Lingua del documento :

ECLI:EU:C:2024:887

JUDGMENT OF THE COURT (First Chamber)

17 October 2024 (*)

(Reference for a preliminary ruling – Intellectual property – Copyright and related rights – Legal protection of computer programs – Directive 2009/24/EC – Article 1 – Scope – Forms of expression of a computer program – Concept – Article 4(1)(b) – Alteration of a computer program – Change of the content of the variables stored in the computer's RAM and used during the running of the program)

In Case C-159/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 23 February 2023, received at the Court on 15 March 2023, in the proceedings

Sony Computer Entertainment Europe Ltd

v

Datel Design and Development Ltd,

Datel Direct Ltd,

JS,

THE COURT (First Chamber),

composed of T. von Danwitz, Vice-President of the Court, acting as President of the First Chamber, A. Arabadjiev and I. Ziemele (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: N. Mundhenke, Administrator,

having regard to the written procedure and further to the hearing on 25 January 2024,

after considering the observations submitted on behalf of:

– Sony Computer Entertainment Europe Ltd, by B. Arnold, C. Rohnke and J. Wergin, Rechtsanwälte,

– Datel Design and Development Ltd, Datel Direct Ltd and JS, by W. Scheuerl, C. Triebe and T. von Plehwe, Rechtsanwälte,

– the European Commission, by J. Samnadda and G. von Rintelen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 April 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1) to (3) and Article 4(1)(b) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ 2009 L 111, p. 16).

2 The request has been made in proceedings between Sony Computer Entertainment Europe Ltd ('Sony'), a company which distributes, inter alia, PlayStation video game consoles and games for those consoles, and Datel Design and Development Ltd and Datel Direct Ltd (together, 'Datel'), a group of companies which develops, produces and distributes software, and their chief operating officer, concerning the alleged infringement, by the latter, of Sony's exclusive right to authorise any alteration of a computer program of which that company is the rightholder.

Legal context

International law

The WIPO Copyright Treaty

3 The World Intellectual Property Organization (WIPO) adopted in Geneva, on 20 December 1996, the WIPO Copyright Treaty, which entered into force on 6 March 2002. That treaty was approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

4 Article 2 of that treaty provides:

'Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.'

The TRIPS Agreement

5 The Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPS Agreement'), set out in Annex 1C to the Agreement establishing the World Trade Organization (WTO), was signed in Marrakesh 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).

6 Article 10 of the TRIPS Agreement, entitled 'Computer Programs and Compilations of Data', reads as follows:

'1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention [for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886, in the version resulting from the Paris Act of 24 July 1971 ("the Berne Convention")].

2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.'

The Berne Convention

7 Article 2(1) and (3) of the Berne Convention provides:

‘(1) The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

…

(3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.’

European Union law

Directive 91/250

8 Article 1 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42), entitled ‘Object of protection’, provided:

‘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 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.’

9 Directive 91/250 was replaced by Directive 2009/24, which entered into force on 25 May 2009.

Directive 2009/24

10 Recitals 2, 7, 10, 11 and 15 of Directive 2009/24 state:

‘(2) The development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently.

…

(7) For the purpose of this Directive, the term “computer program” shall include programs in any form, including those which are incorporated into hardware. 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.

…

(10) 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. …

(11) For the avoidance of doubt, it has to be made clear that only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive. In accordance with this principle of copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under this Directive. In accordance with the legislation and case-law of the Member States and the international copyright conventions, the expression of those ideas and principles is to be protected by copyright.

…

(15) The unauthorised reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes an infringement of the exclusive rights of the author. Nevertheless, circumstances may exist when such a reproduction of the code and translation of its form are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs. It has therefore to be considered that, in these limited circumstances only, performance of the acts of reproduction and translation by or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice and must therefore be deemed not to require the authorisation of the rightholder. …'

11 Article 1(1) to (3) of that directive 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 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.'

12 Article 4(1) of the said directive provides:

'Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2 shall include the right to do or to authorise:

…

(b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program;

…'

German law

13 Paragraph 69a of the Gesetz über Urheberrecht und verwandte Schutzrechte – Urheberrechtsgesetz (Law on copyright and related rights) of 9 September 1965 (BGBl. 1965 I, p. 1273), as amended by the Law of 23 June 2021 (BGBl. 2021 I, p. 1858) ('the UrhG'), provides:

‘1. Computer programs within the meaning of that law are programs in all forms, including preparatory design material.

2. The protection granted 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.

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, in particular qualitative or aesthetic, shall be applied to determine its eligibility for protection.’

