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Copyright in the Information Society 7,5 p

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1. Abbreviations and Definitions

Wherever used in this Memorandum of Law the following terms and abbreviations shall have the meanings described below:

“BC”	Berne Convention for the Protection of Literary and Artistic Works (1979).
“Database Directive”	Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
“ECJ”	European Court of Justice
”Infosoc Directive”	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.
“RC”	Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations (1961).
“Software Directive”	Directive 2009/24/EEC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.
“Term Directive”	Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.
“TIFF-file”	Tagged Image File Format is a file format for storing images. ¹
“TRIPS”	Agreement on Trade-Related Aspects of Intellectual Property Rights.

¹ Originally created by the company Aldus. Adobe Systems, which acquired Aldus, now holds the copyright to the TIFF specification.

2. Introduction

The history of copyright is long and the subject matter has gradually expanded from covering only the ownership.² The first copyright law, the UK Statute of Anne from 1710, granted publishers of a book legal protection during 14 years with the commencement of the statute. It also granted 21 years of protection for any book already in print. The 14 year copyright term could be renewed for another 14 if the author was still alive after the first term expired.³

In the Swedish legislation, the purpose with copyright has been interpreted as a protection to the *spiritual creation* within the literary and artistic works.⁴ This interpretation follows Art. 2 the Berne convention where it is stated that "shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression". An extensive exemplification⁵ follows which is not exhaustive.

Since the Copyright legislation already in the fifties, even though it had been created long before the digital era, was supposed to be technique neutral it is still applicable in today's digital environment. The new technology is operating with the help of identical copies meaning that the reproduction concept is still valid in the digital environment. The problems arising are more related to the subject matter and in order to widen the protection to other works, conventions and directives giving specific protection for databases and computer programmes has been introduced. Due to the rapid development within this field, the focus in this memo is on the recent new praxis, its interpretation, problems, solutions and not obsolete material. The new types of Internet services has made it necessary to reconsider earlier praxis

² L. Bently and B. Sherman *Intellectual Property Law* 3d edition 2009, page 33.

³ http://en.wikipedia.org/wiki/Statute_of_Anne, as of 1 May 2010.

⁴ SOU 1956:25, page 66.

⁵ 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

and its applicability in the digital environment, at the same time as the question should be raised whether it is not still the same world we are considering, however in a new format. The old knowledge is not to be disregarded, but instead translated under correct circumstances and environment. It has never been of more importance than before to understand the background and meaning of existing law, in order to identify their right place on the Internet and in the digital environment. Therefore we should reflect over what kind of identification and protection, which was intended and motivated at the historical point on the day the specific object for the actual copyright was born.

An EC harmonisation is necessary due to the transborder application the commercial and private activities are subject to in this millennium. This is nothing new to the copyright legislation, which has been under attack by the technological advancements several times during its history. However, the advancements and the implications to copyright law must be addressed in a consistent and uniform way in order to make sure that the legislation does not become obsolete. There is a built-in technique neutral view in the copyright legislation where the reproduction right is one of its foundations and covers most activities in the digital environment, but in some cases the advancements has been deemed not to fit the provisions which has led to patchworks such as the database directive and computer programme directive.

3. Technical aspects of Internet Services

In order to grasp the concept of copyright in the information society, it is also necessary to understand the technique behind it. The Internet is a computer network. A computer network is nothing more than a system connecting computers and other devices which are communicating with each other on the Internet. The Internet is often seen as the web, which is a misunderstanding. The Internet is in fact only the network, the roads, on which the web is only one of many different types of vehicles that is transported. The Internet is therefore not synonymous with the web. On the Internet there are connections (routers)⁶ which make copies of all traffic passing. These copies are essential to the operability of the Internet. In order to ensure that these necessary copies should not be regarded as infringements and be a liability

⁶ <http://en.wikipedia.org/wiki/Router>

for the owners and providers of the network, an mandatory exception for temporary acts of reproductions were prescribed in Art. 5.1 in the Infosoc Directive.

The Internet is built by assigning every connected device a unique number, an IP-number (Internet Protocol Address).⁷ In order to be able to communicate with other devices on the Internet such an IP-address must be assigned since all communication over Internet is made according to point-to-point connection. The content, no matter if it is images, films, databases, text or other content, is transferred on the Internet in packages containing digital information in the form of zeros or ones.⁸ When a packet of information has been transferred, the receiving device sends a confirmation or error message. Depending on the reply, the sender retransmits or continues sending the next package. The result is that all material transferred from the sender to the receiver are always duplicated as identical copies.

