SOFTWARE PROTECTION THROUGH COPYRIGHTS

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I. HOW IS PROTECTED SOFTWARE? ➦

Software is usually protected by Intellectual Property Laws, especially by copyrights all over the world although , in some countries like the USA, Japan or Israel, computer programs can be patented too . Soon, in the European Union, software will be able to be patented. But to grant a software patent, software must fullfill the patents requirements (inventive step, novelty and industrially applicable) . Given that, the European Parliament has just passed the software patent Directive. [1]

But nowadays ,computer programs are protected as literary works all over the world, although software is not exactly a literary work.

A. Why software is protected by copyright ? ➦

In 1964 an American Law student (J. F. Bauzhaff [2]) **got for first time**, copyright protection for his two computer programs at the Library of the Congress [3] . The copyright Office held that these two programs were "books" and were registered. The copyright Office announced that any software would be patented.

As software is not exactly a literary work, in 1978 the WIPO tried to give a *sui generis* kind of protection for software [4] (different from patents and copyrights) but this proposal was not success.

In addition, software can be protected in some countries by patents and protection by trademark law is also possible.

B. How do patents and trademarks protection work? ➦

1. **Trademarks** protect words, symbols, designs , colours which people are capable of identifying and distinguish these distintive signs from other goods and services.
2. **Patents** give holders or licensees the exclusive right to prevent others from selling or making the invention lasts 20 years maximum. To grant a patent ,the invention must be:
    a. **New** (novelty) the invention has not to be known in public by use or description,that is to say that, the product we want to patent, must not form part of the state of art.
    b. **Industrially applicable.** It Must be useful.
    c. **Inventive step** that is tested by a person skilled in this area of technology.

C. How different is copyright from patents and trademarks? ➦

1. Trademarks and patents , must be granted by patent and trademarks offices to give the exclusive right and prevent others from using, selling and making the item.

2. Copyright, must be original. The protection begins since the work is created (in some countries must be fixed too). Copyright no protected ideas or discoveries.

D .Copyrighting or patenting software? ➡

Software has always been protected by copyright laws, although nowadays, software patents are becoming popular all over the world.

What is the most effective kind of protection?

A work must be original to be protected by way of copyrights (in some countries like the USA, fixed too). Copyright does not protects ideas or methods, only the expression of the work. The purpose is to promote the exchange of information to benefit society.

A patent owner can keep others from using or making his invention only for 20 years. No extension of this term is possible.

But software has some difficulties to evaluate patents requirements like non-obviousness.

Software is protected better with patent laws against misappropiation.

II. INTERNATIONAL SOFTWARE COPYRIGHT REGULATION ➡

A. Are there international regulations to protect software copyright ? ➡

Since the 19th century there has been an international regulation in order to protect copyright. Nowadays sofware is considered as a literary work.

The different international laws are:

1. **Berne Convention for the protection of Literary and Artistc Works of 1896/1979** [5]

   Under article 2 the expression “literay and artistic works” includes every production in the literary, scientific and artistic domain like books, writings, lectures, dramatic and musical works, drawing, painting, sculpture, maps, plans and so on . But this is not an exhaustive list but only illustrative. Thus computers programs can be protected as literary works under article 2.

2. **TRIPS** [6] **Agreements** [7]

   a.Under Article 10 “computers programs whether in source or object code shall be protected as literary works under the Berne Convention (1971)”.

   b.Under Article 11 “ a Member State shall provide authors and theirs successors in title the right to authorize or prohibit the commercial rental to the public of originals or copies of their copyright works.”

   c.Under Article 27 software is not excluded from patentability of inventions.

3.

3C. 1996 WIPO Copyright Treaty [8]

a.Under Article 4, computers programs are the protected as literary works within the meaning of Article 2 of Berne Convention. The goal of " The Internet Treaty", is to update WIPO Treaties on copyright and related rights because of digital networks (internet) and digital technologies .

III. EUROPEAN SOFTWARE COPYRIGHT PROTECTION ➦

A. Is there an European regulation about software? ➦

Yes, the Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer progams.

The European patent convention is not a communitarian law. The European Patent Office is not a Community Office like like OHIM (office for harmonisation in the internal market [for trademarks and designs]).

