Uses of a Computer Program - within the Frames of Exclusive Rights?

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1 Introduction

Already in 1968 the Working Party for Electronic Data Processing and Law[1] was established at the Faculty of Law at Stockholm University, manifesting a very early academic approach to what would eventually become a legal discipline embracing far more than computing law. Symptomatically, the institute was renamed The Swedish Law and Informatics Institute in 1981. Still, the legal status of results of data processing and computerized uses were also in the early 1980ies, some ten years before the EU Software Directive became effective,[2] phenomena of vague contours. There were intensive discussions in Sweden by then, as in most comparable countries around the World, about the legal nature of e.g. a computer program as such and, not least, copyright problems relating to storage, retrieval and creation of works etc. by means of a computer.[3] As regards storage and retrieval of works by means of computer technology the considerations were to a large extent based on the 1982 WIPO/UNESCO Recommendation on those issues. Hence, it was discussed, by then really not in a firm and plain terrain, how the exclusive rights under copyright law would apply in those cases concerned, when works as such, or abstracts or single information items are stored in a computer system and thereby applied.

There used to be much focus on "input" and "output" actions as definitions of what could be copyright relevant acts by use of a computer program. However, most reports and opinions at the time subscribed to the internationally accepted view that input of protected material into a computer amounts to *reproduction* under copyright law. As regards output of protected material from a computer, including such use of a data base itself, it was normally stated that such output is an act of reproduction of the work in case physical copies were produced, and, by standards of Swedish copyright law, as a type of *public performance* or *public display* in cases where the output is shown on a screen which is made available to the public under the criteria of the Copyright Act in this respect. But, still, the concept of e.g. "publication" was a very blurred phenomenon, indeed just as more generally the dissemination of a computer program itself, to be dealt with over and over again many years later in e.g. the Software Directive, the Infosoc Directive[4] and by numerous judgements by the CJEU.

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1 In Swedish *Arbetsgruppen för ADB och Juridik*.

2 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. Directive 91/250/EEC has been repealed and replaced by Directive 2009/24/EC.

3 *See* e.g. SOU 1985:51, *Upphovsrätt och datorteknik*, Delbetänkande 3. In its report the Committe unequivocally takes the view that computer programs are to be considered as a type of literary works under the Copyright Act and enjoy protection under that Act provided that they are the result of an act of intellectual creativity. This should be clarified by inserting in the Act a mention of such programs as a category of protected works (what also happened some years later). The protection applies to the program regardless of the material support in which it is embodied and regardless of its character of source code or object code.

4 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

Computer programs as such were eventually to be handled on the basis of "ordinary" exclusive rights of an author, when exclusive uses by law were at stake, basically offering no special elements of such exclusivity to owners of the copyright vested in a program. However, legislators (all over the World) had difficulties to place e.g "use", "running", "testing" or mere ("transient") "storage" of a computer program on the roadmap of copyright law. Normally it was assumed, though, that running of a program at least produced some "temporary" copies in the work memory of the computer used, thus an act of reproduction was accomplished.

Of course the Software Directive, and not least the Infosoc Directive, cleared out some of those uncertainties, but a bit surprising, several basic issues still seem to ask for an answer. A recent example of that is given by a decision of a Swedish Appeal Court, in which it finds *storage* of a program in a licensee's computer system, after the expiry of the actual license valid in the case, to be a copyright relevant "use" of the program, although it was not actually disposed, namely as "*passive reproduction*" within the frames of the exclusive reproduction right of the holder of copyright in the program.[5]

This text will explore how such "uses" of a computer program, in particular "passive uses", fits into the normative system of copyright in a contemporary context, in light of EU directives, decisions by the CJEU and other relevant legal sources of today.

