Report of the conference on the international legal protection of computer software : past practise and future policy

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REPORT OF THE CONFERENCE ON THE INTERNATIONAL LEGAL PROTECTION OF COMPUTER SOFTWARE: PAST PRACTICE AND FUTURE POLICY

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Science and Technology subject to the Prime Minister has prepared draft legislation entitled The Computer Program Protection Law. Despite the fact that the draft bill does not incorporate the word "copyright" in its wording and is intended as a separate bill independent of the existing Copyright Law, the draft is, in essence, a copyright law. Infringement is defind the same way, for example, and the draft provides for registration of the software. Unfortuately for foreign authors, the proposed draft does not provide protection unless such software is first published in Korea. However, should Korea accede to one of the international copyright conventions, it is believed that Korea would have to extend the terms of protection to nationals and residents of other member countries.

There have been some conflicting arguments against this new Protection Law in favor of creating a new form of protection directed specifically to computer software on the one hand and to simply amending the existing Copyright Law on the other. In respect to this point, it was Professor Song's view that Korea should establish separate and different laws relating to copyright protection and software protection even if the intended scope of protection is the same.

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Mr. Poullet remarked that, as in the other countries already mentioned, the protection of computer software is currently the subject of a major legal debate in Belgium and the Netherlands. Copyright protection has been traditionally defined by the principles of the Belgian Law of 1986[33] and the Dutch Law of 1912.[34] Both statutes provide that: (1) no formalities are required to obtain copyright protection, (2) author's rights arise upon the creation of the work and (3) author's rights last 50 years after the death of the copyright owner. In addition to their economic aspects, author's rights also include "dissemination rights" (the author does not offer his work to the

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[33] Law of Authors' Rights, Law of March 22, 1986 (Belgium).

[34] Law of Authors' Rights, Law of 1912 (Netherlands).

public until he is satisfied with it) and "signature rights" (the author is entitled to present his work to the public under his own name). Moreover, the author is entitled to take rapid action against infringement by obtaining a court order for a seizure of the infringing article. In the case of an employment contract, authors' rights may be transferred to the employer.

Other methods of software protection, namely patent and unfair competition, have been treated differently in Belgium and the Netherlands. In Belgium, the 1984 Patent Law[35] is aligned with the European Patent Convention of 1973 and rejects the patentability of computer programs themselves "as such." In the Netherlands, however, the patent office advocates acceptance of patents for programs as processes, provided that (1) these programs are incorporated in a computer, (2) they are directly accessible and (3) they determine the operation of the computer. In addition unfair competition law establishes a rapid process by which a victim may oppose unfair practices undertaken by competitors. Several Belgian decisions have been decided on this basis to protect computer programs.

One such case recognizes the applicability of copyrights to computer programs. Nevertheless, while the majority of Belgian and Dutch authors and the Dutch courts are in favor of protecting computer programs as a copyright, some experts argue against this position claiming that author's rights are unsuitable for software which should be treated as an invention rather than as an artistic work. (The law on author's rights does include, however, the protection of works of art which have an industrial application.) These opposing authors urge the adoption of new specific legislation to deal with software.

Four key issues are currently under debate among Belgian and Dutch legal authors in their attempt to arrive at an appropriate system of software protection:

1. Copyright law protects the form but not the substance. But which is the form and which is the substance in the case of a computer program? This issue is analogous to the idea/expression dichotomy dispute in other countries. One of the first Dutch cases concerning software protection merely states that an idea

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[35] Patent Law, Law of March 28, 1984 (Belgium).

is not protectable by copyright. However, in the same case the court made an exception for computer programs, identifying them as "a work within the meaning of copyright law."[36] A later decision of the same court was that the "form" or design of the program is protectable by copyright as it requires individual "creativity."[37] Dutch jurisprudence distinguishes between "writing" in the sense of the action of writing and "writing" as a result. Accordingly, it is not the substance, the conception and the function of the program in themselves which are protected. Nor is the mere form (that is the written representation of the program) covered. Rather it is the development of an idea to its tangible expression that is protectable. Thus, this court sought to resolve the abstract "form-substance" dichotomy presented by legal doctrine.

2. Protection by copyright is based on the originality of the work. How is originality determined in the case of a computer program? It is often quite difficult to distinguish between form and substance in arriving at originality.

3. At what phase of the development of a program--documentation, placing of the program in source code, modifying of the program to object code, etc. -- does the protection apply? Computer programs make a distinction between the source code (the language in which a program is initially written) and the object code (the version directly or indirectly usable by the machine). Both Belgium and Dutch authors are in conflict as to whether copyright protection should be extended to the object code. Arguments opposed to such extension contend that ability to communicate is the issue. Whereas the source code can be understood as a series of instructions, object code on the contrary is intended to solve a problem and should be treated as a translation. Arguments in favor of extension reply that, first, object code is a unique programing activity and thus warrants protection, and, second, that object code is a form of expression of human creativity and can be understood by a human being by means of the process of "reverse engineering."

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[36] Judgment of Jan. 30, 1981, Rb. Hertogenbosch, 1983 G.R.U.R. Int. 669 (Netherlands).

[37] "Logboekgram" Case, May 14, 1982, Rb. Hertogenbosch, 1983 B.I.E. 323 (Netherlands).

4. Finally, is it necessary to provide special protection for video games? Copyright law allows for the protection of the program and also the visual image of the video game. Some authors of legislation argue that the visual image should not be protected, as it is derived from the instructions given by the player rather than the author and thus is ephemeral.

Protection of computer programs by copyright law has specific consequences. The first one concerns the limits of the scope of the author's protection, particularly when his program is used for private purposes by a firm which rents or buys the programed carrier of the data. The second deals with the contractual implications of protection by the copyright law. Respecting private use, both Dutch and Belgium copyright law specifically allow "use, when limited to a few copies and intended exclusively for private purposes, the study or the work of the person who obtained the right of use." The distinction must be made between two different meanings of the word "reproduction": first, the duplication of the software (that is, its use through a copy); and second, the communication of the software to the public (that is, the possibility being accorded to third parties to receive and use the software as a final element). Reproduction in the above second sense of the word requires obtaining a license for the right to reproduce. The second consequence of copyright protection, namely, the contractual issue, relates to the private use of software. The user cannot in principle, except for private use, copy the program appearing on the diskette because such a copy would constitute a representation or exploitation of a right (copyright) which has not been transferred to him.

In general, copyright protection of computer programs under Belgium and Dutch law places heavy emphasis on author's rights. Thus, the notion of the "right of intended use" allows the author to determine which use corresponds to the purpose for which he has allowed reproduction of his work. Accordingly, lacking a direct contractual relationship, the author can set the conditions of use and determine the methods for calculating the royalties to be paid by the end-user.