

# EULA Drafting

Tento projekt je spolu



EVROPSKÁ UNIE

INVESTICE



# 2 | Matěj Myška



MASARYKOVA UNIVERZITA  
PRÁVNICKÁ FAKULTA  
ÚSTAV PRÁVA A TECHNOLOGIÍ

- Institute of Law and Technology
- Research fellow
- Office hours:  
Mon 1.30 – 15:00 a.m.
- Contact:
  - Room no. s61,
  - Tel. 54949 4751
- [matej.myska@law.muni.cz](mailto:matej.myska@law.muni.cz)



# 3 | Outline

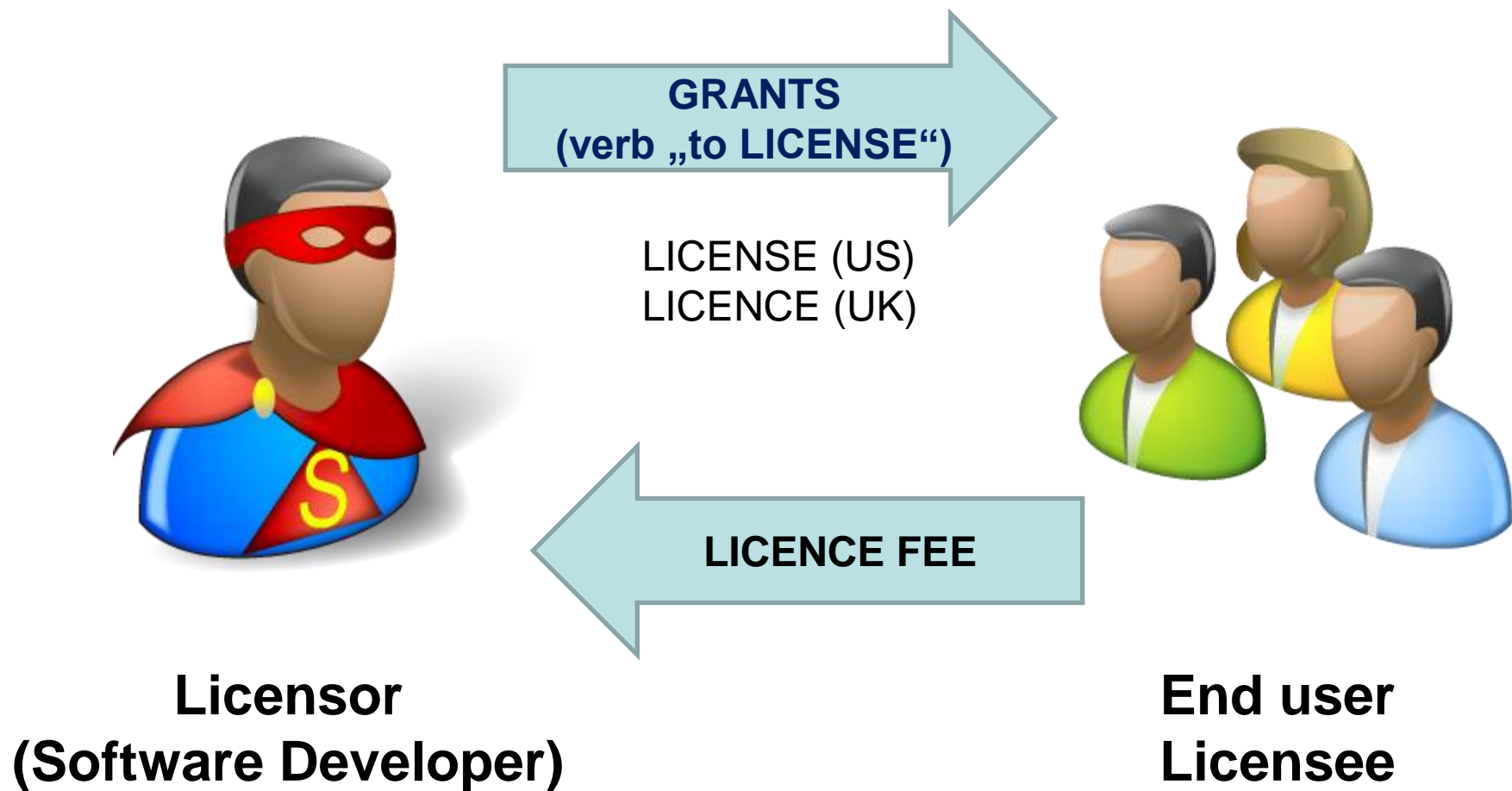


- **Used software**
- **EULA – putting it together**



# End User Licence Agreement

# 5 | Terminology



# 6 | Contract formation



# 7 | Recap



- What types of “contracting techniques” you remember?