2 Reproduction Rights in Swedish Copyright Law

Article 2 of the Swedish Copyright Act,[6] SwCA, states basic and pillar norms on those exclusive rights SwCA affords a copyright owner in a protected literary or artistic work, namely to *reproduce* ("make copies") a work and to *make it available to the public*. Obviously, this concerns two totally different types of uses; what is to be understood by reproduction is clarified in article 2, second paragraph, whereas communication to the public is dealt with in article 2, third paragraph, where the latter in its turn has been split up in four specific forms of uses.[7]

Article 2 first paragraph SwCA also indicates - though as a matter of principle not a very adequate drafting of the statutory text - that those two basic forms of

5 *See* Hovrätten över Skåne och Blekinge, judgement on 2017-03-09, case 74-16, Malmö Stad v. Alfa Kommun & landsting AB. Both parties asked for a leave for appeal at the Supreme Court of Sweden, and there is by now a review permit at hand; Högsta domstolens beslut i protokoll 2017-09-25, Mål nr T 1738-17.

6 Lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk.

7 Article 2 SwCA, 1 – 2 paragraphs read**:** "Subject to the limitations prescribed hereinafter, copyright shall include the exclusive right to exploit the work by making copies of it and by making it available to the public, be it in the original or an altered manner, in translation or adaption, in another literary or artistic form, or in another technical manner.

As the making of copies shall be considered any direct or indirect, temporary or permanent preparation of copies of the work, regardless of the form or through which method this is carried out and regardless of whether it concerns the work in whole or in part."

uses can be applied also if the work is used "in the original or an altered manner, in translation or adaption, in another literary or artistic form, or in another technical manner". What was just quoted is actually defining what may fall within the object protected by copyright, what is described in article 1 SwCA, but says nothing about the nature of those exclusive rights afforded the copyright holders.[8]

The right to make copies, as it was phrased already when the SwCA became active in 1960, in stead of the expression "amplification" ("mångfaldigande") which was considered at the time, had a clear focus on making physical copies, even if just a single copy was made.[9] Also, it had been fully clear since quite long that the making of copies could concern any type of object in which the protected work had been materialized or fixated, thus irrelevant by what kind of technical measures it had been accomplished.[10] Be it a punch card, a recorded tape, a CD-ROM, a computer's hard disc, a USB stick or, eventually, a smartphone; those formats would all fall within the frames of the reproduction right, and did so actually as an outflow of that technological neutrality that as a matter of principle was accepted in copyright law, thus able to encompass eventually upcoming means and facilities for reproduction and storing.[11]

When the Infosoc Directive was implemented in Sweden,[12] The SwCA was amended in 2005 by e.g. a new second paragraph which was added to Article 2, defining the content and impact, or concept, of reproduction, as shown in note 7. Hereby, the making of copies included any direct or indirect, temporary or permanent preparation of copies of the work, regardless of the form or through which method this is carried out and regardless of whether it concerns the work in whole or in part. This was a true and substantial incorporation of Article 2 of the Infosoc Directive.[13] This wide definition of the reproduction right meant,

8 *Cf*. SOU 2011:32, En ny upphovsrättslag, p. 144.

9 *Cf*. prop. 1960:17 p. 60.

10 *Cf*. SOU 1985:51 p. 93; copying of the flowcharts of a computer program and to transfer it to a floppy disc or a tape etc. was exemplifying copying within the frames of the exclusive reproduction right of the holders' of copyright.

11 *Cf*. e.g. NJA 2016 s 490, Copyswede, concerning media players suitable to private copying.

12 Europaparlamentets och rådets direktiv 2001/29/EG av den 22 maj 2001 om harmonisering av vissa aspekter av upphovsrätt och närstående rättigheter i informationssamhället**.**

13 Article 2 Infosoc Directive:

"Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

(b) for performers, of fixations of their performances;

(c) for phonogram producers, of their phonograms;

(d) for the producers of the first fixations of films, in respect of the original and copies of their films;

from a Swedish perspective, and as much as may be of interest here, that also "temporary" copies was an element in this right.[14] Earlier on had sometimes been claimed that "nonindependent" (digital) fixations should not be a part of the reproduction right, such as fixations in a computer disappearing immediately when the computer is shut off.[15] As Article 5.1 of the Infosoc Directive offers a *limitation* to the reproduction right, as temporary copies are concerned, it is thereby confirmed that temporary copies must basically be comprised by the exclusive right to reproduction according to Article 2 of the Infosoc Directive.[16]