As long as any encryption or access control methods are not used, all content available on the Internet, no matter if it is on the web or anywhere else on the Internet, is available to copy for anyone. This simple basic fact is also one of the most problematic issues in interpretation of the copyright legislation. What is protected and how? How far does the scope of protection reach and in those cases when the legislation is incompatible with the technology, how should the law be interpreted and according to which country's law on a global network?

4. The originality criteria and scope of reproduction right in the digital environment under national law

4.1. Swedish law

Overview

In the Swedish legislation a major change took place in 1960 when the new Copyrights Act went into force. Where the subject matter in previous copyright legislation had been the subject of an exhaustive⁹, specified list of protected the subject matter of protection now was given to literary and artistic works, which also was in accordance with BC. The reason given

⁷ http://en.wikipedia.org/wiki/IP_address

⁸ http://en.wikipedia.org/wiki/Packet_%28information_technology%29

⁹ SOU 1956:25, page 62.

for this change was the need to adapt to the quick changes in the technological development which often outran the legislation. Both the literary and artistic works was in the preparatory works said to be taken in its most wide interpretation, but was on the other hand very specific on the point that the subject matter must be a result of creative work with a certain level of independence and originality.¹¹

The Swedish Copyright Act protects all literary and artistic works.¹² The starting point for the interpretation is that, as previously mentioned, the concept includes a wide range of subjects for protection. A work is protected no matter in which appearance or technical shape it appears in.¹³

Computer programmes

The protection for a computer programme was introduced in the Copyright Act in 1989. The protection is more or less the same as for other works, but with some differences as when a computer programme created by someone as a part of the employment the economic right is transferred to the employer. This does not follow the rest of the Swedish copyright legislation whereas Sweden does not adopt the works for hire-doctrine. Computer programmes are treated separately in the Copyright Act, but belongs to the literary works group.¹⁴ This classification means that the programme code, the series of instructions, needed for the programme to work is protected. One problem with this interpretation is regarding webpages made up by HTML-code. The code gives instructions to the web browser on how to draw the page, but at the same time there are several similarities with a word processor file which is only created for the purpose to generate a certain layout.¹⁵

What the Swedish Copyright Act protects is the concrete wording of the programming code for the program.¹⁶ If the protection also includes the GUI (Graphic User Interface) has been debated. Art. 1.2 in the computer program directive gives protection to the expression in any form of a computer program, but not to the ideas and principles which underlies the interface.

¹¹ SOU 1956:25, page 67.

¹² Art. 1 the Swedish Copyright Act.

¹³ Lindberg and Westman, *Praktisk IT-rätt*, 2001, 3d edition, page 223.

¹⁴ *Ibid.* page 226.

¹⁵ *Ibid.* page 227.

¹⁶ *Ibid.* page 230.

This could be interpreted as a protection for what is shown on the screen. However, what is displayed on the screen is a *result* of the computer program when it is *excuted by the computer* whereas the protection is given to the program code itself. The Swedish Supreme court has found that the output from a computer program could not be regarded as a protected work of film.¹⁷

In order for a computer program to be protected it needs to have originality where the interpretation of the Swedish Copyright Act sets a rather low threshold for originality. Art 1.3 Computer Program Directive prescribes that the program shall be protected if it is original in the sense that it is the author's own intellectual creation. The demand for originality does not contain any criterions on the quality of the work.¹⁸

Databases

The Swedish Copyright Act does not have any rules regarding specifically "databases". When the database directive was implemented in the Swedish Copyright Act the word "compilation" was used in order to mark that the legislation not only protects databases but all systematic compilations of works, data or other material.¹⁹ This was a wider interpretation of the directive than required. The effect of this legislation is that the Swedish Copyright Act protects works which lacks the, for a database necessary, function to reach each individual data or work. However, for a compilation to gain protection, it needs to contain independent elements.

The Swedish Copyright Act provides four possible means of protection for databases:

- a. Indirect protection by the individual works contained in the compilation wich, in themelves are protected as independent works,
- b. Protection by Art. 5 the Swedish Copyright Act as a compilation,
- c. Protection by Art. 1 the Swedish Copyright Act as independent work, and
- d. Sui generis protection by Art. 49 the Swedish Copyright Act when the database is the result of a major investment.²⁰

¹⁷ NJA 2000 s. 580.

¹⁸ Lindberg and Westman, *Praktisk IT-rätt*, 2001, 3d edition , page 234.

