# JUDGMENT OF THE COURT (Third Chamber)

**22 December 2010**

(Intellectual property – Directive 91/250/EEC – Legal protection of computer programs – Notion of 'expression in any form of a computer program' – Inclusion or non-inclusion of a program's graphic user interface – Copyright – Directive 2001/29/EC – Copyrights and related rights in the information society – Television broadcasting of a graphic user interface – Communication of a work to the public)

In Case C-393/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Nejvyšší správní soud (Czech Republic), made by decision of 16 September 2009, received at the Court on 5 October 2009, in the proceedings

**Bezpečnostní softwarová asociace – Svaz softwarové ochrany**

v

**Ministerstvo kultury,**

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, G. Arestis (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 September 2010,

after considering the observations submitted on behalf of:

– Bezpečnostní softwarová asociace – Svaz softwarové ochrany, by I. Juřena, advokát,

– the Czech Government, by M. Smolek and D. Hadroušek, acting as Agents,

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the European Commission, by H. Krämer and P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 October 2010,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Article 1(2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42) and of Article 3(1) of 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 (OJ 2001 L 167, p. 10).

2 The reference has been made in the course of proceedings between Bezpečnostní softwarová asociace – Svaz softwarové ochrany (Security software association; 'BSA') and the Ministerstvo kultury (Ministry of Culture) concerning its refusal to grant BSA authorisation to carry out collective administration of copyrights in computer programs.

**Legal context**

*International law*

3 Under Article 10(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which constitutes Annex 1C to the Agreement establishing the World Trade Organisation, signed in Marrakech on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1; 'the TRIPs Agreement'):

'Computer programs, whether expressed in source code or in object code, will be protected as literary works pursuant to the Berne Convention [(Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention')].'

*European Union legislation*

Directive 91/250

4 The 7th, 10th and 11th recitals in the preamble to Directive 91/250 read as follows:

'Whereas, for the purpose of this Directive, the term 'computer program' shall include programs in any form, including those which are incorporated into hardware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage;

…

Whereas the function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function;

Whereas the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as "interfaces".'

5 Article 1 of Directive 91/250 provides:

'1. In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. For the purposes of this Directive, the term "computer programs" shall include their preparatory design material.

2. Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.

3. 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.'

Directive 2001/29

6 The 9th and 10th recitals in the preamble to Directive 2001/29 state:

'Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.'

7 The 20th and 23rd recitals in the preamble to Directive 2001/29 state:

'This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular [Directive 91/250], and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

…

This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.'

8 Article 1 of Directive 2001/29 provides:

'1. This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.

2. Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:

(a) the legal protection of computer programs;

…'

9 Under Article 2(a) of Directive 2001/29:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works.'

10 Article 3(1) of Directive 2001/29 provides:

'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.'

*National legislation*

11 Directive 91/250 was transposed into the Czech legal order by Law No 121/2000 on copyright and related rights and the amendment of various laws (zákon č. 121/2000 o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů) of 7 April 2000 ('the Copyright Law').

12 By virtue of Article 2(1) of that Law, copyright covers all literary works or other artistic work created by its author, which may be expressed in any objectively perceptible form, including electronic, permanent or temporary, without regard to its scope, purpose or meaning.

13 Article 2(2) of that Law states that a computer program is also regarded as a work if it is original, in that it is an intellectual creation of its author.

14 In accordance with Article 65 of that Law:

'1. Computer programs, without regard to the form of their expression, including the preparatory elements of their conception, are protected as literary works.

2. The ideas and principles on which all elements of a computer program are based, including whose which are the basis of its connection to another program, are not protected under this Law.'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

15 On 9 April 2001, BSA, as an association, applied to the Ministerstvo kultury for authorisation for the collective administration of copyrights to computer programs, under Paragraph 98 of the Copyright Law. BSA defined the extent of those rights in a letter dated 12 June 2001.

16 That application was refused, and the administrative action brought against that refusal was dismissed. BSA then brought a legal action against those decisions before the Vrchní soud v Praze (High Court, Prague).

17 Following the setting aside of those two rejection decisions by the Nejvyšší správní soud (Supreme Administrative Court), to which the case was referred, on 14 April 2004 the Ministerstvo kultury adopted a fresh decision by which it again dismissed BSA's application. BSA therefore brought an administrative appeal before the Ministerstvo kultury, which annulled that rejection decision.

18 On 27 January 2005, the Ministerstvo kultury adopted a new decision, by which it rejected BSA's application yet again on the ground, firstly, in particular, that the Copyright Law protects only the object code and the source code of a computer program, but not the result of the display of the program on the computer screen, since the graphic user interface was protected only against unfair competition. Secondly, it

stated that the collective administration of computer programs was indeed possible in theory, but that mandatory collective administration was not an option and that voluntary collective administration served no purpose.

