Belgian law

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Belgian law: aspects of software protection[1]

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Applicable legislation

There is in Belgium no specific legislation on the protection of computer programs, nor is there any scheme of *sui generis* protection. However, a bill has recently been tabled in Parliament, to reform the present Copyright Act.[2] One must therefore turn to existing legislation on patents and on copyright.

The 1984 Law on Patentable Inventions provides that computer programs are not patentable when the patent application concerns the software 'considered as such'.[3] Despite this express wording, some commentators argue that there is still some room for patentability of computer programs,[4] and not only for programs which are integrated in other patentable inventions (as opposed to the programs themselves).[5] However, the majority of commentators do not consider patent protection as a suitable or safe solution for software; and there is no case-law in Belgium which suggests the applicability of patent law to computer programs.

One is thus left with the Law on Copyright, which dates from 1886 and contains no provision about computer programs.[6]

The majority of commentators consider that computer programs are protected by copyright in Belgium, even though it is generally recognised that the solution is far from ideal and raises certain questions.[7] So far, court decisions have only adopted the copyright scheme in an indirect manner, except for one recent (but unclear) decision which seems to go further in the direction of copyright protection.[8]

As the Copyright Act only mentions 'literary and artistic works', the protection of computer programs may find a better basis in art.2 of the Berne Convention (to which Belgium is a party) which covers 'works of the literary, scientific and artistic domains in whatever mode or form of expression'.[9]

Conditions for copyright protection

Three questions have to be examined: originality, fixation and formalities.

(1) First, in order to benefit from copyright protection, a work should be original; how is this condition applied in Belgium?

Most commentators favour a rather broad conception of originality: as soon as the programmer is faced with a choice, his personality comes into play, and the result of his choices (the program) deserves protection.[10]

Only one court decision has been rendered on this question;[11] in this case, the tribunal seems to have required a high degree of originality, in contrast to more widely accepted theory. However, the text of this decision is far from being clear, and since the judgement was appealed, one must wait for the decision of the court of appeal before concluding that Belgium (like Germany, but unlike most of the other European countries) has opted for a very strict interpretation of originality similar to the approach taken by the German court in the *Inkassoprogramm* case.

(2) Secondly, as regards fixation, it is clear that copyright only protects forms of expression and not ideas; however, the idea does not have to be expressed in a completed form; in certain cases, there may not be any tangible form: the text of an improvised speech is protected by copyright. In such cases however, it is clear that difficulties of proof may arise.

As regards software, every stage of its programming may be protected (e.g. flow charts, diagrams), so long as the work is sufficiently original.

(3) Thirdly, as far as formal requirements are concerned, no formality is required to obtain copyright protection in Belgium.

The copyright notice may of course be useful for exportation to countries which are not members of the Berne Convention; such notice would also preclude a party from claiming that he had in good faith failed to recognise that a work was copyrighted, as a defence in an action for damages.

Registration of the work in Belgium is not necessary either; a voluntary deposit or declaration (to a notary public) may, however, be useful to establish the date of creation of the work; in addition, registration in the country of exportation may be useful even for certain countries of the Berne Convention, such as in the United States.[12]

Object of copyright protection

It is generally accepted that the copyright protection of a computer program covers the source code, the object code, and all the different stages of programming, as well as the preparatory documents (flow charts, etc. ...), the auxiliary documentation and the user's manual, subject to the originality requirement. In general, algorithms are considered as not protected.

Software created with the assistance of another program would also be protected (if sufficiently original); and the copyright holder would be the creator of this new program.

In principle, computer-generated works are copyrightable under the same conditions (a.o. regarding originality) as other works, but there is no

case-law on the subject. If the result is sufficiently original and involves personal choices by the user of the program, the latter may then be considered as the author of the final output.[13]

The protection of the user's interface of a program (menus, commands, icons, etc. ...) has only been dealt with in the context of protection of computer games.[14] In the cases involving video games, courts have accepted protection of the elements and figures appearing on the screen (independently of the protection available, as the case may be, for the underlying program), provided again that they were sufficiently original.[15] What applies for video games could therefore also be true for screen displays of other computer programs.

