QUESTION 57

Protection of computer programmes - Protection of computer-software

Question Q57

Protection of Computer Programmes

Resolution

The IAPIP,

taking into account

(a) that, irrespective of any protection of software as know-how, and of any protection provided by contracts and by rules against unfair competition, intellectual creations in the field of software in principle deserve and require protection by way of exclusive rights or inventors' certificates to encourage the production and foster the exploitation of software and promote the dissemination of knowledge related to software, and

(b) that all parties concerned with the production, distribution or application of software, and of computer programmes in particular, need increased legal security,

adopts the following resolution:

1. Inventions otherwise satisfying the criteria of patentability according to national laws, should not be denied patent protection or protection by inventors' certificates merely because software, especially a computer programme, is involved, or because the subject matter can or is intended to be put into effect by using or programming data processing equipment. This approach is not contradictory to provisions in national laws and international conventions which specifically exclude computer programmes as such from patent protection.

2. Until a more appropriate system of protection is established, computer programmes, in whatever form embodied, as well as material concommitant to such programmes, should be eligible for and enjoy copyright protection, where necessary by liberal interpretation of existing national laws.

3. It is desirable that there be prepared under the auspices of WIPO:
(a) a draft treaty on a *sui generis* international deposit system for the protection of computer programmes:

(b) a draft model law corresponding to the system of such a treaty.

4. The study of Question 57 should be continued, *inter alia*, on the following points:

(a) exact definition of the notion covered by the term "computer programme",

(b) search for the most appropriate system of protection,

(c) draft treaty and draft model law according to point No. 3 above,

(d) possible establishment of a system of registration of computer software for the purpose of providing information to the public.

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QUESTION 57

Protection of computer programmes - Protection of computer-software

Question Q57

Protection of Computer Programmes

Resolution

The IAPIP

1. congratulates and expresses its appreciation to WIPO on the efforts made whereby Model Provisions on the Protection of Computer Software have now been agreed upon and published following the Fourth Session of the WIPO Advisory Group on this question at Geneva from June 1 to 3, 1977.

2. requests that all National Groups draw the attention of their own Governments to the agreed upon Model Provisions.

3. proposes that all National Groups in countries where no sufficient provision is yet made for the protection of computer software urge their governments to consider the agreed upon Model Provisions as a basis for national legislation on this question.

4. deems that this question should be kept on the agenda of the IAPIP and WIPO to consider the need for an international treaty and to carry out further work on this question when such need is established.

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QUESTION 57

Protection of computer programmes - Protection of computer-software

Yearbook 1984/III, pages 93 - 94
Council of Presidents of Athens, November 6 - 9, 1983

Q57

Q57

Legal Protection of Computer Software

Resolution

The AIPPI,

Based on the reports of 20 National Groups which explain the systems under which computer software is protected in their countries,

I. On copyright law

1. Finds that most of the countries in question recognize either by virtue of their laws or the practice of their courts that computer software is protected not only under the law of contracts, the laws on unfair competition or the rules of law governing trade secrets, but also by copyright law.

2. Observes that protection of computer software by copyright law would appear immediately to allow making use of the benefits accorded by the existing international treaties.

3. Points out that if protection of computer software should be accorded by copyright law, the adaptation to computer software of the national and international provisions which at present govern the protection of copyright would appear to be necessary.

II. On the application of international treaties to the protection of computer software

1. Recommends that a study in depth should be carried out on an international plane on the following points:

a) Whether it will be necessary to introduce rules into the existing international copyright treaties whereby they would expressly be made applicable on computer software.

b) Whether these international treaties adequately protect computer software.

2. Declares that the above recommendation shall not exclude any later study on whether it would appear necessary to establish an international treaty specifically for protecting computer software.

III. On continuing the AIPPI's Study

In consequence, the AIPPI decides to continue the study of the question along the following lines:

1. Establish a canon for the protection of computer software.

a) Definition of the elements constituting computer software.

