Final countdown: Worldwide perspective

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- International study conducted
- Summer 2011
- ROWAN LEGAL, s.r.o.
- Argentina, Austria, Canada – Ontario, Canada, Colombia, Czech Republic, Denmark, France, Germany, Hong Kong, Hungary, Italy, Japan, Luxemburg, New Zealand, Poland, Russia, Singapore, Slovakia, United Kingdom, United States

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- **What is the legal definition of software? Which category of objects of rights and obligations does software belong to?**
- **CZ**
  - neither the Copyright Act nor the applicable European law provide an explicit definition of software and therefore the general definition of work applies
  - "*other property values*" - subject to legal relationships, as provided by the Act No. 40/1964 Sb. Civil Code

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- no jurisdiction - an actual legal definition of 'software' does exist.
- the word 'software' has not been used within a the respective legal orders at all
- Why?
- Berne Convention / World Copyright Treaty

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- **Computer programs 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**

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- **(1) The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as…**

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- **Colombia, Japan, Slovakia**
  - (i) expression in any form of
  - (ii) instructions
  - (iii) given to a computer
  - (iv) to cause it to execute a particular task.

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- **DB - collection of data meeting certain criteria**
- ***'a collection of independent works, data or other materials arranged in a systematic or methodical way'***
  - Article 1(2) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

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- **All the countries the study treats protect computer programs with copyright protection.**
- **Often a trade secret protection**
- **Canada, Japan and United States**
  - patentable subject matter
- **All EU Member countries**
  - Specifically excluded (Art. 52(3) EPC)

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- What conditions must be met for software to be protected by law?
- CZ
- unique outcome of a creative activity expressed in any objectively perceivable manner) OR
- statutory exception - author’s original intellectual creation

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- **WORLD**
- **As a rule computer programs are protected as literary works within the meaning of the Berne Convention**
- **possible to protect software by means of contractual law, e.g. non-competition clauses or confidentiality agreements, and means belonging to the areas of unfair competition and antitrust law.**

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- **trade secret protection computer program has to meet general conditions**
  - (i) usefulness in trade or business,
  - (ii) not being a subject of general knowledge within a particular business,
  - (iii) entailment of economic value
  - (iv) being subject to reasonable efforts to retain the status of (ii)

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- **United States - scope of patentable subject matter**
- ***'any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof'***
- **Section 101 of the US Patent Act.**
- **In re Diehr; In re Abele; In re Alappat; In re Bilski**

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- **Database - copyright protection if it meets requirements to be considered a work**
- ***'by reason of the selection or arrangement of their contents constitute the author's own intellectual creation'* in the European Union. - Article 3(1)**
- ***'qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents"* – Article 7(1)**

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- What rights related to software are protected by law?
- Who is the original “bearer” of these rights in the case of ordered work that is provided by an individual author?
- Who is the original "bearer" of these rights in the case of ordered work provided by a software house?
- Who is the original "bearer" of these rights in the case of software programmed by an employee (i.e. can a company represent the original author/bearer of the rights to the software, or can it only bear derivative rights?)?

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- **CZ**
- **Personal (moral) rights**
  - right to decide about making a work public, the right to claim authorship, the right to the inviolability of a work, especially the right to grant consent to any alteration of, or other intervention into the work etc.; and
- **Economic rights**
  - right to use the work (the right to reproduce (copy) a work, the right to distribute, rent or lend an original or copies of a work, the right to grant authorisation to any person to exercise the right etc.)

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- **Remain with author**
- **Cannot be waived / transferred**

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- **WORLD**
- **'moral' and 'economic‘**
- **Hong Kong**
  - no moral rights are granted to the authors of software
- **New Zealand**
  - a right to claim authorship and to prevent derogatory treatment of the work do not relate to software

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- **trade secret**
  - the respective right holder is entitled to prohibit any competitor to benefit
- **unfair competition**
  - a standard bulk of rights and obligations arises between the competitors at software market and no special regulations apply
- **patent protection / software monopolies**
  - prohibit everyone within the jurisdictions for which a patent has been registered to incorporate the computer program in their own software or hardware

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- **original 'bearer' – the creator**
  - France, Italy or Japan – sign the rights right away
- **United States**
  - Copyright - rights are automatically assigned to the one who has ordered the software - rare example
- **original 'bearer' of the rights arising of a patent is the inventor**

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- **Are such rights transferable? Are there any limitations to such transfer?**
- **CZ**
  - none of the rights is transferable as such
  - **Derivative rights** may be assigned to a third person by the employer with no restrictions but the consent of the author/employee.