Under Article 52 the European patent convention excludes software protection by patents.

1. How are computer programs protected in the EU? ➦

Under Article 1 computer programs are protected as literary works withing the meaning of the **Berne Convention** for the protection of literary works. At the end of September 2003, software will be able to be protected by patents too (if computer software has inventive step, is new and useful) because the European Parliament has just passed a Directive about software patents [9] .

2. What does Directive 91/250EEC govern? ➦

Under copyright protection only the expression of ideas is protected, not the ideas themselves or principles. When logic, algorithms and programming languages comprise ideas and principles those ideas and principles are not protected under Directive 91/250/EEC [10] .

Software must be original.

Thus, protection includes:

1. Software incorporated into hardware.
2. Developed software.
3. Preparatory software design if this design finally, results in new computer program.
4. Following software updates.
5. Firmware.
6.

Book of directions for use .

7. General copyrights as literary works , e. g : the permanent or temporary reproduction, translation, adaptation, arrangement and other alteration of a computer program, any form of distribution to the public like uploads, downloads, rental [**these acts are subject to authorization by the rightholder**].

3. Is there any exception? ➦

Yes, under Article 5 there aresome exceptions [**authorisation of rightholder is required**] to these restricted acts :

1. The making of a back-up copy by a person having a right to use that software. That exception do not permit an agreement to the contrary.
2. Error correction.
3. Lawful users are entitled without autorisation to study, observe or test the functioning of the program.

4. Does the Berne Convention provide for any exception for literary works? ➦

Yes, Article 9.2 of the Berne Convention providefor the “**three steps test**” so that a copyright exception be applicable .

Only when a law permits an exception is this rule applicable.

This exception is permitted in special cases in which reproduction does not conflict with normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author.

Fair use doctrine permits the use of copyrighted works for example for educational or nonprofit purposes.

5. What does first sale doctrine mean? ➦

The first sale in the EU of a copy of a program sold by the rightholder or with his consent exhaust the distribution right of that copy in the EU (is a sale not a rent). A community exhaustion of the rights is conferred. The first sale doctrine in the EU, exhausts the distribution right. Sales or distribution out of EU does not exhaust these rights.

Community exhaustion prevails over national exhaustion [11] .

6. How long does copyright protection for software last? ➦

Under Article 7 of the Berne Convention, the term of protection is the life of the author plus fifty years after his death. This term is a minimum term, so countries can extend it.

In the EU [12] this term has been extended until 70 years after the author´s death or 70 years since publication (if the work was created by a company).

In the US [13] , the term of protection depends on who has created the work. It is 70 years if it was created by a person or a joint work (not works for hire) or 95 years if the work was made by a company (corporate authors) [14] .

This terms begins on January first (the next January after a work´s creation/performance or the author´s death).

IV. SOME OTHER QUESTIONS CONCERNING SOFTWARE ➡

A. What is source code? ➡

A software programmer´s ideas are stated on several texts files so that, at the end , a computer can understand them but only is comprehensible to the person who develops the computer program . Software developers do that, using a process called compilation.

With compilation, a developer converts source code into object code.

Computers programmer usually keep source code in secret.

B. What is object code? ➡

Source code is converted into object code in a binary language a language formed by 0 and 1 . Object code is only comprehensible to the computer.

Decompilation is the process converting object code into source code.

C. Is decompilation allowed by the European Directive? ➡

Decompilation is a reverse engineering process which permits knowing source code by studying object code.

Under Article 6 91/250/EEC Directive, the authorisation of the rightholder is not required when this process is indispensable to obtain interoperability [15] (the ability to exchange information and to use it).

This information :

1. Has not previously been available.
2. Only can be used to get interoperability.
3. Only can be given it to other people if the program has independently been made .
4. These limits must be interpreted in accordance with three step test of the Berne Convention (Article 9.2).

D. How can copyright infringement in software be proved? ➡

US case law has different doctrines to prove plagiarism [16] :

1. The “look and feel test” even is no copying of source or object code, there could be copyright infringement in copying the overall structure of the program.
2. The “abstraction filtration and comparison” test [17] .