**Browse-wrap**

**Shrink-wrap**

**Click-wrap**

# 8 | Sec. 46 CCA



- (5) *An offer to enter into an agreement is involved even in the cases where the declaration of will is addressed to an **indeterminate circle of persons**.*
- (6) *With respect to the content of the proposal or to the practice introduced between the parties, or with respect to the generally established practice, the person to whom the offer to enter into an agreement is addressed may express his consent with the offer by carrying out an act without notifying it to the offering party, such an act being based on the offered agreement including, but not limited to the provision or acceptance of a discharge. If such is the case, the **acceptance** of the offer shall become **effective at the moment of carrying out such an act**.*



# 9 | Generally



- **take-it-or-leave-it terms**
  - **Concludent**
  - **EULA/terms - visible prior to concluding the contract**
- +**
- **Explicit acceptance**
  - **(i.e. courts will favor click-wraps over shrink-wraps and browse-wraps)**



# Content of the Licence

# 11 | R. Kipling: The Elephant's Child



MASARYKOVA UNIVERZITA  
PRÁVNICKÁ FAKULTA  
ÚSTAV PRÁVA A TECHNOLOGIÍ

**I keep six honest serving-men  
(They taught me all I knew);  
Their names are What and Why  
and When  
And How and Where and Who.**



# 12 | Group work



- **Please form 5 working groups ideally with at least one PC in each group**
- **Please arrange the respective titles in an logical order.**
- **Feel free to use the remaining space to jot down any key-words that should be included under this title.**

- **subject matter;**
- **activities permitted;**
- **field of use;**
- **exclusivity;**
- **territory;**
- **time;**
- **sublicensing.**

- **Content of the licence (CZ LAW!)**
  - Specification of the software
  - Scope of the licence – exclusive/non-exclusive
    - Amount
    - Time
    - Region
  - Fee/Free
  - Other (optional) - sublicence

# 15 | Legal language



**shall**

imposes an obligation to act, but may be confused with prediction of future action

**will**

predicts future action

**must**

imposes obligation, indicates a necessity to act

**should**

infers obligation, but not absolute necessity

**may**

indicates discretion to act

**may not**

indicates a prohibition

# 16 | Please compare...



MASARYKOVA UNIVERZITA  
PRÁVNICKÁ FAKULTA  
ÚSTAV PRÁVA A TECHNOLOGIÍ

- **And add the text of the license to the respective titles...**





**Let us have a closer look...**

**THIS IS A CONTRACT BETWEEN YOU AND ASTRAL PROJECTION SOFTWARE, A PRAGUE, CZECH REPUBLIC CORPORATION. BY USING THIS SOFTWARE YOU ACCEPT ALL THE TERMS AND CONDITIONS OF THIS AGREEMENT. If you do not...**

# **PART ONE**

You may: Install the Software in a single location on a hard disk or other storage device of up to the number of computers indicated in the license agreement. Provided the Software is configured for network use, install and use the Software on a single file server for use on a single local area network for either (but not both)...

## PART TWO



- **USE OF THE SOFTWARE**

You may:....

- **Rights granted**

The Software is the intellectual property of **ASTRAL PROJECTION Software** and is protected by U.S./Czech Republic copyright law, international treaty provisions, and applicable laws of the country in which is being used.

## **PART THREE**



- **Lawful back-up copy?**
- **Reverse engineering contractual exclusion?**
  
- **Please consult the Art. of the Software Directive and §§ of the CCA**

You may not rent, lease, sub-license, or lend the Software or Documentation. You may, however, transfer all your rights to use the Software to another person or legal entity, provided that you transfer this Agreement and transfer

## PART FOUR



- **Sub-licensing etc.**
- **In written form**



**ASTRAL PROJECTION Software warrants to you that the Software will perform substantially in accordance with the Documentation for 90 day period following your receipt of the Software. To make a warranty claim, you must...**

## **PART FIVE**

- **Total limitation - Under Czech law**
  - Null and void
- **§ 574 (2) CCiC „An agreement on the basis of that somebody waives rights that can arise in the future is invalid.“**
- **§ 368 CCoC „**

- **§ 499 CCiC Liability for defects:** *“A person who leaves a thing to someone else for payment shall be liable for that at the moment of the performance, the thing has explicitly stipulated or usual qualities, that it can be used according to the nature and purpose of the agreement or according to what was agreed by the parties and that the thing has no legal defects.”*



# Consumer protection IN THE EU...



- **Consumer** - natural person acting for a purpose which can be regarded as being outside his trade or profession
- **Professional** – natural/legal person acting for a purpose which can be regarded as being inside his trade/profession

- **Consumer Sales Directive**
  - Applies only to goods! - "tangible moveable item,,
  - i.e. not harmonized 2 years warranty!
- **Unfair Contract Terms Directive (93/13/EEC)**
  - *fully protects the uninformed and uneducated consumer by declaring unfair terms not binding, no matter whether or not the consumer was informed about their content*
- **Unfair Commercial Practices Directive (2005/29/EC)**
  - *protects the “average consumer,”*
  - *“reasonably well-informed and reasonably, observant and circumspect”*
- **Injunctions Directive (Cod. Directive 2009/22/EC)**