14 Paragraph 69c of the UrhG is worded as follows:

‘The rightholder shall have the exclusive right to carry out or to authorise:

…

2. the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof. The rights of the persons who adapt the computer program shall remain unaffected.’

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

15 Sony markets, as the exclusive licensee for Europe, PlayStation games consoles as well as games for those consoles. Until 2014, Sony marketed, inter alia, the PlayStationPortable console (‘the PSP console’) as well as games intended for that console, including the game MotorStorm: Arctic Edge (‘the game at issue’).

16 Datel develops, produces and distributes software, in particular products complementary to Sony’s game consoles, including the Action Replay PSP software as well as a device, the Tilt FX, accompanied by software of the same name, enabling the PSP console to be controlled by motion. That software works exclusively with Sony’s original games.

17 The Action Replay PSP software is used by connecting the PSP console to a computer and by inserting into that console a USB stick which loads that software. After restarting the console, the user has an additional ‘Action Replay’ tab in the interface presenting him or her with game options not provided at that stage of the game by Sony. For example, in the case of the game at issue, that tab contains options to remove all restrictions on the use of the ‘booster’ function or to have not only some of the drivers available, but also those who would otherwise be unlocked only once a particular number of points had been obtained.

18 As regards the Tilt FX, the user has at his or her disposal a sensor connected to the PSP console which enables the console to be controlled by motion. A USB stick must also be inserted into the console in order to prepare for the intervention of the motion sensor, which makes available, in the interface, an additional tab removing, in particular, certain restrictions. Thus, for the game at issue, that feature allows for unlimited use of the booster.

19 In the case in the main proceedings, Sony inter alia claimed that, by means of Datel’s devices and software, users alter the software which underpins that game in a manner contrary to copyright. In that regard, it sought, inter alia, the cessation of the marketing of those devices and software, as well as compensation for the loss allegedly suffered.

20 By judgment of 24 January 2012, the Landgericht Hamburg (Regional Court, Hamburg, Germany) upheld Sony’s claims in part. That judgment, however, was varied on appeal by the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany), which dismissed Sony’s action in its entirety.

21 The referring court, before which an appeal on a point of law ('*Revision*') has been brought against the judgment of the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg), observes that the outcome of that appeal turns on whether the use of Datel's software infringes the exclusive right to alter a computer program, within the meaning of Paragraph 69c(2) of the UrhG, of which Sony is the rightholder. The application of that provision in the dispute in the main proceedings, however, depends on the interpretation of Article 1(1) to (3) and of Article 4(1)(b) of Directive 2009/24.

22 Thus, first, the question arises as to whether the use of Datel's software affects the scope of protection of a computer program where there is no change to that program's source code or object code or to its reproduction, but where another computer program, run at the same time as the protected computer program, changes the content of variables which the protected computer program has transferred to the RAM of that computer and uses in the running of that program. The referring court asks whether the content of such variables falls within the scope of copyright protection in the computer program.

23 Second, it is necessary to clarify the scope of the concept of 'alteration', within the meaning of Article 4(1)(b) of Directive 2009/24, in particular in order to ascertain whether that concept covers the situation in which the object code or the source code of a computer program or of the reproduction thereof is not changed, but in which another program run at the same time as the protected computer program changes the content of variables which the protected computer program has transferred to the RAM and uses in the running of that program.

24 In those circumstances, the Bundesgerichtshof (Federal Court of Justice, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is there an interference with the protection afforded to a computer program under Article 1(1) to (3) of Directive [2009/24] in the case where it is not the object code or the source code of a computer program, or the reproduction thereof, that is changed, but instead another program running at the same time as the protected computer program changes the content of variables which the protected computer program has transferred to the [RAM] and uses in the running of the program?

(2) Is an alteration within the meaning of Article 4(1)(b) of Directive [2009/24] present in the case where it is not the object code or the source code of a computer program, or the reproduction thereof, that is changed, but instead another program running at the same time as the protected computer program changes the content of variables which the protected computer program has transferred to the [RAM] and uses in the running of the program?'

Consideration of the questions referred

The first question

25 By its first question, the referring court asks, in essence, whether Article 1(1) to (3) of Directive 2009/24 must be interpreted as meaning that the content of the variable data transferred by a protected computer program to the RAM of that computer and used by that program in its running comes within the scope of the protection conferred by that directive.

26 As a preliminary point, it should be noted that, in its observations, the European Commission submits that the legislation at issue in the main proceedings must be assessed in the light not only of Directive 2009/24 but also 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) and submits, on that basis, that software such as that at issue in the main proceedings constitutes the reproduction of a work within the meaning of Article 2(a) of that directive.

