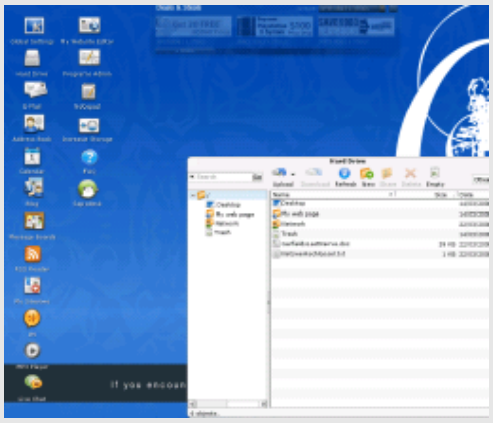
Court of Justice EU, 22 December 2010, Bezpečnostní softwarová asociace



COPYRIGHT

Graphic user interface not a form of expression of a computer program

• **that a graphic user interface is not a form of expression of that program within the meaning of Article 1(2) of Directive 91/250 and thus is not protected by copyright as a computer program under that directive.**

• such an interface can be protected by copyright as a work by Directive 2001/29 if that interface is its author's own intellectual creation.

• criterion of originality cannot be met by components of the graphic user interface which are differentiated only by their technical function.

As the Advocate General states in Points 75 and 76 of his Opinion, where the expression of those components is dictated by their technical function, the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable.

In such a situation, the components of a graphic user interface do not permit the author to express his creativity in an original manner and achieve a result which is an intellectual creation of that author.

TV broadcasting of graphic user interface no communication to the public

• television broadcasting of a graphic user inter-face does not constitute communication to the public of a work protected by copyright within the mean-ing of Article 3(1) of Directive 2001/29.

Nevertheless, if, in the context of television broadcasting of a programme, a graphic user interface is displayed, television viewers receive a communication of that graphic user interface solely in a passive man-ner, without the possibility of intervening. They cannot use the feature of that interface which consists in ena-bling interaction between the computer program and the user. Having regard to the fact that, by television broadcasting, the graphic user interface is not commu-nicated to the public in such a way that individuals can have access to the essential element characterising the interface, that is to say, interaction with the user, there is no communication to the public of the graphic user interface within the meaning of Article 3(1) of Directive 2001/29.

Source: **curia.europa.eu**

Court of Justice EU, 22 december 2010
(K. Lenaerts, R. Silva de Lapuerta, G. Arestis, J. Malenovský en T. von Danwitz)

JUDGMENT OF THE COURT (Third Chamber)
22 December 2010 (*)
(Intellectual property – Directive 91/250/EEC – Legal protection of computer programs – Notion of 'expression in any form of a computer program' – Inclusion or non-inclusion of a program's graphic user interface – Copyright – Directive 2001/29/EC – Copyrights and related rights in the information society – Television broadcasting of a graphic user interface – Communication of a work to the public)
In Case C-393/09,
REFERENCE for a preliminary ruling under Article 234 EC from the Nejvyšší správní soud (Czech Republic), made by decision of 16 September 2009, received at the Court on 5 October 2009, in the proceedings
Bezpečnostní softwarová asociace – Svaz softwarové ochrany
v
Ministerstvo kultury,
THE COURT (Third Chamber),
composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, G. Arestis (Rapporteur), J. Malenovský and T. von Danwitz, Judges,
Advocate General: Y. Bot,
Registrar: M. Ferreira, Principal Administrator,
having regard to the written procedure and further to the hearing on 2 September 2010,
after considering the observations submitted on behalf of:
– Bezpečnostní softwarová asociace – Svaz softwarové ochrany, by I. Juřena, advokát,
– the Czech Government, by M. Smolek and D. Hadroušek, acting as Agents,
– the Finnish Government, by J. Heliskoski, acting as Agent,
– the European Commission, by H. Krämer and P. Ondrůšek, acting as Agents,
after **hearing the Opinion of the Advocate General at the sitting on 14 October 2010**, gives the following
Judgment
1 This reference for a preliminary ruling concerns the interpretation of Article 1(2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42) and of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).
2 The reference has been made in the course of proceedings between Bezpečnostní softwarová asociace

– Svaz softwarové ochrany (Security software association; 'BSA') and the Ministerstvo kultury (Ministry of Culture) concerning its refusal to grant BSA authorisation to carry out collective administration of copyrights in computer programs.

Legal context

International law

3 Under Article 10(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which constitutes Annex 1C to the Agreement establishing the World Trade Organisation, signed in Marrakech on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1; 'the TRIPs Agreement'):

'Computer programs, whether expressed in source code or in object code, will be protected as literary works pursuant to the Berne Convention [(Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention')].'

European Union legislation

Directive 91/250

4 The 7th, 10th and 11th recitals in the preamble to Directive 91/250 read as follows:

'Whereas, for the purpose of this Directive, the term 'computer program' shall include programs in any form, including those which are incorporated into hardware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage;

Whereas the function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function;

Whereas the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as "interfaces".'

5 Article 1 of Directive 91/250 provides:

'1. In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. For the purposes of this Directive, the term "computer programs" shall include their preparatory design material.

2. Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.

3. A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.'

Directive 2001/29

6 The 9th and 10th recitals in the preamble to Directive 2001/29 state:

'Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property. If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.'

7 The 20th and 23rd recitals in the preamble to Directive 2001/29 state:

'This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular [Directive 91/250], and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive. This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.'

8 Article 1 of Directive 2001/29 provides:

'1. This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.

2. Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:

(a) the legal protection of computer programs;

…'

9 Under Article 2(a) of Directive 2001/29:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works.'

10 Article 3(1) of Directive 2001/29 provides:

'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.'

National legislation

11 Directive 91/250 was transposed into the Czech legal order by Law No 121/2000 on copyright and related rights and the amendment of various laws (zákon č. 121/2000 o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů) of 7 April 2000 ('the Copyright Law').

12 By virtue of Article 2(1) of that Law, copyright covers all literary works or other artistic work created by its author, which may be expressed in any objectively perceptible form, including electronic, permanent or temporary, without regard to its scope, purpose or meaning.

13 Article 2(2) of that Law states that a computer program is also regarded as a work if it is original, in that it is an intellectual creation of its author.

14 In accordance with Article 65 of that Law:

'1. Computer programs, without regard to the form of their expression, including the preparatory elements of their conception, are protected as literary works.

2. The ideas and principles on which all elements of a computer program are based, including whose which are the basis of its connection to another program, are not protected under this Law.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 On 9 April 2001, BSA, as an association, applied to the Ministerstvo kultury for authorisation for the collective administration of copyrights to computer programs, under Paragraph 98 of the Copyright Law. BSA defined the extent of those rights in a letter dated 12 June 2001.

16 That application was refused, and the administrative action brought against that refusal was dismissed. BSA then brought a legal action against those decisions before the Vrchní soud v Praze (High Court, Prague).

17 Following the setting aside of those two rejection decisions by the Nejvyšší správní soud (Supreme Administrative Court), to which the case was referred, on 14 April 2004 the Ministerstvo kultury adopted a fresh decision by which it again dismissed BSA's application. BSA therefore brought an administrative appeal before the Ministerstvo kultury, which annulled that rejection decision.

18 On 27 January 2005, the Ministerstvo kultury adopted a new decision, by which it rejected BSA's application yet again on the ground, firstly, in particular, that the Copyright Law protects only the object code and the source code of a computer program, but not the result of the display of the program on the computer screen, since the graphic user interface was protected only against unfair competition. Secondly, it stated that the collective administration of computer programs was indeed possible in theory, but that mandatory collective administration was not an option and that voluntary collective administration served no purpose.

19 BSA lodged an appeal against that decision, which was dismissed on 6 June 2005 by a decision of the Ministerstvo kultury. The association then challenged the latter decision before the Městský Soud v Praze (Regional Court, Prague). In its action, BSA submitted that the definition of a computer program in Paragraph 2(2) of the Copyright Law also covers the user interface. In its submission, a computer program can be perceived at the level both of the source or object code and of the method of communication (communication interface).

20 The Městský soud v Praze having dismissed its action, BSA appealed on a point of law before the Nejvyšší správní soud. BSA takes the view that a computer program is used when it is shown in a display on user screens and that, consequently, such use must be protected by copyright.

21 As regards the interpretation of the provisions of Directives 91/250 and 2001/29, the Nejvyšší správní soud decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Should Article 1(2) of [Directive 91/250] be interpreted as meaning that, for the purposes of the copyright protection of a computer program as a work under that directive, the phrase 'the expression in any form of a computer program' also includes the graphic user interface of the computer programme or part thereof?

2. If the answer to the first question is in the affirmative, does television broadcasting, whereby the public is enabled to have sensory perception of the graphic user interface of a computer program or part thereof, albeit without the possibility of actively exercising control over that program, constitute making a work or part thereof available to the public within the meaning of Article 3(1) of [Directive 2001/29]?'

The Court's jurisdiction

22 It is apparent from the decision for reference that the facts of the main proceedings arose before the date of accession of the Czech Republic to the European Union. The first decision of the Ministerstvo kultury is dated 20 July 2001.

23 Nevertheless, following various actions by BSA, the Ministerstvo kultury adopted a fresh decision on 27 January 2005, rejecting once again BSA's claim. Since BSA has challenged that fresh decision, unsuccessfully, before the Ministerstvo kultury, it has appealed to the national court seeking annulment thereof.

24 It must be observed, firstly, that the contested decision in the main proceedings was adopted after the Czech Republic acceded to the Union, that it is prospective in its regulatory effect and not retrospective, and secondly, that the national court asks the Court for an interpretation of the European Union legislation applicable to the main proceedings (Case C-64/06 Telefónica O2 Czech Republic [2007] ECR I-4887, paragraph 21).

25 Where the questions referred for preliminary ruling concern the interpretation of European Union law,

the Court gives its ruling without, generally, having to look into the circumstances in which national courts were prompted to submit the questions and envisage applying the provision of European Union law which they have asked the Court to interpret (Case C-85/95 Reisdorf [1996] ECR I-6257, paragraph 15, and Telefónica O2 Czech Republic, paragraph 22).