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- **Transfer recorded in written form**
  - United Kingdom, Poland or Thailand
- **Transfer of certain moral rights is usually limited**
  - almost all the European Union Member States or Japan
- **A right to claim authorship cannot be transferred**
  - Russia

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- **WORLD**
  - it is possible for an author or a copyright holder to transfer the rights
  - certain limitations have to be respected in most jurisdictions
  - often related to the moral rights
  - transfer a right to execute some of the rights or all of them

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- **Are there any other ways (apart from the transfer of the rights) of providing a third person with these rights or their derivates? Can the original author impose his own limitations on users? Is the author obliged to publish his/her work? Under what circumstances?**

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- CZ
- License agreement

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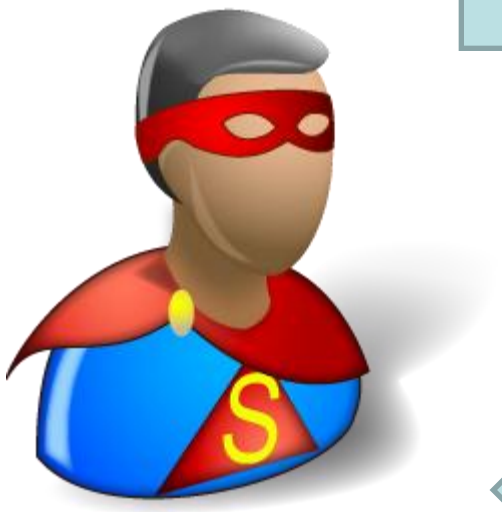

GRANTS
(verb „to LICENSE“)

LICENSE (US)
LICENCE (UK)

LICENSE FEE

Licensor
(Software Rights holder)

End user
Licensee

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- **ALL THE JURISDICTIONS**
  - possible to provide third parties with non-exclusive or exclusive license to agree upon bundle of rights to a copyrighted work
- **Patents**
  - a license to utilize a computer program protected with a patent may be granted.

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- **Tangible media distribution**
  - rights to a copy of software are often transferred by a means of sale, rental or lease.
  - first sale doctrine (USA) or exhaustion principle (Europe)
  - within both areas - copyright and patent law
- **Software as a service**
  - contracts > as regards their mutual rights to software and rights and obligations to each other

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- **Limitations**
  - As long as it does not contravene statutory provisions (antitrust, consumer protection)
- **IN NO JURISDICTION**
  - an obligation to publish a work

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- **Are source/object codes** considered to be a part of a work of software?
- How is a **derivative work** (localisations, compilations of source code, decompilations of object code) **assessed by law** (i.e. is it deemed to be a part of the original work or a new work, are they connected in any way)?

- **CZ**
  - irrespective of the form in which it is expressed and including the preparatory design material, shall be protected as a literary work.
  - if a modification of a piece of software (i.e. localization, graphic changes to the interface) is sufficiently creative > new work, rights still protected
  - the compilation of a source code is not considered to be a modification

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- **Hong Kong**
  - the position of object code is rather unclear while source code is considered to be expression falling within the scope of copyright protection.
- **Compilation**
  - act of making a copy which is the exclusive right of a copyright holder.
- **Decompilation**
  - creation of derivative work which is subject to copyright holder's permission.
  - In most of the jurisdiction third persons have right to decompile software in order to study its functioning and to ensure interoperability

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- **Changes and modifications of the software – are the rights of the author with respect to the integrity of software protected? Are there any statutory licenses enabling the software to be changed and modified by the user?**
  - (i.e. may a user modify or decompile software, if it is necessary to preserve its functionality by virtue of law; or only if source code is provided; or only upon an explicit license)?

