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LEGAL PROTECTION FOR DIGITAL PROPERTY: COPYRIGHT ASPECTS

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Abstract

The author examines legal attempts to regulate digital property. By 'digital property' any valuable that is usable or available in electronic form is understood, including computer programs, databases, digital audio and video, etc. Due to authors' own expertise, legal protection of digital property is represented through issues on legal protection of computer programs[1]. First part of the assignment accomplished by this article deals with copyright protection of digital property. The article surveys most important international legislation and case law, as well as academic opinions on legal regulation of digital property. The significant transformations and differences from traditional principles of intellectual property law that took place with the rise of digital property are emphasized, together with the challenges brought by digital technology. It is further argued that for the newly established national legal systems, such as Lithuanian, a simple extension of the existing intellectual property legislation, or mechanical implantation of foreign laws is not adequate, while the risks are crucial. Careful national approach may be needed in order to achieve socially desirable results and not to prevent establishment of national information economy.

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Introduction

The cyberspace became a major form of medium for social and economical relationship within last few decades. Digital property emerged with the rise of cyberspace and it is clear

[1] The term "computer program" as used herein, is understood by the author in the broadest sense, including any set of instructions causing the machine to work towards a desired result, e.g. HTML, XML, JAVA programming, layout of web pages, graphical user interfaces, business and technical methods implemented by means of software, etc.

that it will shortly become the most important instrument of knowledge based industries and information economy (Shapiro, Varian, 1998). Due to intangible and almost spiritual nature (most of digital property can be represented through a certain sequence of electrical signals) digital property is much more vulnerable to unauthorized use and exploitation than any other property, including intellectual property. Equally to the traditional forms of property, digital property requires legislative recognition and due remedies in order to function as a sterling instrument of the economy. The law, which is always noted for conservativism and lack of flexibility, was the last to catch up with digital property and the rise of cyberspace. Nevertheless, starting from early eighties most of developed countries concentrated legal efforts on the regulation of digital valuables.

The aim of the author is to draw conclusions on the appropriateness of legal regulation of digital property in the developing national legal systems, such as Lithuania. Research done by the author and resulting in this article covers the most important developments of the law directed towards establishing legal protection for digital property through historical and comparative analysis. This article is further limited to one form of digital property – computer programs, which is analyzed from the copyright law perspective. It must be noted that computer programs constitute the most representative subject matter for analysis of changes and challenges of copyright law (Bainbridge, 1994).

In the first part of the article the author concentrates on the overview and comparison of two jurisdictions – the US, which is praised for the fastest technological and legislative development in the field, and the European Community, which has immediate effects on the Lithuanian legal system due to geopolitical objectives of the Republic of Lithuania. The efforts of the copyright law to regulate the digital domain in these two jurisdictions, including the very latest proposals and legal regulation of technological protection measures, are analyzed together with the challenges of the latest regulations and threats foreseen by the academics in foreign countries. Comparisons between the two jurisdictions are usually made in order to draw viable conclusions on the trends of software law (Lemley et al., 2000; Kelleher, Murray, 1999; Bainbridge, 1994). It is important to provide such analysis for three reasons – in order to understand the scope of changes that took place with the copyright law, to provide a full view of all existing legislative approaches and to foresee the threats risen by the latest developments.

Second part of the article provides an overview of relevant Lithuanian legislation dealing with legal protection of computer programs, problems faced by the legislator, attempts critical view on the legislative path chosen by Lithuania, discusses the position of practitioners and academics, also provides suggestions with respect to the desired objectives of regulating digital property in Lithuania.

Conclusions of the article argue that existing software copyright in Lithuania is somewhat mechanical, not adequate to social-economical environment and lacks connections with the needs of the young information society, therefore needs to be revised and improved. Several proposals therefore are included.

It must be noted that the issues discussed in this article are very scarcely analyzed and not given due attention in the Lithuanian legal science, while some are very new as well. The need for extensive scientific examination and research thereof is obvious in the context of ongoing Lithuanian legal reform, where any experimenting is fraught with risk and may lead rather than to the desired progress to the recession (Mikelėnas, 2000).