26 The matter would be different only if the provision of European Union law which was submitted for interpretation by the Court were not applicable to the facts of the main proceedings, which had occurred before the accession of a new Member State to the Union, or if such provision was manifestly incapable of applying (Telefónica O2 Czech Republic, paragraph 23).

27 That is not so in this case. Accordingly, the Court has jurisdiction to interpret the directives above referred to and an answer must be given to the questions submitted by the national court.

Consideration of the questions referred

The first question

28 By its first question, the national court asks, in essence, whether the graphic user interface of a computer program is a form of expression of that program with in the meaning of Article 1(2) of Directive 91/250 and is thus protected by copyright as a computer program under that directive.

29 Directive 91/250 does not define the notion of 'expression in any form of a computer program'.

30 In those circumstances, that notion must be defined having regard to the wording and context of Article 1(2) of Directive 91/250, where the reference to it is to be found and in the light of both the overall objectives of that directive and international law (see, by analogy, **Case C-5/08 Infopaq International [2009] ECR I-6569, paragraph 32**).

31 In accordance with Article 1(1) of Directive 91/250, computer programs are protected by copyright as literary works within the meaning of the Berne Convention. Article 1(2) thereof extends that protection to the expression in any form of a computer program.

32 The first sentence of the seventh recital in the preamble to Directive 91/250 states that, for the purposes of that directive, the term 'computer program' shall include programs in any form, including those which are incorporated into hardware.

33 In that regard, reference must be made to Article 10(1) of the TRIPS Agreement, which provides that computer programs, whether expressed in source code or in object code, will be protected as literary works pursuant to the Berne Convention.

34 It follows that the source code and the object code of a computer program are forms of expression thereof which, consequently, are entitled to be protected by copyright as computer programs, by virtue of Article 1(2) of Directive 91/250.

35 Accordingly, the object of the protection conferred by that directive is the expression in any form of a computer program which permits reproduction in different computer languages, such as the source code and the object code.

36 It is also appropriate to highlight the second sentence of the seventh recital in the preamble to Directive 91/250, in accordance with which the term 'computer program' also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.

37 Thus, the object of protection under Directive 91/250 includes the forms of expression of a computer program and the preparatory design work capable of leading, respectively, to the reproduction or the subsequent creation of such a program.

38 As the Advocate General states in Point 61 of his Opinion, any form of expression of a computer program must be protected from the moment when its reproduction would engender the reproduction of the computer program itself, thus enabling the computer to perform its task.

39 In accordance with the 10th and 11th recitals in the preamble to Directive 91/250, interfaces are parts of a computer program which provide for interconnection and interaction of elements of software and hardware with other software and hardware and with users in all the ways in which they are intended to function.

40 In particular, the graphic user interface is an interaction interface which enables communication between the computer program and the user.

41 In those circumstances, the graphic user interface does not enable the reproduction of that computer program, but merely constitutes one element of that program by means of which users make use of the features of that program.

42 It follows that that interface does not constitute a form of expression of a computer program within the meaning of Article 1(2) of Directive 91/250 and that, consequently, it cannot be protected specifically by copyright in computer programs by virtue of that directive.

43 Nevertheless, even if the national court has limited its question to the interpretation of Article 1(2) of Directive 91/250, such a situation does not prevent the Court from providing the national court with all the elements of interpretation of European Union law which may enable it to rule on the case before it, whether or not reference is made thereto in the question referred (see, to that effect, Case C-392/05 Alevizos [2007] ECR I-3505, paragraph 64 and the case-law cited).

44 In that regard, it is appropriate to ascertain whether the graphic user interface of a computer program can be protected by the ordinary law of copyright by virtue of Directive 2001/29.

45 The Court has held that copyright within the meaning of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation (see, to that effect, with regard to Article 2(a) of Directive 2001/29, **Infopaq International, paragraphs 33 to 37**).

46 Consequently, the graphic user interface can, as a work, be protected by copyright if it is its author's own intellectual creation.

47 It is for the national court to ascertain whether that is the case in the dispute before it.
48 When making that assessment, the national court must take account, inter alia, of the specific arrangement or configuration of all the components which form part of the graphic user interface in order to determine which meet the criterion of originality. In that regard, that criterion cannot be met by components of the graphic user interface which are differentiated only by their technical function.
49 As the Advocate General states in Points 75 and 76 of his Opinion, where the expression of those components is dictated by their technical function, the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable.
50 In such a situation, the components of a graphic user interface do not permit the author to express his creativity in an original manner and achieve a result which is an intellectual creation of that author.
51 In the light of the foregoing considerations, the answer to the first question referred is that a graphic user interface is not a form of expression of that program within the meaning of Article 1(2) of Directive 91/250 and thus is not protected by copyright as a computer program under that directive. Nevertheless, such an interface can be protected by copyright as a work by Directive 2001/29 if that interface is its author's own intellectual creation.

