Kluwer Copyright Blog

Originality of a computer program under French law

Brad Spitz (REALEX) · Wednesday, January 9th, 2013

The usefulness of a computer program is not sufficient to characterise the originality of the program.

There is nothing more subjective, and often arbitrary and unfair, than the notion on which copyright protection is based: originality. Under French law, the Intellectual Property Code protects “the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose” (article L.112-1), without giving a definition of originality. French case law has defined originality as the expression of the personality of the author. European case law validated the French conception of originality, in particular in Infopaq and in Painer (para. 88: “As stated in recital 17 in the preamble to Directive 93/98, an intellectual creation is an author’s own if it reflects the author’s personality”).

Where computer programs are concerned, it is however more difficult to focus on the personality of the author, and the French Supreme Court (‘Cour de Cassation’) ruled that originality results from the “author’s intellectual contribution” (Pachot) or from the “author’s individual contribution” (Isermatic France). This reference to the “intellectual contribution”, instead of the “author’s personality”, reflects a certain shift towards the criterion of novelty, which is used in industrial property law.

In a judgement rendered on 17 October 2012, the French Supreme Court reaffirms this definition and notes that the usefulness of a computer program is not sufficient to characterise the originality of the program.

The computer program concerned in the case was developed to assist French bailiffs in managing their offices. In France, bailiffs (“huissiers”) are public officials who, in particular, provide an auxiliary service to the judicial system. The software publisher brought a copyright infringement case against former clients who had continued to use the computer program after the termination of the license agreement.

The Court of Appeal of Aix-en-Provence condemned the publisher's clients for copyright infringement. In order to rule that the computer program is original, it merely stated that the program "provides a specific solution to the management of bailiffs' offices". The French Supreme Court annulled the judgment. Indeed, the Supreme Court considered that the Aix-en-Provence Court of Appeal breached the law by ruling that the computer program is original, "without explaining why the choices made provided evidence of a specific intellectual contribution and an individual effort by the person who developed the program under litigation, these elements being the only criteria that characterise an original work protected, as such, by copyright".

This ruling therefore asserts that the usefulness of a computer program cannot be used as a criterion to determine whether a program is original. The French Supreme Court is in line with the European legislation, which provides in article 1 of the directive on computer programs that "A computer program 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".

But of course, this does not mean that a useful computer program will not be protected by copyright… This case will now be rejudged by the Court of Appeal of Montpellier, which will have to decide whether the program is original or not, using the classic criteria set out by the Supreme Court: the personal intellectual contribution and the individual effort of the author.

A full Summary of this case will be added to the Kluwer IP Cases Database (http://www.kluweripcases.com/).

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