Should all elements which together form computer software be subjected to the same system of protection?

b) Nature of the right: exclusive right or relief against copying?

c) Extent of the right: prohibited acts.

d) Conditions of protection: is the deposition or the registration of computer software required?

2. Is it necessary to change the rules on copyright or other legislation in order to assure the protection of computer software:

a) on the national plane,

b) on the international plane?

3. Protection of integrated circuits, having regard to the documents to be established by WIPO.

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QUESTION 57

Protection of computer programmes - Protection of computer-software

Question Q57

Protection of Computer Software and Integrated Circuits

Resolution

AIPPI has found at its Executive Committee Meeting in Rio in May 1985 that the protection of Integrated Circuits is necessary and urgent.

The institution of a new specific treaty appears necessary in order to assure that an Integrated Circuit protected in one country can be protected in another country under the same conditions as applicable to Integrated Circuits of nationals of that other country.

It is of course understood that this does not exclude other forms of protection.

AIPPI is of the opinion that this new treaty should contain the following essential rules:

I. Definition of subject matter of protection provided for by the treaty

The object of the treaty should be the protection of the layout-design of semiconductor integrated circuits.

More specifically, the treaty ought to protect the layout-design of an IC which may be defined to mean the three-dimensional disposition of the active elements, interconnections and passive elements, if any, of a semiconductor integrated circuit, which IC is intended to perform an electronic function, in whichever form such disposition is fixed or encoded.

This definition allows for protection of the layout-design of the Integrated Circuit whichever will be the means for its manufacture.

The treaty would thus define those aspects of IC which as a minimum must be protected.

II. Conditions for protection

AIPPI is of the opinion that the treaty should determine the conditions for the protection of layout-designs for Integrated Circuits.

AIPPI is of the opinion that neither technical progress nor novelty should be taken into consideration as a condition for protection.

AIPPI is of the opinion that to be the subject of protection the layout design of an Integrated Circuit must be original.
The notion of originality of a layout design of Integrated Circuit is interpreted to mean:

- the layout-design or the Integrated Circuit must not be a copy-of another layout-design
- it must be the result of an intellectual effort
- it must not be commonplace to interested persons.

III. Rights

1. AIPPI approves the provisions of Article 3 (1) (a) of the second draft treaty prepared by WIPO Document IPIC/CE/II/2), and proposes to consider unlawful the following acts if committed without authorisation:

(a) copying of the layout-design or a material portion thereof. In this regard AIPPI supports the view expressed by WIPO in the note 49 to Article 3 of the draft treaty which refers to copying of less than the totality as requiring authorisation, provided such copying is of an essential and/or substantial portion of the layout-design.

(b) incorporating the copied layout-design in an Integrated Circuit and incorporating the copied Integrated Circuit in an industrial article;

(c) as well as importing, offering for sale, selling, otherwise dealing with such Integrated Circuits or industrial articles or the layout-designs in whatever mode they may appear.

2. AIPPI is of the opinion that a person who without authorisation has copied the layout-design or has incorporated it in an Integrated Circuit should always be held to have infringed, regardless of whether that person has acted in good faith or in bad faith.
On the other hand, AIPPI takes the view that the Contracting States may foresee less strict sanctions for those who in good faith merely import, offer for sale, sell or otherwise deal with Integrated Circuits and/or industrial articles containing an Integrated Circuit made according to a copy of an original layout-design.
However, AIPPI affirms that in any case it must be possible to stop these unlawful acts in order not to end up in a non-voluntary licence situation.

3. AIPPI believes that the treaty should not consider unlawful the following acts:

- use of a concept behind the layout-design of the Integrated Circuit
- copying of the layout-design solely for educational purposes provided the results of such copying are not incorporated in an IC.
- copying of the layout-design solely to analyze and evaluate it for the purposes of reverse engineering, provided that the result of the reverse engineering is an original layout-design.