¹⁹ Ibid. page 236.

²⁰ Ibid. page 237.

One protection does not exclude another meaning that a database can gain protection by one or more of the provisions mentioned.

In order to give protection for a compilation according to Art. 5 the Swedish Copyright Act, the work to create the compilation must be a result of originality in the same manner as prescribed for computer programs, the compilation shall be protected if it is original in the sense that it is the author's own intellectual creation and the demand for originality does not contain any criterions on the quality of the work, the effort put in it or the size of the compilation. The protection for compilations is however limited since the protection is focused on the compilation as a whole. If an extract of the compilation should be regarded as an infringement it must contain the distinctive parts of the compilation which is its distinguishing quality which probably means that only copying of a major part of, or the entire compilation would constitute an infringement.

Originality

There is nowhere in the Swedish Copyright Act to be found any definition or description on what the requirement for originality actually means. This is embedded in the concept "created" and "work".²¹ It is regarded as obvious that a work must contain more than the ordinary, something which makes it distinct from non-works, something that, at least to a certain extent, makes it unique.²² The Swedish scholar Seve Ljungman introduced the expression "height of work"²³ to signify the degree of originality required to motivate protection as a literary or artistic works.²⁴ Height of work corresponds in many respects to the expression "level of invention" within the patent law, which means that the work must be, at least to some extent, unique.²⁵

In regards of the "traditional" copyright protected works, the digital environment is under normal circumstances not a specific problem. Literature, maps, photographs, film and other traditional works are still the same in the digital environment. If they are copied or distributed

²¹ Henry Olsson, *Copyright*, 7th edition, page 66.

²² Per Jonas Nordell, "Verkshöjdsbegreppet inom upphovsrätten", IFIM no 56, page 28.

²³ In Swedish "*Verkshöjd*".

²⁴ Seve Ljungman, "Något om verkshöjd i Festskrift till Carl Jacob Arnholm", 1969 page 179.

²⁵ Henry Olsson, *Upphovsrättslagstiftningen, en kommentar*, 2nd edition, page 41.

without the consent by the copyright holder it constitutes an infringement, even if the infringement is made by means of zeros and ones. The Copyright has been able to handle the digital environment fairly well and the originality is not more of an issue just because the infringement takes place online.

The new types of works – computer programs and databases / compilations – is on the other hand a different matter. These types of works are specifically related to the digital environment and the traditional reasoning on originality has to be adopted to the new kind of works. This has proved to be a quite demanding task. As mentioned above, it was tried to regard the output on a display by a computer program as a work of film. The Supreme Court did not accept this. The protection for computer programs is therefore very narrow, since it is only the programming code which qualifies for protection. In the computing(heter det så?) programming there are several ways to achieve the same result and also different programming languages which can be used to obtain the same result.

For databases protection is available in four possible ways, but only two are specific for databases, namely Art. 5 and 49 the Swedish Copyright Act. In order to gain protection by Art. 5 the Swedish Copyright Act the work must be considered original. Art 49, on the other hand, does not require any originality, a compilation in which a considerable investment has been made is protected. A considerable investment must have been made and the investment could be in money or/and time and effort put in to the project, but the investment needs to be substantial, which excludes minor efforts or money.²⁶ In a Swedish court case a couple had compiled cards with different potted plants which was published by one weekly magazine. A competing weekly magazine then published similar cards with potted plants. The couple sued the competing weekly magazine for infringement in their right to the compilation according Art. 49 the Swedish Copyright Act. The Swedish Supreme court regarded the competing magazine's action as infringement and allowed the couple's claim.²⁷

²⁶ Henry Olsson, "Upphovsrätten en kommentar", from the database Zeteo on the Internet, comment to Art. 49.

²⁷ NJA 1985 s 813.

UK law

Originality

Under UK law, the requirement of originality imposes a low threshold for protection, subject to Copyright, Designs and Patents Act 1988. As copyright protects the expression (or the recorded form of the work), rather than the ideas contained within the relevant work, it is the originality of the *labour expended in the way the work is expressed*, rather than the originality (or inventiveness) of the idea expressed in the work that is the relevant consideration.²⁸ The threshold means that the author must have exercised the requisite *labour, skill or judgement*. Further, originality is satisfied where the copyright work in question is the work of the author and not a copy of another's creation, and the work to the extent that it draws on existing material, exhibits *more than trivial or negligible skill* in its creation. The level of skill and labour required to satisfy the requirement of originality is generally satisfied provided that the creation of the work is not a purely mechanical exercise. The test for each type of copyright work has its own nuances for the satisfaction of the requirement for originality.