In sum, article 2 second paragraph SwCA, emerged on 1 July 2005 as a *clarification* to the first paragraph of that article, thus both paragraphs by and large can be said to overlap each other.[17]

3 Computer Programs in Focus

A computer program is seen as a kind of a literary work, expressly mentioned in article 1 SwCA. This happened already in 1989, when computer programs were simply enumerated among those potential works being listed in that statutory text, mainly as a clarifying addition to what was already in the SwCA.[18] As already said, computer programs were indeed protected by copyright even before the 1989 amendment, classified as being literal by their very nature, but this was by then expressly stated. This was also necessary as seen from an international legal perspective.[19]

(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite."

14 That reproduction could occur wholly or in part was not a novelty to SwCA. Further on, in the decision of the CJEU in C5/08, ECLI:EU:C:2009:465, Infopaq, it had merely confirmed, at para. 51, that "… an act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29, if the elements thus reproduced are the expression of the intellectual creation of their author…"

15 *Cf*. The preparatory works to the implementation of the Directive 96/9/EC of 11 March 1996 on the legal protection of databases; the Government stated that reproduction (making copies) should not encompass uses in a digital format, namely as a "nonindependent" fixation that goes away when an activity with a computer ceases; *see* prop. 1996/97:111 p. 32.

16 *See* prop. 2004/05:110 p. 54.

17 In article 2 first paragraph SwCA is mentioned making copies "in another technical manner"; reasonably, this means the same as "by any means and in any form" as expressed in Article 2 of the Infosoc Directive and article 2 second paragraph of the SwCA. An express right of *alterations*, as expressed in the Software Directive and the Database Directive, does not exist in the Infosoc Directive, but the lastly mentioned directive distinguishes an exclusive right of reproduction "by any means and in any form". *Cf*. prop. 2004/05:110 p. 55.

18 The amendment was built mainly on the preparatory work mentioned in note 3 above, SOU 1985:51, datorprogram och datorteknik, *see* preferably p. 85 et seq.

19 *See* prop. 1988/89:85 p. 10 et seq.

As *preparatory design material* to a computer program is concerned it is covered since 1993 by article 1 last paragraph SwCA, stating that "what is prescribed in this Act concerning computer programs shall mutatis mutandis apply also to preparatory design material for computer programs," as a follow up to the implementation of the Software Directive. Preparatory design material is indeed afforded the same copyright protection as the actual program it adheres to, provided it is being found original. Such material may be descriptions of a program as well as guidebooks or instructive leaflets.[20] A computer program is thus a copyright notion of its own and preparatory design material is comprised by that notion.[21]

Exclusive copyright uses, as expressed by the SwCA, are valid as much for computer programs as for any other kind of literary or artistic work protected by SwCA. This has nothing to do with the fact that *limitations* to that exclusivity do exist just as certain and specific norms for uses of computer programs are valid by law (as also for other types of protected works), mainly expressed in articles 26 g) and 26 h) of the SwCA. But those limitations have no bearing on the actual design of the basic norms of copyright law, e.g. the meaning of the reproduction right. When the Software Directive was implemented in Swedish law, it was laconically noted that Article 2 of the directive by and large was built on the same norms for reproduction as already at hand in article 2 of the SwCA, whereas there was no need for a special reproduction norm for computer programs.[22]

4 Making Copies According to the Software Directive

The Software Directive of 1991, as codified in 2009, holds several attributions to those exclusive rights afforded to the author of a computer program, or to its "rightholder", the expression used in the directive in connection to the articles on the construction and content of the exclusive rights. Of interest here is mainly Article 4 a) of the Directive, defining the reproduction right as:

> 2 (a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole; in so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorisation by the rightholder.

But we must observe that the word "reproduction" in the translation of the Directive to Swedish came out (in 1991 as well as in the 2009 edition) as "återgivning", what would rather be "public display" or "rendition" in English, or merely (public) *use* of a work within the frames of copyright.[23] The phrasing

20 *See* Article 1.1 Software Directive.

21 *Cf.* prop. 1992/03:48 p. 112.

22 *See* prop. 1992/93:48 p. 120.