Legal regulation of digital property: historical perspective

Due to intangible nature of digital property, intellectual property laws that deal with somewhat comparable subject matter were chosen as model for regulation of digital property. Digital property has first emerged as reincarnation of intellectual property in the electronic form, therefore it was and sometimes still is considered a sub-institute of intellectual property. Traditionally, intellectual property laws were asked to serve two purposes – securing award to the authors, inventors or other owners of intellectual property rights, by granting them exclusive rights to control reproduction and use of their creations, but at the same time fostering further innovation and creativity, by allowing exceptions from exclusive rights or requiring the owner to disclose details of the new art (Digital Dilemma, 1999). Preservation of these principles is the cornerstone for regulation of digital property, however at the same time the need to prevent unauthorized exploitation of digital property, which has never been easier, is also vital (Lemley et al., 2000).

First blazers of cyberspace in sixties and seventies of the twentieth century attempted to protect their digital valuables by means of legal protection afforded for commercial secrets, however this form of protection quickly proved not sufficient (Lemley et al., 2000). Further attempts to regulate protection for such vaporous valuables as computer programs in the US and other common law countries (Australia, UK) were taken by the courts attempting or denying copyright and/or patent protection for computer programs (Bainbridge, 1994). The legislator making relevant amendments to intellectual property laws followed established court practice. Continental European countries took slightly different approach where court practices were not always followed by the legislator[2] or the laws preceded courts in legal protection of computer programs. Copyright and patent law forms of legal protection for computer programs, already by mid-eighties established themselves as the two most important considerations for owners and right holders of digital valuables. Alongside the copyright and patent juggernaut, a group of cyberspace savants have suggested complete denial of legal protection for computer software and similar electronic valuables (Stallman, 1994; Watson, 1999) or protection based on technological measures (Barlow, 1994). Other approaches, which propagate reservations of legal protection for specific types of common or publicly important digital valuables, e.g. *de facto* standard interfaces (Lessig, 2000) or combination of any available means (Stranieri, Zeleznikow, 2000), are gaining popularity today. Still it will take some time before copyright and patent law surrenders the positions for legal protection of computer programs they have today. As it was noted in the introduction, this article shall only deal with copyright law protection of computer programs.

As computer program was probably the first reincarnation of digital property and remains one of the most important up until now, the following chapter shall discuss copyright protection for computer programs to collect evidence on changes of a traditional copyright law that took place during the last few decades.

Copyright protection for computer programs

The first attempt to extend copyright to computer programs were the 1980 amendments to the 1976 United States Copyright Act. Copyright protection of computer programs allowed them legal protection equal to legal protection of a literary work (original work of authorship). As an underlying principle of copyright a traditional idea/expression dichotomy became applicable to computer software, thus excluding from copyright protection any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied (Section 102(b) of the US Copyright Act). At the time, most of expression used in the computer programs was literal code, since graphical user interfaces, sound and video, other multimedia elements were not known. Mostly literal presentation of early computer programs, as well as simple or no entitlement procedures were the reasons for applying copyright. Significant degree of internationalization and relatively long record of copyright were also important advantages (Widdison, 2000). Initiative of the United States was followed by an avalanche of other national legislation allowing copyright protection for computer programs and data-bases (Australia and France in 1984, United Kingdom in 1985, etc.).

In Europe the efforts to provide copyright protection for computer programs culminated in early nineties, with the enactment of the European Community Directive on Legal Protection of Computer Programs 91/250/EEC in 1991. On the international level copyright protection for software was secured by the Agreement on Trade Relater Aspects of Intellectual Property (TRIPS) in 1994 and the WIPO Copyright Treaty in 1996. It must be noted that by the time of enactment of the European Community Directive 91/250/EEC, seven of then twelve members of the European Economic Community had no legislation for legal protection of computer programs, while the extent of legal protection in the other varied significantly[3] (Czarnota, Hart, 1991).

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[2] Cf. note 3 infra.

