IAJ - Third study commission questionnaire

November 11th 2012 - November 15th 2012 Washington DC, USA

TOPIC 2012

The infringement of copyright and other intellectual property rights, especially through the use of the internet

Answers to the questionnaire from the Portuguese Association of Judges (ASJP)

QUESTIONNAIRE

Question 1

- Does your country have specific legislation dealing with:

1.1. The violation of copyrights?

Yes, the Copyright and Related Rights Code, of 1985 (Portuguese legal source: “Decreto-lei 63/85 de 14/03”).

1.2. Other intellectual property rights?

Yes, there is extensive legal protection regarding patents, designs, trademarks, utility models, logos and topography of semiconductor products, established by the Industrial Property Code, of 2003 (“Decreto-lei 36/2003, 5/03”), which was subject to important changes in 2008 (“Dec-lei 143/2008, 15/07”, and “Lei nº 16/2008, 1/04”). The latter transposed the Directive nº 2004/48/CE of the European Parliament and the Council of 29/04, on the enforcement of intellectual property rights and also introduced changes in Copyright and Related Rights Code.

A law from 1994 (“Decreto-lei 252/94, 20/10”), which transposed the Directive nr 91/250/CEE, of the Council, provides legal protection for computer programs with creative nature, to which it is not directly applicable the Copyright and Related Rights Code.

Another law, from 2000 (“Decreto-lei 122/2000, 4/07”), which transposed the Directive nr 96/9/CE, of the European Parliament and Council, provides criminal protection for the databases which are intellectual creations: crime of illegitimate reproduction, release, or communication of databases, punished with up to three years imprisonment or fine.

1.3. If so, could you specify to what extent?

1.3.1. - The Copyright and Related Rights Code (Portuguese acronym: “CDADC.”) concerns the protection of copyrights in literary, scientific and artistic works, for example, books,
magazines, newspapers, conferences, dramatic works, musical compositions, TV, radio, cinema or video productions, works of applied art, photography, design and architectural, urbanistic, geographic and other scientific projects or designs, if the work has a certain degree of originality or individuality.

The Related Rights concern artistic performances and the rights of video or phonogram producers and broadcasters.

In the case of Copyrights, the protection is valid for 70 years after the year of the creator's death. In the case of Related Rights, 50 years since the performance, the first phonogram, video and film or the first broadcaster's emission.

The Copyright and Related Rights contain provisions regarding civil damage claims, administrative offenses and crimes in case of infringements. The civil damage can be claimed on the criminal proceeding.

This code punishes, essentially, the following crimes:
- Usurpation, defined as unauthorized use of copyrighted works.- (“Art. 195º CDADC”)
- Counterfeiting, defined as use of copyrighted work as if it one’s work, namely the ordinary plagiarism – (“Art. 196º CDADC”);
- Violation of moral rights – (“Art. 198º CDADC”);
- Exploitation of counterfeited or usurped work, by who sells, imports, exports or makes public distribution of copyrighted work - (“Art. 199º CDADC”)
- Unauthorized neutralization of technical measures to protect copyright (“Art. 218º CDADC ”);
- Unauthorized effacement or modification of any information to the electronic management of copyrights and distribution, importation for distribution, or other actions specified by law, of altered work (“Art. 224º (“CDADC ”).

In all the above mentioned cases the criminal proceeding doesn’t depend on a complaint. The offender is subject to penalties from one month up to three years imprisonment, worsened to double in case of repeated infringement. The code also provides some preventive injunctions and complementary penalties or inhibitory measures.

1.3.2.- The Industrial Property Code (Portuguese acronym : “CPI”), also contains provisions regarding civil damages claims, administrative offenses and crimes, in case of infringements.

Differently from the CDADC.”, the Industrial Property Code only protects the inventions, esthetic creations (design) and signs used to distinguish products or enterprises in the market.

This code punishes, essentially, the following crimes:
- Violation of patent exclusivity, of the utility model or the topography of semiconductor products (“Art. 321º CPI”);
- Violation of the exclusive rights concerning new and registered designs or models – (“Art. 322º”)
- Counterfeiting, copy or illegal use of brand (“Art. 323º”)
- Sales, circulation or concealing of counterfeited products or articles (“Art. 324º”);
- Obtainment of patents, utility models, and registration of designs or models, by bad faith (mala fides) - (“Art. 326º”)
- Obtainment or conservation of registration with abuse of rights (“Art. 327º”)
- Inexistent or untruthful acts registration (“Art. 328º”)

1.3.3. – The illegal reproduction or illegal unauthorized public release and communication of computer programs protected by law (see above, 1.2) is a crime, according to the Cybercrime Law (“Art. 8º, Lei 109/2009, 15/09”) which transposed the Council Framework Decision 2005/222/JHA, of 24/02, on attacks against information systems and adapted the Portuguese law to the Cybercrime convention of the European Council.

1.3.4. - The illegal reproduction or illegal unauthorized public release and communication of databases protected by law (see above, 1.2) is a crime, according to a specific law (“Art. 8º, Lei 109/2009, 15/09”), which transposed the specific law quoted above (see 1.2.).

1.3.5. - The Law of Judiciary Organization contemplates since 2011 (“Lei 46/2011 de 24.06”) a new Intellectual Property Court, installed as of 30/03/2012, which deals with matters of Copyright and Related Rights and Industrial Property, except for criminal proceedings due to a constitutional prohibition of specific criminal courts. The new court has national competence and is based in Lisbon.