27 In that regard, it should be pointed out that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to rule on the case before it. In that context, the Court may extract from all the information provided by the national court, in particular from the grounds of the order for reference, the legislation and the principles of EU law that require interpretation in view of the subject matter of the dispute in the main proceedings in order to reformulate the questions referred to it and to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in those questions (judgment of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112, paragraph 36 and the case-law cited).

28 However, it is for the national court alone to determine the subject matter of the questions which it wishes to refer to the Court. Thus, where the request itself does not reveal a need to reformulate those questions, the Court cannot, at the request of one of the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union, examine questions which have not been submitted to it by the national court. If, in view of developments during the proceedings, the national court were to consider it necessary to obtain further interpretations of EU law, it would be for it to make a fresh reference to the Court (judgment of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112, paragraph 37).

29 In the present case, and in the absence of any mention of Directive 2001/29 in the first question referred for a preliminary ruling or of any other element in the order for reference that requires the Court to consider the interpretation of that directive in order to provide a useful reply to the referring court, there is no reason to examine that question in the light of the said directive. That is all the more so since the referring court expressly stated in its order for reference, without referring to that directive, that the question of whether there is reproduction is not at issue in the dispute in the main proceedings.

30 As regards the answer to the question referred, it should be recalled that, according to settled case-law, the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context, the objectives pursued by the rules of which it is part and, where appropriate, its origins (judgment of 23 November 2023, *Seven.One Entertainment Group*, C-260/22, EU:C:2023:900, paragraph 22 and the case-law cited).

31 In the first place, as regards the wording of the provisions at issue, it should be noted that Article 1 of Directive 2009/24 defines, according to its title, the object of protection of computer programs.

32 According to paragraph 1 of that article, computer programs are protected by copyright as literary works within the meaning of the Berne Convention. Paragraph 2 of that article extends such protection to the ‘expression in any form of a computer program’ and states that ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under that directive. Paragraph 3 of the same article provides, moreover, that a computer program is to be protected if it is original in the sense that it is the author’s own intellectual creation, while specifying that no other criteria are to be applied to determine the program’s eligibility for protection.

33 It is thus apparent from the wording of Article 1 of Directive 2009/24, in particular of paragraphs 2 and 3 thereof, that ‘expression in any form’ of a computer program is protected, apart from ideas and principles which underlie its constituent elements, provided that such a program is original, in the sense that it is the author’s own intellectual creation.

34 As to the content of that concept, the Court has held, having regard to Article 1(2) of Directive 91/250, the wording of which is identical to that of Article 1(2) of Directive 2009/24 and the interpretation of which is, therefore, transposable to the latter provision, that the ‘expression in any form’ of a computer program is that which permits reproduction in different computer languages, such as the source code and the object

code (judgment of 22 December 2010, *Bezpečnostní softwarová asociace*, C-393/09, EU:C:2010:816, paragraph 35).

35 On the other hand, the Court has held that the graphic user interface of a computer program, which does not enable the reproduction of that program, but merely constitutes one element of that program by means of which users make use of the features of that program, does not constitute a form of expression of a computer program within the meaning of that provision (see, to that effect, judgment of 22 December 2010, *Bezpečnostní softwarová asociace*, C-393/09, EU:C:2010:816, paragraphs 41 and 42).

36 Likewise, it has found that neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program for the purposes of that provision. To accept that the functionality of a computer program can be protected by copyright would amount to making it possible to monopolise ideas, to the detriment of technological progress and industrial development (see, to that effect, judgment of 2 May 2012, *SAS Institute*, C-406/10, EU:C:2012:259, paragraphs 39 and 40).

37 It is thus apparent from the wording of Article 1(2) of Directive 2009/24, and as the Advocate General observed in point 37 of his Opinion, that the source code and the object code fall within the concept of 'forms of expression' of a computer program, within the meaning of that provision, since they allow that program to be reproduced or subsequently created, whereas other elements of that program, such as, inter alia, its functionalities, are not protected by that directive. Nor does that directive protect the elements by means of which users make use of such functionalities, without, however, allowing such reproduction or subsequent creation of the said program.

38 As the Advocate General observed in points 38 and 40 of his Opinion, the protection guaranteed by Directive 2009/24 is limited to the intellectual creation as it is reflected in the text of the source code and object code and, therefore, to the literal expression of the computer program in those codes, which constitute, respectively, a set of instructions according to which the computer must perform the tasks set by the author of the program.