The second question

52 By its second question, the national court asks, in essence, whether television broadcasting of a graphic user interface constitutes communication to the public of a work protected by copyright within the meaning of Article 3(1) of Directive 2001/29.
53 In accordance with that article, Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
54 It follows from the 23rd recital in the preamble to Directive 2001/29 that 'communication to the public' must be interpreted broadly. Such an interpretation is moreover essential to achieve the principal objective of that directive, which, as can be seen from its 9th and 10th recitals, is to establish a high level of protection of, inter alia, authors, allowing them to obtain an appropriate reward for the use of their works, in particular on the occasion of communication to the public (**Case C-306/05 SGAE [2006] ECR I-11519, paragraph 36**).
55 It follows that, in principle, television broadcasting of a work is a communication to the public which its author has the exclusive right to authorise or prohibit.
56 In addition, it is apparent from paragraph 46 of the present judgment that the graphic user interface can be its author's own intellectual creation.
57 Nevertheless, if, in the context of television broadcasting of a programme, a graphic user interface is displayed, television viewers receive a communication of that graphic user interface solely in a passive manner, without the possibility of intervening. They cannot use the feature of that interface which consists in enabling interaction between the computer program and the user. Having regard to the fact that, by television broadcasting, the graphic user interface is not communicated to the public in such a way that individuals can have access to the essential element characterising the interface, that is to say, interaction with the user, there is no communication to the public of the graphic user interface within the meaning of Article 3(1) of Directive 2001/29.
58 Consequently, the answer to the second question referred is that television broadcasting of a graphic user interface does not constitute communication to the public of a work protected by copyright within the meaning of Article 3(1) of Directive 2001/29.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.
On those grounds, the Court (Third Chamber) hereby rules:
1. A graphic user interface is not a form of expression of a computer program within the meaning of Article 1(2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs and cannot be protected by copyright as a computer program under that directive. Nevertheless, such an interface can be protected by copyright as a work by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society if that interface is its author's own intellectual creation.
2. Television broadcasting of a graphic user interface does not constitute communication to the public of a work protected by copyright within the meaning of Article 3(1) of Directive 2001/29.

OPINION OF ADVOCATE GENERAL Y. BOT

delivered on 14 October 2010 (1)
Case C-393/09
Bezpečnostní softwarová asociace – Svaz softwarové ochrany
v
Ministerstvo kultury
(Reference for a preliminary ruling from the Nejvyšší správní soud (Czech Republic))
(Intellectual property – Directive 91/250/CEE – Legal protection of computer programs – Concept of 'expression in any form of a computer program' – Inclusion or non-inclusion of a program's graphic user interface –

Copyright – Directive 2001/29/EC – Copyrights and related rights in the information society – Television broadcasting of a graphic user interface – Communication of a work to the public)

1. In the present case, the Court is requested to define the scope of the legal protection conferred by copyright on computer programs under Directive 91/250/EEC. (2)

2. The questions referred by the Nejvyšší správní soud (Supreme Administrative Court) (Czech Republic) relate, more precisely, to the graphic user interface of a computer program. That interface, as I will see, is used to establish an interactive link between that program and the user. It makes a more intuitive and user-friendly use of that program possible, for example, by displaying icons or symbols on the screen.

3. The national court is therefore unsure as to whether the graphic user interface of the computer program constitutes an expression in any form of that program within the meaning of Article 1(2) of Directive 91/250 and thus benefits from copyright protection applicable to computer programs.

4. In addition, the national court asks whether a television broadcast of such an interface equates to communication of the work to the public, in accordance with Article 3(1) of Directive 2001/29/EC. (3)

5. In this Opinion, I will state why I consider that a graphic user interface is not, of itself, an expression in any form of a computer program within the meaning of Article 1(2) of Directive 91/250 and that, accordingly, it cannot benefit from the protection conferred by that directive.

6. Next, I will explain why I believe that, when it constitutes the author's own intellectual creation, a graphic user interface can benefit from copyright protection as a work within the meaning of Article 2(a) of Directive 2001/29.

7. However, I will propose that the court rule that a television broadcast of a graphic user interface, because it deprives the latter of its quality of a work within the meaning of Article 2(a) of Directive 2001/29, does not constitute a communication of that work to the public within the meaning of Article 3(1) of that directive.

I – Legal context

A – International law

1. The TRIPS Agreement

8. The Agreement on Trade-Related Aspects of Intellectual Property Rights, which constitutes Annex 1 C of the Agreement establishing the World Trade Organisation (WTO), signed in Marrakech on 15 April 1994, was approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994). (4)

9. Under Article 10(1) of the TRIPS Agreement, '[c]omputer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)'.

2. The Copyright Treaty

10. The Copyright Treaty ('the CT') adopted by the World Intellectual Property Organisation (WIPO) in Geneva on 20 December 1996 was approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000. (5)

11. Article 4 of the CT provides that '[c]omputer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression'.

12. The CT does not define the concept of a computer program. However, in the travaux préparatoires, the signatories agreed on the following definition. A computer program means a set of instructions capable, when incorporated in a machine-readable medium, of causing a machine having information-processing capabilities to indicate, perform or achieve a particular function, task or result. (6)

B – European Union law

1. Directive 91/250

13. Directive 91/250 seeks to harmonise Member States' legislation in the field of legal protection of computer programs by defining a minimum level of protection. (7)

14. Thus, the sixth recital in the preamble to that directive states that the European Union's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and, further, to establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorise or prohibit certain acts and for how long the protection should apply.