[3] German courts in Nixdorf and Inkassoprogramm cases refused copyright protection for computer programs on the criteria of less than average skill and craft of the programmer, thus requiring a (high) level of creativity (Schöpfungshöhe) for copyright protection of computer programs. BGHZ 94, 276.

Further developments in the software copyright law in the US shall give credit to the fact that copyright protection for non-literal elements of computer programs was not considered by copyright laws, thus the courts were faced with a dilemma of whether the copyright protection shou;d be granted to elements of computer programs other than the literal expression. Hardy at the beginning with the extension of copyright for protection of non-literal elements of expression of computer programs (Whelan v. Jaslow[4]), by mid-nineties the US courts came to the boundaries of copyright, where legal protection was denied for structure of computer programs (Computer Associates v. Altai[5]), essential elements of graphical user interface (Apple v. Microsoft[6]) or user menu structures of computer programs (Lotus v. Borland[7]).

The US courts also affirmed and reworked applicability of traditional copyright doctrines for software copyright. Fair use doctrine, idea-expression merger doctrine and scenes-a-faire doctrine deserve specific mention.

Fair use doctrine allows a number of fair exceptions from the exceptional rights of the copyright holder or a royalty-free license allowing limited copying and/or use of copyrighted work (Lemley et at., 2000). The reasoning beyond the fair use lies in the fundamental principle of intellectual property law of not only protecting the right holder, but also fostering further advancement and innovation based on previous art (Vinje, 1999). Fair use is derived from the general provisions (Article 107) of the 1976 Copyright Act of the US and is generally allowed for access, reproduction and use of the copyrighted work, if it is done for public non-profit purposes, teaching or research, concerns not essential part of the copyrighted works and does not affect the market of a copyrighted work. It must be noted that there is no closed list of fair use exceptions in the US Copyright Act. Further to fair use, normal uses and making of back-up copy are expressly identified as software specific exceptions allowing adaptation and copying of computer programs according to Article 117 of the US Copyright Act.

Idea-expression merger and scenes-a-faire are traditional copyright doctrines, which allow separation of the copyrightable and non-copyrightable elements of the intellectual creation. As it has already been mentioned, the major limitation of copyright lies in the general principle of idea/expression dichotomy. Further to that, copyright law does not extend to public domain, which assumes the non-copyrightability of the work due to expiration of protection terms, waiver of the rightholder or origin from the common knowledge pool. Idea-expression merger and scenes-a-faire doctrines deal with expressions, which normally are copyrightable, however due to limited ways of employing the same ideas are not. These doctrines represent a practical attempt to implement the principle of idea/expression dichotomy and apply when drawing a dividing line between the idea and the expression becomes difficult if not impossible. Idea-expression merger doctrine deals with the situation when the expression *per se* represents the idea, i.e. there is no possibility to implement the same idea by a different expression. Scenes-a-faire adds cases of very limited expressions, which are predetermined by functionality, mathematical rationale of the algorithm (efficiency) or the context (external factors) (Lemley et al., 2000). Existence of idea-expression merger or scenes-a-faire situation prejudices copyright infringement in cases where actual copying of certain elements occurs. Both these doctrines found their application and were elaborated in the aforementioned landmark US software copyright cases (Kiškis, 1999).

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[4] Whelan Associates, Inc. v. Jaslow Dental Labs, Inc., 797 F.2d 1222 (3d Cir. 1986); the Circuit Court found that copyright protection of computer programs may extend beyond the programs' literal code to their structure, sequence, and organization.

[5] Computer Associates Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992); the Court of Appeals agreed that copyright can be infringed even if no literal code is copied, but continued that the scope of copyright protection that extends to a computer program's non-literal structure must be evaluated, for which the Court proposed a three-step *abstraction-filtration-comparison* process.

[6] Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435 (9th Cir. 1994); the Ninth Circuit Court held that the use of icons, windows, and hierarchical menus were not copyrightable.

[7] Lotus Development Corp. v. Borland Int'l, Inc., 49 F.3d 807 (1st Cir. 1995) aff'd per curiam, 116 S. Ct. 804 (1996), the First Circuit Court of Appeals found that the system of menu commands developed for the 1-2-3 spreadsheet were not copyrightable, because they constituted a method of operation, not a protectible form of expression.

