LEGAL PROTECTION OF AUTHOR RIGHT (COPYRIGHT)

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O. Ref. : 12/00146
Y. Ref. :

Date
26/01/2015

Legal Framework

a) Directives

Copyright is still mainly regulated by national laws. To this day, there is no global harmonization on the European level but a large number of specific texts, mainly[1]:

- Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.
- Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, aiming at facilitating the cross border transmission of audio-visual programs such as, particularly broadcasting via satellite and retransmission by cable.
- Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, which is set to adapt legislation on copyright and related rights to reflect technological developments.

[1] One should also have a look to the chapters related to computer programs, and databases.

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- Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, creating a standard level of protection within the single market.

- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

- Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. It also provides for a harmonization of certain neighboring rights including the right of fixation, reproduction, broadcasting and communication to the public and distribution.

- Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, which sets the term of protection for performers and sound recordings to 70 years in the EU.

b) EU Court of justice

In intellectual property more than anywhere else, the EU Court of justice has worked tremendously to harmonize the way the notions are interpreted and applied throughout the EU. Despite the lack of a global harmonization, many core-principles are therefore largely shared throughout Europe (see here after for landmark cases).

Copyright vs. author right

The lack of harmonization is partly caused by the coexistence of two different models within the European union:

- The copyright model. Mainly used in the common law EU-members (UK, Ireland, etc…), it provides a protection which is set to ensure a financial reward to creators and enable them to remunerate the effort they put in their creative activities. This model is based on "skill and labor" and less on originality and moral rights of the authors over their creations.

- The author's right model (continental Europe). It places the author at the centre of the protection system by granting him moral rights (paternity, integrity,…) over his work in addition to the traditional exclusive rights covering all commercial uses of the work. This model is based on a core-notion: originality.

Thanks to international texts, such as the Berne convention, these models are converging, but there remain strong differences (not to speak about the cultural inheritance).

Which works are protected under author right?

There is no general list of works/objects protected by author right.

However, specific elements are explicitly protected by author right, notably:

a) Computer programs. According to article 1 of the applicable 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. (…)";

b) Database. According to article 3 of the applicable Directive : "Databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection".

Beside those examples, the meaning of literary and artistic works is unclear (as it is in the international conventions and treaties).

It typically refers to all artworks: photographs, written compositions, statues, architectural plans, models, paintings, but also movies, video games, etc.

As an example, in the Painer case, the Court of Justice of the European Union has ruled that a portrait photograph can be protected by copyright if, which it is for the national court to determine in each case, such photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph. Since it has been determined that the portrait photograph in question is a work, its protection is not inferior to that enjoyed by any other work, including other photographic works.

Besides artistic works, the concept of literary and artistic works is nearly borderless (as shown by the two examples here above where database and computer program are protected as literary and artistic works).

After a decade of cases brought before the Court of Justice, one may reasonably assume that any work/object can potentially be protected by author right if, and only if, it is considered as an original creation[2].

The definition of literary and artistic works is not detachable from the criteria of originality : any work is eligible as a 'protected work' if it is an intel-

[2] See notably : Infopaq vs. Danske Dagblades Forening (2009) ; Softwarova vs. Svaz (2010) ; Premier League (2011) ; Painer vs. Standard, Axel Springer, Spiegel a.o. (2011) ; Football Dataco (2012) ; SAS Institute (2012) ; Usedsoft v. Oracle (2012); Flos vs. Semeraro (2011).

lectual creation of the author (i.e. it reflects his personality and expresses his free and creative choices).

Originality

Originality is the core-notion of author right : the work must exhibit creativity and originality, reflecting the author's imprint.

The idea expressed in the work does not need to be original. But the manner in which the idea is expressed must be original.

Let's take an example:

- Generally speaking, taking a picture of the sky is far from being original. The idea of such photograph is not original and if I take my autofocus camera and push on the appropriate button, it shall be difficult to pretend it is original;
- However, *a* picture of the sky, taken in *a* specific circumstance, by *a* specific person, who made *a* specific work, may be protected if it is original. This is exactly what the Court said in the Painer case (see here above).

Until recently, originality was largely a national issue, but the Court of Justice of the EU has worked tremendously in several decisions, in order to affirm that :

- originality should be applied similarly to all types of works protected by copyright (computer programs, literary and artistic work, books, etc.) ; and
- it has a pan-European meaning (it must be an intellectual creation of the author reflecting his personality and expressing his free and creative choices).