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- CZ
- author of the software has the undisputable right to protect the integrity of the software
- user (lawful acquirer) of the software needs an explicit (contractual) license to change or modify the software

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- a. alters the computer program for the sake of its **utilisation** in compliance with its purpose, including the correction of program errors
- b. makes a **back-up copy** of a computer program, if necessary for its utilization;
- c. examines studies or tests the **functionality** of the program in order to identify the ideas and principles underlying any element of the program;
- d. reproduces the code or translates its form, if such reproduction or translation is necessary to obtain the information needed to achieve the **interoperability** of an independently created computer program with other programs.

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- **WORLD**
- **Moral right of integrity – Art. 6 Berne Convention**
  - any unauthorized distortion, alternation, adaptation or modification is prohibited and constitutes a copyright infringement
- **France - author-centric jurisdiction**
  - affect the author's reputation and/or honour in a negative way

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- **Statutory exemptions / only by authorized user**
- **a BACK-UP COPY- limited and cannot be used for any other purpose except for the foreseen and regulated one**
  - EU, this exemption cannot be contracted out and any provisions to the contrary are null and void
  - **DRM**
  - **Austria -** the lawful acquirer/user is not allowed to "break" the technical protection
  - **United States –** circumvention legal
    - **Security testing, cryptography**
    - **Subject to revison - jailbreaking**

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- **PROPER FUNCTIONING OF THE SOFTWARE AND ERROR CORRECTION (“debugging”)**
  - **Colombian -** user is entitled to modify the computer program when it is absolutely necessary for the use of the program
  - **Japan** – user allowed to adapt the program *"if and to the extent deemed necessary for his own exploitation"*
  - **New Zealand** – if necessary for the lawful use and an error-free copy of the program is not reasonably available
  - **Singapore** and **United States** – adaptation OK *“created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner”*

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- **Member states of the EU**
  - could be (and often is) contracted out in the license agreements (e.g. **Italy, France**).
  - Art 5 Software Directive

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- **FUNCTIONALITY**
  - right to examine study or test its functionality
  - determine the underlying ideas and principles, albeit under restricted conditions.
  - in the **member states of the EU**, this right cannot be contracted out.
- ***"may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with a normal exploitation of the computer program".***

- **Hong Kong**
  - no moral rights regarding software, the right to integrity could be therefore protected only contractually (either in an assignment or a license). The lawful user of the respective copy is still entitled to make a back-up copy the software.
- **Argentina**
  - does not permit any modifications or changes to the software at; however it is customary regulate this issue in the license agreements.

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- **How are collective works regulated and how is the employee, as an author, treated by the law?**

- **CZ**
  - person who ordered the work (e.g. a client ordering specific software) shall be considered as being an employer in such case
  - collective works
    - works that are created by more than one author on the initiative and under the management of a natural person or a legal person, and are made public under those persons' name, provided that the contributions involved in such works are not capable of being independently used
  - employee works even when they have been created to an order

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- **WORLD**
- **Collective work**
  - **France**, **Czech Republic** and **Slovakia**
- **work of joint authorship**
  - **Germany**, **Hong Kong**, **Japan**, **United Kingdom**
  - all of the co-authors own and exploit the rights jointly and severally

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- **work created during the course of employment**
  - **In all jurisdiction – special attention**
- **employer is**
  - owner/holder of any copyright > **Argentina, Canada, Denmark, Hong Kong, Luxembourg, New Zealand, Poland. Singapore, United Kingdom** and **USA** (“work for hire”).
  - has the exclusive right to exploit the economic rights > **Austria, Czech Republic, Germany, Slovakia.**

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- **Thailand – the employee (sic!)** is regarded as the sole bearer of copyright under the condition that the employer is entitled to publish/communicate the created work in accordance with the purpose of employment.
- **Hungary -** the employee must be obligated expressly to create software as part of his/her employment relationship. Otherwise the employer cannot acquire any rights over the work even if it was created during the working hours of the employee.