1.4. Do specific rules exist for criminal investigation?
No, specific rules for criminal investigation regarding crimes against copyright and related rights do not exist.

However, the Portuguese Cybercrime Law applies some of the procedural provisions included in The Convention on Cybercrime - Council of Europe – 2001 – (v.g. Expedited preservation of stored computer data, preservation and partial disclosure of traffic data or Real-time collection of traffic data), to investigate the crime of illegal reproduction or illegal unauthorized public release and communication of computer programs protected by law (see above, 1.2. and 1.3.3.) and other crimes committed by means of computer systems.

1.5. If not, is any such legislation under consideration?
Not to my knowledge.

Question 2

- Does your country have specific legislation dealing with:

2.1. Trademark
2.2. Patent
2.3 If so, do these laws include specific punitive measures?

Yes, see answer 1.2 and 1.3
Question 3

- Does your country have specific legislation dealing with:

3.1. The protection of copyrights based on the use of internet?

No. The Portuguese law protects copyrights based on the use of internet in the same way as other forms of publishing.

Nonetheless, Portuguese law specially regulates computer programs and punishes Unauthorized neutralization of technical measures to protect copyright ("Art. 218º CDADC") and Unauthorized effacement or modification of any information to the electronic management of copyrights and distribution, importation for distribution, or other actions specified by law, of altered work ("Art. 224º ("CDADC").

3.2. If so, could you specify and give a concrete example?

See above, 1.3.3. and 1.3.1..

Question 4

- Does your country have specialized agencies to investigate and identify the violation of copyrights and other intellectual property rights, especially through the use of the internet?

No, but in 2010 ("Portaria 882/2010 de 10/09") it was created the interministerial "Anti-Counterfeiting Group" formed by members of police forces and other governmental entities, such as ASAE (Economic and Food Security Authority) and INPI (Industrial Property National Institute).

This group has the purpose of developing conjoint actions to prevent and repress counterfeiting, namely actions to raise awareness to the public and inform them of the means available for protection and defence of industrial property rights. It also allows for the public to make an online complaint through their website, http://www.anti-contrafaccao.org.

The group also cooperates with the European Observatory on Counterfeiting and Piracy.

Question 5

5.1. To what extent does your country have jurisdiction over issues of, for instance, intellectual property theft?

According to the Copyright and Related Rights Code, competence to define the protection each work is under is exclusive to Portuguese law, however considering approved or ratified international conventions.

Work by foreign authors or foreign-origened work benefits of protection by Portuguese law should reciprocity be observed, save for contrary international convention Portugal has signed.

By the Portuguese Code of Criminal Procedure, which applies to all criminal charges, Portuguese courts have jurisdiction over crimes committed in Portugal as well as those committed out of Portugal under certain conditions, namely crimes of currency, debt claim...
or sealed values counterfeiting, and others, albeit the violation of copyrights or other intellectual property rights is not included. However, Portuguese courts have jurisdiction to judge any other crimes committed abroad if Portugal is bound by international convention.

5.2 Should the principle of universality apply for specific types of cybercrime relating to the infringement of copyright and other intellectual property rights?

When thinking about the principle of universality what comes to mind are crimes against the most important legal goods, and I’m not certain that copyright and other intellectual property rights should considered as such.

5.3 Is there a need to establish rules of international criminal law to regulate these aspects of cybercrime?

There should be rules for international cooperation between the states investigating, gathering evidence, confiscating property and extradition of suspects to the state that has jurisdiction over the cybercrime. If two states have parallel jurisdiction, there should be rules for cooperation to insure success of the proceedings.

5.4 Should there be an international authority to handle the violation of copyright and other intellectual property rights through the use of internet?

It depends on composition, aim and competences of said authority.

6.1 Did your country sign and/or ratify international agreements or treaties relating to the violation of copyright and other intellectual property rights through the use of internet?

- Paris Convention for the Protection of Industrial Property – Signature, 20.03.1883; Accession, 6.6.1884; Entry in force, 7.7.1884.
- Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods- Ratification and entry in force, 31.10.1893;
- Berne Convention for the Protection of Literary and Artistic Works (1886) – Accession, 29.03.1911; Entry in force, 29.03.1911
- UCC (Universal Copyright Convention of UNESCO) (1952) – Signature, 6t.9.1952, Date of receipt of notification, 23.7.1997

6.2 Does your country participate in any other form of international cooperation relating to this subject?

Portugal is a member of WIPO and is member of the Intergovernmental Copyright Committee (UNESCO)
As member of EU, Portugal has adopted legislation and other measures to fight the copyrights violation and cybercrime.

7.1 Is it your opinion that your country could and/or should be more active in dealing with this issue?

In the past few years, Portugal has done some efforts to implement law enforcement in the area of intellectual property infringements, including those through the use of internet, and both the public and the institutions are much more aware of the problem.

8.1 Is it your opinion that you could and/or should be more active in dealing with this issue as a judge?

Judges should be well informed about intellectual property laws and internet laws, including international conventions, agreements and organizations.

8.2 Do you have sufficient means – instruments and qualifications – to address the violation of copyright and other intellectual property rights through the use of internet?

I believe we are sufficiently prepared, and when dossiers become more specific we will study the matter further and make use of expert witnesses.

9. Is there any other comment on the subject you would like to make?

No, I have no further comments.

Lisbon, August 30th 2012