Legislative Council Bills Committee

Copyright (Amendment) Bill 2001

Definition of the term "computer program"

Purpose

This paper reviews the copyright laws of Australia, the United States, and the European Union and its members on the definition of "computer program" and considers the need to provide a definition for the term in the Copyright (Amendment) Bill 2001.

Report on the reform of the copyright law in Hong Kong

2. The question as to whether a definition for "computer program" should be included in our copyright legislation was considered by the Law Reform Commission of Hong Kong ("LRC") prior to enactment of the Copyright Ordinance (Cap. 528) in 1997. In the report on the reform of the copyright law in Hong Kong issued by LRC in November 1993, LRC took the view that there were shortcomings in each of the definitions considered including the definitions adopted in Australia and the United States at that time. It considered that the problem of arriving at a satisfactory definition for "computer program" was a worldwide one. It noted that the absence of a definition in, for example, the United Kingdom did not appear to result in any abuse. On balance, LRC recommended that "computer program" should not be defined.

3. In line with LRC's recommendations, there is no definition for "computer program" in the Copyright Ordinance.

Position in other jurisdictions

4. The term "computer program" is defined in certain jurisdictions, some of which are set out below for reference.

United States

5. Section 101 of Title 17 of the United States Code defines a "computer program" as "*a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result*".

Australia

6. In section 10 of the Copyright Act, a computer program is defined to mean *"a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result"*.

7. The meaning of "computer program" is further expanded in section 47AB of the same Act (for the purposes of certain provisions in the Act[1]) to include:

> "*any literary work that is:*
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> *(a) incorporated in, or associated with, a computer program; and*
>
> *(b) essential to the effective operation of a function of that computer program.*"

European Union

8. Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs was issued for the purpose of establishing legal protection of computer programs in those members states of the European Union where such protection did not exist. It also sought to ensure that protection granted in member states is based on common principles.

9. It should be noted that the Directive does not set out a definition for "computer program" binding on all member states. However, some guidance is provided by recital 7 of the Directive which is set out 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;*"

10. Paragraphs 1 and 2 of Article 1 of the Directive also provides *inter alia* as follows:

> *"For the purpose of this Directive, the term "computer program" shall include their preparatory design material."*

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[1] They include provisions on reproduction for normal use or study of computer programs, back-up copy of computer programs, reproducing computer programs to make interoperable products, reproducing computer programs to correct errors and for security testing.

"*Protection in accordance with this Directive shall apply to the expression in any form of a computer program.*"

11. The Commission of the European Communities reviewed the implementation and effects of the Directive on the member states[2] and issued a report[3] on 10 April 2000 ("Report"). It can be gathered from the Report that amongst the various issues that have been examined, the Commission noted that the vast majority of member states had not provided for a definition of computer programs. The Commission also suggested in the Report that only France and Germany had such a definition on their statute book.[4]

Germany

12. Article 69a(1) of the Germany Copyright Law[5] provides that:

"*For the purposes of this Law, computer programs shall mean programs in any form, including their design material.*"

France

13. Amongst the copyright works that are protected under Chapter II of the Code de la Propriete Intellectuelle[6] in France, the following work is included:

"*Les logiciel, y compris le materiel de conception preparatoire*"

(In English means the software including the preparatory design material.)

Need for a definition of "computer program"?

14. We do not consider appropriate to define "computer program" in the Bill for the following reasons:

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[2] They are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom.

[3] It is called the "Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs". Full text of the Report can be viewed at: http://europa.eu.int/comm/internal_market/en/intprop/docs/reporten.pdf.

[4] See paragraph 1(b) of section V of the Report.

[5] The Germany Copyright Law can be viewed at: http://www.iuscomp.org/gla/statutes/UrhG.htm#18.

[6] The Code de la Propriete Intellectuelle can be viewed at: http://www.legifrance.gouv.fr/Waspad/RechercheExperteLegi.

(a) Due to continuing rapid technological development, it may not be possible to devise a comprehensive definition for the term. On the other hand, a definition couched in general terms may not serve any particularly useful purpose. Without a definition, the meaning of the term could be automatically updated according to prevailing technology by leaving the extent of the meaning to be determined by the courts. This was also the view expressed by LRC.[7]

(b) We have not provided a definition for the term "computer program" in our copyright legislation since computer program was given express copyright protection under our copyright law starting from 1 February 1988.[8] We are not aware of any interpretation problem encountered by the Hong Kong courts.

(c) We note that a limited number of jurisdictions provide a definition of the term in their copyright legislation. However, there are many jurisdictions which have not done so. Amongst the 15 members of the European Union, only France and Germany have given some meaning to the term in their respective copyright legislation. Such meaning is not elaborate at all.[9] In both of these two member states, the meaning of the term includes preparatory design material for a computer program. In our Copyright Ordinance, the definition of "literary work" has already included the preparatory design material for a computer program[10]. It should be noted that the Report of the European Commission has in fact concluded that it does not see fit to impose a definition binding on all member states.[11]

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[7] See paragraph 13.17 of the LRC's Report on Reform of the Law relating to Copyright.
[8] The Copyright (Computer Software)(Amendment) Act 1985 was extended to Hong Kong on 1 February 1988 by Order in Council making it clear that computer programs attract copyright protection.
[9] See paragraphs 12 and 13 of this paper.
[10] See section 4(1) of the Copyright Ordinance.
[11] See paragraph 3 of section IX of the Report.