39 In the second place, such an interpretation, based on the wording of the provisions at issue, is supported by the context, particularly under international law, into which those provisions fit.

40 In that regard, first, like Article 1(1) of Directive 2009/24, Article 10(1) of the TRIPS Agreement provides that computer programs, whether in source or object code, are to be protected as literary works under the Berne Convention.

41 The Court has pointed out, however, with regard to Article 2(1) of that convention, as well as Article 2 of the WIPO Copyright Treaty and Article 9(2) of the TRIPS Agreement, that copyright protection may be granted to expressions, but not to ideas, procedures, methods of operation or mathematical concepts as such (judgment of 13 November 2018, *Levola Hengelo*, C-310/17, EU:C:2018:899, paragraph 39 and the case-law cited).

42 Second, that interpretation is also supported by the preamble to Directive 2009/24.

43 First of all, recital 7 of that directive states that the term 'computer program' also includes preparatory design work leading to the development of a program provided that the nature of the preparatory work is such that the program can result from it at a later stage.

44 Next, it is apparent from recital 11 of that directive that ideas and principles which underlie the various elements of a program, such as the ideas and principles which underlie logic, algorithms and programming languages, are not protected under the said directive; only the expression of those ideas and principles is protected by copyright.

45 It follows, last, that, according to recital 15 of Directive 2009/24, with regard to the exclusive rights of the rightholder, it is the unauthorised reproduction, translation, adaptation or transformation 'of the form of the code in which a copy of a computer program has been made available' that constitutes an infringement of the author's exclusive rights.

46 The interpretation referred to in paragraph 37 of the present judgment is, in the third place, consistent with the objectives pursued by the legal protection of computer programs under Directive 2009/24.

47 In that regard, as the Advocate General emphasised in point 41 of his Opinion, the objective pursued by the system of protection of computer programs introduced by the EU legislature is, as is apparent from recital 2 of Directive 2009/24, to protect the authors of programs against their unauthorised reproduction, which has been made very easy and inexpensive in the digital environment, and against the distribution of 'pirated' copies of those programs. That recital recalls that the development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently.

48 On the other hand, as is apparent from paragraphs 3.6 and 3.12 of the explanatory memorandum to the Proposal for a Council Directive on the legal protection of computer programs of 5 January 1989 (OJ 1989 C 91, p. 4), which gave rise to Directive 91/250, the legal regime for the protection of computer programs does not grant monopolies hindering independent development and does not therefore block technical progress. Moreover, the competitors of the author of a computer program are free, once they establish through independent analysis which ideas, rules or principles are being used, to create their own implementation of them in order to create compatible products. They may, moreover, build on the identical idea, but may not use the same expression as that of other protected programs.

49 Furthermore, as recital 10 of Directive 2009/24 states, the function of a computer program is to communicate and work together with other components of a computer system and with users, and, for that 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.

50 In the case at hand, the referring court observes that Datel's software is installed by the user on the PSP console and runs at the same time as the game software. It adds that that software does not change or reproduce either the object code, the source code or the internal structure and organisation of Sony's software used on the PSP console, but merely changes the content of the variables temporarily transferred by Sony's games to the PSP console's RAM, which are used during the running of the game, such that it runs on the basis of those variables to the changed content.

51 Furthermore, as is apparent from the grounds of the order for reference, it is apparent that Datel's software, in so far as it changes only the content of the variables transferred by a protected computer program to a computer's RAM and used by that program in its running, does not, as such, enable that program or a part of it to be reproduced, but presupposes, on the contrary, that that program will be run at the same time. As the Advocate General stated, in essence, in point 48 of his Opinion, the content of the variables is therefore an element of the said program by means of which users make use of its features, which is not protected as a 'form of expression' of a computer program within the meaning of Article 1(2) of Directive 2009/24, which it is for the referring court to verify.

52 In the light of the foregoing considerations, the answer to the first question is that Article 1(1) to (3) of Directive 2009/24 must be interpreted as meaning that the content of the variable data transferred by a protected computer program to the RAM of a computer and used by that program in its running does not

fall within the protection conferred by that directive, in so far as that content does not enable such a program to be reproduced or subsequently created.

The second question

53 Having regard to the answer given to the first question, there is no need to answer the second question.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (First Chamber) hereby rules:

Article 1(1) to (3) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs

must be interpreted as meaning that the content of the variable data transferred by a protected computer program to the RAM of a computer and used by that program in its running does not fall within the protection conferred by that directive, in so far as that content does not enable such a program to be reproduced or subsequently created.

[Signatures]

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* Language of the case: German.