It should be noted that the originality requirement, stated above, only applies for the purposes of protection of literary, artistic, dramatic, and musical works. In contrast, there is no need for entrepreneurial works (sound recordings, films, broadcast, and typographical arrangements) to be original for them to qualify for protection. Instead the 1988 Act declares that copyright only subsists to the extent that such works are not copied from previous work.²⁹

The European law's new concept - *the author's own intellectual creation*- shall be put against the traditional British conception of originality which consists of *labour, skill or effort*, however both concepts means that the author must have exercised some intellectual qualities. The importance to determine originality is that the author has contributed with some input to the resulting work, either the creation is new or not. A written book shall consist of labour, skill or efforts when creating the text to get originality, despite if the characters of the people in the story have been known before. Even if the British threshold is established, the policy basis for it has never been made clear. Under such circumstances it will be difficult to

²⁸ This low level of originality required may be contrasted to the novelty requirement under patent law, which requires a patentable invention to be new, and not otherwise seen before.

²⁹ L. Bently and B. Sherman *Intellectual Property Law* 3d edition 2009, chapter 3.

compare it with the European law's new concept - the author's own intellectual creation, in order to identify any or none differences. We need to understand what we have if we will be able to determine how well it will be compatible with a new concept. With other words, we need goods kills in our native language if we will be able to learn another language.

Reproduction

The traditional British praxis says that an infringement is for stake in the event of a reproduction of *a substantial part* of the work. (British applications of this concept are distinct and should not be applied as British, under case law from US.) The concept should be compared to the Art. 2 of Infosoc Directive which says that there might be an infringement when "*a part*" of the work is reproduced. The European case law from the proceedings between Infopaq International A/S and Danske Dagblades Forening (C-5/08) will set the terms and its praxis under debate for the British concept. Quite what impact, if any, this change will have on British case law is difficult to predict.³⁰ First, you have to determine if there is a difference in the meaning and definition of the two ways of expression. It might be found that the meaning is the same. For example, the British law has a low acceptance for reproductions of music through a method called "sampling". Sampling means the act when somebody use a small portion(a sample) of one sound recording and reusing it as an instrument or a different sound recording of a song reiterated into different pitches. Despite the result can be comprehended as a new work for a listener the British court has decided many cases as to be an infringement.³¹ The U.K. "substantial use" doctrine provides that infringement must relate to a "substantial part" of the original work – each case being decided on its individual merits, depending on the context .When this defence was tested in Produce Records Limited v. BMG Entertainment International UK and Ireland Limited (1999), the court reinforced the view that sampling sound recordings without the consent of copyright owners is prima facie infringement. The Los Del Rio hit song "Macarena," produced by BMG, sampled a seven-and-a-half-second section of The Farm song "Higher and Higher," a copyrighted recording owned by Produce Records. Prior to that decision, an unwritten "three-second rule" was used according to which sampling three seconds of a work or less would not

ibid, chapter 8

³¹ For example the lawsuit regarding the song "Bittersweet Symphony" (1997) by The Verve, however based on Rolling Stones' "The last time"(1965) owned by Allen Klein's company ABKCO Records. The case was settled by an agreement giving 100% of royalties to ABKCO.

lead to legal action against the sampler, however this praxis is not established.³² Obviously, may a “substantial part”, under British law constitute three seconds of a music composition, where the labour consists of tempo, selected instruments and arrangement as whole to determine the originality of the work. The question is which extension has a “substantial part” under the British law compared with “a part”. Even if the European concept is new under the statutory instruments and has not achieved any praxis yet, it has its origin from somewhere. Most likely from all Member States all together, why we should analyse each national legislation’s background of praxis to extract a common meaning. Second, if a difference in the meaning is identified, the whole concept of copyright under British law has to be considered before an application of the new term will be taken in use. The legislator has to consider the low threshold for originality together with the extension of the reproduced part of the work, before an infringement event is decided.

4.3. *US law*

One major difference between the European and the US concept of copyright protection is that in the US, the “look and feel” can be protected. The practical implication is that the look and feel of a computer program can be protected whereas only the program code is protected in the European copyright. The look and feel- doctrine for computer programs began in the eighties, but the look and feel has an older history not related to computer programs.³³ In the case *Whelan v. Jaslow* the court found that look and feel could be applied to the GUI of a program.³⁴

The assessment of originality has in the US not involved any major difficulties since the threshold for originality is low. In a case between *Atari v. Oman*³⁵ a very simple game’s GUI was regarded as be original enough to be registered by the registration office. On the other hand it ruled quite the opposite in the *Apple v. Microsoft* case which did not involve games but instead the GUI of an operating system.