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- **Moral rights (if recognized)**
  - **Japan**, both moral and economic rights belong to the employer (even a legal person)
  - CZ/SK – legal presumption of agreement – exploitation possible
- **Possibility to modify**
  - **Austria**, **Czech Republic**, **Italy**, **Germany**, **Japan**, **Luxembourg**, and **Slovakia**

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- **“beyond the reasonable expectation” exploitation**
  - **(Hong Kong, Czech Republic**)
- **protection of the employee against the non-utilization of his creation**
  - **Russia -** if the employer does not start exploiting the copyrights within three years period after he obtained them, the right to works belongs to the author.
  - **Czech Republic -** standard-term license from the employer if he is not exploiting the work sufficiently

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- **Liability for damages and product liability on the part of an author. Is it possible to limit or exclude liability for damages and/or product liability with respect to software? If so, is it regulated by general law or a special, software-focused, framework?**

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- **Czech Commercial Code, quality guarantees have to be agreed upon;**
  - otherwise the author is only responsible for the defects that existed at the moment the work was handed over.
- **The parties**
  - the exclusion of product liability OR
  - stipulation of quality guarantees for a period determined by the parties (there is no minimum length of warranty period).

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- **Compensation of damages**
  - whoever breaches a duty arising from a contractual relationship is obliged to provide compensation for the damages caused to the other party
- **Exclusion**
  - The parties are also not entitled to waive their rights to damages prior to the breach of an obligation and thus exclude their liability for damages
- **actual damages and loss of profit**
- **objective criteria – fault does not matter**

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- complete exclusion of product liability is not allowed by virtue of the Czech Civil Code
- two-year statutory guarantee
- subjective criteria
- Cannot be contracted out

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- **NOWHERE**
  - special, software-focused framework regarding the *exclusion/limitation of liability for damages*
  - general provisions of private law (Civil and/or Commercial Law) applicable
- **Limiting clauses**
- **France**
  - the limitations basically annulling the author's fundamental obligations arising from the contract - found void by the courts.

- **Hong Kong**
  - excluding causes are enforceable as long as they are fair and reasonable
- **Russia**
  - original author cannot be held liable for damages or product liability if he has sold the computer program to the “holder of the rights”

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- **Consumer protection**
  - **Austria** in the B2C (business-to-customer) relations the liability for personal injury may not be limited
  - **Japan -** clauses that exempt the business operator from liability for damages are invalid

- **Product liability (disputed)**
  - if YES then cannot be excluded by contract (e.g. **Austria**, **Denmark**, **Hungary**, **Italy**, **Thailand, Russia**)

- **Goods**
  - **Hong Kong, Thailand**
  - **New Zealand –** some warranties could be contracted out
- ***contra proferentem* rule always**
  - ambiguous terms are interpreted to the contrary of the party that introduced them in the contract.

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- **How are IT related disputes usually resolved? What is the prevailing (plus what is the recommended) body to solve such disputes? How long does it take?**

- CZ
- Arbitration Court attached to Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic
- 3-5 months

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- **WORLD**
  - common courts
  - alternative dispute resolution (" i.e. mediation, a combination of mediation and arbitration, or solely arbitration).
  - The common civil courts prevailing bodies to solve software-related disputes in **Austria, Czech Republic, Denmark, , Germany, Hungary, Italy, Luxemburg, New Zealand, Poland and Slovakia**
  - **X**

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- Copyright Tribunal in Hong Kong
- Intellectual Property High Court in Japan, The Patent Chamber in Russia
- Intellectual Property Office of Singapore
- Intellectual Property and International Trade Court in Thailand

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- ***arbitration* is prevailingly acknowledged as being more suited for the complex software-related disputes**
- **Canada** and **Hong Kong** as have incorporated the UNCITRAL Model Law on International Commercial arbitration into their national legislation

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- **In total, what is the average time period from the presentation of a formal petition (to an arbitral/judicial or similar first instance body) until the award of an enforceable decision?**
- **CZ**
  - one or two years, even in case of a small claim dispute – civil
  - Arbitration couple of months

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- **WORLD**
  - general approach and conduct of the parties (a strongly adversarial approach will cause significant delay in any type of dispute resolution),
  - size and complexity of the issue,
  - quantity of evidence submitted by the parties,
  - number of scheduled meetings/hearing days.
- **in Slovakia to hear even a small IT case before a court could take up three to five years.**