Scope of copyright protection

First, the author has 'economic rights': the copyright holder has the right to authorise reproductions of his work. The question as to whether reproduction which inevitably takes place during the normal use of a program on a computer also constitutes an infringement of the rights of the author is subject to debate.

The author also has the right to authorise public representation of his work; for computer programs, this can only be of interest for representation in classroom or during seminars, for videogames in public places (amusement arcades, etc. ...) and also for the use of computer programs in public data bases.

To some extent, the author also has the right to determine the use which will be made of his right of reproduction, arguably (but this is not unanimously accepted) even after he has decided to assign this right.[16] If he imposed certain conditions on the exercise by others of his right of reproduction, those limits are binding even upon subsequent purchasers of copies of the work.

Besides these economic rights, the author also has 'moral rights' on his work. In theory, the author has several moral rights: right of authorship, right to the integrity of the work, right of suppression (second thought),[17] and right of disclosure. In practice, it is uncertain whether these moral rights would be recognised by courts in cases involving software. Indeed, the function of these moral rights is to protect the personality of an author as it is expressed in his work.; it could therefore be claimed that a computer program incorporates less personal aspects than e.g. a poem or a painting.[18] Therefore, courts might refuse to recognise such moral rights (esp. right of suppression) in computer programs.[19]

With regard to restrictions on copyright protection, the position is uncertain: the right to make a back-up copy is controversial, as is the right to make a private copy (of any copyrighted work).

The proposal of Lallemand would allow the former and prohibit the latter. This uncertainty renders it all the more necessary to deal with the subject in the software licence agreement.

Beneficiaries of copyright protection

The author having created the program is of course the first copyright holder.

If it is a work made for hire, the author still remains the copyright holder, unless the contract specifies otherwise.[20]

When the author is an employee, there is a conflict between copyright law and labour law: according to the former, the employee should be the author; according to the latter, the fruits of the work of the employee belong to the employer.[21]

It is generally accepted that the employee retains moral rights to his work, except if otherwise agreed.[22] But there is controversy about economic rights: some say that there is a tacit assignment of rights as a result of the employment contract; others say that there can only be an assignment for those patrimonial rights that the parties had in mind when the work was created, i.e. 'what corresponds to the normal activity of the enterprise'.[23]

Since the position is uncertain, it is very important that the employment agreement deals explicitly with this question.

It should be mentioned that the proposal of Lallemand would give the copyrights to the employer, but only for the case of computer programs.

Duration of the copyright protection

Economic rights extend for 50 years after the death of the author (or of the last co-author in the case of works resulting from collaboration). The proposal of Lallemand suggests a reduced duration of 25 years for computer programs (which raises questions regarding conformity with the Berne Convention).

As for moral rights, in the absence of any statutory provision, their duration is controversial: the possibilities are that they disappear with the author, or at the same time as the economic rights, or they are perpetual.[24]

Assignment of rights

The author may assign part or all of his economic rights (art.3 of the Copyright Act); the principle is that he retains all rights which have not been explicitly assigned. The rights in a new method of exploitation of a work (unknown at the time of the original assignment) will only be considered to have been assigned if an express clause provided for such assignment of rights on methods yet unknown upon signature of the agreement. However, an assignment of rights may be tacit, so long as the will to assign can be clearly established (along with the scope of such tacit assignment).[25]

With regard to moral rights, the position is uncertain; the possibility to assign these rights is controversial. It is sometimes possible for the author to surrender their future exercise.

Databases, expert systems and topographies

As regards databases, there is no case-law on this issue either, nor is there any statutory definition of a database; it is probable that they can be protected by copyright law, in the same way (and under the same conditions regarding originality) as other compilations or catalogues.[26]

Expert systems would also be protected; the software enabling investigation and exploitation of the knowledge base can be protected under the same conditions as other programs; and the knowledge base will be protected under the same conditions as a data base.

