

PROTECTING COMPUTER PROGRAM USER INTERFACES

It is not always obvious which part of a computer program can be protected using intellectual property. Piotr Niezgodka takes a look.

The economic success of computer programs is directly linked to offering an attractive user interface, eg, an intuitive menu, toolbars, icons, interconnections between functionalities, special effects. Due to the wide scope of outlays necessary to design a user interface that meets market needs, one will inevitably face the question of how to protect the end product. This article aims to present legal solutions available in Poland—a significant European software market.

When seeking protection of any creative activity, copyright is the starting point. However, a question arises whether a graphical user interface (GUI) should be treated as a standard artistic work within the meaning of the Berne Convention, or as a computer program.

Intuitively, one tends to put an equals sign between a GUI and a computer program. However, based on such an assumption, software development contracts would not have to contain any clauses referring to the GUI as separately subject to copyright. As a result, could such a contract allow the assignee / licensee to lawfully exploit the GUI as a separate product, for example to use elements of the GUI in the process of development of different software?

As regards Poland, finding an answer to the above questions is made easier due to Poland's status as an EU member state. Polish law, following provisions of Directive 91/250/EEC, grants copyright protection for software solely to "forms of expression of a computer program", creative and individual in character. The question whether a GUI constitutes such a "form of expression of a computer program" was subject to European Court of Justice (ECJ) analysis in its judgment of December 22, 2010 in the case C-393/09 (*Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury*). The ECJ's argumentation was based not only on *acquis communautaire*, but also on Article 10 (1) of the TRIPs agreement requiring "computer programs" to be a portion of source or object code that enables the reproduction of the whole program itself. Following the Advocate General's opinion, the ECJ stated that the GUI does not enable the reproduction of the whole

"CONTRACTS THAT ASSIGN OR LICENSE EXCLUSIVE RIGHTS TO SOFTWARE SHOULD INCLUDE SEPARATE PROVISIONS DEDICATED TO THE GRAPHICAL USER INTERFACE."

computer program. On the contrary, it merely constitutes an element of that program, by means of which users make use of its features. Thus, the ECJ held that a GUI is not a "form of expression of a computer program" and does not fall within the copyright protection of computer programs. Nevertheless, a GUI can be protected by copyright as a "standard" work, on the condition that it meets the basic requirements for copyright protection of literary and artistic works—ie, that it is the author's own intellectual creation.

Accordingly, under Polish law it is advisable to differentiate between the GUI and the computer program itself. Therefore, contracts that assign or license exclusive rights to software should include separate provisions dedicated to the GUI, particularly those referring to the agreed fields of exploitation. One should also assess which elements of the GUI meet the requirement of creative character of an artistic work. In this respect, the jurisprudence of the Polish courts offers useful guidelines. The general trend is to grant copyright protection for works that are not a mere implementation of technical standards or features dictated solely by technical function. As such, an innovative logical structure of software toolbars might be a good example of a copyright-protected element of a GUI.

On the other hand, when enforcing the exclusive rights to an already existing GUI, one should

consider basing claims not only on copyright law, but also on the Polish Act on combating unfair competition, which prohibits trade dress imitation. This may, however, induce a possible defence strategy built around the argument that the imitation is dictated solely by a technical function, instead of an aesthetic one.

A comprehensive approach to the issue of GUI protection should include applying for an industrial design registration. Polish Industrial Property Law, following Directive 98/71/EC, excludes computer programs from the catalogue of 'products' that a design can refer to. However, following the aforementioned ECJ judgment, GUIs do not fall into the category of computer programs mentioned in Directive 98/71/EC and therefore can be protected as industrial designs.

When speaking of effective protection of user interfaces under Polish law, the main guideline is the differentiation between the computer program and its user interface. This guideline should be followed not only in the process of drafting software agreements, but also in enforcement proceedings. ■

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