

Criminal Protection Regarding the Copyright of Computer Programs - European and National Legislation -

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Abstract: Any harmonization of copyright and related rights must be based on a high level of protection since these rights are crucial to intellectual creation. Their protection helps to maintain and develop creativity in the interests of authors, performers, producers, consumers, culture, industry and general public. Consequently, intellectual property has been recognized as an integral part of the property. A rigorous and effective system of protection of copyright and related rights is one of the main instruments that guarantee the production and creativity of European cultural resources necessary to obtain and maintain autonomy and dignity of creators and performers. A joint research and a consistent implementation at European level of technical measures for the protection of works or other subject-matter and to provide necessary information on rights to be essential, since the ultimate goal of these measures is to implement the principles and guarantees prescribed by law.

Keywords: Unauthorized reproduction, pirate goods, software piracy.

Creating computer programs involves the use of considerable human, technical and financial resources while the possibility of copying at a much lower cost than that which it assumes a self-conception. Computer programs play an increasingly important part in many industries and technology can be considered as being of fundamental importance for industrial development of the European Community. Certain differences that characterize the legal protection of computer programs under the laws of Member States have direct negative effects on the functioning of the common market as regards computer programs such differences risking to stress as Member States adopt new legal rules in this area.

Among the most significant regulations on the protection of copyright of computer program and the right sui - generis of the holder of databases we should consider the following:

- Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/CEE).
- Council Directive 93/98/EEC of 29 October 1993 regarding the harmonization of the duration of the copyright protection and certain related rights.
- Directive 2001/29/EC of 22 May 2001 of the European Parliament and Council regarding the harmonization of certain aspects of copyright and related rights in the information society.

European Council Directive no. 91/250/EEC of 14 May 1991 on the legal protection of computer programs has shown that computer programs have a fundamental importance for the industrial development and therefore must be protected through a harmonized legal framework for all Member States and by Directive 93/98/EEC of 29 October 1993 they have laid the foundations for harmonization of terminology used in the field of copyright and related rights.

According to European Council Directive no. 91/250/EEC regarding the legal protection of the computer programs¹, Member States shall protect computer programs by copyright as literary works within the meaning of the Berne Convention on the Protection of Literary and Artistic Works. The term "computer program" shall include their preparatory design material. Protection under this Directive shall apply to any forms of expression of a computer program. The ideas and principles which are the

¹ Vezi Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs

basis of any element of a computer program, including those which underlie its interfaces, are not protected by copyright.

The essential condition to be fulfilled by a computer program in order to qualify for protection under the Council Directive is the originality, in this sense it representing an author's own intellectual creation. No other criteria shall be applied to determine if this is eligible for protection. The author of the program is attributed to the person or group of individuals who created the program or if the Member State's legislation so permits, the legal person designated by law as the right holder.

Where collective works are recognized by the legislation of a Member State, the person who, under legislation of the Member State has created work is considered to be the author. If a computer program is commonly created by a group of individuals, exclusive rights are held jointly. If a computer program is created by an employee in the exercise of service or by the employer's instructions, his employer is the only entitled to exercise all rights relating to computer program so created, except as provided by contract.

Holder enjoys the exclusive² right to do or to authorize the permanent or temporary reproduction of a computer program, in part or in whole by any means and in any form. Insofar as loading, displaying, running, transmitting or storing of the computer program necessitates such reproduction of the program; such acts of reproduction are subject to authorization by the right holder;

- translation, adaptation, arrangement and any other alteration of a computer program and 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 renting the original or copies of a computer program

The first sale of a copy of the computer program within the Community by the right holder or with his consent shall exhaust the distribution right of that copy within the Community, except the right to control further rental of the program or a copy thereof.

Under the provisions of Directive 91/250/EEC the Member States shall, in accordance with their national legislation, take appropriate measures in order to guard against persons committing acts such as:

- Placing into circulation of a copy of the computer program knowingly or having reason to know that it is unlawful,
- Possession for commercial purposes of a copy of a computer program knowingly or having reason to know that it is unlawful;
- Placing into circulation or possession for commercial purposes of any means with the sole purpose to facilitate the unauthorized removal or neutralization of any technical device which can be installed to protect a computer program.

Any unlawful copy of a computer program may be confiscated under the law of the Member State concerned. Existing inconsistencies that have such effects must be eliminated and the emergence of new ones should be prevented, while it is permitted the elimination or prevention of the occurrence of those not affecting significantly the functioning of the common market. Community legal framework on the protection of computer programs may therefore, in a first step to restrict the prescribing of Member States to grant protection under the copyright of computer programs as literary works and to determine the beneficiaries and the object of the protection, the exclusive rights, which the protected persons can invoke in order to authorize or prohibit certain acts, and also the duration of the protection.