As regards topographies, Belgium has very recently adopted in its legislation the *sui generis* protection introduced under the EEC Directive of December 1986 on the protection of topographies of semi-conductor products.[27] The text does not impose registration nor the (T) notice as formal conditions for protection.[28]

Protection under the law on unfair competition

Besides copyright protection, it is sometimes possible to bring an action for unfair competition, in cases of acts by other traders contrary to honest trade practices. The interest of such an action for discontinuance (*action en cessation*) is that while it benefits from an accelerated procedure, it still gives way to a decision on the merits of the case.

In principle, this action is not available when the defendant's behaviour consists of acts of copyright infringement.[29] However, if it can be established that other acts accompanied the infringement, an action is available and it may be possible to stop the infringement itself.

To date, several rulings following an action for discontinuance have been rendered in the field of software: only in one case was the action refused;[30] in other cases, judges have accepted the plaintiff's request , on the basis of the law on trade practices.[31]

Summary

Despite the fact that many issues remain unsettled (mainly due to scarcity of case law), the situation can be summarised as follows:

The present legislation does not contain any provision on the protection of computer programs; a proposal for reform of the Copyright Act does suggest solutions which are very similar to the French legislation. It is uncertain whether the Belgian legislators will adopt the provisions about computer programs while waiting for the adoption of an EEC directive on that issue.

The case-law has only dealt with copyright protection of computer programs in an indirect manner; the copyright solution may however be implicitly deduced from a few decisions.

Commentators generally agree on the copyright solution, while often regretting that it is not the perfectly adequate solution. Because they do not always accept all of the consequences of copyright protection (e.g. moral rights, duration), the impression is sometimes given that one is trying to obtain 'the best of both worlds'.[32]

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NOTES

1. The present article is a summary of the Belgian report on 'The legal protection of computer programs' presented to the ALAI Conference, L'informatique et le droit d'auteur, Québec City, September 1989.
2. The proposal contains three articles about computer programs, which are to a great extent derived from the French legislation on the subject (and so is the whole proposal); see 'Proposition de loi relative aux droits d'auteur, aux droits voisins et à la copie privée d'oeuvres sonores et audiovisuelles', D.P.S., S.E., 1988, n° 329–1; for some comments on the proposal, see A. Berenboom, 'Une nouvelle loi sur le droit d'auteur', *Journal des Tribunaux*, 1989, p.117; C. Doutrelepont, 'Nouvelles de Belgique: une proposition de révision de la loi belge du 22 mars 1886', R.I.D.A., n 134, p.71; B. Lejeune, 'Belgique: proposition visant à protéger le logiciel par le droit d'auteur', *Droit de l'informatique et des télécoms*, 1989–1, p.77
3. Article 3: '... le logiciel considéré en tant que tel'; this provision is derived from art.52.2 of the European Patent Convention, which contains a similar text.
4. See the interesting studies by M. Flamée, 'Octrooieerbaarheid van software', Bruges, Die Keure, 1985; F. Gotzen, 'Intellectuele eigendom en nieuwe technologieen ', *Rechtskundig Weekblad*, 1983–84, col.2375 et seq.
5. Even though computer programs as such are not patentable, an invention would normally not be excluded from patent protection merely because it involves the use of a computer program (but there is no case-law on the subject).
6. See, however, the proposal for reform mentioned supra (hereafter referred to as proposal of Senator Lallemand).
7. See a.o. G. Vandenberghe, *Bescherming van computer software*, Anvers, Kluwer, 1984; Y. Poullet, 'La protection des programmes par le droit d'auteur en droit belge et néerlandais', *Droit des Affaires/Ondernemingsrecht*, 1986, n.2, p.181; B. Lejeune, 'Protection privative du logiciel en droit belge', in *La protection privative du logiciel dans six pays de la CEE*, ed. M. Vivant, Litec, Paris, 1989.
8. Trib. Bruxelles, 30 Sept.1988, *Droit de l'informatique et des télécoms*, 1989–1, p.69 (with note by B. Lejeune). A more recent decision (Trib. Arr. Bruxelles, 4 Sept. 1989, reg. n° 2032, unpublished) deals with the question in an even less clear manner, and it is difficult to draw any conclusion from it.
9. According to a statute of 26-6-1951, Belgian authors (here, writers of computer programs) may invoke the Berne Convention on any occasion when it grants greater protection than the Copyright Act.
10. One has sometimes spoken of 'statistic originality', see G. Vandenberghe, 'Current developments in protecting computer programs, data bases and semi-conductor chips in Europe', PLI, New-York, 1985, p.859
11. Trib. Bruxelles, 30 Sept. 1988, op.cit.
12. Even though registration is no longer a prerequisite to an action for infringement (since the US joined the Berne Convention), copyright holders of registered works do benefit from certain advantages.
13. F. Brison, 'The computer-assisted/generated creation of works', (Belgian report), ALAI Conference, L'infor-