Europe has developed different approach toward dealing with the complex nature of computer software. Principal regulations, which extend to all European Community Member States and Associated countries are found in the European Community Directive 91/250/EEC, which was further supplemented with the Directive 92/100/EEC covering rental rights of copyrighted works and the Directive 93/98/EC extending terms for legal protection of copyrighted works.

The Directive 91/250/EEC intentionally omits the definition of the computer program, just limiting itself to the key principle that computer programs shall be protected by copyright as literary works (Article 1.1). Thus, it is unclear whether this protection extends to non-literal elements – "look and feel" of a computer program. Further to these provisions, Article 1.1 of the Directive 91/250/EEC provides that "the term 'computer programs' shall include their preparatory design material". Early commentators of this provision have alleged that the intent of this provision is to extend copyright protection beyond object or source code of the software, thus assuming copyright protection to overall sequences, structures, organization, flow diagrams of a program (Czarnota, Hart, 1991). National jurisdictions (e.g. Sweden) are not always as liberal in granting copyright protection to "look and feel" of computer software (Rosén, 1995), though formally national laws of the Community Member States must comply with the Directive. Article 1.2 of the Directive also establishes principle of idea/expression dichotomy by excluding from copyright protection ideas and principles that underlie any element of a computer program, including those which underlie its interfaces.

Fair use doctrine in the Directive 91/250/EEC is implemented, through a closed list of exceptions applicable in clearly defined cases. According to Article 5 of the Directive, exceptions from the rights of the copyright holder shall include those needed for normal use, error correction, making of a back-up copy and observation, study and testing of the functionality of a computer program (reverse engineering). Article 6 provides for an additional exception permitting unauthorized decompilation for interoperability with other programs. Late case law in France (Nomai v. Iomega[8]) seems to extend decompilation for interoperability to include not only software but also hardware (Kelleher, Murray, 1999). In general, exception provisions of the Directive provide adequate legal safeguards for not to be abused and are praised for securing balance of interests (Czarnota, Hart, 1991).

Formal statutory differences between the US software copyright law and the EC Directive are evident. The US fair use exceptions do not directly allow error correction and reverse engineering (observation, study and testing of the functionality of a computer program), the US 1980 copyright statute also does not know decompilation for interoperability with other programs. These divergences, however, are somewhat ameliorated by the case law. Most of the exceptions found in the Directive 91/250/EEC are just elaboration on the fundamental principle of idea/expression dichotomy, which was readily recognized by the US courts interpreting fair use doctrine (Sega v. Accolate[9]). Thus, notwithstanding formal discrepancies, it was recently concluded by the European Commission[10] that "the Directive appears to provide similar scope of protection to that provided in the legislation of the Community's major trading partners".

Latest developments in software copyright law may be attributed to the 1996 WIPO Copyright Treaty, the 1998 US Digital Millennium Copyright Act and the EC proposal for Directive on certain aspects of copyright and related rights in the information society, all attempting to address issues faced by the copyright in the information society. These initiatives generally extend exclusive rights of the copyright holder to the digital dimension, as well as establish remedies (anti-circumvention regulations) for the technological measures of protection and rights management information embedded in digital works. Interestingly, the 1996 WIPO Copy-

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[8] Societe Nomai v. Societe Iomega Corporation. E.C.C. 281 [1998].

[9] Sega Enterprises Ltd. v. Accolate, Inc., 977 F.2d 1510 (9th Cir. 1992), where the Court of Appeals held that disassembly of object code is a fair use where disassembly is necessary to gain access to those elements of the code that are not protected by copyright and the disassembler has a legitimate reason for seeking such access.

[10] Report on the implementation and effects of Directive 91/250/EEC on legal protection of computer programs. Brussels, 10.04.2000. COM(2000)199 final.

right Treaty presumes that limitations and exceptions that currently apply in national laws shall be extended into the digital environment, moreover it allows to devise new exceptions and limitations that are appropriate for the digital environment (Article 10). Both the 1998 US Digital Millennium Copyright Act and the EC proposal for Directive on certain aspects of copyright and related rights in the information society attempt to pin down these "digital exceptions" differently.

