Case C-159/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

15 March 2023

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

23 February 2023

Applicant and appellant on a point of law:

Sony Computer Entertainment Europe Ltd.

Defendant and respondent on a point of law:

Datel Design and Development Ltd.

Datel Direct Ltd.

JS

Subject matter of the main proceedings

Intellectual property – Directive 2009/24/EC – Legal protection of computer programs – Scope – Extensions to the basic equipment of game consoles – Concept of 'alteration' – Software which changes the content of variables used in the running of a protected computer program

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred 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/EC 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 working memory and uses in the running of the program?

2. Is an alteration within the meaning of Article 4(1)(b) of Directive 2009/24/EC 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 working memory and uses in the running of the program?

Provisions of European Union law relied on

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, in particular Article 1(1) to (3) and Article 4(b)

Provisions of national law relied on

Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights) (UrhG), in particular Paragraphs 69a and 69c

Succinct presentation of the facts and procedure

1 The applicant, as exclusive licensee for Europe, distributes PlayStation game consoles, in particular the PlayStationPortable (PSP), which was distributed until 2014, as well as games for those consoles (‘the games, software or computer program distributed by the applicant’), including the ‘MotorStorm: Arctic Edge’ game. Datel Design and Development Ltd. (‘the first defendant’) and Datel Direct Ltd. (‘the second defendant’) are part of the Datel Holdings Group, which develops, produces and distributes software, in particular complementary products for the game consoles distributed by the applicant, including the ‘Action Replay PSP’ software and, under the name ‘Tilt FX’, an additional input device for the PSP game console, together with software. The ‘Tilt FX’ device allows the game console to be controlled by motion. The first defendant developed the ‘Action Replay PSP’ and ‘Tilt FX’ software products. The second defendant distributed them. JS (‘the third defendant’) is the ‘director’ of the second defendant.

2 The defendants' software products work exclusively with the applicant's original games. To this end, the PSP is connected to a PC and a memory stick with the defendants' software written on it is inserted into the PSP. After restarting the PSP, the user is able to bring up on the game console an additional menu item, 'Action Replay', that can be used to make changes to individual games distributed by the applicant. In the case of the 'MotorStorm: Arctic Edge' game, those changes consist, for example, of the 'Infinite Turbo' and 'All Drivers Available' options, which remove restrictions on use of the 'Turbo' ('Booster') function or activate the drivers' part otherwise released only on attainment of certain scores.

3 With the 'Tilt FX' software, the purchaser receives a sensor which, once connected to the headset port on the PSP, enables the PSP to be controlled by moving the game console. The motion sensor too is deployed by inserting a memory stick into the PSP. This brings up an additional menu item, 'Tilt FX', together with a selection of games. Here too, the 'Tilt FX' software allows the user, by depressing a combination of keys, to call up during the game an additional menu not available in the original game. Selecting the 'FX' option from that menu removes certain restrictions. Thus, for example, in the case of the 'MotorStorm: Arctic Edge' game, the 'FX' option enables unlimited use of the 'Turbo' function.

4 The applicant claims that, by using the defendants' software products complained of, users alter the software underpinning its games in a manner impermissible under copyright law. The defendants are liable for this. In the alternative, the applicant asserts claims based on competition law and, in the further alternative, relies on tort law in alleging interference with its right to establish and operate an undertaking.

5 At first instance, the applicant claimed in the end that the court should:

I. order the defendants, on pain of specified judicial enforcement measures, to desist, in the Federal Republic of Germany, from

a. offering, selling, distributing and/or having a third party offer, sell or distribute the Action Replay PSP software usable on hardware variants PSP 1000, PSP 2000, PSP 3000 and PSP Go, and deployable by the user to effect in respect of games running on the PSP game console an interference making it possible or easy to alter the games by changing the game software,

b. offering, selling, distributing and/or having a third party offer, sell or distribute the motion-sensor-linked 'Tilt FX' software usable on hardware variants PSP 1000, PSP 2000 and PSP 3000, and deployable by the user to effect in respect of games running on the PSP game console an interference making it possible or easy to alter the games by changing the game software,

c. and from offering for download software such as that described in points (a) and (b) and/or licences and/or updates for such software;

II. order the defendants to provide the applicant with information, presented in a chronologically ordered list and starting from January 2008, on the origin and channel of distribution of the products distributed to Germany, as set out in section I, which must include details of the names and addresses of the manufacturers, suppliers and other previous holders [of the products], the commercial buyers and customers, and the quantities and prices of the goods produced, delivered, received and ordered, and must be accompanied by supporting documentation (offers, invoices, delivery notes and customs documents);

III. declare that the defendants are jointly and severally liable for compensating the applicant for all of the damage which it has suffered and is still suffering as a result of the fact that the defendants are committing and have already committed the acts described in section I.

