

SOFTWARE LEGAL PROTECTION IN THE INTELLECTUAL PROPERTY ACT (ROYAL LEGISLATIVE DECREE 1/1996, OF 12th APRIL): TECHNOLOGICAL SOLUTIONS AND LEGAL REGULATION.

Javier Gonzalez de Alaiza

Civil Law
University of Balearic Islands

Abstract. Practical issues on legal regulation in the field of intellectual property of the technological solutions proposed by the scientific consortium ARES.

1 Introduction and objectives

The aim of this brief report is to facilitate companies a legal overview of the intellectual property issues of our technology. The paper is focused in software legal protection.

2 Legal framework

Software is a particular kind of work, which deserves an own regulation in the Spanish Intellectual Property Act. This specific regulation is found in Title VII, Book I of the Intellectual Property Act, that is, in the articles 95 and following of the Act

Here we highlight especially important articles that technicians have to take into account.

Art. 95. Legal Regime. The copyright in computer programs shall be governed by the provisions under this Title and, where not specifically provided for therein, by such of the provisions of this Law as may be applicable.

Art. 96. Subject Matter of Protection. (1) For the purposes of this Law, "computer program" means any sequence of instructions or data intended for either direct or indirect use in a data processing system to perform a function or task or to obtain a specific result, regardless of its form

of expression and recording. For the same purposes, the expression "computer programs" shall cover also the preparatory documentation thereof. The technical literature and manuals for the use of a program shall enjoy the same protection as is afforded to computer programs themselves under this Title. (2) The computer program shall be protected only if it is original in the sense that it is the author's own intellectual creation. (3) The protection provided for in this Law shall apply to any form of expression of a computer program. The protection shall likewise extend to any and all successive versions of the program, and also to derived programs, with the exception of those created for the purpose of doing harm to a computer system. Computer programs that form part of a patent or utility model shall, without prejudice to the provisions of this Law, enjoy whatever protection may accrue to them by operation of the legal regime governing industrial property. (4) The ideas and principles underlying any of the elements of a computer program, including those underlying its interfaces, shall not be protected by copyright in terms of this Law.

Art. 97. Ownership of Rights. (1) The natural person or group of natural persons that has created a computer program, or the legal entity considered the owner of the copyright in the cases expressly provided for in this Law, shall be considered the author thereof. (2) In the case of a collective work, unless otherwise agreed, the person, whether natural person or legal entity, who edits and discloses it under his name shall have the status of author. (3) The copyright in a computer program that is the unitary result of collaboration between two or more authors shall be their joint property, and shall belong to all of them in proportions determined by them. (4) Where a salaried worker creates a computer program in the course of duties entrusted to him or on instructions from his employer, the ownership of the corresponding exploitation rights in the computer program so created, including both the source program and the object program, shall belong exclusively to the employer, unless otherwise agreed. (5) Protection shall be granted to all persons, whether natural persons or legal entities, who meet the requirements laid down in this Law for the protection of copyright.

Art. 98. Term of Protection. (1) Where the author is a natural person, the term of the exploitation rights in a computer program shall, depending on the circumstances, be that provided for in Chapter I of Title III of this Book. (2) Where the author is a legal entity, the term of the copyright referred to in the foregoing paragraph shall be 70 years, counted from the

first of January of the year following that of the lawful disclosure of the program or that of its creation if it has not been disclosed.

Art. 99. Content of Exploitation Rights. Without prejudice to the provisions of Article 100 of this Law, the exclusive rights in the exploitation of a computer program by the person who is the owner thereof in terms of Article 97 shall include the right to do or authorize the following: (a) total or partial reproduction, including for personal use, of a computer program by any means and in any form, whether permanent or temporary. Where the loading, display, operation, transmission or storage of a program calls for such reproduction, the authorization to do so, which is granted by the owner of the rights, must have been obtained; (b) translation, adaptation, arrangement or any other transformation of a computer program, and the reproduction of the results of such acts, without prejudice to the rights of the person who transforms the program; (c) any form of distribution to the public, including the rental of the original computer program or of copies thereof. For the above purposes, where assignment of the use of a computer program occurs, it shall be understood, in the absence of proof to the contrary, that the assignment is non-exclusive and intransferable, it being likewise presumed that assignment has taken place only to meet the needs of the user. The first sale in the European Union of a copy of a program by the owner of the rights or with his consent shall exhaust the right of distribution of the said copy, subject to the right to control over the subsequent rental of the program or of a copy thereof.