Anti-circumvention provisions of the 1998 US Digital Millennium Copyright Act (Section 1201) effectively and very broadly ban any circumvention and circumvention devices for technological measures used by copyright owners to protect their works (Vinje, 1999). Exceptions therein are implemented in a form of limited rights not to comply with the anti-circumvention regulations, i.e. lawful removal of the technical measures of protection, which is allowed for reverse engineering for interoperability, also for encryption research, law enforcement and intelligence activities, protection of minors, personal privacy and security testing. There is also an exception for non-profit institutions. Other provisions of the 1998 US Digital Millennium Copyright Act provide additional exception to transient copying and caching of copyrighted material by the on-line service providers, also limitation of service provider's liability related to third party content and linking.

The EC proposal for Directive on certain aspects of copyright and related rights in the information society is akin to the 1998 US Digital Millennium Copyright Act with respect to anti-circumvention provisions. The exceptions in the proposed Directive (Articles 5.1-5.3) are not related to circumvention of technical measures but rather pare down the new extensions of the copyright holders exclusive rights. The list of exceptions is lengthy and includes *inter alia* transient and incidental reproduction in digital transfers, private and personal use for non-commercial ends, archiving and conservation by non-commercial institutions, teaching and scientific research, uses for the benefit of people with disability, information and quotation purposes and public security. Private and personal use for non-commercial ends requires fair compensation for the rightholders. The proposal for Directive also qualifies the exceptions with a three step test (Article 5.4), providing exceptions and limitations only in prescribed cases, not for the use in a manner, which unreasonably prejudices legitimate interests of the rightholders or conflicts with the normal use of the works. It is unclear, however, how these new exceptions and limitations along with the previously established are to be implemented without any exceptions to the anti-circumvention provisions (Vinje, 1999). It is suggested that the proposal shall be further supplemented with an extensive list of exceptions to anti-circumvention exceptions or preferably with a general principle that anti-circumvention provisions shall not prevent or limit the operation of the exceptions to the exclusive rights of the copyright holders (Vinje, 1999), as implemented in some international examples[11].

It is arguable whether regulatory regime set by the 1998 US Digital Millennium Copyright Act and proposed by the EC proposal for Directive on certain aspects of copyright and related rights in the information society retains the delicate balance of interests discussed above. Deemed by some as balanced (Lai, 1999), they also raise significant doubt. It is evident that technical protection measures may equally be used both for protection of the copyrighted works, and for preventing fair use thereof, while the latter effectively threatens not only the fair use but also all the benefits of the legal regulation *per se* (Lessig, 2000). Recent US case law may be provided as a proof for these apprehensions (e.g. DVD/DeCSS case[12]). (Vinje, 1999) further suggests that instead of providing broad protection against circumvention, we should have considered imposing limits on technical measures in order to preserve some semblance of the mediating role traditionally played by copyright. A practical implementation of this proposal may be technical solutions dampening the negative effects of technological protection (Stranieri, Zeleznikow, 2000).

Summarizing this chapter it is possible to conclude that during the last decade copyright law survived a virtual revolution, if it survived at all. Starting from the mere expansion of the

[11] Australian Copyright Amendment (Digital Agenda) Bill, 1999.

[12] Cf. http://eon.law.harvard.edu/openlaw/DVD/

subject matter of copyright, with the celebration of digital technology, a significant redesign of fair use and other fundamental concepts of traditional copyright law was needed in order to complement the needs of digital property. In addition to that, digital copyright has developed some of its own doctrines and concepts ("look and feel", "preparatory design material", decompilation, etc.). Furthermore, the very latest developments of digital copyright law with the claim to secure digital property in cyberspace, have threatened the essence of copyright law itself. All this situation adds to the arguments that copyright law is not suitable for protection of digital property, however this is a topic for examination extending beyond this article.

