Columns

Software protection – sky-high damages in the USA

At the beginning of the software industry, the legal protection of computer programs was an open issue. The patent system perceived computer programs as mere algorithms, which do not satisfy a definition of invention, i.e. a solution to a technical problem. There was a general tendency to exclude programs for "computable machines" from patentability. On the other hand, the copyright system, which was designed for the protection of literary, artistic, and scientific works, also seemed not to be appropriate, especially since it granted a monopoly lasting far beyond commercial applicability of computer programs. According to a commonly recognised justification of intellectual property protection, after a limited period of monopoly (by European standards in general: 20 years for inventions, author's life+70 years for copyrighted works, 25 years for designs, etc.) then they all fall into a public domain, hence we may enjoy free reproductions of Lof der Zotheid (The Praise of Folly) by Erasmus and commercial exploitation of basic optical storage disc related inventions.

Logically, a new sui generis system for computer programs protection was needed. However, since time was of the essence, computer programs were incorporated into the existing worldwide framework of intellectual property rights protection, by approving that they will be protected as literary works. The "necessity" here was as quick as possible recognition of IP rights to computer programs within the international system without having to go through a burdensome and time-consuming process of negotiating a new international treaty. To achieve this goal, the USA in 1988, finally acceded to the Berne Convention for the Protection of Literary and Artistic Works of 1886.

The main feature of copyrights is that it protects only expression of ideas and not ideas themselves, thus the system creates a monopoly mainly against reproduction. Now, any real-life use of software generates a number of reproductions of computer programs (or its parts) within hardware. Such reproductions (of which an end-user may be not aware) are recognised by copyright law as falling within the scope of monopoly; hence, the mere use of computer programs requires a license. This stands in sharp contrast to the scope of protection of other copyrighted works. We do not need a license to use (i.e. read) a book, admire a painting, or enjoy living in a work of architecture.

In parallel, in certain circumstances and depending on jurisdiction, computer programs may also be protected under a patent system, which grants a broader scope of monopoly for inventive ideas defined by patent claims. Under the European Patent Convention, computer programs as such are excluded from the patentability, but where it may be established that a computer program provides a solution to a technical problem; patents are often granted (leaving aside what is meant by the notion of "technical").

This outline of software protection under IP law was inspired by a recent verdict of the US district court in California, which ordered SAP to pay damages in the staggering amount of 1.3 billion USD to Oracle for software copyright infringement.

Naturally, it is rather unlikely that any 10-digits damages are awarded by Polish courts. However, one should not underestimate the power of Polish copyright protection. Although damages (as a civil law remedy) are not thought to have a punitive character, in the case of intellectual property rights, infringement of this general rule is subject to exceptions. Under Polish law, a copyright holder may demand damages at double (or even triple when infringement is culpable) the amount of royalties' payable under a hypothetical license.

The verdict of the US court is generally perceived as a warning to executives, corporate attorneys, IT managers, software developers, and analysts around the world to observe software copyrights and, in particular, software license terms including unauthorised use by company employees.

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Polish-Dutch culture conflict

For the last two years in my business meetings often the subject of conversation turns to the culture conflict between typical Polish and Dutch business mentality. The Dutch are used to communicating in a direct way, everything is transparent, careers are built on performance, and companies use 360 degrees feedback where management is assessed by their subordinates and a decision model which is built on participation. The Polish mentality is more introvert and hierarchical, people wait for the management decisions and directions and then do the work. And then they work hard! Polish subordinates are careful with being open about their thoughts and feelings regarding their work.

Here I observe a problem, or better a challenge (to use another cliché): the typical Dutch Anglo-Saxon culture of giving open feedback and addressing behaviour, meets much resistance from Polish colleagues. They are not used to it and perceive it as threatening because in their perception admitting mistakes can cost you your job. The Dutch seem to perceive this reaction as negative: the glass is half-empty, I quote: "my people are very creative in thinking of reasons why my plans won't work, i.s.o. thinking about ways how we can make it work, dead-lines are excuse-lines".

Like any relation, everything starts with trust. The first lesson in any simple sales training is, "first build trust before you go to the next phase". This applies not only in any sales-client relations, but also in personal relations and for sure, also in co-worker relations! Most of the time the management decides for the co-workers that they have to train competences and skills and also decides which skills and competences. This causes resistance in any culture. If you really, really urgently ask someone to stop smoking, will he/she do this for you? No… Someone will only stop when there is a strong motivation from within.

So the solution seems to be to build trust and create a new culture. People will not change attitudes and behaviour when asked or trained, only when they feel the need and see the benefit themselves. When you start with open 360 degrees feedback-sessions top-down and bottom-up, it will be a real eye-opener! The next step is to create a common shared culture by establishing a new set of values. And it is not enough when values only hang on the wall! So, from the company values you can work to establish common shared individual attitudes. When attitudes are established and accepted, you can start to work together to establish effective behaviour and only after that, you can train skills and competences.

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