³² Ben Challis “The Song Remains the Same: A Review of the Legalities of Music Sampling”, WIPOMAGAZINE, November 2009

³³ Per-Jonas Nordell, ”Upphovsrättsligt skydd för datorprograms användargränssnitt – utvecklingen i amerikansk praxis”, NIR 1999, page 40.

³⁴ *Ibid.* page 41.

³⁵ *Atari Games Corp. v. Oman*, 888 F.2d 878, (D.C. Cir. 1989).

The substantial similarity standard is the common principal used by US courts in cases concerning infringements in computer programs. There must be a substantial similarity in the expression of the ideas in order for an infringement to exist. There are similarities with the European assessment of likeness, but the US substantial similarity is, at least supposed to be, a copyright in itself.³⁶

While the question of originality has not been a major issue in the US, there has been problems with the idea-expression dichotomy, the border between the idea behind the work and the expression, which is the protected work. According to US praxis it is not possible to protect other expressions in a computer program than those resulting from literary creations or artistic work.³⁷

5. Originality criteria and scope of reproduction right in the digital environment under European case law

Case C-5/08

The case law under ECJ has recently been updated by the case between Infopaq International A/S (hereinafter “Infopaq”) and Danske Dagblades Forening (hereinafter “DDF”) numbered as C-5/08. With reference for a preliminary ruling from the Højesteret in Denmark, gave ECJ the decision last summer on the 16th July 2009, followed by attention from legal expertise. The background of the case concerns the dismissal of Infopaq’s application for a declaration that it was not required to obtain the consent of the rightholders for acts of reproduction of newspaper articles using an automated process consisting in the scanning and then conversion into digital files followed by electronic processing of that file. Infopaq operates in the business of media monitoring and analysis, which consists primarily in drawing up summaries of selected articles from Danish daily newspapers and other periodicals. Since 2005 had Infopaq delivered selected articles on the basis of certain subject criteria agreed with customers. The selection was made by means of a ‘data capture process’, thereafter summaries was sent to customers by email.³⁸ The summaries consisted of the agreed search

³⁶ Ibid. page 44. (HÄNVISAR DESSA TILL PER-JONAS?)

³⁷ Ibid. page 43-44.

³⁸ C-5/08 p.13

word together with 5 words before and 5 words after (defined as “extract of 11 words”) in order to clarify the context and place where the search criteria incurred.³⁹ The digital files was deleted upon it was sent by e-mail, however the customer could have printed the mail into a paper copy. It was indisputable between the parties that the data capture process consisted by two types of reproduction, namely the creation of a TIFF file when the printed articles was scanned and the conversion of the TIFF file into a text file. In addition, it was common ground that this procedure entailed the reproduction of parts of the scanned printed articles since the extract of 11 words was stored and those 11 words was printed out on paper. The dispute was according to whether there was reproduction as contemplated by Art. 2 of Infosoc Directive. Further, they disagreed as to whether, if there was reproduction, the acts in question, taken as a whole, was covered by the exemption from the right of reproduction provided for in Art. 5(1) of that directive.

Initially, ECJ noted and identified the need for uniform application of Community law and the principle of equality require that where provisions of Community law make no express reference to the law of the Member States for the purpose of determining their meaning and scope, as is the case with Art. 2 of Infosoc Directive, they must normally be given an autonomous and uniform interpretation throughout the Community. Those considerations are of particular importance with respect to Infosoc Directive, in the light of the wording of recitals 6 and 21 in the preamble to that directive.⁴⁰ Therefore, it was of importance that ECJ clarified the application and limits for the reproduction right from the broad protection stated in Art. 2 of Infosoc Directive, in order to remedy the lack of definition of the term in the Directive.⁴¹ For this harmonisation ECJ declare that they will take the wordings and context of the said Directive into consideration, as well as earlier case law and overall objectives of the Directive and international law.

The matter of originality constitutes the scope of protection for reproduction why we have to look into that part before an answer to of the reproduction issue, may be given. Fulfils an extract of 11 words the criteria for originality? As an extract the words are solely parts of the whole artistic work and could that lead to the consequence that it lacks originality as an artistic work and are without protection? ECJ declared that it should be borne in mind that

³⁹ Please, see C-5/08 p.16-21. for technical details.