AIPPI notes that reverse engineering is understood by the industry to refer to the situation where a later layout-design results from the extraction and use of the circuits, logic flow, ideas and methodology embodied in the earlier layout-design.

IV. Compulsory Licence

AIPPI is of the opinion that the question whether the treaty should allow compulsory licenses specifically in the interest of national security should be studied.

However, AIPPI is of the opinion that, given the possibilities of independent development and reverse engineering of competing Integrated Circuits, technical progress in ICs will not be hindered by the absence of compulsory licences.

V. Sanctions

AIPPI approves the dispositions of Art 3 (1) (b) of the draft treaty according to which any contracting state should provide for measures to ensure the prevention and repression of acts considered unlawful.

VI. Formalities

AIPPI is of the opinion that any contracting state may make protection conditional upon the deposit of material allowing the identification of the original layout-designs.

However, AIPPI takes the view that this deposit should be kept secret at the request of the depositor. But such a secret deposit should be available for inspection by anyone accused of committing an infringement provided that appropriate measures are taken to preserve the depositor's rights (such as a trade secret) and in any event the deposit should be available to the public at the end of the term of protection.

VII. Duration of protection

AIPPI is of the opinion that the minimum duration of protection for a layout-design of an Integrated Circuit should be ten years.

AIPPI wishes that the starting point of this duration be the same in all contracting states, and that this starting point be established with certainty.

VIII. AIPPI expresses the wish that the principles as set forth above may also serve as a basis for future national legislation as well as for a new international treaty.

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QUESTION 57

Protection of computer programmes - Protection of computer-software

QUESTION Q57

Legal Protection of Computer Software

Resolution

I. Having reviewed the question of protection of computer software in the light of legal developments and experience acquired since the resolution passed at Rio in May 1985, AIPPI observes the following:

1. The countries which have adopted legislation, have based the protection for software on copyright.

2. By using the copyright route States can provide protection for software in general terms effectively and quickly; copyright has not hitherto given rise to major difficulties in its application to computer software.

3. Such protection by means of copyright may be supplemented by rules of unfair competition or by the law of contract.

4. It is immaterial as a matter of principle whether software is treated the same as other existing types of copyright works or as a separate species of copyright work.

5. But having regard to the specific nature of software, there may be a need for special rules on certain aspects of software protection and such rules should be harmonized internationally.

II.1. AIPPI confirms the basic principles of the resolution passed at Rio (Yearbook 1985/III).

2. AIPPI further specifically confirms the following points thereof, namely:
- translation (para. 3, c);
- back-up copies (para. 3.d.i.)
- moral rights (para. 4);
- duration (para. 5);

- deposit formalities (para. 6);
and also that the use, storing, storage, loading and running of an unauthorized copy of a program should be a prohibited act (cf. para. 3, d, i), and in addition that the international conventions on copyright are applicable.

3. According to the resolution passed at San Francisco (Yearbook 1975/III), AIPPI is of the opinion that patent protection should be available for technological inventions incorporating software.

III. AIPPI further affirms as follows:

1. An effective regime for the enforcement of protection of computer software is essential.

2. For a program to qualify for copyright protection, it should not be necessary for a degree of non-obviousness (in the patent sense), or for technical improvement to be present.

3. The fact that a computer program is of its essence functional in nature should not preclude it from protection by copyright.

4. Whether by natural application of copyright law or by express provisions, the rental of a copy of a program, even if legally acquired, should require an express authorization from the copyright owner.

5. A screen display as such should be protectable by copyright to the same extent as any other graphic or textual work; the scope of protection should include the particular form of the display, but should not be so broad as to protect the content of the display as such.

6. Having regard to the fact that commercially successful software may define a „de facto" standard for interconnection with other equipment or for the user's convenience, AIPPI is of the opinion that such software should remain protectable subject to the normal national rules of copyright and that the ordinary anti-trust or anti-monopoly rules are the appropriate legal basis for preventing an abuse of the position so obtained.