Copyright protection of computer programs in Lithuania

Lithuania, similarly as many other newly established market economies, is just in the process of establishing national system for regulation of digital property and computer programs. In addition to traditional purposes of intellectual property and information technology law, as discussed above, as well as the need to comply with international commitments, a coherent national system is required for two other important reasons – to fully uncover national intellectual potential and foster transition to information based economy. Unfortunately, these objectives are not always understood and bargained away for the copyright enforcement (anti-piracy fight) (Matulevičienė, 1996), which is lobbied by strong international and corporate interests, thus resulting in a low priority of regulating digital property, prohibitory type of regulation, as well as disbalance of public and private interest in the freshly baked Lithuanian copyright laws.

Legal protection for computer programs in Lithuania started with the 21 September 1992 Resolution No. 681 of the Government of the Republic of Lithuania "On legal protection of computer programs and databases". Item 1.1 of the Resolution cited that "computer programs [...] shall be considered intellectual creations [...] and shall be subject to legal protection". Authors of computer programs were granted an exclusive right of integrity (Item 1.2) and rights to authorize reproduction and use of computer programs (Items 1.3-1.4). The Resolution also allowed creating of a back-up copy (Item 1.7), however prohibited reproduction and use for personal purposes (Item 1.8), as well as any other use not expressly provided for in the Resolution by the author of a computer program (Item 1.7).

With the 17 May 1994 revision of the Civil Code of the Republic of Lithuania, the amendments to Article 515 of the Civil Code expanded the notion of "the work" to include computer programs and databases. Except for the expansion of the subject matter of copyright, no other regulations, which would discriminate computer software against literary works, were introduced. Thus, computer programs were subject to basic copyright protection compatible with the 1886 Berne Convention of Legal Protection for Literary and Artistic Works (Lithuania is bound by this convention as of 14 December 1994). Article 532 of the Civil Code provided the list of fair use exceptions, which by their very nature were designed for literary works and not for computer programs. Additional exception found in the 1994 Civil Code, which deserves specific mention, was established in Article 533 and authorized any personal use of the copyrighted work without any compensation to the author thereof (thus, previous prohibition of personal use was overridden).

On 30 January 1996 a special Law on Legal Protection of Computer Programs and Data Bases, complementing (but not replacing) the copyright regulations of the Civil Code, was enacted. The Law introduced computer program specific regulations. Novel regulations of the Law include – prohibition of reverse engineering (Items 4-5 Part 1 Article 13), exceptions for error correction, adaptation to specific hardware and for the purposes of efficiency, back up copy (Article 14), decompilation for interoperability (Article 15).

On 18 May 1999 the Law on Legal Protection of Computer Programs and Data Bases was replaced with the new Law on Copyright and Related Rights, which invalidated copyright regulations of the Civil Code as well as the said 1996 Law. The 18 May 1999 Law on Copyright and Related Rights is currently in effect.

Provisions of the 1999 Law on Copyright and Related Rights pertinent to computer programs were made fully compliant with the European Community Directive 91/250/EEC, however this compliance is somewhat mechanical. The computer program provisions of the 1999

Law on Copyright and Related Rights are rather diluted among the general copyright provisions and provisions applicable to other specific types of copyrightable subject matter. The 1999 Law for the first time introduced provisions on idea/expression dichotomy (Article 5). Computer program fair use provisions of the 1999 Law include reproduction for normal use (including error correction), back up copy, reverse engineering (Article 25) and decompilation for interoperability (Article 26). Exception for personal use of computer programs is expressly disallowed (Article 20). Large portion of the 1999 Law deals with the enforcement of copyright and related rights (Articles 64-71), which also include legal protection for rights management information and technical measure anti-circumvention provisions (Article 64). Unfortunately, the most radical approach was followed with the anti-circumvention provisions, which prohibit both the act of removing or circumventing the technical protection measures and also any circumvention assisting devices. Moreover, (Vileita, 2000) argues that these prohibitions shall also include services related to circumvention of technical measures, thus in fact adopting the US approach but without a single exception. As it was demonstrated by (Vinje, 1999; Lessig, 2000), such broad prohibition may be a direct threat to the lawful interests barred by the technical protection measures, thus preventing innovation and other benefits of copyright. It is doubtful, however, whether the authors of the Lithuanian anti-circumvention provisions cared for anything but ultimate copyright enforcement.

