

# Software Protection

# Intellectual Property Law

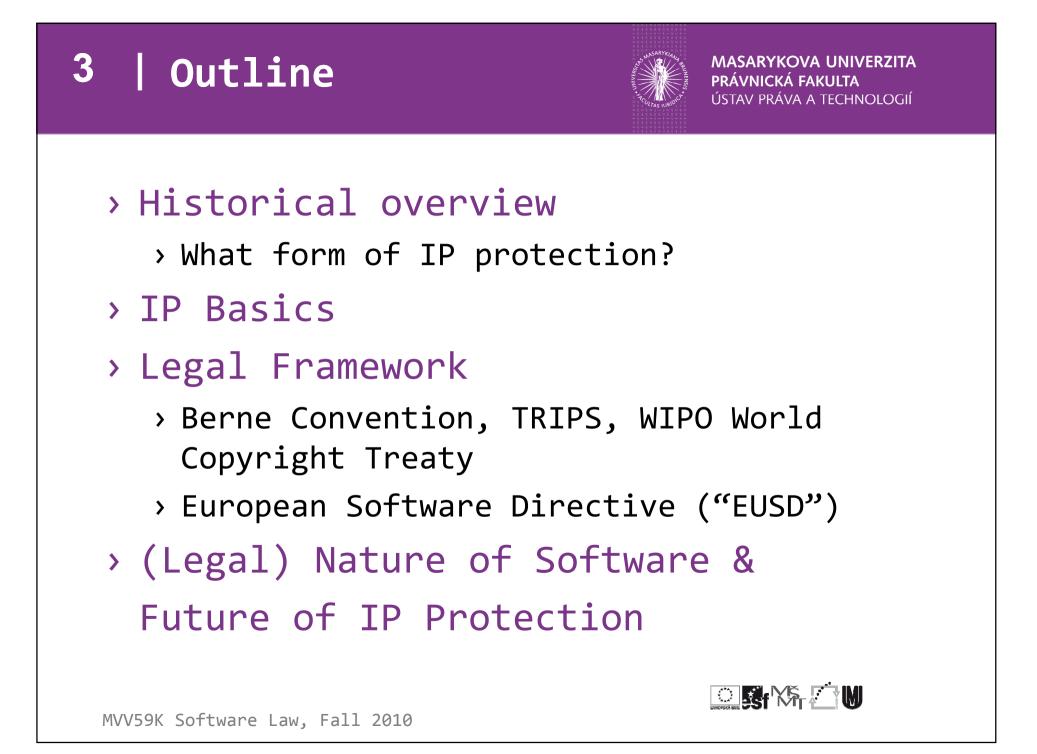
MVV59K Software Law Mgr. Matěj Myška

Tento projekt je spolufinancován Evropským sociálním fondem a státním rozpečtem České republiky.



INVESTICE DO ROZVOJE VZDĚLÁVÁNÍ









- > 1960s software as accessory
- > 1969 Unbundling IBM 360-series
- > 1970s and 1980s the Great Debate USA - Commission on New Technological Uses of Copyrighted Works (CONTU)
  - > Contract clauses
  - > Trade secret
  - > Patent Law
  - > Copyright Law



# 5 | History II



MASARYKOVA UNIVERZITA PRÁVNICKÁ FAKULTA ÚSTAV PRÁVA A TECHNOLOGIÍ

- > 1991 EU Software Directive
- > 1996 WIPO World Copyright Treaty
- > 2002 Proposal for Directive on the protection by patents of computerimplemented inventions



# 6 | IP Basics



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Copyright Law

- > Idea-Expression
   dichotomy
- > Sufficient level of creativity or originality (!)
- > Original works of authorship 70y

#### Patent Law

- > Definded by
  claims
- > new, non-obvious, and useful or industrially applicable implementation (inovative step) of ideas

> 20y



# <sup>7</sup> | The Difference



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- Droit d'auteur
  - Civil Law
  - Author

- Copyright
  - Common law
  - Rightholder



# 8 | Legal framework I



MASARYKOVA UNIVERZITA PRÁVNICKÁ FAKULTA ÚSTAV PRÁVA A TECHNOLOGIÍ

#### > Berne Convention

- > Art 2 Definitions literary works
- > Art 9 Right of Reproduction
- > The Agreement on Trade-related Aspects of Intellectual Property Rights ("TRIPS")
  - > Article 10 -
    - Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention.



#### Legal framework II 9 SARYKOVA UNIVERZITA PRÁVNICKÁ FAKULTA ÚSTAV PRÁVA A TECHNOLOGIÍ > WIPO World Copyright Treaty (Art 4) > ...are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression. > Directive on the legal protection of computer programs ("EUSD") 2009/24/EC







#### > Computer programs as literary works



#### **11** | European Patent Convention



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#### > Art 52

- > The following in particular shall not be regarded as patentable inventions:
  - > (c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;







#### > Overview

- > Art 1 Object of protection
- > Art 2 Authorship
- > Art 3 Beneficiaries of protection
- > Art 4 Restricted acts
- > Art 5 Exceptions
- > Art 6 Decompilation
- > Art 7 Special measures of protection
- > Term of protection



### 13 | EUSD Art 1



MASARYKOVA UNIVERZITA PRÁVNICKÁ FAKULTA ÚSTAV PRÁVA A TECHNOLOGIÍ

# > (1)

- > In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as Literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works.
- For the purposes of this Directive, the term "computer programs" shall include their preparatory design material.