7. Where copyright law provides that works made by an employee belong to the employer, such provision is equally applicable to the copyright in computer soft-ware.

8. The protection by copyright should clearly cover slavish copying, copying of a substantial part only of a program, and adaptation of a program. It should not cover the ideas embodied in a program, or algorithms as such.

9. The traditional distinction between ideas and expression should be applicable but special consideration should be given to where the line between ideas and expression should be drawn. Copyright should not prevent further development in programming, it being recognized that treating the program as a literary work may lead to protection which is too broad. In that respect, the analogy with scientific works is more suitable than with literary works. In the application of art. IVbis of the Geneva Convention (UCC), the „recognition" test should not be applied too broadly, and should be limited to the expression and not extended to the ideas.

IV. AIPPI considers that it should in the context of its previous work continue study on the following points:

1. To seek to provide firmer guidelines for the application of the distinction between ideas and expression to computer software. It seems appropriate to consider that the scope of protection be proportional to the range of expression available to a programmer. The ideas should not be too broadly stated. Furthermore the mere fact that an alternative expression of the idea is possible should not imply that the chosen form of the expression of the idea must be protectable.

2. In order to enable further progress to take place in programming, consideration should be given to the possibility of decompiling a legally acquired copy of a program to examine its content, which has - perhaps inappropriately - been termed „reverse engineering“, provided that this activity does not lead to a work which is itself infringing. A subsidiary question is whether the contractual exclusion of such an activity may be enforced.

3. On the definition of software, in particular as to whether it includes programmable logic devices (when programmed) which might otherwise appear to be unprotected. In defining computer software, consideration should be given to the border-line between copyright protection and chip protection.

4. Is the author of a computer-generated work (which may itself be a program) the person who initiates the creation of the work?

5. Are normal copyright rules relating to copying for private use applicable to computer software, or should special provisions apply as has been proposed in relation to reprographic copying? Also, should a legitimate owner of a program have the automatic right to translate, modify or adapt a program to run on different hardware, and if so should it be permissible to exclude this right by contract?

6. The so-called „shrink-wrap“ licence practice (under which a purchaser is assumed to agree with the terms of a contract by opening the package containing a program) in particular as to its enforcement by law and as to the scope of the rights which could thereby be retained.

7. The problem that arises when a software provider ceases to exist, e.g. due to liquidation, in ensuring continuity of maintenance for the software user and to enable the user to develop the program further. It seems equitable that the interests of the software user should override the ordinary liquidation rules in this respect.

Similar considerations can arise in cases of bankruptcy or reorganization.

V. AIPPI recommends to the special committee considering the GATT negotiations that it should take account of the need for efficient border controls, when appropriate, and for preliminary injunctions, in relation to computer software.

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QUESTION 57

Protection of computer programmes - Protection of computer-software

Yearbook 1989/II, pages 303 - 305   Q57
Executive Committee of Amsterdam, June 4 - 10, 1989

Question Q57

Protection of Computer-Software

Resolution

Based on the review of the question of legal protection of computer-software in the light of the legal developments and experience acquired since the resolution passed at Rio in May 1985 (Rio resolution), the resolution passed at Sydney in April 1988 (Sydney resolution) confirmed the basic principles and specifically important points of the Rio resolution (see Section II of the Sydney resolution).

The Sydney resolution also addressed further issues arising from legal developments and affirmed them in nine respects (Section III, paragraphs 1-9). Further, the Sydney resolution listed seven points of particular interest for further study. These seven points were the subject of reports from the national groups (Annuaires 1988/IV and 1989/I). In the light of the foregoing and on basis of further review by the Working Committee, AIPPI observes the following:

1. Scope of Protection

1.1 AIPPI acknowledges that computer software is protectable as a written work within the framework of the copyright law.

1.2 AIPPI notes that the EC Proposal for a Council Directive on the legal protection of computer programs COM(88)816-final in Article 1 (2) is in line with that view, the term „literary work" being understood in the broad sense of Article 2 of the Berne Convention.

