CERHA HEMPEL
CEE NEWSLETTER
Czech Republic

Top System v Belgian State – case law overview

JUDGMENT OF THE COURT (Fifth Chamber) 6 October in Case C-13/20

The recently published judgment relates to one of, if not the most important software law case of 2021. It relates to intellectual property, in particular the rights of the acquirer, as defined in Directive 91/250/EEC, on the legal protection of computer programs ("**Software Directive**").

To explain why this case is important, we must first shed some light on the technical background of computer programs. The Software Directive defines computer programs as "literary works", although they differ from typical literary works in many respects, which is why they are also granted further, specific protection. Computer programs are written in "source code", which is the part that is coded, written in a programming language by programmers as their own intellectual creations and protected under Article 1 of the Software Directive. This source code then has to be compiled into machine code, a binary code made up of ones and zeroes. However, any computer program can then be decompiled (reverse engineered) from the machine code back to the source code, and this process is protected by the Software Directive, and can be done by the legal acquirer only under special circumstances, as stipulated in Article 6. The source code is the aftermath of the author's ideas and principles that led him to write the computer program, which are not protected by the directive, and therefore the right of decompilation is essential for the author.

Under Article 6, the authorisation of the rightholder is not required for decompilation in order to achieve the interoperability of an independently created computer program with other programs under specific conditions, and such decompilation may only lead to interoperability and may not result in the computer program being given to other subjects or used for development, production, marketing, etc. Separately, under Article 5(1) of the Software Directive, the lawful acquirer, in the absence of specific contractual provisions, does not require authorisation from the rightholder to perform exclusive rights of the rightholder for specific tasks stated in Article 4(1)(a)(b) when they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

Returning to the case, Top System, the rightholder of a software program, sued Selection Office of the Federal Authorities in Belgium ("**SELOR**"), the licensee, because SELOR decompiled the software without Top System's involvement or consent. In further proceedings, the Belgian court referred the following questions to the Court of Justice of the European Union:

1. Is Article 5(1) of the Software Directive to be interpreted as permitting the lawful purchaser of a computer program to decompile all or part of the program for the purposes of enabling that person to correct errors affecting the usability of the program, including where the correction consists of disabling a function that is affecting the proper operation of the application of which the program forms a part?
2. In the event that that question is answered in the affirmative, must the conditions referred to in Article 6 of the directive, or any other conditions, also be satisfied?'

The court ruled that the lawful purchaser is allowed to decompile all or parts of computer programs to enable functionality, even in those

cases where the correction would result in a function that is affecting operability being disabled.

In its second ruling, the court ruled that the conditions of Article 6 do not need to be met, which fully separates Article 5 from Article 6 in order to achieve decompilation. The court also stated that the parties cannot prohibit any possibility of correcting errors by contractual means; they can however be the subject of "specific contractual provisions".

Even after the judgment, there lingers a question about the person of the licensee. The Software Directive uses the term "lawful acquirer", whereas the judgment uses "lawful purchaser". Are these two terms identical in meaning or did the court create a new autonomous term? This could impact the incorporated national acts as well.

For more information

Mgr. David Kučera
Partner Czech Republic
david.kucera@cerhahempel.cz
Tel: +420 221 111 711

Media owner and publisher: **CERHA HEMPEL Rechtsanwälte GmbH**, Parkring 2, A-1010 Vienna | Tel: +43 1 514 350 Fax: +43 1 514 35 35 | email: office@cerhahempel.com | Although this newsletter was created with the greatest of care, we nevertheless do not accept any responsibility whatsoever for its content being correct, complete or up to date **| Visit us at www.cerhahempel.com | CERHA HEMPEL** Austria Belarus Bulgaria Czech Republic Hungary Romania Slovak Republic