15. Article 1 of Directive 91/250 is worded as follows:

'1. In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. For the purposes of this Directive, the term "computer programs" shall include their preparatory design material.

2. Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.

3. A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.'

2. Directive 2001/29

16. Directive 2001/29 concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society. (8)

17. That directive applies without prejudice to the existing provision relating, inter alia, to legal protection of computer programs. (9)

18. Article 2(a) of Directive 2001/29 states that Member States are to provide authors with the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of their works.

19. Under Article 3(1) of that directive, '[m]ember States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them'.

C – National law

20. Directive 91/250 was transposed into the Czech legal order by Law No 121/2000 on copyright and related rights and the amendment of various laws (zákon č. 121/2000 o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů) of 7 April 2000. (10)

21. By virtue of Article 2(1) of that law, copyright covers all literary works or other artistic work created by its author, which may be expressed in any objectively perceptible form, including electronic, permanent or temporary, without regard to its scope, purpose or meaning.

22. Article 2(2) of that Law states that a computer program is also regarded as a work if it is original, in that it is its author's own intellectual creation.

23. Under Article 65(1) of the Law on copyright, computer programs, without regard to the form of their expression, including the preparatory elements of their conception, are protected as literary works. Article 65(2) of that Law states that the ideas and principles on which all elements of a computer program are based, including whose which are the basis of its connection to another program, are not protected under that Law.

II – Facts and the dispute in the main proceedings

24. By an application made on 9 April 2001 to the Ministerstvo kultury (Ministry of Culture) and amended by letter of 12 June 2001, Bezpečnostní softwarová asociace – Svaz softwarové ochrany (Security software association; 'BSA') requested authorisation for the collective administration of copyrights to computer programs, under Article 98 of the Law on copyright.

25. By a decision of 20 July 2001, the Ministerstvo kultury dismissed that application. Accordingly, on 6 August 2001 BSA appealed against that decision, which appeal was also dismissed by decision of 31 October 2001.

26. BSA brought an appeal against the decision of 31 October 2001 before the Vrchní soud v Praze (High Court, Prague). The Nejvyšší správní soud, to which the case was referred, set aside that decision.

27. The Ministerstvo kultury therefore adopted a fresh decision on 14 April 2004, by which it once again dismissed BSA's application. BSA brought an appeal against that new decision before the Ministerstvo kultury. By decision of 22 July 2004, the decision of 14 April 2004 was annulled.

28. The Ministerstvo kultury finally adopted a new decision on 27 January 2005, by which it rejected BSA's application yet again. Inter alia, it stated that the Law on copyright protects only the object code and the source code of a computer program, but not the graphic user interface. BSA appealed against that decision to the Ministerstvo kultury. Since that appeal was dismissed by decision of 6 June 2005, BSA further appealed to the Městský soud v Praze (Municipal Court, Prague) which confirmed the line taken by the Ministerstvo kultury. BSA appealed against the decision of the Městský soud v Praze before the Nejvyšší správní soud.

III – The questions referred for a preliminary ruling

29. Being unsure as to the interpretation of the provisions of European Union law, the Nejvyšší správní soud decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Should Article 1(2) of … Directive 91/250 … be interpreted as meaning that, for the purposes of the copyright protection of a computer program as a work under that directive, the phrase 'the expression in any form of a computer program' also includes the graphic user interface of the computer programme or part thereof?

2. If the answer to the first question is in the affirmative, does television broadcasting, whereby the public is enabled to have sensory perception of the graphic user interface of a computer program or part thereof, albeit without the possibility of actively exercising control over that program, constitute making a work or part thereof available to the public within the meaning of Article 3(1) of … Directive 2001/29 …?'

IV – Analysis

A – The jurisdiction of the Court

30. In its reference for a preliminary ruling, the national court draws attention to the fact that the Court could be found not to have jurisdiction to answer the questions which it refers.

31. The facts of the dispute in the main proceedings do indeed predate the accession of the Czech Republic to the European Union.

32. In accordance with settled case-law, the Court has jurisdiction to interpret directives only as regards their application in a new Member State with effect from the date of that State's accession to the European Union. (11)

33. However, the Court, in its judgment in the case of Telefónica O2 Czech Republic, (12) pointed out that the decision contested in the main proceedings was adopted after the Czech Republic acceded to the Union, that it is prospective in its regulatory effect and not retrospective, and secondly, that the national court asks the Court for an interpretation of the Community legislation applicable to the main proceedings. Next, it stated that, provided that the questions referred for preliminary ruling concern the interpretation of European Union law, the Court gives its ruling without, general-

ly, having to look into the circumstances in which national courts Ire prompted to submit the questions and envisage applying the provision of European Union law which they have asked the Court to interpret. (13)

34. In the case which gave rise to that judgment, although the facts of the dispute arose before the accession of the Czech Republic to the European Union, the decision contested in the main proceedings was adopted after accession. (14) Accordingly, the Court considered that it had jurisdiction to rule on the questions referred by the national court.