1.3 AIPPI reaffirms that ideas are not protectable by copyright.

1.4 AIPPI notes that for the moment it is not possible to provide firm guidelines as to the

breadth of protection and as to the borderline between „idea" and expression. The protection should certainly cover slavish copying, but the degree of extension beyond that must be determined on a case-by-case basis.

1.5 AIPPI notes that the EC Proposal for a Council Directive in Article 1 (3) is in conformity with that view, except that the words logic and algorithm are not clear in scope.

1.6 AIPPI believes it appropriate to consider that the scope of protection should be proportional to the range of possibilities of expression available to the programmer. The „idea" should not be interpreted too broadly. Furthermore the mere fact that an alternative expression of the idea is possible should not imply that the chosen form of the expression of the idea must be protectable.

2. Permissible Analysing

2.1 Reaffirming the resolutions passed at Rio in May 1985 and at Sydney in April 1988, stating that there may be a need for special rules on certain aspects of software protection, AIPPI believes it is important that making a copy of a legally acquired program should be allowed when this is necessary to analyse the program for extracting its „idea", so that free access to the unprotected idea is not prevented.

2.2 AIPPI believes that the law of contract may allow clauses according to which such copying may be prohibited, but that national law may make such clauses unenforceable, provided that such national law does not impair the legitimate interests of the copyright owner pursuant to Art 9 (2) of the Berne Convention.

2.3 AIPPI notes that the EC-Commission Proposal does not deal with these problems.

3. Definition of Software

AIPPI is of the opinion that the elements of software which are involved in the operation of a computer are worthy of protection, irrespective of the carrier therefor. Thus logic devices should not be excluded from copyright protection, to the extent that they express software.

4. Author of a Computer Program

4.1.1 AIPPI observes that according to general rules of copyright everyone who has made a creative contribution to a computer-generated program has to be regarded as (one of) its author(s). In principle this may be the creator of the generating program, the creator of the program generated, or both.

4.1.2 AIPPI is of the opinion that the authorship can be assessed in particular by evaluating to what extent elements of the generating program appear in the program generated.

4.1.3 AIPPI notes that where the creator of the program generated has copyright rights on the basis of the above assessment, he should be able to have his rights enforced independently.

4.2.1 AIPPI observes that in an increasing number of countries it is recognised that a legal person can be the original author of a computer program.

4.2.2 AIPPI observes that in other countries the author is a natural person and the copyright may vest directly in a legal person.

4.2.3 AIPPI sees no objection in a legal person being the original author of a computer program, nor in vesting the copyright directly in a legal person.

4.2.4 AIPPI reaffirms the resolution adopted at Rio in May 1985 that due to the special commercial nature of software, moral rights should apply to computer programs to an appropriate extent and believes that it should be possible for them to be waived by the author.

5. Copying for Private Use

5.1 AIPPI reaffirms its resolution adopted in Rio in May 1985 that copies for safety reasons (back-up copies) should be allowed.

5.2 AIPPI, while recognizing the difficulties of enforcement of the copyright, is of the opinion that copying for private use should not be allowed if such private use saves the user from having to purchase another copy of the program.

5.3 AIPPI reaffirms Point 3 (b) of its Resolution adopted in Rio in May 1985, that an author of a program should not be entitled to prohibit adaptation or improvement of his program by a user for his own needs, provided such alteration is necessary for the intended use for which the first program was designed.

6. „Shrink-Wrap" Licences

AIPPI is of the opinion that the validity of licences is a question of national law, and that such „shrink-wrap" licences should not unduly restrict the rights of the user.

7. Liquidation of the Supplier of Computer Software

Considering that in some countries the liquidator of a company in bankruptcy or similar procedures has the power to disregard existing contracts:

AIPPI is of the opinion that the liquidator should not have undue power against a licencee of a computer program to terminate or vary the licence, and should not have undue power to inhibit maintenance of a program.

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