E. What is an Escrow agreement? ➦

A computer programmer usually keeps the secret source code to protect his computer techniques. Thus, in general, the user only has the object code depending on the rightholder to maintain and update it.

Holding on deposit by a third party, some chamber of commerce , some nacional agencies or agreed legal entities, specialized on escrow agreements [18] .

With a source code escrow agreement, a licensee can obtain under certain circumstances (e.g. computer´s programmer bankruptcy) the source code.

This agreement is useful to avoid some possible problems in the future, especially if the publisher or software programmer fall into bankruptcy because the user could need the source code and some technical information concerning source code in the future.

In this way, a software developer or publisher transfers a copy of the source code to the escrow service (escrow agent or third party). The escrow agent (it is to say the third party) is obliged to transfer the source code to user.

The escrow agent holds source codes in trust.

F. What is sharesoftware, freesoftware, spyware and adware? ➦

1. Sharesoftware is a computer program distributed (usually in computer magazines) so that this program can be evaluated only for trial use. When this term of evaluation (normally a couple of months or weeks) finishes ,user must decide after this trial use if he wants to go on using the computer program or not. If he wants he will have to paid for it (taking the licence) or if he refuses to go on using, then he will have to stop using it.

   Software is protected by copyright laws and is not under public domain.

2. Freesoftware [19] is a computer program too, but it is free. This software is under the public domain. A computer programmer wants to share his software and he usually renounces any IPR [20] .

   There are four software freedoms so that software be free:

   a. [Freedom 0]. Freedom to use the program for any goal.
   b. [Freedom 1].Freedom to study how the program works. Each user can adjust the program his own way. Source code access is open.

c. [Freedom 2] .Freedom to make and hand out copies.

d. [Freedom 3] .Freedom to improve the software program. Each user has the right to put these improvements and updates into the public domain.

No protection by copyrights nor patents. Use, distribution and reproduction is free. These works pass into the public domain.

3. Spyware is a software inside in an other software, software installed to gather information about you without your knowledge, recording personal internet usage and capturing personal information .Generally, a user has downloaded a program (freesoftware) so he do not know that he has installed a spyware too inside the program downloaded . The goal, is to register web pages visited by a user, how long has he visited them and so on [21] .

   A cookie is a kind of spyware, a mechanism for storing information about an internet user on his own computer. The problem with cookies is the conflict with the right of privacy.

4. Adware is a kind of spyware too. When user is surfing in internet many pop-ups invade his screen, usually with ads related to another web sites (very frequently in erotic and porn web sites).

   Software developers earn money not selling these softwares because is freesoftware, but selling this data to spam companies.

G. What are click-wrap and shrink-wrap licence agreements? ➦

[22] Licence means that copyright owner permit users using, copying and distributing the computer program without copyright infringement.

A licensor is the party who owns the IP. A licensee is the party who has the permission to use software but he has to pay for it.

A licence permits users to use the program and know it and the copyright owner earns money.

1. **Click-wrap licence agreement** . User must accepts the licence agreement conditions. He clicks a button marked. If he accepts he can download the program. (On-line contracts).

2. **Shrink-wrap licence agreement** [23] . Here, software is fixed in a tangible medium like a CD-ROM or disk. This software is wrapped in transparent plastic. Users can read the requirements of the agreement before buying this software.

   But if users remove this wrap from the CD or disk box he will have accepted the term of the licence agreement

H. Are these contracts binding for consumers? ➦

Both of them are contracts , therefore they are binding. The problem with on-line contracts is basically consumer protection. Because on-line contracts usually include a choice of forum and a choice of law clause we could have some problems about Private International Law.

In the EU, under article 15 of Regulation 44/2001 [24] (also called Brussels 1) on jurisdiction recognition and enforcement of judgments in civil and commercial matters, consumers can choose the court to sue between the defendant courts or consumer courts.

If someone brings proceedings against a consumer, the jurisdiction must be in courts where the consumer is domiciled .

Agreements to the contrary are valid only if these have been agreed to after the dispute.

This Regulation only is enforceable when the defendant has his domicile or , e. g., a branch office in the EU. Only is domicile important not nationality. If a defendant is not domiciled in the EU, the jurisdiction will be determinate by national law.