Latest developments of software copyright law in Lithuania are attributable to the introduction of the criminal liability for reproduction, distribution and possession of infringing copies of copyrighted works, legal protection rights management information and technical measure anti-circumvention provisions introduced in the Criminal Code of the Republic of Lithuania (Articles 142-1, 142-2 and 142-3) on 20 April 2000. Although currently criminal liability is limited to commercial purposes, the situation is likely to become worse with the adoption of the new Lithuanian Criminal Code (which is not yet in power). Article 194 thereof is identical to current anti-circumvention provisions (Article 64 of the 1999 Law on Copyright and Related Rights and Article 142-3 of the currently valid Criminal Code), however does not contain the requirement of commercial purposes. It is clear that fair use exceptions may be lawfully used for commercial purposes (e.g. for interoperability of an independently created commercial computer program), thus, by eliminating the "commercial purpose" limitation and not allowing any exceptions, even the non-profit institutions serving obvious public goods (libraries, universities, etc.) become criminally liable for exercising fair use.

Court practice related to software copyright is very scarce in Lithuania. Starting from 1996 only several cases were investigated, all of which are related to enforcement of copyright remedies and recovery of damages for the software piracy (Kiškis, 2000). Late case law of the Supreme Court of Lithuania attempts to restrict the unlimited claims for damages incurred due to software piracy (Microsoft v. Akvanautai[13]), which may be interpreted as a warning on the unreasonableness of regulation (Kiškis, 2000).

Conclusion

Several conclusions may be drawn from the above overview of the developments of copyright law in Lithuania and abroad. First of all, it is evident that the regulation of copyright in Lithuania equally to foreign countries, underwent significant changes, introduction of new concepts and principles. Just the amount of legislative changes in the area speaks for itself. On the other hand, such inconsistency of legal regulation in Lithuania may indicate lack of scientific background and failure to understand the objectives of this legislation.

Secondly, a gradual strengthening of the rightholders position in Lithuanian copyright legislation may be observed. This is especially evident with the 1999 Law on Copyright and Related Rights when compared to the 1996 Law on Legal Protection of Computer Programs and Data Bases. The former clearly shifted the balance of legal protection for computer programs towards the copyright holder – no private use, no adaptation for efficiency purposes, decompilation provisions are strictly conditional, etc. In view of constantly strengthened copy-

[13] Microsoft Korporacija v. VĮ JAE povandeninio plaukiojimo klubo monė "Akvanautai". By the 2000 04 26 Ruling in the Civil Case No. 3K-3-455/2000, the Supreme Court prescribed that claims for damages in copyright shall be paid for a stamp duty amounting to 5% of the claimed damages.

right enforcement regulations, it is also evident that the objectives of copyright enforcement prevail the copyright regulation in Lithuania to date (Kiškis, 2000). It may be paradoxical but according to the recently approved (29 September 2000) Lithuanian Copyright Enforcement Strategy, most of the efforts and even funds of the state are directed to the enforcement of the (mostly foreign) copyright and not to fostering local copyrightable production and innovation. Thirdly, Lithuania is in the process of harmonization of national laws with the requirements of regional (European Community) and international regulations. Although this may not be bad *per se*, this process shall not end in itself, i.e. international regulations shall not be required just to demonstrate Lithuania's conformity with international developments, it shall also extend beyond protection of foreign copyright in Lithuania. Unfortunately, the dismaying aspects are rather pronounced in Lithuanian copyright legislation – certain over-assiduity of the legislation may be noted (Lithuania has implemented part of provisions of the 1996 WIPO Copyright Treaty, without even becoming a party to it; furthermore, anti-circumvention provisions of the Criminal Code of the Republic of Lithuania, by prohibiting the anti-circumvention devices, extend beyond the requirements of this treaty); implementation (or it is more precise to say – implantation) of the international regulations is somewhat mechanical (e.g., implementation of the Directive 91/250/EEC in Lithuanian law is almost verbatim, what is not the case with any Member State of the European Community; again, anti-circumvention provisions are implemented without any exceptions or mechanism ensuring fair use).

