

THE LAW OF COPYRIGHT AND COMPUTER SOFTWARE

Memorandum by the Government of ZIMBABWE

The law of copyright is concerned with the protection of authorship and the encouragement of intellectual creativity in literature, drama, music art and the dissemination of information. It gives those who create works (copyrighted) rights of control over the use to which the public may put those works.

This has been the basic tone of all copyright statutes from the very first - the United Kingdom Statute of Anne of 1709 - through to the international conventions - the Berne and the Universal Copyright to which most states belong.

However, the world of communication has greatly changed over the years with new technologies - radio and television broadcasting (terrestrial and by satellite), cable distribution systems, audio and video recording, reprography, and computers - coming into use. The basic copyright law has, albeit with some difficulties particularly based on definitions, managed to offer some form of protection based on the traditional restrictions against unauthorised reproduction, broadcast or performance by any of these new technologies of copyrighted works.

Most statutes have been easily amended to offer protection in the face of this technological onslaught. Even because, in the case of broadcasts, cable distributions, audio and video recordings and reprography, there was hardly any doubt that such protection fell within the ambit of copyright law.

The same cannot be said for computers and particularly computer software or computer programmes.

The use of computerised systems affects copyright in two ways:

- (a) the need to ensure that copyright owners continue to enjoy adequate protection in respect of their works when they are stored in processed by or retrieved from, computerised systems; and
- (b) whether computer programmes are by themselves proper subjects of protection under copyright law.

The first question does not present much difficulties. The input of a protected work into a computer system is to be regarded as including the reproduction of the work in a material form, and also the fixation of the work and both these acts, i.e. reproduction and fixation, are governed by both the Berne Convention (Article 9(1) and the Universal Copyright Convention (Article 4 bis (1)).

It is the second question that has been subject of extensive debate over the years and to date there is no general agreement that copyright law offers the best form of protection for computer software. The fact that the trend is protection by copyright law is perhaps based on convenience rather than its (copyright law) adequacy/appropriateness.

A computer programme has been variously defined as a sequence of instructions or commands destined for direct or indirect use in a computer so as to achieve a certain result;

or a computer statement, drafted in any desired language, to solve a problem by an EDP system. But is it the same as a mere mathematical formula which is not subject of any protection? Is the fact that programmes are useless without the computer (hardware) enough reason that they should be considered to be part of the computer and be protected as such? Because of the enormous human and financial inputs and the recognised role of the computer in communication and development the need for protection has universally been accepted.

When the need for protection was accepted early discussion were on the possible use of the patent system to protect computer software. The attraction to the patent system, particularly to the programme developers, was the right of "exclusive use". Another advantage was the shorter period of protection compared to copyright protection i.e. at most 20 years compared to 25 post mortem auctoris (Universal Copyright Convention) or 50 years post mortem auctoris (Berne). However, patent protection for computer software failed the still novelty, inventive step and industrial applicability tests required under the system. Further, the rapid development in the computer software industry combined with the long delays in processing and granting patents would result in programmes being obsolete by the time a patent is granted.

Next to be considered was the formulation of a sui generis system of protection. Most experts agree that this would offer the best form of protection considering the problems encountered with the other forms of protection.

However, because the need for protection was urgent as cases came up before the courts, it was felt that the formulation of sui generis system for the purpose would take far too much time and as the copyright system was already in existence and offered more or less the same protection needed it was to be used for software protection.

Another possibility has been the law of Trade Secrets. The law protects against the unauthorized use of secret information having industrial commercial applications. Unlike copyright law the information need to be expressed in a tangible form and there is no novelty or inventive step requirements as.

This would seem most appropriate but falls flat on the grounds that it is not binding on third parties as it is contractual between licensor and licensee or employer and employee for example.

The other view considered was to limit copyright protection for software to those computer programmes that produce works which themselves qualify for copyright protection. In contrast, if a computer programme was an integral part of a machine, causing it to perform a new function thus constituting a new invention, then it would qualify for patentability. This solution, however, left unanswered the question of what type of proprietary protection would be available for software falling outside these areas.

Trade Marks law also offers some form of protection.

Faced with all these uncertainties and the urgent need for protection resulting from pressure on governments from developers of computer software the question of programme copyrightability was left with the courts. In countries where this question has come before the courts (Australia, Federal Republic of Germany, the United States of America etc), the courts were guided by the principles embraced in the Berne and Universal Copyright Conventions that copyright protects all works of authorship. The courts have also ruled that computer programmes are works of authorship.

Following this decision a number of states, among them the U.S., Australia, France, Germany, Hungary, India, U.K., have amended their copyright statutes to extend protection

expressly to computer software. However, despite these developments the question still arises: is a computer programme "a manifestation of the author's personality" - another underlying principle of copyright law - particularly given the fact that the trend is to vest the rights of ownership not in the individual programmer who created it , but in the enterprise financing the production of the programme? Further, a computer programme is not intended to be distributed and published - quite to the contrary it is usually kept secret!