V. AUTHORSHIP OF SOFTWARE COPYRIGHT ➦

A. Who owns the software copyright? ➦

Under copyright system, the author of a work is the owner. But in software, the owner not is always the software programmer.

The European Directive 91/250 EEC of 1991 under its article 2 governs authorship of computer programs. We can distinguish some different cases :

1. If software is created by a natural person ,he owns the copyright.
2. The owner can be a legal entity .
3. Co-ownership is possible when the program has been created by more than one software programmer.
4. When the program is created by an employee following the employer´s instruccions or when he has created the program in the execution of his duties , the owner will be the employer (unless an agreement on the contrary) [25] .
5. Directive 91/250 does not governs software ownership when a company hires someone (not their own employees) to develop software by outsourcing.

   The most convenient method for the company if the company wants to grant ownership, is at the beginning of the relationship to agree to it by writing.

B. How is protected software in the United States? ➦

[26] In the US, ownership is governed in chapter 2 of Copyright Law. In the USA, works must be original and must also be "fixed" to grant copyright protection.

1. If someone creates a work he is the owner.
2. The authors in a joint work are co-owners of copyright.
3. Collective works are possible.
4. In works **made for hire** the employer is the owner of the copyright.
    a. In works made for hire, the employer can be a firm, a natural person, a corporation and so on. But the work is prepared by an employee **whitin the scope of his employment** . The employer is the owner unless the parties have expressly agreed otherwise in a signed and written contract. This doctrine was applied for first time in by US Supreme Court in re Community for creative non-violence v. Reid in 1989. The employer must control the work (e. g. providing equipment).
    b. The copyright term in works made for hire is 95 years since first publication or 120 years since creation whichever expires first.

VI. SOFTWARE PROTECTION IN SPAIN ➡

A. How software is protected in Spain? ➡

Software is excluded from patent law [27] under Article 4.2 (software as literary work) and article 5.

Software is governed by The Spanish Copyright Act of 1996 [28] (article 10).

Computer programs must be original to grant protection (article 96.2) preparatory design material is also protected.

Protection begins when software developer makes source and object code (article 96.). Updates are protected too (96.3)

Virus and harmful programs (as trojans) **are not protected** (article 96.3)

Concerning ownership the same cases as the European Directive :

1. The author of a computer program is the natural person (or group of people) who has created the program.
2. In collective works, the author is the natural or legal entity who publishes the program (the program has been created on his initiative), unless the parties have expressly agreed otherwise in a signed and written contract.
3. If a legal entity or natural person hires a third party (not his employee) so that this person (or enterprise) on his initiative creates the program, the author will be this computer developer. Unless the parties have expressly agreed otherwise in a signed

and written contract. So they have to write in the contract to know the contract´s conditions (article 1091 Spanish Civil Code). If the enterprise wants to get authorship, it has to agree to it by writing . Employer will be the owner of economics rights and the software programmer is the holder of moral rights [29] .

4. When the program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer will be the author, unless otherwise provided by contract (works for hire, US doctrine).

B. Is there any exception concerning a rightholder´s copyright? ➦

Yes, the same exceptions as in European Directive (articles 5, 6 Directive 91/250 EEC).

The Spanish Copyright Act (article 100) follows the three steps test (under article 9.2 of Berne Convention).

C. Must I file my Software at Copyright Office? ➦

[30] It is optional , not compulsory to grant protection. (article 101) but it is better to avoid problems.

You can file your computer´s updates.

No formality is necessary to grant copyright protection in Europe (article 1.3 European Directive) because copyright begins when the work is created and if this is original.

D. Which is the term of protection? ➦

The life of the author plus 70 years after his death. If the author is a legal entity, the term will be for 70 years since 1st January of the next year afterfirst publication or creation.

VII. SUMMING UP ➦

o Copyright only protects original works.

o Computer programs are protected as literary works by the Berne Convention.

o Ideas are not copyrightable, only the expression of these ideas or plans.

o Trademarks and software patents are compatible with copyright, because the scope of protection is different.

o Copyright protection is cheaper than patent protection.

o Filing is not necessary to grant protection, but in some countries like US is necessary to sue someone who has infringed your copyright; in addition in the US, works must be fixed to grant protection.

o It is advisable to file your software although is not necessary do it.

o The European Parliament has just passed (at the end of September 2003)the Patent Software Directive.

