

[FREE TRANSLATION]

Criminal Court Hasselt - Judgment of February 15, 1999,

Novell Inc. vs. Renaat Crommen

Docket No. 68.97.377-96

PRO JUSTITIA

A. Criminal prosecution

Defendant is the manager of a bulletin board called Point Break (BBS). Against payment of a fee users can exchange information by uploading documents on the BBS or downloading documents from the BBS.

By virtue of the Law of June 30, 1994 regarding the transposition in Belgian law of the European Directive of May 14, 1991 on the legal protection of computer software, computer software benefits from copyright protection and is equated with literary works as in the Bern Convention on the protection of literary and artistic works.

This equation is particularly important in regard of issues raised by the relationship between the software law and the copyright law.

The term "computer program" comprises all programs in any format including programs that are incorporated in hardware. Hence, protection is offered to different kinds of computer programs and, for example, not only to those that regulate the functioning of the computer, but also to the so called application programs such as word processing programs or the relevant design material.

Art. 2. paragraph 2 of the software law provides that the offered protection can only be offered to the phrasing of a computer program.

A computer program benefits from protection when it is original in the sense that it is a personal intellectual creation by the author.

To be protected, it is sufficient that a program is made by an author and is the result of a personal intellectual effort of the author and as such is not a copy of another program. [...] *In casu* , there is no need to investigate whether the program bears the stamp of the author's personality.

On the basis of Art. 3 of the software law, the employer is considered to be the owner of the patrimonial rights, unless otherwise agreed by contract or statute.

Those patrimonial rights comprise among others the permanent or temporary reproduction of a part of or the entire computer program (independent of the way and/or format – Art. 5a), the treatment or changing of a program and the reproduction of the result (Art. 5b).

Following a house search with Defendant, executed on August 27, 1996, three personal computers were seized and placed at the judicial police's disposal for further investigation.

It follows from the record established by Luc Swerts, judicial police officer, that:

1. as to network software, the three computers contain the same software: Novell Personal Netware; Defendant therefore used three times the same package.
2. on PC3 three files were found concerning a program to modify serial numbers of Novell Netware and files were found by which licenses for small networks could be altered to licenses for large networks

Defendant has therefore clearly violated the provisions of Art. 5.

According to Art. 10, paragraph 1 of the software law, copyright violation of a computer program is sanctioned by law, in accordance with the provisions of the copyright law and the penal code. [...]

As indicated above, the material element is present.

Additionally it needs to be examined whether the violation was committed with malicious or fraudulent intent.

Fraud emerges from the existence of a profit motive, which means that one wants to cash the copyright for oneself.

Whether or not any profit was actually made is irrelevant.

Because Defendant made these programs available on his BBS, by which users could download these programs on their computer in exchange for putting another program on his BBS, Defendant kept the copyrights for himself.

As a BBS manager Defendant is responsible for the content of his BBS and therefore had to verify the software uploaded by the users.

The argument that the amount of information was so large that it was impossible to perform a daily control does not relieve him from his obligations: Defendant as manager of a BBS had to take the necessary precautions in order to store the new software on a place secured from other users; an action which was technically possible for Defendant because of his long experience in this field.

Because these punishable facts are precisely denied and punished they do not have to be considered as "theft".

Defendant is therefore acquitted from this charge, for which he appeared voluntarily.

Because of the gravity and the nature of the facts, Defendant is charged with a fine of 200 BF.

Also, in line with Art. 11§1 of the software law, the confiscation is pronounced of the seized goods [...].

B. Civil claim

This court is in effect competent to examine the claim of the civil party.

Art. 13 of the software law regulates the competence of the court in case of a merely civil claim: the provisions of Art. 13§2.1° - namely plaintiff or defendant - point unmistakably to the opening of a civil procedure.

Following Art. 4 of the Law of April 17, 1878 on the introductory chapter of the Code of Criminal Procedure a civil claim can be treated at the same time and by the same court as the penal prosecution.

Now that the civil party has demonstrated that it has suffered damage from the criminal offence, which has been proven, this court is competent to consider its claim for compensation.

The civil party's claim is therefore admissible and completely legitimate for an amount of 500.000 BF [approximately \$13,000].

The argument by the defendant that the civil party's claim of 500,000 BF is unsubstantiated is denied by the damage calculations provided by the civil party in its brief.

The argument that the civil party is itself distributing illegal copies of its programs does not influence the fact that the civil party estimates the incurred damages at 500,000 BF.

The arguments of the defendant are therefore not founded.

[...]

For these reasons the court:

Declares the defendant not guilty for the charge of theft (crime according to art. 461 of the penal code).

Acquits the defendant thereof.

Declares the defendant guilty of the crime described in the introductory summon.

Sentences the defendant to a fine of 200 BF brought to 40,000 BF and, in case he fails to pay, a jail sentence of eight days

[...]

Declares the seized good confiscated

Declares the claim of the civil party admissible and legitimate.

Sentences the defendant Renaat Crommen to the payment, as damages of the sum of 500,000 BF [approximately \$13,000] to the civil party Novell Inc.

Defendant has to bear the cost of the public claim, budgeted at 1,728 BF.

[...]

Sentence February 16, 1999.