⁴⁰ C-5/08 p. 27-28.

⁴¹ C-5/08 p. 31.

there is nothing in Infosoc Directive or any other relevant directive indicating that those parts are to be treated any differently from the work as a whole. Contrary, it follows that they are protected by copyright since, as such, they share the originality of the whole work. In the light of these considerations, the various parts of a work thus enjoy protection under Art. 2(a) of Infosoc Directive, provided that they contain elements which are the expression of the intellectual creation of the author of the work.⁴² According to the recitals 9 to 11 in the preamble to the Infosoc Directive, the purpose is to introduce a high level of protection and similar to recitals 21, which requires that the acts covered by the right of reproduction be construed broadly.

That requirement of a broad definition of those acts is, moreover, also to be found in the wording of Art. 2 of that directive, which uses expressions such as ‘direct or indirect’, ‘temporary or permanent’, ‘by any means’ and ‘in any form’.⁴³

Consequently, the protection conferred by Art. 2 of Directive 2001/29 must be given a broad interpretation, ECJ concludes. Regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an *intellectual creation of the author* who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an *intellectual creation*. Words as such do not, therefore, constitute elements covered by the protection.⁴⁴ ECJ finally summarises that being so, given the requirement of a broad interpretation of the scope of the protection conferred by Art. 2 of Infosoc Directive, the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in Art. 2(a) of that Directive.⁴⁵ If the actual 11 words in this case fulfilled the criteria of originality was for the national court in Denmark to make that determination..

⁴² C-5/08 p. 37-39.

⁴³ C-5/08 p. 40-42.

⁴⁴ C-5/08 p.43-46.

⁴⁵ C-5/08 p.47.

Well, let us pass back to the reproduction issue. ECJ recognises that the data capture process used by Infopaq allowed for the reproduction of multiple extracts of protected works and that process reproduced an extract of 11 words each time a search word appears in the relevant work since a customer could use several search words, upon its decision. In so doing, that process increases the likelihood that Infopaq will make reproductions *in part* within the meaning of Art. 2(a) of Infosoc Directive because the cumulative effect of those extracts may lead to the reconstitution of lengthy fragments which, in addition, are liable to reflect the originality of the work in question.⁴⁶

Taken together all these circumstances, ECJ found that a prohibited *reproduction in part* might have occurred and causing an infringement, provided that the national court decided that the originality criteria were fulfilled.

Comments

An EC harmonisation is necessary due to the new possibilities of technology, not limited under the national borders. When establishing this new praxis we should be careful and take all information into account. We have to decide which way to go regarding the scope of protection - if it shall be lesser, more or equal as before. Is the protection of these 11 words as an extract of newspapers article the same as it should have been if it had been picked out solely in paper format? The advocate general declared that “In its order, the national court states that it is not disputed in this case that consent from the copyright holders is not necessary in so far as monitoring of the written press and the drawing up of summaries of newspaper articles is involved, if a person physically reads each publication, if the articles are selected manually on the basis of predefined search words and if, on that basis, a document is produced manually, indicating the search word in the article in question and the position of that article in the publication. Nor is it disputed that, in itself, the drawing up of summaries does not require the consent of copyright holders.”⁴⁷ The critical point is the extension of the reproduction the digital environment serves. No case before can act as a comparison as it hasn't been possible or an interest in the reality to collect and reproduce articles to the same extent with an analogue method. If it had been done before it would probably not be extracts, but the articles in the whole content and the originality would have been obvious, followed by

⁴⁶C-5/08 p.48-51.

⁴⁷ Opinion of Advocate General, delivered on 12 February 2009 Case C-5/08, p. 18.

a right to control the reproduction. To what extent is it reasonable for the future, to stretch the originality definition articulate with an exclusive right to authorise or prohibit the reproduction? Or should we ask ourselves - to which limitation is it reasonable to restrict the originality definition and release reproductions?

Further, Art. 2 of Infosoc Directive states that a reproduction by any means and in any form is for stake not only “in whole”, but also “in part”, which extents the scope of infringement further. Hence, the copyright owner has the right to authorise or prohibit reproduction in part of the whole artistic work as long as this part demonstrates originality. In line with that wordings (“in part”) it seems like the range of protection shall at least not be lesser than before, but more likely enlarged. The term “indirect” covers reproduction done via an intermediate stage as “caching” and shall no be considered per se as an infringement.⁴⁸ The provision is also intended to make clear that the right is not affected by the distance between the place where an original work is situated and the place where a copy is made. The second element (temporary/permanent) attends to clarify the fact that in the digital environment very different types of reproduction might occur as tangible and non-visible copies. Both of them are covered by the definition of an act of reproduction.⁴⁹

When standing in the beginning of a new established field of business, we should also consider if that praxis correspond to the public opinion, which cannot be neglected if we will have an, by the people, accepted legislation. A balancing act has to be made between the authors and users of artistic works.