35. In the present case, I find the same situation. We have seen that the first decision of the Ministerstvo kultury dates from 20 July 2001, thus before the date of accession of the Czech Republic to the European Union. After a number of appeals by BSA which Ire dismissed by the Ministerstvo kultury, the latter adopted a new decision on 27 January 2005, once again dismissing BSA's application.

36. Since BSA has contested that new decision before the Ministerstvo kultury without success, it has sought annulment thereof before the Městský soud v Praze.

37. That court upheld the decision of the Ministerstvo kultury and BSA therefore appealed to the Nejvyšší správní soud.

38. The decision which forms the subject-matter of the dispute in the main proceedings is therefore one which postdates the accession of the Czech Republic to the European Union, that is to say, the decision of 27 January 2005.

39. Furthermore, that decision is prospective in its regulatory effect, since what is at stake is the collective management, by BSA, of copyright in computer programs, and the questions referred concern the interpretation of provisions of European Union law.

40. Consequently, in the light of those factors, I take the view that the Court has jurisdiction to answer the questions referred by the national court.

B – The first question referred

41. By its first question, the national court wishes to know, in essence, whether the graphic user interface is an expression in any form of a computer program within the meaning of Article 1(2) of Directive 91/250 and therefore benefits from copyright protection of computer programs.

42. The difficulty facing the national court in the present case is related to the fact that that directive does not give a definition of the concept of a computer program. The question referred by the national court leads us, in reality, to investigate the object and scope of the protection conferred by that directive.

43. In order to answer that question, it is necessary to ascertain, first of all, what that concept covers for the purpose of Directive 91/250 in order to be able to determine, next, whether the graphic user interface is an expression in any form of that concept.

44. After examining the concept of a computer program, I wall state why I believe that the graphic user interface is not an expression in any form of a computer program within the meaning of Article 1(2) of Directive 91/250 and that accordingly it cannot benefit from the protection conferred by that directive. Next, I will explain why, in my view, that interface is likely to be protected by the ordinary law of copyright.

1. The concept of a computer program

45. Article 1(1) of Directive 91/250 states that computer programs are to be protected, by copyright, as literary works. That directive gives no definition of the concept of a computer program and merely states that it also includes its preparatory design material. (15)

46. The lack of definition results from an express choice by the European Union legislature. In its proposal for the directive, (16) the Commission of the European Communities states that '[i]t has been recommended by experts in the field that any definition in a directive of what constitutes a program would of necessity become obsolete as future technology changes the nature of programs as they are known today'. (17)

47. Nevertheless, although the European Union legislature refuses to bind the concept of a computer program to a definition which could quickly become obsolete, the Commission, in that Proposal for a directive, does provide useful information. Thus, it is stated that that concept designates a set of instructions the purpose of which is to cause an information processing device, a computer, to perform its functions. (18) The Commission also states that, given the present state of the art, the word program should be taken to encompass the expression in any form, language, notation or code of a set of instructions, the purpose of which is to cause a computer to execute a particular task or function. (19)

48. The Commission adds that the term should be taken to encompass all forms of program, both humanly perceivable and machine readable, from which the program which causes the machine to perform its function has been or can be created. (20)

49. In reality, the Commission is referring here to the literary elements which are at the basis of computer programs, that is to say, the source code and the object code. At the base of a computer program is the source code, written by the programmer. That code, made up of words, is intelligible to the human mind. However, it cannot be executed by the machine. In order for it to become executable, it must be compiled to be translated into machine language in binary form, most frequently using the digits 0 and 1. That is what is called the object code.

50. Those codes therefore represent the writing of a computer program in a language first understood by the human mind, then by a machine. They are the expression of the programmer's idea and, as such, there is no doubt that they benefit from the copyright protection conferred by Directive 91/250.

51. Furthermore, that finding is confirmed by the wording of Article 10(1) of the TRIPS Agreement which provides that computer programs, whether expressed in source code or in object code, will be protected as literary works pursuant to the Berne Convention.

52. The question which presently arises is whether the graphic user interface, which is the result, on screen, of a computer program, constitutes an expression in any form of that program and thus benefits from the protection conferred by Directive 91/250.

2. The concept of any form of expression of a computer program

53. The 10th recital in the preamble to Directive 91/250 states that the function of a computer program is to communicate and work together with other components of a computer system and with users. For this purpose, a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function. It is then stated that the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as interfaces. (21).

54. In the field of computing, interfaces thus have many forms which can be grouped into two categories, that is to say, physical interfaces and logical or software interfaces. Physical interfaces include, inter alia, hardware such as the computer screen, the keyboard or the mouse.

55. At the heart of software interfaces, I find interconnection interfaces, which are internal to the software and permit dialogue with other elements of the computer system, and interaction interfaces, of which the graphic user interface forms part.

56. The graphic user interface, commonly referred to as the 'look and feel', enables communication between the program and the user. It is in the form, for example, of icons and symbols visible on the screen, windows or drop-down menus. It makes interaction possible between the program and the user. That interaction can consist of the mere provision of information, but can also enable the user to give instructions to the computer program using commands. That is so, for example, in the case of a file dragged by the mouse and dropped into the recycle bin or the commands 'copy' and 'paste' in a word processing program.