The term "computer program" includes programs in any form, including those that are incorporated into hardware, this term also includes preparatory design work aimed at developing a program, provided that they are likely to allow a computer program at a later stage;

² See Article 2 of Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC)

The criteria applied in determining whether a computer program constitutes or not an original work should avoid including any assessment of the quality or of the aesthetic merits of the program. Function of a computer program is to communicate and work with other components of a system and with users, to this end, a logical and, where appropriate, physical interconnection and interaction is needed to allow full operation of all software and hardware components with other software and hardware, and users. For the avoidance of doubt, it should be 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 by copyright.

The author's exclusive rights to prevent unauthorized reproduction of the work must be subject to limited exceptions when the subject is a computer program in order to allow the reproduction of the program when used by its legal acquirer. This means that the acts of loading and running necessary for using a copy of the legally purchased program and the correction of its errors can not be prohibited by contract, in the absence of specific contractual provisions, including in case of sale of copies of the program, any other act necessary in order to use a copy of a program can be performed in accordance with its intended purpose by a purchaser of the legal copies.

A person who enjoys the right to use a computer program should not be prevented from carrying out the acts necessary for the analysis, study or test the functioning of the program, provided that these measures should not prejudice the copyright on the program. Reproduction, translation, adaptation or transformation of the code form in which a copy of the computer program has been provided constitutes an infringement of the exclusive rights of the author. In certain circumstances, the reproduction of the computer program code or translation of its form are indispensable in order to achieve interoperability information necessary to a program independently created by other programs. Bear in mind that only in these well-defined circumstances, the acts of reproduction and translation by a person or on its behalf, having the right to use a copy of the program is legitimate and consistent with the best practices and is therefore not considered necessary the authorization from the copyright holder. One objective of this exception is to allow the interconnection of all elements of a computer system, including those of different producers so that they can work together. Such an exception to the author's exclusive rights can not be applied so as to prejudice the legitimate interests of the right holder or a normal exploitation of the program.

On 22 May 2001 the European Parliament and Council adopted Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society³. This directive states that the harmonization of the member countries legislation on copyright and related rights contributes mainly to:

- the organization of a single market, undistorted where free competition may be conducted in compliance with the legal framework;
- making substantial investment in creativity and innovation, including network infrastructure
- providing jobs, creating new positions and jobs.

Directive 2001/29/EC is appreciated as the most important measure adopted by the EU as regards to copyright which brings the European legal regulations in the digital era, thus achieving the targets set by the Lisbon European Council in preparing for the transition of the EU to a competitive, dynamic economy, based on knowledge. The directive will be implemented by Member States into national law within 18 months from the date of publication in the Official Journal of EU and European creators, artists, copyright industries in the area can have more reliable expectations regarding the protection of their property rights in the conditions created by electronic commerce. Together with these regulations of the European Communities a series of measures have been taken in the world and all States have established some institutions aimed at protecting copyright.

Member States should provide for sanctions and effective remedies against violations of rights and obligations. Member States shall take all necessary measures to ensure that those sanctions and

³See Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society

remedies are applied. The sanctions must be effective, proportionate and dissuasive, and include the possibility to request damages and / or an injunction and, where appropriate, confiscation of materials used for committing crime.

In the digital environment, in particular the services of intermediaries may be used increasingly by others to commit crimes. In many cases such intermediaries are best placed to put an end to such violations. Consequently, without prejudice to any other penalties or remedies available, right holders should have the opportunity to request that an injunction be pronounced against an intermediary who distributes in an illegal network a copy of a protected or a protected object. This possibility should be provided even where the acts performed by the intermediate constitute for exceptions. Terms and conditions of such injunction should remain the responsibility of the national legislation of Member States. This protection is without prejudice to national laws or community in other areas such as industrial property, data protection, conditional access, access to public documents and the right media exploitation chronology, which may undermine the protection of copyright and related rights.

An important role in the legal protection of copyright protection is taken by the criminal protection and all states must unequivocally incriminate any action to use (exploitation) of the work belonging to others by bringing knowledge, presentation, representation, translation, publication, fixing a support issue or transmission, communication, reproduction, importation, design, exhibition sales, counterfeiting, production, use, entry into service, the disclosure of all or part of the content of a patent, misleading the consumer or acquisition without the quality Authorship of work. As far as the computer programs are concerned the Member States' laws criminalize the unauthorized reproduction of computer systems software and any reproduction in any form of computer programs.