Art. 100. Limitations of the Right of Exploitation. (1) The authorization of the owner shall not be required, in the absence of a contractual provision to the contrary, for reproduction or transformation of a computer program, including the correction of errors, where those acts are necessary for the use of the program according to its intended purpose by the lawful user. (2) The making of a reserve copy by the person who holds the right to use the program may not be prevented by contract in so far as it is necessary for such use. (3) The lawful user of the copy of a program shall be entitled to observe, study or verify the operation thereof, without prior authorization from the owner, for the purposes of ascertaining the ideas and principles underlying any element of the program, provided that this is done in the course of any of the operations of loading, display, operation, transmission or storage of the program that he is entitled to perform. (4) Unless otherwise agreed, the author may not object to the assignee who holds the exploitation rights carrying out or authorizing the carrying out of successive versions of his program, or of programs derived therefrom. (5) The authorization of the owner of the rights shall not be

necessary where the reproduction of the code and the translation of its form as provided in subparagraphs (a) and (b) of Article 99 of this Law is essential to the securing of the necessary information for achieving interoperability of an independently created program with other programs, provided that the following requirements are met: (a) such acts must be performed by the legitimate user or by any other person authorized to use a copy of the program, or, in their name, by a duly authorized person; (b) the information necessary to achieve interoperability must not have been previously made readily and rapidly available to the persons referred to in the foregoing subparagraph; (c) the said acts must be confined to those parts of the original program that are necessary for the achievement of interoperability. (6) The exception provided for in paragraph (5) of this Article shall be applicable in so far as the information so obtained: (a) is used solely for the achievement of the interoperability of the independently created program; (b) is communicated to third parties only where essential to the interoperability of the independently created program; (c) is not used for the development, production or commercialization of a program substantially similar in its expression, or for any other act that infringes copyright. (7) The provisions contained in paragraphs (5) and (6) of this Article may not be interpreted in a manner that permits their implementation to prejudice unjustifiably the legitimate interests of the owner of the rights or is contrary to the normal exploitation of the computer program.

Art. 101. Protection of Register Entries. The rights in computer programs, and also in their successive versions and in derived programs, may be recorded in the Intellectual Property Register. It shall be laid down by regulation what elements of registered programs may be laid open to public inspection.

Art. 102. Infringement of Rights. For the purposes of this Title and without prejudice to the provisions of Article 100, those persons shall be considered infringers of copyright who, without authorization from the owner thereof, perform the acts provided for in Article 99, and who in particular: (a) bring into circulation one or more copies of a computer program when they know or can assume that they are unlawful; (b) stock for commercial purposes one or more copies of a computer program when they know or can assume that they are unlawful; (c) bring into circulation or stock for commercial purposes any instrument whose sole purpose is the unauthorized removal or disablement of any technical device used to protect a computer program.

Art. 103. [Writing under Law 1/2000, of 7 January, of Civil Procedure] Protection Measures. The owner of the rights recognized under this Title may bring the actions and institute the proceedings that are provided for in general terms in Title I, Book III of this Law, and more specifically the temporary measures contemplated in the Civil Procedure Act.

Art. 104. Safeguarding of the Application of Other Legal Provisions. The provisions under this Title shall be understood as being without prejudice to any other legal provisions such as those concerning patent rights, trademark rights, unfair competition, trade secrets, the protection of semiconductor products or contractual obligations.

The Spanish software regulation does not differ too much from other European Union countries legal responses as they all are subject to the mandates of the Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC).

The criminal regulation of intellectual property is to be found in the articles 270 to 272 of the Criminal Code (Organic Law 10/1995, of 23 November 2005), with special mention of the computer programs in the article 270 paragraph 3.

Article 270. [Writing under Law 15/2003 of 25 November] (1) Shall be punished with imprisonment from six months to two years and fine of 12 to 24 months who, for profit to the detriment of third, reproduces, plagiarizes, distributes or publicly communicates, in whole or in part, a literary, artistic or scientific work, or their transformation, artistic performances fixed in any medium or communicated by any means, without the authorization of the owners of relevant intellectual property rights or their assignees. [Added by Organic Law 5/2010 of 22 June] However, in cases of retail distribution, attended the characteristics of the guilty and the small amount of profit, provided they do not attend any of the circumstances the following article, the judge may impose a fine of three to six months or work for the benefit of the community of thirty-one to sixty days. In the same assumptions, if the benefit does not exceed 400 euros, the fact is punishable as a misdemeanor of Article 623.5. (2) Shall be punished with imprisonment from six months to two years and fine of 12 to 24 months who knowingly export or store copies of works, productions or performances referred to in the previous section without the aforementioned authorization. Also incur the same penalty who knowingly imports these products without such permission, whether they have a legal origin as illegal in their country of origin, however, the importation of the goods in a State belonging to the European Union will not be offense when

those have been acquired directly from the holder of rights in that State, or with his consent. (3) Shall also be punished with the same penalty who manufactures, imports, put in circulation or have any means specifically designed to facilitate the unauthorized removal or circumvention of any technical device that was used to protect computer programs or any other works, performances on the terms set forth in paragraph 1 of this article.