Is a common European concept of originality emerging?

Is a common European concept of originality emerging and what room is there for preserving differences in national interpretations?

⁴⁸ See also Art.5.1, “temporary acts”.

⁴⁹ Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society”, page 23.

ECJ refers to *author's own intellectual creation* in the case C-5/08 as a harmonised concept to determine originality. The same do applicable directives under the European statutory instrument as follows by:

- Software Directive Art. 2, which states,
 “A Computer programme shall be protected if it is original in the sense that it is the *author's own intellectual creation*. No other criteria shall be applied to determine its eligibility for protection,”; and
- Database Directive Art. 3.1, which states,
 “In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the *author's own intellectual creation* shall be protected as such by copyright. No other criteria shall be applied to determine its eligibility for that protection.”; and
- Term Directive Art. 6, which states,
 “Photographs which are original in the sense that they are the *author's own intellectual creation* shall be protected in accordance with Art. 1. No other criteria shall be applied to determine its eligibility for protection. Member states may provide for the protection of other photographs.”

The international statutory instrument doesn't define the copyright originality criteria, except from BC Art. 2(5), which states the criteria for database protection as:

“Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, *constitute intellectual creations* shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.”

Hence, all Directive focus on the “*author's own intellectual creation*” as the essential criteria for originality.⁵⁰ Despite the Infosoc Directive miss a definition of originality it seems very most likely that the European copyright in the information society shall follows the same originality criteria. There is a common endeavour by the Member States to reach a unified concept, however it have to be compatible with the national legislation's praxis. The European parliament share this view and have called for the Commission to present harmonising measures in order to bring a coherent and favourable environment for creativity

⁵⁰ See also Wittem Project's proposal for an European Copyright Code.

and investment in the framework of the internal market.⁵¹ The Infosoc Directive is one of these measures.⁵²

The exclusive right to authorise or prohibit reproductions of the work is reflected on an international level in Art. 9 BC, Art. 10 RC and Art. 14 TRIPS. It is followed by Infosoc Directive, Art. 5 Database Directive, Art. 4.1 (a) Computer Programs Directive and (in some circumstances) Directive on Electronic Commerce. The Directives repeat the concept of prohibited reproduction “in whole” or “in part”.

Lionel Bently refers to a general tolerance for differences in law between Member States, according to directives wordings and accompanied trend.⁵³ In some directives, Member States are expressly permitted to state the national details of legal prescriptions as well as some other directive, Member States are offered loose, open-textured concepts around which the national legislations must formulate their own praxis. At the same time, Lionel Bently identifies, a notable trend in the European statutory instruments to form a basis for a harmonized law, which set up an European standard for copyright law.

Wittem Project’s proposal for an European Copyright Code

The Wittem Project Group released a proposal for an European Copyright Code on the 26th of April this year.⁵⁴ The European legal reference for such a unified code is found in Art. 118 Lisbon Reform Treaty. The aim of the Project is to promote transparency and consistency in European copyright law. The Code is not comprehensive, but concentrates on the main elements of copyright as; subject matter of copyright, authorship and ownership, moral rights, economic rights and limitations. The Code is not a recodification of EU copyright law *tabula rasa*, but takes into account of the substantive norms of the BC and TRIPS. The Drafting Committee found it hard to ignore the *aquis communautaire* in the form of the seven directives in this field, however the Code does on occasion deviate from the *aquis* and cannot

⁵¹ Proposal for 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 - Explanatory Memorandum, page 2.

⁵² ”Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society”, preface.

⁵³ L. Bently and B. Sherman *Intellectual Property Law* 3d edition 2009, page 47.

⁵⁴ <http://www.copyrightcode.eu/>

be considered a mere restatement or consolidation of the norms of the directives. The Drafting Committee seems to attempt to develop established norms with appropriate adjustments for future legislation, where this Code will be an important reference tool at the European and national levels.

Regarding the originality criteria, the Code prescribes, subject to Art. 1.1 – Works:

“Copyright subsists in a work, that is to say, any expression within the field of literature, art or science in so far as it constitutes its author’s own intellectual creation.”