19 BSA lodged an appeal against that decision, which was dismissed on 6 June 2005 by a decision of the Ministerstvo kultury. The association then challenged the latter decision before the Městský Soud v Praze (Regional Court, Prague). In its action, BSA submitted that the definition of a computer program in Paragraph 2(2) of the Copyright Law also covers the user interface. In its submission, a computer program can be perceived at the level both of the source or object code and of the method of communication (communication interface).

20 The Městský soud v Praze having dismissed its action, BSA appealed on a point of law before the Nejvyšší správní soud. BSA takes the view that a computer program is used when it is shown in a display on user screens and that, consequently, such use must be protected by copyright.

21 As regards the interpretation of the provisions of Directives 91/250 and 2001/29, the Nejvyšší správní soud decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘1. Should Article 1(2) of [Directive 91/250] be interpreted as meaning that, for the purposes of the copyright protection of a computer program as a work under that directive, the phrase ‘the expression in any form of a computer program’ also includes the graphic user interface of the computer programme or part thereof?

2. If the answer to the first question is in the affirmative, does television broadcasting, whereby the public is enabled to have sensory perception of the graphic user interface of a computer program or part thereof, albeit without the possibility of actively exercising control over that program, constitute making a work or part thereof available to the public within the meaning of Article 3(1) of [Directive 2001/29]?’

**The Court’s jurisdiction**

22 It is apparent from the decision for reference that the facts of the main proceedings arose before the date of accession of the Czech Republic to the European Union. The first decision of the Ministerstvo kultury is dated 20 July 2001.

23 Nevertheless, following various actions by BSA, the Ministerstvo kultury adopted a fresh decision on 27 January 2005, rejecting once again BSA’s claim. Since BSA has challenged that fresh decision, unsuccessfully, before the Ministerstvo kultury, it has appealed to the national court seeking annulment thereof.

24 It must be observed, firstly, that the contested decision in the main proceedings was adopted after the Czech Republic acceded to the Union, that it is prospective in its

regulatory effect and not retrospective, and secondly, that the national court asks the Court for an interpretation of the European Union legislation applicable to the main proceedings (Case C-64/06 *Telefónica O2 Czech Republic* [2007] ECR I-4887, paragraph 21).

25 Where the questions referred for preliminary ruling concern the interpretation of European Union law, the Court gives its ruling without, generally, having to look into the circumstances in which national courts were prompted to submit the questions and envisage applying the provision of European Union law which they have asked the Court to interpret (Case C-85/95 *Reisdorf* [1996] ECR I-6257, paragraph 15, and *Telefónica O2 Czech Republic*, paragraph 22).

26 The matter would be different only if the provision of European Union law which was submitted for interpretation by the Court were not applicable to the facts of the main proceedings, which had occurred before the accession of a new Member State to the Union, or if such provision was manifestly incapable of applying (*Telefónica O2 Czech Republic*, paragraph 23).

27 That is not so in this case. Accordingly, the Court has jurisdiction to interpret the directives above referred to and an answer must be given to the questions submitted by the national court.

**Consideration of the questions referred**

*The first question*

28 By its first question, the national court asks, in essence, whether the graphic user interface of a computer program is a form of expression of that program within the meaning of Article 1(2) of Directive 91/250 and is thus protected by copyright as a computer program under that directive.

29 Directive 91/250 does not define the notion of 'expression in any form of a computer program'.

30 In those circumstances, that notion must be defined having regard to the wording and context of Article 1(2) of Directive 91/250, where the reference to it is to be found and in the light of both the overall objectives of that directive and international law (see, by analogy, Case C-5/08 *Infopaq International* [2009] ECR I-6569, paragraph 32).

31 In accordance with Article 1(1) of Directive 91/250, computer programs are protected by copyright as literary works within the meaning of the Berne Convention. Article 1(2) thereof extends that protection to the expression in any form of a computer program.

32 The first sentence of the seventh recital in the preamble to Directive 91/250 states that, for the purposes of that directive, the term 'computer program' shall include programs in any form, including those which are incorporated into hardware.

33 In that regard, reference must be made to Article 10(1) of the TRIPS Agreement, which provides that computer programs, whether expressed in source code or in object code, will be protected as literary works pursuant to the Berne Convention.

34 It follows that the source code and the object code of a computer program are forms of expression thereof which, consequently, are entitled to be protected by copyright as computer programs, by virtue of Article 1(2) of Directive 91/250.