- Consumer Rights Directive - proposal

- **Article 3**
- **„A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.“**



- **§ 56 (1) CCoC „The consumer agreements must not contain terms that are at variance with the requirement of good faith and mean a considerable inequality in rights and duties of the parties to the detriment of the consumer.“**

- a) terms that exclude or restrict the supplier's liability for a conduct or omission resulting in the consumer's death or injury;
- b) terms that exclude or restrict the consumer's rights in asserting the liability for defects or the liability for damages;
- c) terms that stipulate that the agreement shall be binding for the consumer whilst the supplier's performance is linked to fulfillment of a condition whose realisation depends exclusively on the supplier's will;
- d) terms that allow the supplier not to give the consumer the performance provided by him even if the consumer does not conclude the agreement with the supplier or if he withdraws from it;
- e) terms that entitle the supplier to withdraw from the agreement without any contractual or legal reason without entitling the consumer to the same;
- f) terms that entitle the supplier to terminate the agreement concluded for an infinite period of time without an adequate period of notice without having reasons worth a special account therefor;
- g) terms that oblige the consumer to fulfil conditions he was not enabled to learn of before the conclusion of the agreement;
- h) terms that allow the supplier to change the terms of the agreement unilaterally without any reason stipulated in the agreement;
- i) terms stipulating that the price of goods or services shall be specified at the moment of their performance or that entitle the supplier to increase the price of goods or services unless the consumer is entitled to withdraw from the agreement if the price agreed at the moment of conclusion of the agreement is essentially exceeded at the moment of the performance;
- j) terms that bind the consumer to fulfil all his obligations even if the supplier has not fulfilled the obligations already arisen to him;
- k) terms that allow the supplier to assign the rights and duties from the agreement without the consumer's consent if the assignment results in worsening of the enforceability or security of the consumer's claim.

This Agreement will be governed by the laws in the force in the country within the European Union, Switzerland or Norway in which you are located at the moment of entering into this Agreement. If you are located...

## PART SIX

**Generally CCA applies on every use in CZ**

- **Can be agreed**

**BUT (in the EU)**

***more favorable rule-approach***

- **The Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.**
  - Art 6(2) choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law of the consumer's habitual residency



# OTHER CLAUSES...

# 39 | Dispute resolution



- **Alternative dispute resolutions > arbitration, mediation, etc.**
- **Tendency to reject with respect to consumers**

# 40 | Recommended >



- **Safety clause**
- **Invalid part of the licence does not invalidate the whole contract.**



# 41 | The „as is“ clause...



- **In Czech Law**
  - Unapplicable
- **Applies only to “stock” -**

# SOFTWARE RESALE & USED SOFTWARE (?)



# US FIRST SALE



- **sec. 109(a) of the U.S. Copyright Act**
- ***“any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy...”***
- **i.e. not any other copies (like e.g. copies of this copy)**

- **Microsoft v. Harmony Computers**
  - 1994
  - Not sale, but license
  - First sale rule not applicable = © infringement
- **SoftMan Products Co. v. Adobe Systems, Inc., 171 F. Supp. 2d 1075 (C.D. Cal. 2001) ([full-text](#)).**
  - sale – no assent to EULA (never installed software) – First sale rule applicable





# EU EXHAUSTION

- Only the rights to the one *particular* embodiment of the work
- Art. 4 (2) SW Directive: „*The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.*“

- **UsedSoft**

- Used software reseller
- Not copies, merely licences (OEM, multi)
- 2 families of cases
  - „Microsoft“
  - „Oracle“



- **Master CD**
- **Q:** Are the strict contractual terms enforceable against later resellers/users?
- German Federal Supreme Court of 6 July 2000  
I ZR 244/97 **OEM = original equipment manufacturer**
  - Bundling with hardware (cheaper price)
- exhaustion prevailed – unbundling possible
- Conclusion: terms forbidding further reselling are null and void



- Transfer via Download
- *Oracle v usedSoft* BGH  
(Urteil vom 06.07.2000, I ZR 244/97)
- Unclear
- Referred to CJEU
- C-128/11

- Is the person who can rely on exhaustion of the right to distribute a copy of a computer program a 'lawful acquirer' within the meaning of Article 5(1) of Directive 2009/24/EC?
- If the reply to the first question is in the affirmative: is the right to distribute a copy of a computer program exhausted in accordance with the first half-sentence of Article 4(2) of Directive 2009/24/EC when the acquirer has made the copy with the rightholder's consent by downloading the program from the internet onto a data carrier?

- If the reply to the second question is also in the affirmative: can a person who has acquired a ‘used’ software licence for generating a program copy as ‘lawful acquirer’ under Article 5(1) and the first half-sentence of Article 4(2) of Directive 2009/24 also rely on exhaustion of the right to distribute the copy of the computer program made by the first acquirer with the rightholder’s consent by downloading the program from the internet onto a data carrier if the first acquirer has erased his program copy or no longer uses it?