57. For reasons which I will set out below, I do not believe that a graphic user interface is an expression in any form of a computer program or that it can be protected by the law as a computer program.

58. The objective which Directive 91/250 seeks to achieve is that of protecting computer programs against any reproduction not authorised by the proprietor of the right. (22)

59. In my view, the specific nature of the copyright applicable to computer programs arises from the fact that, contrary to other works protected by that right which appeal directly to the human senses, a computer program has a practical purpose and is therefore protected as such.

60. We have seen, in point 47 of this Opinion, that a computer program forms the expression of a set of instructions the purpose of which is to enable a computer to perform a task or a particular function.

61. Thus, I believe that, whatever the form of expression of a computer program, that form must be protected from the moment when its reproduction would engender the reproduction of the computer program itself, thus enabling the computer to perform its task. In my opinion, that is the meaning which the European Union legislature intended to give to Article 1(2) of Directive 91/250.

62. Furthermore, it is the reason why the preparatory design work, where it leads to the creation of such a program, is also protected by copyright applicable to computer programs. (23)

63. That design work can include, for example, a structure or organisational chart developed by the programmer which is liable to be re-transcribed in source code and object code, thus enabling the machine to execute the computer program. (24) That organisational chart developed by the programmer could be compared to the scenario of a film.

64. Accordingly, I consider that the concept of any form of expression of a computer program refers to those forms of expression which, once used, enable the computer program to perform the task for which it was created.

65. The graphic user interface alone cannot give that result, since its reproduction does not entail reproduction of the computer program itself. It is, in addition, possible for computer programs having different source and object codes to share the same interface. Accordingly, the graphic user interface does not divulge the computer program. It merely serves to make its use easier and more user-friendly.

66. The graphic user interface is not, therefore, in my opinion, an expression in any form of a computer program within the meaning of Article 1(2) of Directive 91/250.

67. To admit the contrary could lead to protection being conferred on a computer program, and therefore to its source code and object code, on the basis of the mere fact that the graphic user interface has been reproduced and without even having ascertained whether the codes which constitute it are original, which would manifestly run counter to Article 1(3) of that directive, which provides that '[a] computer program shall be protected if it is original in the sense that it is the author's own intellectual creation'.

68. For those reasons, I take the view that the graphic user interface is not an expression in any form of a computer program within the meaning of Article 1(2) of that directive and, accordingly, that it is not eligible for protection under Directive 91/250.

69. However, I do not believe that such an interface is never entitled to protection.

3. Protection of the graphic user interface by the ordinary law of copyright

70. Although the graphic user interface cannot be regarded as an expression of a computer program and therefore cannot be protected as such, I consider that it is, nevertheless, entitled to protection under copyright applicable to all literary and artistic works under Article 2(a) of Directive 2001/29.

71. In accordance with the case-law developed in **Case C-5/08 Infopaq International**, (25) copyright applies to a work when it is original in the sense that it is the author's own intellectual creation. (26)

72. In my opinion, there is no doubt that the graphic user interface can be an intellectual creation.

73. Development of such an interface requires considerable intellectual effort on the part of its author, as is the case for a book or piece of music. Behind the graphic user interface there is a complex structure developed by the programmer. (27) He uses a programming language which, structured in a certain way, will create a special command button, for example, 'copy-paste', or permit an action, such as double-clicking on a file to open it or clicking on an icon to minimise an open window.

74. However, even if the graphic user interface requires intellectual effort, it remains necessary, under Article 2(a) of Directive 2001/29, for it to be, as the Court described it, a subject-matter which is original in the sense that it is its author's own intellectual creation. (28)

75. The difficulty as regards determination of the originality of the graphic user interface lies in the fact that the majority of the elements which comprise it have a functional purpose, since they are intended to facilitate the use of the computer program. Accordingly, the manner in which those elements are expressed can be only limited since, as the Commission stated in its written submissions, (29) the expression is dictated by the technical function which those elements fulfil. Such is the case, for example, of the mouse which moves the cursor across the screen, pointing at the command button in order to make it operate or of the drop-down menu which appears when a text file is open.

76. In such cases, it seems to me that the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable. If such a possibility Ire offered, it would have the consequence of conferring a monopoly on certain companies on the computer program market, thus significantly hampering creation and innovation on that market, which would run contrary to the objective of Directive 2001/29. (30)

77. Accordingly, I believe that, in its case-by-case assessment, the national court must ascertain whether, by the choices of its author, by the combinations which he creates and the production of the graphic user interface, it is an expression of the author's own intellectual creation, excluding from that assessment the elements whose expression is dictated by their technical function.

78. In the light of the whole of the foregoing considerations, I take the view that the graphic user interface is not an expression in any form of a computer program within the meaning of Article 1(2) of Directive 91/250 and that, accordingly, it is not entitled to protection under that directive. However, when it constitutes the author's own intellectual creation, a graphic user interface is entitled to protection under copyright as a work within the meaning of Article 2(a) of Directive 2001/29.