6 In the alternative, the applicant claimed that the court should prohibit the first defendant from supporting the acts referred to in the main head of claim set out in section I. In the further alternative, it claims that the defendants should be ordered to desist from making it possible or easy to circumvent measures to protect against copying the game console.

7 At first instance (LG Hamburg (Regional Court, Hamburg, Germany), judgment of 24 January 2012 – 310 O 199/10, juris), the second and third defendants were the subject of orders upholding the main heads of claim, the second defendant was the subject only of a prohibitory injunction upholding the alternative head of claim and the action was otherwise dismissed.

8 The parties appealed against that judgment. In the appeal proceedings, the applicant pursued the claims set out in sections I and II as against the second and third defendants and, in addition, claimed that the court should,

I. order the first defendant, on pain of specified judicial enforcement measures, to desist, in the Federal Republic of Germany, from

offering, selling or distributing the ‘Action Replay PSP’ software usable on the PSP 1000, 2000, 3000 and PSP GO hardware variants and the motion-sensor-linked ‘Tilt FX’ software, and deployable by the user to effect in respect of games running on the PSP game console an interference making it possible or easy to alter the games and at the same time to change the game software, or offering updates to such software for download;

II. order the first, second and third defendants to provide the applicant with information on the extent to which it has committed the acts described in section I, in particular by submitting a list setting out:

a) the names and addresses of the manufacturers, suppliers and other previous holders [of the products],

b) the delivery quantities, type designations, item numbers, delivery times and delivery prices,

c) the cost prices, including all cost factors, and the profit obtained,

d) the individual offers, including details of the quantities offered, the type designations, item numbers, offer times and offer prices,

e) the nature and extent of the advertising carried out, broken down by advertising medium, print run, time of publication and area of distribution, and

f) the names and addresses of the commercial purchasers and commercial addressees of offers;

III. declare that the first defendant is jointly and severally liable with the second and third defendants for compensating the applicant for all the damage which it has suffered and will yet suffer as a result of the fact that the first defendant is committing and has already committed the acts described in section I.

9 The appeal court (OLG Hamburg (Higher Regional Court, Hamburg, Germany) dismissed the applicant's appeal and, in response to the defendants' appeal, varied the judgment at first instance and dismissed the action in its entirety.

10 The appeal court considered the action alleging copyright infringement to be permissible but unfounded. It stated that the applicant does not have standing to assert the rights to obtain a prohibitory injunction that are provided for in the first sentence of Paragraph 97(1) and Paragraph 69c, point 2, of the Urheberrechtsgesetz (Law on Copyright) (UrhG). The use of the defendants' software does not lead to an alteration of the computer programs underpinning the applicant's original games. It is true that the applicant's games meet the conditions of definition as a computer program laid down in Paragraphs 69a of the UrhG. In accordance with Paragraphs 69a and 69c of the UrhG, however, the object of the copyright protection afforded to a computer program consists of the program data of the object code and the source code and the internal structure and organisation of the computer program, but not the running of that program as prescribed. The defendants' software does not make any change either to the programs themselves or to the copies of the programs that are uploaded to the PSP's working memory. Parallel instructions issued from it change only the variable data saved by the computer game to the working memory and thus bring about a change in the result of the game. The functional approach advocated by the applicant, whereby, irrespective of any influence exerted upon the program code or of any modified reproduction of that code, an alteration must also be assumed to be present in the case where the running of the program is interfered

with in some other way, is irreconcilable with the object of the protection afforded to a computer program as defined in Paragraph 69a of the UrhG. The running of a computer program as prescribed is not covered by the exclusive right of alteration provided for in Paragraph 69c, point 2, of the UrhG. The author of a computer program has no right derivable from Paragraphs 69a or 69c of the UrhG to be assured that his/her program will be used only in the chronological order he/she originally intended, provided that – as in the case at issue – the game, even if influenced by third parties, runs as prescribed by the program and the individual game scenarios are provided for by the game software itself.

11 By its appeal on a point of law, which the appeal court allowed it to bring and the defendants contend should be dismissed, the applicant continues to pursue the heads of claim it raised on appeal.