Article 271. [Writing under Law 15/2003 of 25 November]. The penalty is imprisonment of one to four years, fine of 12 to 24 months and disqualification for the exercise of the profession related to the offense, for a period of two to five years, when any of the following circumstances: (a) That the benefit is of particular economic significance. (b) The acts of particular gravity, taking the value of the unlawfully produced objects of particular importance or damages. (c) That the offender belongs to an organization or association, including transient, which had intended to carry out activities infringing intellectual property rights. (d) To be used for children under 18 years to commit these crimes.

Article 272. (1) The extent of civil liability for offenses under the two preceding articles shall be governed by the provisions of the Copyright Act relating to cessation of the unlawful activity and compensation for damages. (2) In the event of conviction, the judge or court may order the publication thereof, the infringer's expense, in an official newspaper.

Digital rights management measures are legally protected by article 162 of the Intellectual Property Act. This article was introduced by the transposition of European Parliament and Council Directive 2001/29/EC of 22 May on the harmonisation of certain aspects of copyright and related rights in the information society.

Article 162. Protection of information rights management. [Added by Law 23/2006 of July 7] (1) The holders of intellectual property may bring an action under Title I of Book III against those who knowingly and without authorization, carry out any of the acts listed hereafter, and know or has reasonable grounds to know that in so doing they are inducing, enabling, facilitating or concealing an infringement of any of those rights: (a) Removal or alteration of any information for the electronic management of rights. (b) Distribution, importation for distribution, broadcasting, communication or making available of protected works or which have been removed or altered without authorization information for electronic rights management. 2. For the purposes of the preceding paragraph shall mean information rights management any information provided by rightholders which identifies the work or other protected object, author or any other rightholder, or stating the conditions of use of the work or other protected

object, and any numbers or codes that represent such information, provided that these items of information be associated with a copy of a work or other subject-matter or appear in connection with its communication to the public.

3 Assessments

The protection of computer programs is different, but similar to that of other works. The basis of protection is the prohibition of reproduction of any original part of a computer program without permission of the author or a right holder, except under any of the exceptions in art. 100 of the Intellectual Property Act.

Unlike what happens with different kinds of works, in the case of computer programs we are often in front of collective or in collaboration works. Also commonly the right holder is a legal person. Therefore, we shall apply the respective regime to such situations, particularly in what refers to duration of protection and exploitation of rights.

A fundamental decision in the exploitation of a computer program is whether it will be released as proprietary or open source software. In the latter case, the right holder must decide whether to allow other people to develop the code and, if so, if they impose the obligation to maintain the source code open through the copyleft clause.

The validity of the copyleft clause has been asserted by U.S. (i. e., *Jacobsen v. Katzer*, US Court of Appeals for the Federal Circuit, Washington D.C., vom 13.08.2008, 2008-1001) and German (i. e., *Welte./.Sitecom Deutschland GmbH*, LG Mnchen I, Az. 21 O 6123/04) courts. In Spain, despite the lack of jurisprudence on this type of clause, it has been admitted the validity of the creative commons licenses, which are granted for works other than computer programs.

The removal and alteration of all information relating to digital rights management and the exploitation of works where have been removed or altered this information receives the same legal response that violations of intellectual property rights themselves.

References

1. "Comentarios a la Ley de Propiedad Intelectual: Real Decreto Legislativo 1/1996, de 12 de abril", por el que se aprueba el Texto Refundido de la Ley de la Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia", Bercovitz Rodriguez-Cano, Rodrigo (coord), et. al., Madrid, Tecnos, 2007, 3a ed.

2. "Comentarios a la ley de propiedad intelectual : texto refundido, Real Decreto Legislativo 1/1996, de 12 de abril", Rodrguez Tapia, Jose Miguel (dir.) et. al., Madrid, Thomson-Civitas, 2007
3. "Manual de propiedad intelectual", Bercovitz Rodrguez-Cano, Rodrigo (coord.) et. al., Valencia, Tirant lo Blanch, 2010, 4a ed
4. "Open Source, Free Software and Contractual Issues", Gonzalez de Alaiza, Jose Javier (Winter, 2007), Texas Intellectual Property Law Journal, p. 157
5. "Copyleft. Manual de uso", AA.VV., Madrid, Tds, 2006
6. "Digital Rights Management in the United States and Europe", Bechtold, Stefan, American journal of comparative law, num. 2, 2004, p. 323 http://www.ip.ethz.ch/people/bechtold/publications/articles/DRM_2004.pdf