1. **§ Towards a new trend in software copyright?**

Internet has been probably the most important invention at the end of the 20th century. News technologies, internet and the digital era have launched new changes on copyright basis all over the world.

Because of internet, there is a trend to limit or extinguish copyrights.

There are important movements like free software foundation or gnu [31] which goals are toshare software (usually in public domain) and put object code into public domain . Thus, some European public Administrations have begun to install and use freesoftware in theirs computers (linux) e. g. town council of Munich in Germany or Andalusia and Extremadura in Spain (or Porto Alegre in Brazil).

In addition, IBM has decided to install in their computers linux.

The European Union in the e- Europe 2005 document on page 11 decided to stimulate freesoftware and encourage the use of open source software [32] .

On the other hand, more and more, software patents are popular due to US influence and the importance of American software companies.

There is an important movement to agree to cheaper licenses. They also encourage authors, to share object code or even to renounce IPR, some of these movements are creative commons at Stanford University (to get cheaper and more fair licences) and Internet2 [33] .

Maybe this is the future of some IPR.

CONCLUSIONS ➡

Although copyright laws govern software all over the world, more and more software is protected by way of patents (some software like business methods).

Software copyright is cheaper than patents, especially for small and medium-sized enterprises. Because copyright protection is automatic.

Software is protected as a literary work by the Berne Convention. This kind of protection has succeeded but maybe software should be protected by another kind of protection, different from patents and copyright or maybe we should mix up these two sorts of protection to create another one specific for software.

On the other hand, it would be better to avoid copyright ownership problems, agree by writing in the contract, who is the rightholder if a company hires someone (not their employees) to develop software.

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§DAVARA RODRÍGUEZ, MIGUEL ANGEL “ Manual de Derecho Informático”, (pages 103-123) 2001.

§PLAZA PENADES, JAVIER “ Propiedad Intelectual y Sociedad de la Información”, 2002.

§SEVERAL AUTHORS, “Copyright and electronic commerce”, Klumer law international 2000.

§SEVERAL AUTHORS “Patentes, marcas y software”, (pages 19-89), 2001.

WEB SITES ➡

http://www.wipo.org

http://www.uaipit.com

http://www.ipr-helpdesk.org

http://www.europa.eu.int

http://www.bsa.org

http://www.gigalaw.com

http://www.findlaw.com

http://www.e-gateway.net

http://www.lessig.org

http://www.usacopyright.org

http://www.european-patent-office.org

http://www.mec.es/Propiedad_Intelectual/indice.htm

http://www.sgae.es

1: At the end of September 2003, European Parliament has passed the "Patentability of computer- implemented invention" there have been 361 votes for and 157 against. http://www.europa.eu.int/comm/internal_market/en/indprop/comp/index.htm ➦

2: "Comentarios a la ley de propiedad intelectual" on page 1346 by Bercovitz Rodríguez-Cano, Rodrigo.. ➦

3: In the United States, lierary works, are registered at The Library of the Congress (Copyright Office) in Washington, under US Constitution article 1 section 8. http://www.loc.gov/copyright ➦

4: Only Brazil managed to promulgate a new law in 1984 but because of some Reagan Administration pressures, software was governed by copyright. Read more on page 34 at" Patentes , marcas y software" by Several Authors. ➦

5: The Berne Convention was completed at Paris in 1896 and has been revised in several times: at Berlin in 1908, at Berne in 1914, at Rome in 1928, at Brussels in 1948, at Stockholm in 1967, at Paris in 1971 and amended on September 28 , 1979. Available at http:// www.wipo.org/treaties/ip/berne/index.html ➦

6: TRIPS Agreement means Trade Related Intellectual Property Rights. This agreement was drawn up in 1996 when the WTO was founded. http://www.wto.org ➦

7: The main goal of this agreement is to fight against piracy, protect IPR´s (intellectual property rights) due to importance that these rights have in business and global economic growth. This Agreement has two principles: under article 4 national treatment (no discrimination), and finally under article 5 the principle most-fauvored-nation treatment. Available at: http://www.wto.org/english/docs_e/legal_e/27-trips.doc ➦

