, a contract for the use of a computer program shall assume that^{xxxi}:

- a) the user has been granted the non-exclusive right to use the program;
- b) the user may not transfer the right to use the program to another person.

Anyway, the transfer of the right to use a computer program shall not imply transfer also of the copyright in it^{xxxii}.

Unless otherwise agreed, the authorization of the copyright owner shall not be required for the acts provided for in Article 73(a) and (b) where they are necessary to permit the acquirer to use the computer program in a manner that corresponds to its purpose, including for the correction of errors^{xxxiii}.

The authorized user of a computer program may, without authorization from the author, make an archive or reserve copy where necessary for the use of the program^{xxxiv}.

As well, the authorized user of a computer program may copy, without authorization from the copyright owner, observe, study or test the operation of the program, to determine the principles and ideas underlying any of its elements at the time of loading the program in the memory or displaying, converting, transmitting or storing it, which operations the authorized user is entitled to carry out^{xxxv}.

The authorization of the copyright owner shall not be mandatory where the reproduction of the code or translation of its form is indispensable to procure information required for the interoperability of a computer program with other computer programs, provided that the following conditions^{xxxvi} have been fulfilled:

- - the acts of translation and reproduction are carried out by the person holding the right to use a copy of the program, or by a person who is doing so in the name of that person, having been duly authorized for the purpose;
- - the information necessary for interoperability is not readily and rapidly accessible to the persons referred to in paragraph (a) of this Article;
- - the acts referred to in paragraph (a) of this Article are limited to the parts of the program required for the interoperability.

Anyway, the information obtained by virtue of Article 78^{xxxvii}:

- - may not be used for purposes other than the achievement of interoperability of the independently-created computer program;
- - may not be communicated to others, except where such communication proves necessary for the interoperability of the independently-created computer program;
- - may not be used for the development, production or marketing of a computer program that is basically similar in expression or for any other act that might damage the author's rights.

As well, the provisions of Articles 78 and 79 shall not apply if they are liable to prejudice either the owner of the copyright or the normal exploitation of the computer program^{xxxviii}.

It shall be an offence and punishable with imprisonment for 2 to 5 years or with a fine the following acts^{xxxix}

- 1) making of pirate goods, for the purpose of the distribution, without aiming at, directly or indirectly, a material benefit, with any means and in any modality;
- 2) placing of the pirate goods under a final import or export customs regime, under a suspensive customs regime or in free zones;
- 3) any other modality of introducing the pirate goods on the domestic market.
- 4) To offering, the distribution, possession, or storage and transportation, for the purpose of distribution of pirate goods, as well the possession of them for the purpose of utilization through the communication to the public at the working locations of the legal persons, it shall be an offence and punishable with imprisonment from 1 to 5 years or with a fine^{xl}

(1) and (2) are committed for commercial purpose, these are sanctioned with imprisonment from 3 to 12 years^{xli}

- 5) The rental or offering for rental the pirate goods are sanctioned with from 3 to 12 years^{xlii}.

The promotion of the pirate goods through any means and in any modality, including the utilization of public announcements or electronic means of communication or through the exhibiting or presentation to the public of the lists or catalogues of products, it shall be an offence and punishable with imprisonment from 6 months to 3 years or fine^{xliii}

- 6) In the case in which any of the acts provided for in paragraphs (have caused very serious consequences, these are sanctioned with imprisonment from 5 to 15 years. In order to evaluate the seriousness of the consequences, the calculation of the material damage is made by taking into account the pirate goods identified under

the conditions provided in paragraphs and the price per unit of the original products, cumulated with the amounts illegally earned by the offender^{xliv}.

- 7) Committing of the acts mentioned under paragraphs (1)-(5) by an organized infraction group is sanctioned with imprisonment from 5 to 15 years^{xlv}.

The unauthorized reproduction on computer systems of computer programs in any of the following modalities: installation, storing, running or execution, display or transmission in the domestic network, it shall be an offence and punishable with imprisonment for 1 to 4 years or with a fine^{xlvi}.

The act of a person that, unlawfully produces, imports, distributes or rents, offers, in any way, for sale or rent, or possesses for commercial purposes, devices or components that allow the neutralization of the technological measures of protection or performs services which lead to the neutralization of some technological measures for protection, including in the digital environment, it shall be an offense and punishable with imprisonment for 6 months to 3 years or with a fine^{xlvii}.

3. COURT OF JUSTICE (GRAND CHAMBER), CASE C-406/10, REFERENCE FOR A PRELIMINARY RULING UNDER ARTICLE 267 TFEU FROM THE HIGH COURT OF JUSTICE OF ENGLAND AND WALES, CHANCERY DIVISION (UNITED KINGDOM), MADE BY DECISION OF 2 AUGUST 2010, RECEIVED AT THE COURT ON 11 AUGUST 2010, IN THE PROCEEDINGS SAS INSTITUTE INC. V WORLD PROGRAMMING LTD.