In Romania, the copyright to a literary, artistic or scientific work, as well as any such works of intellectual creation is recognized and guaranteed in the Law no. 8 / 1996 on copyright and related rights.

The objective of the copyright for the works is the original intellectual creation in the literary, artistic or scientific value and independent of its destination. When we refer to the subject of copyright we refer to the ideas of the work itself and not the material object in which the content of ideas is realized, although some work in order to be the subject of copyright, must be necessarily externalized and objectified in a certain way, specific to the field in which it matches. The author has copyright over the content of ideas that draw up a work. He has a property right on the material in which the work is found objectified. The author of a scientific work can dispose of personal property rights on the material form of the expression of his work (e.g. the manuscript of his work), may no longer be in possession of any copy of such material (e.g. edition being exhausted), but he retains the copyright in the work.

The exercise involves copyright assertion of rights and any use of any of the faculties in copyright. The capitalization of intellectual property rights, as a concept, refers in particular to the rights of initiative, of those which give the copyright its value as the means by which the goals envisaged in creating the work are achieved. Among these rights are, first of all, the author's right to bring his work effectively to the public, so to use the means - either technical or social - necessary to spread his work, without which the right to make his work known to the public would remain purely theoretical.

Capitalization of the copyright constitutes also the recognized right of the author to obtain remuneration for creative work which became socially useful precisely by making it available to the creative community and using it by them.

Romanian legislation provides protection both a civil and a criminal protection of copyright of computer programs. Crime in breach of copyright of computer programs is generically known as "software piracy"

As is known, "software piracy" means the use and illegal use of copyright without a computer program. Law no. 8 / 1996 on copyright and related rights infringes as crime the unauthorized reproduction of the computer systems software on calculation systems in any of the following ways: installation, storage, or running performance, display or transmission in the domestic network. Further we make a brief analysis of the crimes:

1. Object. Subjects.

A. *Crime object.*

a) *The special legal object* is represented by the particular social relations that are borne, developed and placed in relation to protecting and defending the rights of holders of copyright of computer programs against unauthorized reproduction.

b) *The material object* constitutes of computer software.

B. *Crime subjects.*

a) Although the legal text does not place it we consider that an active subject may be any individual which can be held legally responsible and has the appropriate computer knowledge.

Criminal participation is possible in all its forms: coauthor, instigation or complicity

b) *The passive subject* of the liability is the holder of the copyright of computer program reproduced unauthorized.

2. Legal content. I. Situation premise. Committing this crime is conditioned by the existence of a computer program in the protection period, which is the prerequisite.

II. The constitutive content. A. *Objective side.* a) *The material element* of the analysed crime consists in the *unauthorized reproduction of the computer systems of computer programs by the installation, storage, or running performance, display or transmission in the domestic network.* By "computing system" we must understand the computer itself.

This notion is not to be confused with that of "system". A system is defined⁴ as any device or set of devices interconnected or in functional relation out of which one or more ensures the automatic data processing using a computer program. System includes the computer, but can also mean a network computer or a network of networks - Internet, intranet.

While no clear legal text states it, we believe that the existence of such crimes requires the following conditions to be cumulatively met

- To commit an act of unauthorized reproduction, all or part of a computer program
- Unauthorized reproduction to be committed in the protection period of the computer program;
- Computer program to meet the requirement of originality ;
- Unauthorized reproduction should be made on a computing system.

b) *The immediate result* consists in the changes of the prior existing situation by unauthorized reproduction on the computer systems of computer programs thus creating a state of danger for the copyright holder.

c) Between the incriminated fact and the immediate consequence there must be a causal link which usually results from materiality of the crime.

B. *Subjective side.* From the subjective point of view the crime is committed with guilt manifested as intended direct or indirect.

3. Forms, procedures, sanctions. Although the offense is likely to be committed in all imperfect, the legislature does not criminalize any *attempt* or *preparatory acts*. The consumption of crime takes place when the incriminated fact is achieved in any of the arrangements stipulated in the text. The analyzed offense may be considered as committed in any of the regulatory arrangements incriminated in the text, which can satisfy a multitude of ways actually.

The jurisdiction of the crime lies in the first instance with the court.

⁴ See art.35 paragraph (1). a) Law nr.161/2003 on measures for ensuring transparency in the exercise of public dignities, public functions and in business, the prevention and punishment of corruption

It is also incriminated the offense of offering, distribution, possession or storage or transport, for the purpose of distribution, renting or offering for hire of pirate goods, and holding them for the purpose of usage by public communication in the work stations of legal persons.