matique et le droit d'auteur, Québec City, September 1989.
14. P. Peeters, 'La protection des jeux vidéoe lectroniques', *Droit de l'informatique*, 1984, n 2, p.10
15. Juge saisies, Bruxelles, 6 September 1982, (*Atari v. GAA*), unpublished; Juge saisies Gand, 10 Sept. 1982 (*Atari v. D.V.*), unpublished.
16. Cour de Cassation, 19-1-1956, Pasicrisie, I, p.484. The importance of this decision of the Supreme Court is the object of discussions (about the 'droit de destination').
17. Its existence in Belgium is uncertain (there is no case-law on the subject).
18. That argument has sometimes been used (wrongly) to deny any copyright protection to software.
19. In France, the right of suppression and the right to integrity of the work have been explicitly excluded by the Act of 1985 on software protection.
20. The proposal of Lallemand may intend to change the position; but that is not certain, and its phrasing on this question is not precise.
21. B. Hubo, 'La titularité des droits d'auteur sur les logiciels écrits par un salarié. Situation en France, en Belgique et aux Pays-Bas', *Droit de l'informatique*, 1986, p.151.
22. Cf. supra about the possibility of assigning moral rights.
23. A. Berenboom, *Le droit d'auteur*, Larcier, Bruxelles, 1984, p.141.
24. This last solution is generally not accepted; Belgian commentators usually do not share the same quasi-mystic conception of French commentators about moral rights.
25. Bruxelles, 16-6-1954, *Journal des Tribunaux*, 1955,p.484 (Concl.W.G.)
26. S. Denis, Y. Poullet, X. Thunis, 'Banques de données, quelle protection juridique?', *Cahiers du CRID*, n° 2, 1988; also F. Brison, 'Les banques deédonnées' (Belgian report), ALAI Conference, L'informatique et le droit d'auteur, Québec City, Sept. 1989.
27. Loi du 10 janvier 1990 concernant la protection juridique des topographies de produits semi-conducteurs, *Moniteur belge*, 26 Jan. 1990, p.1093.
28. J. Keustermans, 'Belgisch wetsontwerp voor de juridische bescherming van chips', *Computerrecht*, 1989, n° 3, p.157.
29. Article 56 of the Law on Trade Practices.
30. Prés. Trib. Com. Brussels, 4 Oct. 1985, *L'Ingénieur-Conseil*, 1985, p.463.
31. See a.o. Prés. Trib. Comm. Brussels, 17 Sept. 1982, *Revue de Droit Commercial*, 1983, p.641 (note G. Vandenberghe); Prés. Trib. Com. Brussels, 9 Aug. 1986, *Droit de l'Informatique et des Télécoms*, 1989, p.73 (note B. Lejeune).
32. And the same remark may be made about the situation in other countries.