23 In available (semi-) official English translations of the SwCA, the word "återge" is mentioned as "use in public" or merely "use".

in Swedish of the Software Directive hereby offered a substantially different terminology relative to the English or French versions of the same phenomenon, those latter adhering to a strict use of the word reproduction, i.e. making copies.[24] Actually, the same is valid for virtually all national translations of the Software Directive in the Member States; they all use the word reproduction in Article 4 a).[25]

As said, the word ”återgivning” in the SwCA has a much wider meaning, hence a wider field of application than that of making copies. The just quoted Swedish word is found in the second chapter of SwCA, where all the limitations to exclusive copyright uses are collected, and is there utilized when someone entitled to apply a limitation may do that in any manner capable of exposing the protected work in a way relevant from a perspective of Copyright Law, be it by performance, display, broadcast or a print-out etc.

By practical application of different specific exceptions found in the SwCA, this phrasing may surely cause difficulties, not least as Article 26 h) SwCA is concerned. It says that the use of the code of a computer program or a translation of its code is permitted if those acts are *required* in order to obtain interoperability between the program and another program, i.e. to understand its interface.

Some years ago the then working governmental committee to revise the SwCA suggested that the word “återgivning” should be expressly defined in the Act, namely by these words (in my translation): “The work is displayed when copies of it are made or when it is made available, irrelevant by what manner or

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24 *Cf.* Article 4 in French:

Article 4

Actes soumis à restrictions

1. Sous réserve des articles 5 et 6, les droits exclusifs du titulaire au sens de l'article 2 comportent le droit de faire ou d'autoriser:

a) la **reproduction** permanente ou provisoire d'un programme d'ordinateur, en tout ou en partie, par quelque moyen et sous quelque forme que ce soit; lorsque le chargement, l'affichage, l'exécution, la transmission ou le stockage d'un programme d'ordinateur nécessitent une telle reproduction du programme, ces actes de reproduction sont soumis à l'autorisation du titulaire du droit;

b) la traduction, l'adaptation, l'arrangement et toute autre transformation d'un programme d'ordinateur et la reproduction du programme en résultant, sans préjudice des droits de la personne qui transforme le programme d'ordinateur;

c) toute forme de distribution, y compris la location, au public de l'original ou de copies d'un programme d'ordinateur.

2. La première vente d'une copie d'un programme d'ordinateur dans la Communauté par le titulaire du droit ou avec son consentement épuise le droit de distribution de cette copie dans la Communauté, à l'exception du droit de contrôler des locations ultérieures du programme d'ordinateur ou d'une copie de celui-ci.

25 At a closer look, it is merely the Swedish text and the version in Swedish (identical to that of Sweden) of the Finish bilingual (Finish Ugrian and Swedish) text that use the word ”återge”. E.g. the Danish text uses the word ”reproduction”.

technique."[26] The definition was not meant to cause a material change to Swedish Copyright Law (the committee didn't have a mandate for that). But, obviously, this definition, not yet worked into the SwCA, would be far too wide to be fully applied within the frames of Article 26 h) of the SwCA. Naturally, it cannot be "required" to make the code of a computer program available to the public in order to understand its interface. What you may need is a new copy of it.

Irrelevant of the ill phrased Swedish translation of the Software Directive there simply are no reasons for interpreting it as meaning something else than what is found in the e.g. the English version, namely that Article 4 a) concerns reproduction. It is possible that the Swedish translator at the time of the early 1990-ies was confused by those phenomena mentioned in that article, such as *loading*, *displaying*, *running*, *transmission* and *storage*, and what impact they could have on concepts of copyright uses. But we must observe here that the Software Directive does really not say that loading, displaying, running, transmission or even storage of a computer program, per se means reproduction of the program. The Directive merely says that "in so far as" loading, displaying, running, transmission or storage of the computer program "necessitate … reproduction", it falls under that exclusive right of the rightholder. In sum, the Software Directive is oriented to a technically neutral notion of reproduction, meaning making copies of a protected computer program.[27]