Succinct presentation of the reasoning in the request for a preliminary ruling

12 The success of the appeal on a point of law depends, so far as the applicant's main heads of claim are concerned, on whether the use of the defendants' software infringes the exclusive right to alter a computer program which the applicant claims to have under Paragraph 69c, point 2, of the UrhG. The application of that provision raises questions as to the interpretation of Article 1(1) to (3) and Article 4(1)(b) of Directive 2009/24/EC.

13 The applicant complains of an infringement of the exclusive right to alter a computer program which it claims to have under Paragraph 69c, point 2, of the UrhG.

14 Question 1: The issue is whether Article 1(1) and (2) of Directive 2009/24/EC is to be interpreted as meaning that there is an interference with the protection afforded to a computer program under Article 1(1) to (3) of Directive 2009/24/EC 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 working memory and uses in the running of the program.

15 According to the appeal court's findings, which are not challenged on appeal on a point of law, the effect of the defendants' software products is to leave untouched the loading of the program to the working memory but to influence the running of programs by making changes to variables which in principle form part of the game. Changes are not made to the instructions in the working memory themselves but only to the (variable) data which the game software saves to the working memory during the execution of those instructions. The program instructions from the applicant's game software likewise remain active and their internal structure untouched. It is only data in the working memory which have been generated from the game in play that are changed. Thus, the game's instructions are executed on the basis of values different from those that would

have arisen at this point in regular play. Even when the defendants' software is being used, the game always runs as prescribed by the program. However, the defendants' software overwrites certain data generated during the game (for example, use of the 'Turbo' function) and saved to the working memory with values which are also known to, and can be interpreted by, the game itself. The program is thus presented with a scenario which, although capable of arising during regular game operation and forming an integral part of the program, would not arise at the score concerned. For example, the defendants' software does not add an instruction triggering a 'crash barrier collision'; it simply influences when and how often the game executes that instruction, which likewise forms part of the original program.

16 The decisive criterion in the case at issue, therefore, is whether the content of variables which the computer program saves to and uses in the working memory of the game console still falls within the scope of the protection conferred by copyright in the computer program. It is important to bear in mind in this regard that variables of the category in question are fully provided for by the applicant's software and it is only the content of those variables that is changed by use of the defendants' software during play, inasmuch as there is a change, for example, in the timing or frequency of the execution of a command as dictated by the value of those variables. Whether such an influence on the variable data generated during play and saved to the working memory of a computer program constitutes in and of itself an interference with copyright, is unclear.

17 In accordance with the first sentence of Article 1(1) of Directive 2009/24/EC (see Paragraph 69a(4) of the UrhG), Member States are to protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention). In accordance with the second sentence of Article 1(1) of Directive 2009/24/EC and Paragraph 69(1) of the UrhG, the term 'computer program' is to include their preparatory design material. In accordance with the first sentence of Article 1(2) of Directive 2009/24/EC and the first sentence of Paragraph 69a(2) of the UrhG, the protection so granted is to apply to any form of a computer program. In accordance with the second sentence of Article 1(2) of Directive 2009/24/EC and the second sentence of Paragraph 69a(2) of the UrhG, ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright. In accordance with the first sentence of Article 1(3) of Directive 2009/24/EC and the first sentence of Paragraph 69a(3) of the UrhG, a computer program is to be protected if it is original in the sense that it is the author's own intellectual creation. In accordance with the second sentence of Article 1(3) of Directive 2009/24/EC and the second sentence of Paragraph 69a(3) of the UrhG, no other criteria are to be applied to determine its eligibility for protection.

18 Both the wording of the rules laid down in Directive 2009/24/EC, on the one hand, and the context and drafting history of that legislation, on the other, probably support an interpretation of the concept of computer program which is

informed by the source code and the object code as expressions of the work uniquely self-styled by the programmer (author), and does not therefore include [within that concept] a mere act of influencing the variable data generated in the computer's working memory during play.

19 According to the wording of the first sentence of Article 1(1) of Directive 2009/24/EC, computer programs are to be protected, by copyright, as literary works within the meaning of the Berne Convention. A computer program is initially written in the form of a 'source code' in a programming language comprehensible to humans, before being transcribed into a functional form which the computer can understand, that is to say, into the form of an 'object code', by means of a special program called the 'compiler' (see Court of Justice, judgment of 6 October 2021, *Top System*, C-13/20, EU:C:2021:811, paragraph 35). 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. The source code and the object code of a computer program are thus the forms of expression thereof and therefore benefit from the copyright protection afforded to computer programs. The object of the protection conferred by Directive 2009/24/EC 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 (Court of Justice, judgments of 22 December 2010, *Bezpečnostní softwarová asociace*, C-393/09, EU:C:2010:816, paragraphs 33 to 35, and of 6 October 2021, *Top System*, C-13/20, EU:C:2021:811, paragraph 36). The foregoing principle is also supported by recital 15 of Directive 2009/24/EC, according to which 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 rights of the author.