The Committee comments this article by i.a. following declarations:

- That “work” shall be meant as such work protected by copyright and not by related rights.
- That “any” denotes that there is no requirement of fixation as an adaptation of a work may qualify as a work itself.
- The term “expression” indicates the traditional requirement that works shall be the result the author’s personal expression.
- The term ‘literary, artistic or scientific expressions’, circumscribes the domain of copyright, and serves as a generic term.
- ‘In so far as’ indicates that the requirement of constituting ‘its author’s own, intellectual creation’ is not merely a condition for the existence of copyright, but also defines its limits.
- That the term “own” shall be meant as an indication that it is still original work which shall be qualified as protected work.
- The term ‘the author’s own intellectual creation’ is derived from the *acquis* (notably for computer programs, databases and photographs). The committee says that “it can be interpreted as the “average” European threshold, presuming it is set somewhat higher than skill and labour. This is possible if emphasis is put on the element of creation. For factual and functional works, the focus will be more on a certain level of skill (judgement) and labour, whereas for productions in the artistic field the focus will be more on personal expression.”

The reproduction right is reflected in Art. 4.1 – General, which states that;

“The economic rights in a work are the exclusive rights to authorise or prohibit the reproduction, distribution, rental, communication to the public and adaptation of the work, in whole or in part, as provided for in articles 4.2, 4.3, 4.4, 4.5 and 4.6.” and,

is followed by in Art 4.2 – Right of reproduction, prescribing that;

“The right of reproduction is the right to reproduce the work in any manner or form, including temporary reproduction insofar as it has independent economic significance.”

As we can find, the Committee has kept the phrase “in part” in the proposal. They clarify the meaning of this section as “The phrase ‘in whole or in part’ implies that the use of a part of a protected work constitutes a restricted act or, as the case may be, an infringement, if this part in and by itself qualifies for copyright protection.” According to this comment we found the statement from the case C-5/08 repeated in such a way that the decision of an illegal reproduction shall take the originality criteria into consideration, as they are followed hand-in-hand with each other.

Concerning the issue of what room there is for preserving differences in national interpretations of the European law, we find the Witten Group’s statement under the preamble to the proposal of the Code to be an essential signpost when declaring “that copyright legislation should achieve an optimal balance between protecting the interests of authors and right holders in their works and securing the freedom to access, build upon and use these works” and finalised with the Group’s awareness for “that rapid technological development makes future modes of exploitation and use of copyright works unpredictable and therefore requires a system of rights and limitations with some flexibility”. We think that there should be a room not only for national interpretations, but definitely for case-by-case interpretations and flexibility for specific circumstances every individual case are followed by. The European law should be interpreted and appropriate understood to reflect the harmonised intentions for every unique and specific case in the digital environment. Having a unified European legal framework in the background, the courts and legislators will be ready for a flexible application of copyright in concordance with new technological conquests.

Conclusions

Even if the Infopaq case (C-5/08) has given some guidance on the issue of originality there are still many questions left. It has become quite apparent that the subject matters related to the digital environment is changing in a very rapid way. Since there is no harmonization on the concept of originality this is to a large extent a job for the national legislation to interpret.

Where there is a tendency in European copyright law to make an overall assessment whether an infringement exists, the American tendency is rather the opposite and instead divides the assessment into different subjects. We believe that such a fragmentation of the assessment can not be in the interest of the development of copyright law in the digital environment in its adopting to the rapidly changing digital environment where it is necessary to maintain a constant copyright approach on the technical development.

There are attempts on creating a uniform European copyright legislation. The WITTEM Group released a proposal for a European copyright code 26 April 2010.⁵⁵ The purpose of the work is to promote transparency and consistency in European copyright law in distinction from the secrecy which has been surrounding the ACTA negotiations and also the differences between national legislations which makes protection in the globalized digital world both complicated and unpredictable. Facing new technical fields under the digital environment the need for a unified law is increasing. An accepted European Copyright Code as a reference tool for future legislation is very much welcome. Further, we have to harmonise and adapt the IP law in accordance with ethical values and define the borders for infringement in harmony with the common opinion in order to find an appropriate balance for all parties involved. There is a matter of importance to avoid legislation with no acceptance and leading to lawless common people who establish praxis in non-accordance with the law. However, the rightholders need appropriate protection for their work, otherwise they cannot earn their living and no more artistic work will be created.

⁵⁵ <http://www.copyrightcode.eu/> .