C – The second question referred

79. By the second question, the national court asks whether the television broadcasting of a graphic user interface constitutes a communication of the work to the public within the meaning of Article 3(1) of Directive 2001/29.

80. At the hearing, which was held on 2 September 2010, the parties gave some examples of the broadcasting, on a television screen, of a graphic user interface. It could be, inter alia, the display on the screen, during the broadcasting of elections, of a table showing the results of those elections.

81. The national court is uncertain as to whether such an interface can be the object of a communication to the public within the meaning of Article 3(1) of Directive 2001/29, since that interface is broadcast on a television screen in a passive manner, without the television viewers being able to use that interface or even access the computer or other equipment to which it gives control.

82. In my view, the mere television broadcasting of a graphic user interface is not a communication of a work, within the meaning of Articles 2(a) and 3(1) of Directive 2001/29.

83. We have seen in point 56 of this Opinion that the graphic user interface is intended to enable interaction between the computer program and the user. The purpose of such an interface is to make the program more user-friendly.

84. The graphic user interface therefore differs from other works protected by the ordinary law of copyright by its particular nature. Its originality lies in its production, in its method of communicating with the user, such as the possibility of operating buttons or opening windows.

85. By the broadcasting of that interface on a television screen, it loses its originality by reason of the fact that the essential element which makes it original, that is to say, interaction with the user, is made impossible.

86. Accordingly, deprived of the essential element which gives it its character, the graphic user interface no longer corresponds to the definition of a work within the meaning of Article 2(a) of Directive 2001/29. It is therefore no longer the work which the broadcasting body shows on television screens and communicates to the public.

87. For those reasons, I consider that the television broadcasting of a graphic user interface, because it causes it to cease to be a work within the meaning of Article 2(a) of Directive 2001/29, does not constitute a communication of a work to the public within the meaning of Article 3(1) of that directive.

V – Conclusion

88. In the light of all the foregoing considerations, I propose that the Court should answer the Nejvyšší správní soud as follows:

'1 A graphic user interface is not an expression in any form of a computer program within the meaning of Article 1(2) of Council Directive 91/250/EEC of 14

May 1991 on the legal protection of computer programs and, accordingly, it is not entitled to protection under that directive.

2 When it is the author's own intellectual creation, a graphic user interface is entitled to copyright protection as a work within the meaning of Article 2(a) of Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

3 The television broadcasting of a graphic user interface, because it causes it to cease to be a work within the meaning of Article 2(a) of Directive 2001/29, does not constitute a communication of a work to the public within the meaning of Article 3(1) of that directive.'

1 Original language: French.

2 – Council Directive of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42).

3 – Directive of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

4 – OJ 1994 L 336, p. 1; 'the TRIPS Agreement').

5 – OJ 2000 L 89, p. 6.

6 – See the definition given by the WTO in its standard provisions on protection of computer programs on the WIPO internet site (http://www.wipo.int/edocs/mdocs/copyright/en/wipo_ip_cm_07/wipo_ip_cm_07_www_82573.doc).

7 – See the first, fourth and fifth recitals in the preamble to that directive.

8 – See Article 1(1) of that directive.

9 – See Article 1(2)(a) of Directive 2001/29.

10 – 121/2000 Sb., 'the Copyright Law'.

11 – See, inter alia, Case C-302/04 Ynos [2006] ECR I-371, paragraph 36 and the case-law cited.

12 – C-64/06 [2007] ECR I-4887.

13 – Paragraphs 21 and 22 and the case-law cited.

14 – Paragraphs 19 and 20.

15 – The seventh recital in the preamble to that directive states that 'for the purpose of this Directive, the term "computer program" shall include programs in any form, including those which are incorporated into hardware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage'.

16 – Proposal for a Council Directive on the legal protection of computer programs (OJ 1989, C 91, p. 4; 'the Proposal for a directive').

17 – See the first subparagraph of Article 1(1) in the second part of the Proposal for a directive, entitled 'Particular provisions'.

18 – See Article 1(1) in the first part of the Proposal for a directive, entitled 'General'. See also footnote 6.

19 – See the second subparagraph of Article 1(1) in the second part of the Proposal for a directive.

20 – See the third subparagraph of Article 1(1) in the second part of the Proposal for a directive.

21 – See the 11th recital in the preamble to that directive.

22 – See the first and second recitals in the preamble to that directive.

23 – See the seventh recital in the preamble to that directive and paragraph 1(1) in the first part of the Proposal for a directive.

24 – For a concise overview of the development of software, see Caron, C., Droits d'auteur et droits voisins, 2nd edition, Litec, Paris, 2009, pp. 134 and 135, and Stroll, A., and Derclaye, E., Droit d'auteur et numérique: logiciels, bases de données, multimédia: droit belge, européen et comparé, Bruylant, Brussels, 2001, pp. 181 and 182.

25 – C-5/08, ECR I-6569.

26 – Paragraph 37.

27 – For an example of creation of a graphic interface, see internet site http://s.sudre.free.fr/Stuff/Interface.html.

28 – See Infopaq International, paragraph 37.

29 – See paragraphs 36 and 37.

30 – See the second and fourth recitals in the preamble to that directive.