20 The drafting history of the EU-law provisions on the copyright protection of computer programs also appears to support the proposition that a computer program is to be understood on the basis that it is the embodiment of the result of programming. Thus, during the preparations for Directive 91/250/EEC, which was replaced by Directive 2009/24/EC, the Commission took the view that a computer program is to be understood as being a set of instructions the purpose of which is to perform a particular function or task (Commission proposal for a [Council] directive on the legal protection of computer programs, COM (88) 816 final, OJ 1989 C 91, pp 5 and 9; see also the European Commission's Decision of 24 March 2004 – COMP/C-3/37.792 – C(2004)900 final, paragraph 21 – Microsoft). Consistent with the foregoing is Section 1(i) of the Model Provisions of the World Intellectual Property Organisation (WIPO) on the Protection of Computer Software (GRUR Int. 1978, 286). This states that '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.

21 On the basis of those principles, there has been no interference with the protection conferred by Article 1 of Directive 2009/24/EC in the case at issue. The appeal

court thus found, without objection from the parties, that the software used by the applicant in the PSP fulfils the conditions of definition as a computer program, but that the defendant's software changes neither the program data of the object code and the source code nor the internal structure and organisation of the game software or of the operating system software of the games distributed by the applicant.

22 The appellant on a point of law, on the other hand, takes the view that both the wording and the drafting history of Directive 2009/24/EC support the proposition that the contents of the contested variables uploaded to the working memory fall within the scope of the protection afforded to a computer program by Article 1 of Directive 2009/24/EC. In its submission, it follows from the definition of 'computer program' given in Section 1(i) of the WIPO Model Provisions as 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 that the decisive criterion lies in the purpose of the controlling program structures. Consequently, the term 'computer program' also includes any such parts of the set of instructions as contribute towards achieving planned results or enabling certain functions. The task of the computer games at issue is to use dynamic game play to achieve an entertaining and challenging gaming experience. Dynamic gameplay is the result of the combination of program instructions and variable data that influence those instructions. How a game plays out depends on the variable data saved to the working memory. Those data are subject to constant change by the game's software, depending on how the game is progressing. The running of the program is dependent on the generation during the game of certain parameters which are used again later as the program dictates. The achievement, as a product of the dynamic running of the program, of a result specifically determined by the author (such as, for example, the player's no longer being able to deploy a 'booster') is necessarily contingent upon the variables which the author intended to be saved to the working memory for that very process. Consequently, the values stored in the working memory are not merely the random, technically unavoidable products of running of game. The program's objective – of providing a particular gaming experience – presupposes that certain variable data can be retrieved from the working memory. If, contrary to the rules of the game, other data are saved there as the program runs on, the result of the gaming experience will change and the objective pursued by the program will not be achieved.

23 In the view of the referring court, it is uncertain whether the programmer's intention, as shaped by the desired objective of designing an entertaining gameplay experience, that program instructions should be based only on variable data arising during the course of the program in accordance with the rules of the game, can be taken into account when it comes to determining the scope of the protection afforded to computer programs. Article 1(2) of Directive 2009/24/EC provides that protection in accordance with that directive is to apply to the expression in any form of a computer program (first sentence); 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 (second sentence; see also recital 11 of Directive 2009/24/EC). In international law, both Article 2 of the WIPO Copyright Treaty and Article 9(2) of the TRIPS Agreement provide that copyright protection extends to expressions but not to ideas, procedures, methods of operation or mathematical concepts as such. Neither the functionality of a computer program nor the programming language and the format of the data files used in a computer program in order to exploit certain of its functions constitute an expression of that program for the purposes of Article 1(2) of Directive 2009/24/EC. 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 (Court of Justice, judgment of 2 May 2012, *SAS Institute*, C-406/10, EU:C:2012:259, paragraphs 35 to 40). On that basis, the result of using a computer program that arises during the running of that program is probably not covered by the protection of the computer program.

