GERMANY

Supreme Court Applies 'Old' Law In Ruling on Software Protection

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In an important decision on software protection issued on 14 July 1993 (edited in October and registered as I ZR 47/91), the German Federal Supreme Court dealt with a situation where two programmers claimed to be the author of a software product.

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The authors had worked together on the product from 1980 to 1984. In 1985, they stopped their cooperation. Nevertheless, the defendant sold a copy without the permission of the plaintiff, who brought a suit for compensation and an injunction. The County Court of Hamburg and the Court of Appeal dismissed these claims; the Supreme Court cancelled these decisions.

Retroactivity of EC Directive Legislation

The judges first had to determine whether the software product is copyrightable. The German legislature implemented the EC software directive by adding a new chapter in the Copyright Act (sections 69a—g UrhG), which entered into force on 24 June 1993 (Bundesgesetzblatt 1993, I, 910). However, it is questionable whether the new protection regime applies to cases before that date.

On this question, the Supreme Court had to make difficult distinctions. In general, it ruled that the new regulations apply to: programs created after 24 June (cf. section 137 (1) UrhG); infringing acts done after that date; and claims for injunction based on infringing acts done before that date.

The court ruled that the old law applies to claims for compensation based on infringing acts done before 24 June 1993. Thus, the court held that the old law has to be applied in this case since the plaintiff sought compensation for infringing acts done before 24 June (the court seemed to forget the claim for an injunction). Therefore, the EC software directive and the German implementation act does not apply.

Originality Standard

The court stated that the standard of originality for copyrightability of software is lower under the EC directive than under its own previous rulings. However, in this case it could continue to apply its past decisions.

According to Sec. 2 of the German Copyright Act, computer programs are protected by copyright law if they represent a "personal, intellectual creation". In the view of the Supreme Court, this section applies only if the form of a program—in selection, collection, arrangement, and division of information and statements—goes far beyond the skills of an average programmer (see the Inkasso decision of 9 May 1985 (I ZR 52/83, (1986) 17 IIC 681 (English translation)).

These rules have been widely criticized in national and international literature, the main argument being that their application would result in about 90 percent of software being unprotected against piracy. Nevertheless, the Supreme Court refers to this standard in its new decision and is unwilling to accept the criticism and to lower the standard of originality.

In addition, the court refers to the use of copyright notices in computer programs. According to Section 10 of the Copyright Act, a copyright notice establishes the presumption that the person noticed as author is the author of the work. The judges applied this principle to computer programs, stating that if the initials of a name are listed in the mask, the presumption of authorship applies.

Co–authorship

The court also considered the principles of co–authorship. Software developed by a team of programmers is regarded as the work of co–authors. According to Section 8 of the Copyright Act, a co–author is not allowed to market the work on his own; he has to receive the permission of each co–author.

Therefore, the plaintiff here must prevail if he is regarded as a co–author in relation to the defendant. As his initials are present in the software mask, he is presumed to be an author.

This presumption could not be rebutted, the court held. As an expert witness stated in the County Court, the final software product has at least partly been influenced by the plaintiff's above–average work. The defendant cannot claim to be the sole author of the program. In particular, some of his instructions relate to the scientific and technical principles which, in the Supreme Court's view, are per se uncopyrightable.

Implications

The Supreme Court was unwilling to lower the standard of originality, although it will have to lower it under the new software protection regime. But it refused to cancel its restrictive attitude with regard to the copyrightability of software where a plaintiff claims compensation for infringing acts done before 24 June 1993.

The court's underlying distinction between injunction and compensation is dubious, however, because these two kinds of claim both refer to past infringements. In addition, the court has taken an overly nationalistic approach, without sufficient regard to practical considerations and the requirements of European harmonization.