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Protection of GUIs (Graphical User Interfaces): some comments about the ECJ ‘s preliminary ruling in BSA v. Ministervo Kultury.

Philippe Laurent (Marx, Van Ranst, Vermeersch & Partners) · Thursday, March 24th, 2011

In case C 393/09, the ECJ decided that a GUI is not a form of expression of a computer program and cannot therefore be protected by copyright as a computer program under Directive 91/250/EEC. Indeed, that directive protects the forms of expression of a computer program and the preparatory design work capable of leading, respectively, to the reproduction or the subsequent creation of such a program. A GUI is an interaction interface which enables the user to communicate with the program and to make use of its features: it is only an element of the program which does not enable its reproduction, and which does not constitute a form of expression of the latter, either.

Nevertheless, the ECJ confirms that a GUI can be protected by copyright as a work by the “Infosoc” Directive 2001/29/EC, if the interface is its author’s own intellectual creation. Indeed, a GUI can be considered as a literary or artistic work in the traditional sense, and its original elements should therefore benefit from copyright protection… so far, so good.

In a second question, the ECJ was asked whether television broadcasting of a GUI “constitutes communication to the public of a work protected by copyright within the meaning of Article 3(1) of Directive 2001/29”. The ECJ answers that if a GUI is displayed in the context of television broadcasting of a programme, television viewers receive a communication of that GUI in a passive manner, without having the possibility to interact with the program. According to the ECJ, as individuals do not have access to the essential element characterising the interface, that is to say, interaction with the user, “there is no communication to the public of the graphic user interface within the meaning of Article 3(1) of Directive 2001/29”.

Even if it constitutes the first step towards the cliff, this sentence remains entirely valid. If indeed the ECJ deems that the essential feature of a GUI is interactivity between the program and its users (a point on which one could easily concur), then the mere broadcasting of “what’s happening on the screen when the GUI is operated” is not a communication of the GUI as such. In other words, what is communicated does not correspond to the GUI definition upheld by the ECJ.

Nonetheless, something other of a graphical nature is communicated, which could embody some original features or elements that are part of or used in the GUI (an icon, a frame, an animation, a graphic charter for instance), that could still be protected as such by copyright, that could still be displayed on the viewers’ screens, and the communication of which could anyway need the prior authorization of the author.

The ECJ awkwardly concludes that “the answer to the second question referred is that television broadcasting of a graphic user interface does not constitute communication to the public of a work

protected by copyright within the meaning of Article 3(1) of Directive 2001/29". According to us, this conclusion is to be handled very cautiously, as it seems that the ECJ focuses only on the GUI as a whole. One must however bear in mind that even if the GUI is not transmitted as such, some of its graphical elements might be copyright protected items that could possibly not be communicated without the author's prior consent.

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