## 14 | EUSD Art 1



MASARYKOVA UNIVERZITA PRÁVNICKÁ FAKULTA ÚSTAV PRÁVA A TECHNOLOGIÍ

# › (2)

- > Protection in accordance with this Directive shall apply to the expression in any form of a computer program.
- > Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.



### 15 | EU Art 1



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# > (3)

- A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation.
- > No other criteria shall be applied to determine its eligibility for protection.



#### 16 | Originality SARYKOVA UNIVERZITA PRÁVNICKÁ FAKULTA ÚSTAV PRÁVA A TECHNOLOGIÍ > Eligibility criterion for copyright protection > skill, labour, and judgment doctrine (UK) > sweat of the brow (US) > After Feist Publications, Inc., v. Rural *Telephone Service Co.*, 499 U.S. 340 (1991) • a program may not be a copy of another program, and it must be possible to demonstrate a minimum degree of creativity > Author's mark (France)

> Kleine Münze (Germany)







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### 18 | EUSD Art 2,3



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#### > Authorship

- 1. natural person, group of natural
   persons, legal person designated as
   the rightholder, collective works
- 2. group of natural persons jointly
- 3. employee employer
- > Beneficiaries







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- > (1) Exclusive acts (rights)
  - > Reproduction (a)
  - > Integrity (b)
  - > Distribution (c)
- > (2) First-sale doctrine
  > Within EU only







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# 22 | EUSD Art 5 (1)



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#### > Intended use

> In the absence of specific contractual provisions...(reproduction+alternation)... shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.



## 23 | EUSD Art 5 (2)



MASARYKOVA UNIVERZITA PRÁVNICKÁ FAKULTA ÚSTAV PRÁVA A TECHNOLOGIÍ

#### > Back-up copies

The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use.

#### > EUCD Art 5 (2)(b)

> made by a natural person for private use



# 24 | EUSD Art 5 (3)



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#### > Interpretation

> The person having a right to use a copy of a computer program shall be entitled, without the authorisation of the rightholder, to observe, study or test the functioning of the program in order to determine the *ideas* and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.







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### 26 | EUSD Art 6



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#### > Decompilation

- > Interoperability
- > Only:
  - > Independent program
  - > Person having a right to use a copy of a program
  - > No necessary information available
- > Gained result
  - > Any other purpose
  - > Three-step test
    - > in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with a normal exploitation of the computer program







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#### > Special measures of protection

- > Infringing copies
- > Technical protection measures (measures)
  - Act of circumvention not illegal
  - Any act of putting into circulation, or the possession for **commercial purposes** of, any means the **sole intended** purpose of which is to facilitate the unauthorised removal or circumvention of any technical device which may have been applied to protect a computer program.



Právo elektronických komunikací





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# **30 | Term of protection**



MASARYKOVA UNIVERZITA PRÁVNICKÁ FAKULTA ÚSTAV PRÁVA A TECHNOLOGIÍ

#### > WAS 50y

- > Council Directive 93/98/EEC harmonisig the term of protection of copyright and certain related rights
- > NOW 70y post mortem auctoris
- > Justification X life-span
- > New versions? derivative works



# 31 | The Big Questions

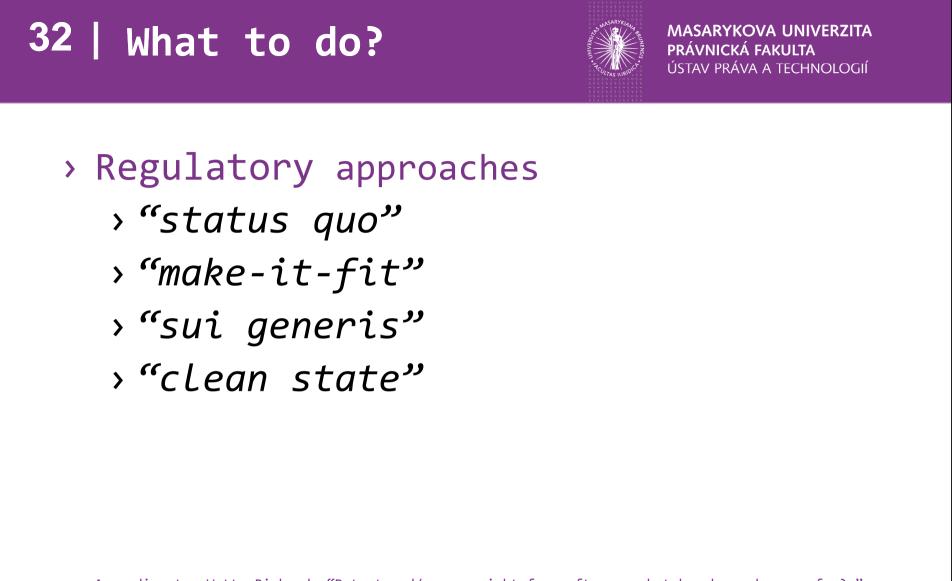


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#### > What to protect and how

- > Literal copying of the source code
- > Non-literal copying (?)
- > Pluralistic nature of software
  - > Textual
  - > Functional
- > Structure, sequence and organization





According to: Watt, Richard. "Patent and/or copyright for software: what has been done so far?." Review Literature And Arts Of The Americas 4, no. 1 (2007): 3-14.



# <sup>33</sup> | SAS v WPL



MASARYKOVA UNIVERZITA PRÁVNICKÁ FAKULTA ÚSTAV PRÁVA A TECHNOLOGIÍ

- "Court finds World Programming Ltd. Infringed on SAS Copyrights"
- "World Programming secures High *Court victory* against SAS David slays Goliath as 30 year monopoly is ended."





# Thank you for your attention!

# matej.myska@law.muni.cz

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