8: WIPO copyright Treaty available at: http://www.wipo.org/treaties/ip/wct.index.html ➦

9: Read more: http://www.europa.eu.int/comm/internal_market/en/indprop/comp/index.htm But this is the proposal because the Directive is not published in this site yet. ➦

10: Directive 91/250 EEC official journal L122 17/05/1991/ pages 0042-0046 available at: http://www.europa.eu.int/scadplus/leg/en/lub/l26027.htm ➦

11: European Union Court of Justice so held in 1998 in case "Never say never again". Read more at "Los Derechos de autor en la sociedad de la informacion" on page 122 – 127 by Javier Plaza Penadés. ➦

12: The term is the life of the author and 70 years after his death, this term was extended by and European Directive 93/98EEC of 29 October 1993. ➦

13: This term was fixed by Sonny Bono Copyright Term Extension Act in 1998. US Supreme Court held that this term was constitucional in re Eldred v. Ashcroft 2002. Decision available at: http://www.suprecourts.gov/opinions/02pdf/01-618.pdf ➦

14: Chapter 3 American Copyright Act. http://www.usacopyright.org/laws.html ➦

15: Interoperability means the software ability to exchange information and mutually to use it. Interconnecion and interaction between software and hardware is called "interfaces", this functional interconnection and interaction is known as interoperability. ➦

16: http://www.ladas.com/Patents/SoftwareProtectionIndex.html ➦

17: This test has been applied in some judgements E.g Computer Associates International inc v Altai inc in 1992 2nd Circuit Court of Appeals. In re Apple Computer inc v. Microsoft Corporation in 1994, 9th Circuit. ➦

18: The UK´s leading escrow agency is The National Computing Centre. http://www.nccglobal.com . There are some interestings web sites : http://www.locumsoftware.co.uk/escrow http://www.depositcentral.com or http://www.escroweurope.com . ➦

19: Some interesting web sites: http://www.opensource.org http://www.fseurope.org/documents/freesoftware.en.html ➦

20: IPR means Intellectual property rights. ➦

21: E.g. Kazaa, althogh the new kazaa does not use spyware . ➦

22: Read more on page 16 to 21 in "e-licence and software contracts" by Robert Bond. ➦

23: These kind of contracts have been validate in US by UCITA "the US of the Uniform Computer Information Transactions Act Code". Available at: http://www.law.upenn.edu/bll/ucl/ucita/ucita200.html In June 1996 the federal appeals court for first time validated this kind of licence in case Pro CD, Inc v. Zeidenberg. Read more at" Copyright and Electronic Commerce" by Several Authors , Klumer law international 2000 on page 270. ➦

24: See: http://www.europa.eu.int/comm/justice_home/ejn/homepage/homepage_ec_en.htm This Regulation is only for the EU except Denmark, in this country instead of this Regulation is applied Brussels Convention which is very similar. ➦

25: Doctrine BMW v. Pachot. French Supreme Court held that Pachot was the rightholder of software copyright who had in his own (no paid, out of the scope of his contract, the instruccions of his employer). Pachot was the accounts chief of BMW and developed a new software related to accounts. Read more on page 1357, at "Comentarios a la ley de propiedad intelectual" by Bercovitz Rodríguez-Cano, Rodrigo. ➦

26: http://www.usacopyright.org/laws.html ➦

27: Available at: http://www.mcyt.es/grupos/grupo_legislacion.htm ➦

28: Available at: http://www.mcu.es/Propiedad_Intelectual/anexos/LeyProp_Intelectual_mod171.PDF ➦

29: Economics rights are distribution, reproduction, public performance, record, adaptation , translation and so on. Whereas moral right is the right to claim the authorship of the work. The author can oppose against the changes if these changes harm his honour or reputation. Moral rights are not always recognized in common law countries, on the contrary, this rights are recognized in civil law countries. ➦

30: http://www.mec.es/Propiedad_Intelectual/indice.htm ➦

31: http://www.gnu.org ➦

32: http://www.europe.eu.int/information_society/eeurope/news_library/documents/eeurope2005/eeurope2005_en.pdf ➦

33: http://www.creativecommons.org http://www.internet2.org ➦