As an example, it has ruled in the Dataco case that a 'database' is protected by the copyright laid down by the applicable directive provided that the selection or arrangement of the data which it contains amounts to an original expression of the creative freedom of its author, which is a matter for the national court to determine.

In the landmark 2009 Infopaq case, the Court has confirmed that works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense that they are their author's own intellectual creation.

Formalities

Unlike industrial property right – such as patent or trademark – the protection under author right is automatically granted by the mere creation of the original work. Once is it created and fixed (as long as it is not fixed, it remains an idea), it is protected.

Who is the author?

As a general rule, the copyright owner is the creator of the initial work.

Since author right is based on originality, thecopyright owner is normally an individual. (Please note that taking into consideration the development of artificial intelligence, there is a growing debate on the necessity to change this traditional way of thinking.)

Exceptions to this principle exist and may vary from one country to another as it is not harmonized at the EU legislative level:

- If the work was created by an employee of a company during working hours, the company could be the owner of the copyright;
- If the work is created by more than one person, all creators could be considered as co-authors, unless otherwise agreed;
- Where students have assigned copyright in their research or exercise works to a university or educational body, the copyright could then reside with this body.

Please pay attention to the fact that due to the lack of harmonization, the ownership must be verified by a local lawyer before any action. Notably, the important question of works created by employees may considerably vary depending the country considered.

Scope of protection

The author has both moral and economic rights on his work. The common law countries do not completely recognize moral rights, at least not as part of copyright protection.

The economic rights can be sold, inherited or assigned. It can also be divided, so that the rights holder can assign it for a particular application or medium. Moral rights are, as a rule, not transferable nor assignable (however with exceptions depending the country).

ECONOMIC RIGHTS

Economic rights allow the owners of the rights to get income from its exploitation. They own the exclusive right to authorize it, under different forms, and to set the size of the royalties – however respecting competition law rules as they are the owner of a monopoly.

The copyright's economic rights are embedded in the Directive 2001/29 which holds a list of the prerogatives:

- A right of reproduction, which includes the right to authorize or prohibit digital reproductions and temporary copying[3];
- A right of communication to the public, which provides that the protected work may be accessed by the public[4];
- A rental and lending right, which provides for exclusive rights to authorize or prohibit the rental and lending of the protected work,
- A right of distribution, which includes the right to authorize or prohibit the first sale or transfer of ownership in the EU territory[5].

Under specific circumstances and strict conditions, users can be exempted to ask for the author's authorization : *e.g.* for education, research and information needs, for libraries and museums, for private use, …

The Court of Justice has underlined on several occasion the importance of the three-step-case when there is no specific exception to the right of the author or when the scope of such exception is unclear[6].

This test was first established in relation to the exclusive right of reproduction under Article 9 (2) of the Berne Convention for the Protection of Literary and Artistic Works in 1967 (Article 9 : (…) "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author"). Since then, the test as been included in Article 13 of TRIPs ("Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.")

[3] Important caselaw of the Court of Justice of the EU includes : SAS Institute (2012) ; ACI Adam (2014).
[4] Important caselaw of the Court of Justice of the EU includes : Svensson vs. Retriever (2014) ; TVCatchup (2013).
[5] Important caselaw of the Court of Justice of the EU includes : UsedSoft vs Oracle (2012) ; Donner (2012).
[6] Important caselaw of the Court of Justice of the EU includes : Amazon Austro-Mechana (2013) ; Infopaq (16 July 2009).

Moral rights typically include:

- A right to paternity, which ensures that a work cannot be falsely attributed, but also allows the author to publish anonymously or under a pseudonym ;
- A right to integrity, which guarantees the integrity of a work in such a way that the work cannot be modified or distorted without the author's permission;
- A right of controlling publication, to which the author is entitled to freely decide whether his work shall be released to the public or not, and when.

Moral rights cannot normally (there are some specificities …) be transferred, as they are personal rights of the author.

What are "related rights"?

Related rights are similar to author right, but they do not protect the *author*.

It protects those people who are involved in the performance of the work or in its communication to the public. When a famous music artist sings a text/music written by someone else, he is protected by related rights but not author rights (for he is not the author of the work – music and text – protected).

In the EU, the related rights are largely treated the same way as author rights. Holders of related rights in the EU enjoy the same economic rights granted to authors.

Duration of protection

Copyright has a strict duration which in most cases follows the Berne Convention. As a general rule, copyright applies for the lifetime of the creator, plus 50 years. However, in the EU, copyright applies for 70 years after the author's death date.