All this regulation of computer programs in Lithuania may serve well for the enforcement of copyright but not always for creation thereof. Establishment of a proper legal regime for digital property is one of the primary conditions for successful transition to the information based economy. For developing economies, especially for the ones with young and not large information technology sector (Lithuania and most other Central and Eastern European countries), proper legal regulation may also stimulate the uncovering of national potential and development of national knowledge based industries. Unfortunately, these latter objectives are pursued inadequately or even not understood, while Lithuanian knowledge orientated industries due to their youth are deprived of any possibility to influence or resist damaging legal regulation.

Although Lithuanian software copyright caught up with the international developments in the field, the latest regulatory initiatives evidence the over-regulation and prevalence of copyright enforcement while possibilities for innovation and sequential creativity are prevented through very strong anti-circumvention regulations.

Lack of research and factual data on the development of knowledge based industries in Lithuania does not allow making any unambiguous conclusions on actual effects of existing regulatory regime. Nevertheless, overprioritizing of copyright enforcement together with other warnings raised herein may suggest that the development of knowledge based economy in Lithuania is at risk of being prevented at the very early stage. Immediate legislative action, which may include enacting broad exceptions to anti-circumvention provisions, establishing the principle of primacy of fair use against any anti-circumvention provisions or similar, shall be taken to cure this situation and to reestablish the equilibrium of interests.

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Informacinės nuosavybės teisinė apsauga: autorių teisių aspektai

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SANTRAUKA

Straipsnyje istoriniu ir lyginamuoju aspektu analizuojama informacinės nuosavybės, o visų pirma kompiuterių programų, teisinė apsauga autorių teisės normomis. Kompiuterių programos pasirinktos kaip viena iš pagrindinių ir teisinio reguliavimo prasme reprezentatyviausia informacinės nuosavybės forma.

Pirmoje dalyje pateikiama trumpa istorinė informacinės nuosavybės (t.y. visų vertybių, kurios gal būti išreikštos elektronine forma) teisinės apsaugos apžvalga, aptariamos svarbiausios tendencijos.

Antroje dalyje pateikiamas JAV ir Europos Sąjungos norminių aktų, teismų praktikos bei

mokslinių pozicijų kompiuterių programų teisinės apsaugos srityje palyginimas, pabrėžiami pasikeitimai tradiciniuose autorių teisės institutuose, taip pat pavojai, kuriuos kelia naujausios autorių teisių reglamentavimo iniciatyvos.

Trečiojoje dalyje apžvelgiamos kompiuterių programų teisinės apsaugos nuostatos Lietuvoje, pateikiamas jų palyginimas su tarptautine praktika. Straipsnyje teigiama, kad vienas iš svarbiausių kompiuterių programų ir informacinės nuosavybės reglamentavimo tikslų Lietuvoje greta autorių teisių užtikrinimo ir piratavimo prevencijos turėtų būti nacionalinės informacinės ekonomikos kūrimosi skatinimas. Deja, argumentuojama tuo, kad šis tikslas dažnai laikomas mažesnės svarbos nei autorių teisių (ypač užsienio teisių turėtojų) gynimas.

Išvadose pateikiama nuomonė, kad naujausi autorių teises reglamentuojančių teisės aktų pasikeitimai Lietuvoje, ypač nuostatos dėl techninių apsaugos priemonių reglamentavimo, yra tik mechaninės kai kurių tarptautinių nuostatų kopijos, priimtos skubotai, neatsižvelgiant į mokslines nuomones ir tarptautinę praktiką, todėl neatitinka minėtų tikslų ir kelia grėsmę jaunai informacinei ekonomikai Lietuvoje. Kaip galimus šios situacijos sprendimo būdus siūloma nustatyti papildomas teisinės apsaugos išimtis, techninių priemonių teisinės apsaugos apribojimus ir kt.

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