Considering that the reference for a preliminary ruling concerns the interpretation of Articles 1(2) and 5(3) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42), and of Article 2(a) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) and this reference has been made in proceedings between SAS Institute Inc. and World Programming Ltd concerning an action for infringement brought by SAS Institute for infringement of copyright in computer programs and manuals relating to its computer database system, the Court of Justice (Grand Chamber) hereby rules^{xlviii}:

- - Article 1(2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs must be interpreted as meaning 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.
- - Article 5(3) of Directive 91/250 must be interpreted as meaning that a person who has obtained a copy of a computer program under a licence is entitled, without the authorisation of the owner of the copyright, to observe, study or test the functioning of that program so as to determine the ideas and principles which underlie any element of the program, in the case where that person carries out acts covered by that licence and acts of loading and running necessary for the use of the computer

program, and on condition that that person does not infringe the exclusive rights of the owner of the copyright in that program.

- - Article 2(a) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that the reproduction, in a computer program or a user manual for that program, of certain elements described in the user manual for another computer program protected by copyright is capable of constituting an infringement of the copyright in the latter manual if – this being a matter for the national court to ascertain – that reproduction constitutes the expression of the intellectual creation of the author of the user manual for the computer program protected by copyright.

4. ROMANIAN STATISTICS AND CASE LAW ON THE LEGAL PROTECTION OF COMPUTER PROGRAMS

I. Romanian statistics on the legal protection of computer programs

Romanian Copyright Office operates as specialized body under the subordination of the Government, being the sole regulatory authority, registration by national registries, supervision, authorization, arbitration and technical-scientific establishment in the field of the copyright and neighboring rights^{xlix}.

Following the verification of products after the requests of institutions with competencies of control referring to compliance with the legislation in the field of copyright, the Division of Analyses and Controls (which is an integral part of Romanian Copyright Office) identified^l:

- - in 2010: 717 business software recorded on optical disks, 4.055 entertainment software recorded on optical disks, 1.165 business software recorded on hard disk, 1.633 entertainment software recorded on hard disk;
- - in 2011: 1.303 business software recorded on optical disks, 2.197 entertainment software recorded on optical disks, 1.696 business software recorded on hard disk, 727 entertainment software recorded on hard disk,
- - in 2012: 544 business software recorded on optical disks, 755 entertainment software recorded on optical disks, 440 business software recorded on hard disk, 384 entertainment software recorded on hard disk.

II. Romanian case law on the legal protection of computer programs

It has been considered^{li} that installing pirate copies of computers games on computers and making them available for general use for a given amount of time in exchange for money meets both the constitutive elements of offences stipulated at article 139/6 paragraph (4) of Law no. 8/1996 consisting of the rental of pirate goods since, in the meaning of article 14/3 of this law, rental means making available a work for general use, for a limited amount of time and for a direct or indirect economic or commercial benefit –, but also the elements of the offence stipulated at article 139/9 of Law no. 8/1996 consisting of the illegal reproduction on computer systems of computer software under any of the following

methods: installation, storage, running or execution, display or transmission on the internal network.

Through the criminal sentence no. 5/P of January 11th, 2007, given by the Court of Neamt, the defendant I.F. was sentenced for the offences of rental or offering to rent pirate goods as stipulated at article 139/6 paragraph (4) of Law no. 8/1996 and illegal reproduction of computer software on calculation systems, as stipulated at article 139/9 of Law no. 8/1996.

In order to give this sentence, the first court mentioned that, on December 24th, 2005 the defendant set up a trading company with the main object of activity related to databases and, with the secondary activity the editing of software and computer data processing. He opened a company working point of the „internet cafe” type, with 9 computers and one server, where customers, in exchange for ROL 15,000/hour accessed internet pages or computer games and, although he had an operating license for only 3 computers, he also installed operating systems „Windows XP”, whose owner was Microsoft Corporation, as well as games belonging to Electronic Arts on the other computers as well.

The defendant made an appeal against the sentence, invoking lack of grounds.

The Court of Appeal Bacău mentioned that the evidence of the file does not specify that the defendant rented the pirate goods, namely the computer software, so it addressed to change the legal framework of the deed into the offence stipulated at article 139/8 of Law no. 8/1996, amended (the law text refers to offering software via the internet or through computer networks, without the consent of their rightful owners, but which are not pirate goods).