5 Conclusions about "Passive Reproduction" of a Computer Program

As the exclusive rights of an author consist of acts of reproduction and making available to the public, "running" of a computer program – typically using the instructions of a program to the machinery of a computer – fall as a matter of principle aside of those exclusive rights, as much as reading a book or watching a film. It doesn't really exist any kind of protection specifically for the running of a program.[28] Therefore, for such a maneuver there is no need for a license from a rightholder.[29] However, normal running of a program probably causes temporary copies to be produced in the computer's RAM or work memory, thus causing a use of the reproduction right.[30] It is against this backdrop we must look

26 "Verket återges när exemplar framställs av det eller när det tillgängliggörs, oavsett tillvägagångssätt eller teknik." *See* SOU 2011:32, *En ny upphovsrättslag*, p. 170 et seq.

27 *Cf.* Strowel, *Reconstructing the Reproduction and the Communication to the Public Rights, in Copyrights Reconstructed*, ed. Bernt Hugenholtz, 2018, p. 214 et seq.

28 Already in late 1980s it was considered if a complimentary protection to copyright was needed for mere running of a computer program. In the preparatory works to amendments to the SwCA such complementary protection was denied, and was then called "heterologous" to the system for copyright protection. *See* SOU 1985:51;prop. 1988/99:85, p. 12 et seq.

29 *See* Rosén, *Upphovsrättens avtal*, third edition, 2006, p. s 273 et seq.

30 *Cf.* Olsson/Rosén, *Upphovsrättslagstiftningen. En kommentar*, fourth ed. 2016, p. 70.

upon the limitations in Articles 26 g) and 26 h) SwCA, both directly implementing elements of the Infosoc Directive.

The two just mentioned articles are, as already said, limitations to copyright uses, and more specifically to the exclusive reproduction right, which is typically used when anyone who has acquired a right to use a program may (i) make copies necessary for the running of the program, (ii) make back-up copies, (iii) make adaptions and corrections, (iv) ascertain the ideas and principles which lie behind various details of the program and (v) reproduce the code in order to obtain interoperability.

If any of those acts could be performed without the making of a new copy of the program – this is valid in particular for (iv) and (v) – they would entirely fall aside of the exclusive rights of the copyright holder and then there would be no need apply any of the limitation described in Articles 26 g) and 26 h) SwCA, as they would simply not be applicable. As said, there isn't any copyright protection for the running as such of a computer program.

Of course, the making of copies for the running of the program (if necessary) and back-up copies fall within the frames of copyright proper, and thereby, as a matter of principle, needs an accept from the rightholder. But the exceptions following from Articles 26 g) and 26 h) SwCA are construed to support a user who actually has lawfully gained a right to use the program, in practice this would be a licensee, who would therefore be exempted from seeking permission for certain types of uses.[31]

The exception concerning a right to make a copy needed for the running of the program according to Article 26 g) first paragraph SwCA, as well as the one following from the third paragraph of that article – meaning that those copies just mentioned may not be used for *other purposes* and may not be used when the right to exploit the program has *expired* – are dispositive rights; by contract they may be regulated in other ways. In other respects, the norms of Articles 26 g) and h) are of a mandatory nature to the benefit of the user of a computer program, as much as contractual stipulations which limit the right of the user are null and void, what is expressly said in the 6th paragraph of Article 26 g) and third paragraph of Article 26 h) respectively.

We may thus conclude that those exclusive rights of a copyright nature are construed as specified types of uses of a protected work, i.e. to actively dispose over certain forms of uses. The stress of the phrasing of the statutory text is on the "making" of copies or to "reproduce" or to "make" available to the public.[32] The activity to e.g. make copies may obviously be very instantaneous, what doesn't negate that the use in question results in a copy (or several) in the meaning of SwCA. Certain passivity or failure to act may be of relevance in this context, e.g. when a running machine for reproduction is not turned off in due

31 We may note that reproduction of a computer program for private purposes also falls within the exclusive right; *see* Article 12 second paragraph 2 point SwCA.