24 The appellant on a point of law submits that, in accordance with the first sentence of Article 1(1) of Directive 2009/24/EC, Member States are to protect computer programs, by copyright, as literary works within the meaning of the Berne Convention. It is not only the actual textualisation of the idea, and thus the form directly given to that idea, that are protectable by copyright, but also any uniquely self-styled components and formative elements of that work that might be present, for example, in the development of the plot and the setting of scenes. So far as concerns computer programs, it follows that it is not only the machine-readable code that is protectable, but also the program concept as a uniquely self-styled component of that program, including, therefore, the variable data saved to the working memory, too.

25 That view is almost certainly untenable. Plot development and scene setting may be expressed in the program data of the object code and the source code. This is, arguably, also true of the variables, created by the developer as a category in their own right, that help determine how the plot develops. According to the findings reached by the appeal court, however, the defendants' software specifically does *not* interfere with these plot-defining program elements created by the developer, but changes only the variable content generated by the user during play. That content is not in itself, however, the expression of a self-styled creation unique to the author, but has to do with the particular way in which the program runs in response to the user's behaviour. The defendants' software does not change the development of the plot or the setting of scenes, but only the order or frequency of action replays or scene successions. The copyright protection of plot development and scene setting which the appellant on a point of law claims to exist thus itself seeks to protect the idea, progression and functionality of the program in a way which is not provided for in Directive 2009/24/EC.

26 Question 2: It also falls to be ascertained whether an alteration within the meaning of Article 4(1)(b) of Directive 2009/24/EG is 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 working memory and uses in the running of the program.

27 The appeal court – proceeding on the basis of its assessment that, in the case at issue, the defendants' software does not interfere with the object of the protection afforded to computer programs as defined in Paragraph 69a of the UrhG, because there is no modification of the object code, source code or inner structure of the applicant's computer program – took the view that an alteration within the meaning of Paragraph 69c, point 2, of the UrhG is not present. A functional approach to this question, whereby, irrespective of any influence exerted on the program code or of any modified reproduction of that code, an alteration can also be assumed to be present in the case where the running of the program is interfered with in some other way, is not compatible with the object of protection defined in Paragraph 69a of the UrhG. For, running the program as prescribed is not part of the object of the protection afforded to a computer program and is not therefore protected against the exertion of external influence by the exclusive rights provided for in Paragraph 69c of the UrhG. The functionality of a program does not benefit from the protection which the computer program enjoys and the mere use of a work – in contrast to technical rights of use – is not protected as a form of use under copyright law. The author of a computer program does not therefore have any right derivable from Paragraphs 69a and 69c of the UrhG to be assured that his/her program will be used only as he/she intended, so long as the game, even when influenced by third parties, runs as prescribed by the program and the individual game scenarios are provided for by the game itself.

28 The appellant on a point of law, on the other hand, assumes that an alteration does not presuppose any interference with the substance of the program. What matters here is that, in a particular game scenario, the program runs on the basis that only very specific variable content will be saved and subsequently retrieved, and that other variable content is to be saved only under other conditions. The use of incorrect variable content is in itself an interference.

29 Whether the assumption as to the existence of an alteration within the meaning of Article 4(1)(b) of Directive 2009/24/EC and Paragraph 69c, point 2, of the UrhG requires a change to have been made to the substance of the computer program in the form of the source code or the object code is a matter of dispute. One view is that the assumption as to the existence of an alteration requires there to have been an interference not with the substance of the computer program but only with the running of that program (OLG Hamburg (Higher Regional Court, Hamburg), GRUR-RR 2013, 13 [juris paragraph 62]). Another view is that an alteration always presupposes that influence has been exerted on the source code or the object code, and thus on the substance of the computer program (LG München I (Regional Court, Munich I) MMR 2015, 660 [juris paragraph 288 et seq.]; LG Hamburg (Regional Court, Hamburg), CR 2016, 782 [juris paragraph 28]; LG Hamburg (Regional Court, Hamburg), order of 22 July 2016 – 308 O 244/16,

BeckRS 2016, 137325 [paragraph 11]; LG Hamburg (Regional Court, Hamburg), GRUR-RR 2022, 253 [juris paragraph 52]). The referring court inclines towards the latter view. The very word ‘Umarbeitungen’ [in German] indicates – as the term ‘alteration’ in the English-language version [of the Directive] does too – that influence must be exerted on the source code or the object code and that the mere influencing of variable functional results generated in the course of the running of the program is not sufficient. The position may well be otherwise if the Court, in connection with Question 1, considers such functional results to be part of the copyright protection afforded to computer programs. In that event, a modifying interference with the computer program would be present even in the case of an act of influencing the content of variables such as that at issue in the present dispute.