Special legal subject is represented by the social relationships that are born, develop and take place in connection with the defense of copyright holders or holders of rights related to copyright against the infringement of their rights. The material object is represented by the pirate goods.

By pirate goods we understand all copies regardless of the medium, including the cover, made without the consent of rights holder or person duly authorized by it and which are made directly or indirectly, in whole or in part, on a host of copyright or of related rights or their packaging or cover them. Software may be incorporated unauthorized on different media which thus become pirate goods.

The active subject of the crime may well be any individual. Criminal participation is possible in all its forms.

The passive subject is represented by the copyright holder or related rights holder. The committing of the crime is conditioned by the existence of a product bearing copyright or related rights, this being the state assumption.

The immediate following is the creation of a state of danger against the holders of copyright or related copyright rights holders, status arising from the realization of the actions incriminated in the legal text. Between the incriminated actions and the immediate follow there must be a causal link, link resulting from the materiality of the crime itself.

From the subjective point of view, the actions of offering and distribution are committed with direct or indirect intent and the actions of holding (in the first variant), storage or transport are committed with *intent qualified directly by purpose*, meaning these are done with the purpose of distribution. Form of guilt which is the subject of the second variant is the direct intention qualified by purpose.

There are three aggravating variants:

1. the situation where the crime is done for commercial purposes. By „commercial purposes” we may understand the means of obtaining, follow directly or indirectly, a material or economic advantage. Commercial purposes shall be presumed if pirate goods are identified on the premises, at the work points, in annexes or the means of transport used by economy operators which have as their activity object the reproduction, distribution, rental, storage or transport of products bearing rights author or related rights.

2. serious consequences have resulted. By ”serious consequences” we understand a material loss of more than 200,000 lei or a very serious disturbance activity, caused to a public authority or any of the establishments referred to art.145, or other legal or natural individuals.

3. the crime is committed by an organized criminal group. By „organized criminal group” we refer to a structured group, composed of three or more persons, existing for a period and acting in a coordinated manner with the aim of committing one or more serious crimes in order to obtain directly or indirectly a financial benefit or other material benefit; it does not constitute as organized criminal group one formed occasionally in the immediate aim of committing one or more crimes and which has no continuity or a fixed structure or fixed roles for its members within the group.

The criminal action is put in motion on its own. Jurisdiction of trial, in the first instance, reverts to the court.

Technological development has multiplied and diversified the vectors for creation, production and exploitation. Even if no new concepts are needed for protection of intellectual property, existing laws on copyright and related rights will be adapted and supplemented to adequately reflect economic realities, such as new forms of exploitation. Without harmonization at the Community level, legislative procedures at national level that have already been initiated in several Member States to meet the technological challenges can create significant differences in protection and, therefore, restrictions on the free movement of services and products incorporating or are based on intellectual property, leading to defragmentation of the internal market and legislative inconsistency. The impact of such legislative

differences and legal insecurity will become more important with developments in the information society, which has already led to increased cross-border exploitation of intellectual property.

Major differences of law and legal uncertainty may prevent the realization of economies of scale for new products and services protected by copyright and related rights. Therefore, the community legal framework must also be adapted and completed as much as necessary in order to have a functional domestic market. To this end, those provisions regarding national copyright and related rights which vary considerably from one Member State to another or those generating legal uncertainty should be tailored, because they may prevent the proper functioning of the domestic market and the evolution of the information society in Europe, and should avoid inconsistencies between the national reactions to technological developments, not having to eliminate or avoid the differences that do not adversely affect the operation of the domestic market. Various social implications, societal and cultural aspects of information society are required taking into account the specific characteristics content of products and services.

Any harmonization of copyright and related rights must be based on a high level of protection since these rights are crucial to intellectual creation.

There has to be a fair balance between the rights and interests of various categories of rights holders and between them and the rights and interests of users of protected objects. Existing exceptions and limitations of rights established by Member States should be reconsidered in the light of the new electronic environment. Differences between the exceptions and limitations on certain restricted acts have direct negative effects on the functioning of the internal market in the field of copyright and related rights. Such differences may become more pronounced with the development of foreign exploitation of works and cross-border activities. To ensure proper functioning of the domestic market, such exceptions and limitations must be defined in a more harmonized manner. The degree of harmonization of these exceptions depends on its impact on the smooth functioning of the domestic market.