32 *Cf*. note 7 supra.

time, resulting in reproduction of illicit copies.[33] But a factual use of relevance from a copyright perspective may be manifest by a single copy.[34]

In sum, nothing in the SwCA indicate that ”passive” storage or custody over a copy would fall within the frames of those *uses* held exclusively for the copyright holder – at least, that would not fall within the frames of *reproduction*.[35]

6 Constraint to Erase a Copy?

Against the backdrop of what has been said above it may be a given thing that exclusive copyright use, as far as interests us here, means reproduction of a computer program and that anyone licensed by the copyright holder may wholly or in part, according to Article 27 SwCA, based on a contractual agreement take the legal position of the rightholder in that sense and, further, will have a right to apply those exceptions concerning e.g. running copies and back-up copies. It is just as clear that a license limited in time does not allow the licensee to use the program or to invoke the exceptions after the expiry of the license.

But from this does not follow an obligation of the former licensee to erase or obliterate those copies of a computer program, or to resend them to the licensor, which have been reproduced/used when the license was valid, unless this is a separately negotiated obligation of the licensee.[36] Quite naturally, property emanating from an infringing act or a violation of copyright according to Article 53 SwCA, may be surrendered to the rightowner or be destroyed or altered as decided by a Court, all according to Article 55 SwCA. On the other hand, there are some statutory norms, typically in public law or tax law, expressing obligations for a user to keep or store also computer programs as well as computerized material, also after the expiry of a software license.

A matter of minor interest here are those norms, following from amendments to the SwCA in 1989, saying that those copies made by a licensed user based on an exception, such as a back-up copy, cannot be used for “other purposes” and

33 *Cf.* NJA 1996 s. 74, BBS. The Supreme Court of Sweden noted that Article 2 first paragraph SwCA concerned some forms of *action* or *activity* of a perpetrator, what the principle of legality in penal law demanded under those circumstances of the case at hand. The Supreme Court also stated that transmissions to a BBS meant copying (of certain computer programs of relevance in the case), called ”upload”, and that the same happened when a copy was collected from the BBS and stored on a computer connected to the BBS, called ”download”.

34 *Cf.* CJEU in C-419/13, ECLI:EU:C:2015:27, Allposter. Color pigments from a photographic poster was transferred in a technical and chemical way to the surface of a canvas, so that the photo was exposed on the latter medium, while the poster thereby was destroyed. CJEU found that a *new copy* was produced on the canvas, what wasn’t covered by the license to reproduce posters.

35 Possibly, custody of a copy of a computer program could be deemed e.g. as *preparation* of a copyright use eventually or some sort of *adding to a crime* concerning another type of use, such as (illegal) *distribution*.

36 An obligation to erase a copy of a computer program after the expiry of a right to use it was once considered in Swedish copyright law, *see* SOU 1985:51, but was rejected by the Government, *see* prop. 1988/99:85, p. 20 et seq.

may not be used when the right to exploit the computer program has expired.[37] But those norms have no bearing on lawfully made copies and may obviously not form a basis for an obligation for a formerly licensed user to actively erase copies.

Neither can some sort of support for an obligation of a former licensee to actively erase a copy be found in the Software Directive. In an intensively debated decision by the CJEU, often called the UsedSoft case, C-128/11, offers far from a general norm on extinction of copies no longer under a license.[38] In a very complex scenario, built up by the CJEU, actually with no support from the Software Directive or the Infosoc Directive, though related to in the decision, concerned whether the *distribution rights* to a computer program disseminated via the internet was consummated when the originally licensed user sells program copies, what very surprisingly was found to be the case, provided that the original user actively made his own copies "unusable" at the time of the further sale.

In a very special situation, where the CJEU actually reduces the basic exclusive copyright of the rightholder, the Court in the unsolved decision wanted to some extent compensate for that by issuing an obligation for a first licensee to make his copies unusable after the further sale. We may conclude, that this decision has very little, or nothing, to say about the question of a more general nature, namely if copies of a computer program must be destroyed after the expiry of a license. The answer from copyright proper must be no!

37 *See* Article 40 a) SwCA, in force as of 1 July 1989, eventually substituted for Article 26 g) third paragraph SwCA.

38 *See* C-128/11, ECLI:EU:C:2012:407 , UsedSoft GmbH v. Oracle International Corp.

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