The court of appeal considered that, given the fact that the defendant did not rent the software, but offered and distributed it to customers at the company headquarters or via the internet and that the deed was committed under the Law no. 285/2004, his deed is a contravention and it is an offence only if two civil sanctions were previously applied for the same deeds. But, since in the file it was noted that the defendant did not receive a civil sanction, the criminal decision no. 77 of April 3rd, 2007 accepted the defendant's appeal against the criminal sentence no. 5/P of January 11th, 2007, which it completely eliminated and, after a second trial, under article 139/9 of Law no. 8/1996, sentenced the defendant again under article 11 point 2 letter a) with reference to article 10 paragraph (1) letter b) Code of criminal procedure, acquitted him for the offence stipulated at article 139/6 paragraph (4) of Law no. 8/1996.

The prosecutor filed appeal against the decision, invoking grounds of unlawfulness.

The High Court of Cassation and Justice, upon analysis of the decision compared with the formulated criticism, which refers to the cassation file stipulated at article 385/9 paragraph (1) point 16 of the Code of criminal procedure, but also by office for the files listed at article 385/9 paragraph (3) Code of criminal procedure, considered that the appeal was grounded.

The court of appeal noted that the instance of appeal was wrong in considering that the distribution of pirate goods and offering them to customers while they are at the working point is not an operation of incriminated rental as long as, for the offer, the defendant

charged a fee characterized by the law as a direct or indirect economic or commercial benefit. For these reasons, under article 385/15 point 2 letter d) of the Code of criminal procedure, the prosecutor's appeal was accepted, the criminal decision no. 77 of April 3rd, 2007 and the criminal sentence no. 5/P of January 11th, 2007 were partly classified and, among others, under the provisions of article 139/6 paragraph (4) of Law no. 8/1996, sentenced the defendant.

ⁱ The Universal Declaration of Human Rights, available at: <http://www.un.org/en/documents/udhr/>.

ⁱⁱ Article 27.

ⁱⁱⁱ The Berne Convention for the Protection of Literary and Artistic Works, available at: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

^{iv} Article 2 paragraph 1.

^v The Agreement on Trade-Related Aspects of Intellectual Property Rights, available at: http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

^{vi} Article 10.

^{vii} The World Intellectual Property Organization Copyright Treaty, available at: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P8_189.

^{viii} Article 1 paragraph 1.

^{ix} Article 2.

^x Article 4.

^{xi} Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:111:0016:01:EN:HTML>.

^{xii} Article 1 paragraph 1.

^{xiii} Article 1 paragraph 2.

^{xiv} Article 1 paragraph 3.

^{xv} Article 3.

^{xvi} Article 4 paragraph 1.

^{xvii} Article 4 paragraph 2.

^{xviii} Article 5.

^{xix} Article 6 paragraph 1.

^{xx} Article 6 paragraph 2.

^{xxi} Article 6 paragraph 3.

^{xxii} Article 7 paragraph 1.

^{xxiii} Article 7 paragraph 2.

^{xxiv} Law on Copyright and Neighboring Rights no. 8/1996 published in the Official Gazette of Romania no. 60/20.03.1996.

^{xxv} Article 7 letter a).

^{xxvi} Article 72 paragraph 1.

^{xxvii} Article 72 paragraph 2.

^{xxviii} Article 73 paragraph 1.

^{xxix} Article 73 paragraph 2.

^{xxx} Article 74.

^{xxxi} Article 75 paragraph 1.

^{xxxii} Article 75 paragraph 2.

^{xxxiii} Article 76.

^{xxxiv} Article 77 paragraph 1.

^{xxxv} Article 77 paragraph 2.

^{xxxvi} Article 78.

^{xxxvii} Article 79.

^{xxxviii} Article 80.

xxxix Article 139/6 paragraph 1.

xl Article 139/6 paragraph 2.

xli Article 139/6 paragraph 3.

xlii Article 139/6 paragraph 4.

xliii Article 139/6 paragraph 5.

xliv Article 139/6 paragraph 6.

xlv Article 139/6 paragraph 7.

xlvi Article 139/9.

xlvi Article 143 paragraph 1.

xlvi Court of Justice (Grand Chamber), Case C-406/10, available at:

<http://curia.europa.eu/juris/document/document.jsf?text&docid=122362&pageIndex=0&doclang=RO&mode=lst&dir&occ=first&part=1&cid=115060>.

xlix Article 137 paragraph 1.

¹ Romanian Copyright Office, Statistics on 2010-2012, available at:

<http://www.orda.ro/default.aspx?pagina=418>.

^{li} Romanian High Court of Cassation and Justice, Criminal Section, Decision no. 4782 of 16 October 2007, available at: <http://www.scj.ro/SP%20rezumate%202007/SP%20r%204782%202007.htm>.