35 Accordingly, the object of the protection conferred by that directive is the expression in any form of a computer program which permits reproduction in different computer languages, such as the source code and the object code.

36 It is also appropriate to highlight the second sentence of the seventh recital in the preamble to Directive 91/250, in accordance with which the term 'computer program' also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.

37 Thus, the object of protection under Directive 91/250 includes 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.

38 As the Advocate General states in Point 61 of his Opinion, any form of expression of a computer program must be protected from the moment when its reproduction would engender the reproduction of the computer program itself, thus enabling the computer to perform its task.

39 In accordance with the 10th and 11th recitals in the preamble to Directive 91/250, interfaces are parts of a computer program which provide for interconnection and interaction of elements of software and hardware with other software and hardware and with users in all the ways in which they are intended to function.

40 In particular, the graphic user interface is an interaction interface which enables communication between the computer program and the user.

41 In those circumstances, the graphic user interface does not enable the reproduction of that computer program, but merely constitutes one element of that program by means of which users make use of the features of that program.

42 It follows that that interface does not constitute a form of expression of a computer program within the meaning of Article 1(2) of Directive 91/250 and that,

consequently, it cannot be protected specifically by copyright in computer programs by virtue of that directive.

43 Nevertheless, even if the national court has limited its question to the interpretation of Article 1(2) of Directive 91/250, such a situation does not prevent the Court from providing the national court with all the elements of interpretation of European Union law which may enable it to rule on the case before it, whether or not reference is made thereto in the question referred (see, to that effect, Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 64 and the case-law cited).

44 In that regard, it is appropriate to ascertain whether the graphic user interface of a computer program can be protected by the ordinary law of copyright by virtue of Directive 2001/29.

45 The Court has held that copyright within the meaning of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation (see, to that effect, with regard to Article 2(a) of Directive 2001/29, *Infopaq International*, paragraphs 33 to 37).

46 Consequently, the graphic user interface can, as a work, be protected by copyright if it is its author's own intellectual creation.

47 It is for the national court to ascertain whether that is the case in the dispute before it.

48 When making that assessment, the national court must take account, inter alia, of the specific arrangement or configuration of all the components which form part of the graphic user interface in order to determine which meet the criterion of originality. In that regard, that criterion cannot be met by components of the graphic user interface which are differentiated only by their technical function.

49 As the Advocate General states in Points 75 and 76 of his Opinion, where the expression of those components is dictated by their technical function, the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable.

50 In such a situation, the components of a graphic user interface do not permit the author to express his creativity in an original manner and achieve a result which is an intellectual creation of that author.

51 In the light of the foregoing considerations, the answer to the first question referred is that a graphic user interface is not a form of expression of that program within the meaning of Article 1(2) of Directive 91/250 and thus is not protected by copyright as a computer program under that directive. Nevertheless, such an interface

can be protected by copyright as a work by Directive 2001/29 if that interface is its author's own intellectual creation.

The second question

52 By its second question, the national court asks, in essence, whether television broadcasting of a graphic user interface constitutes communication to the public of a work protected by copyright within the meaning of Article 3(1) of Directive 2001/29.

53 In accordance with that article, Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

54 It follows from the 23rd recital in the preamble to Directive 2001/29 that 'communication to the public' must be interpreted broadly. Such an interpretation is moreover essential to achieve the principal objective of that directive, which, as can be seen from its 9th and 10th recitals, is to establish a high level of protection of, inter alia, authors, allowing them to obtain an appropriate reward for the use of their works, in particular on the occasion of communication to the public (Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 36).

55 It follows that, in principle, television broadcasting of a work is a communication to the public which its author has the exclusive right to authorise or prohibit.

56 In addition, it is apparent from paragraph 46 of the present judgment that the graphic user interface can be its author's own intellectual creation.

57 Nevertheless, if, in the context of television broadcasting of a programme, a graphic user interface is displayed, television viewers receive a communication of that graphic user interface solely in a passive manner, without the possibility of intervening. They cannot use the feature of that interface which consists in enabling interaction between the computer program and the user. Having regard to the fact that, by television broadcasting, the graphic user interface is not communicated to the public in such a way that individuals can 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.

58 Consequently, 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.

**Costs**

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **A graphic user interface is not a form of expression of a computer program within the meaning of Article 1(2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs and cannot be protected by copyright as a computer program under that directive. Nevertheless, such an interface can be protected by copyright as a work by 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 if that interface is its author's own intellectual creation.**

2. **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.**

[Signatures]

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* Language of the case: Czech.