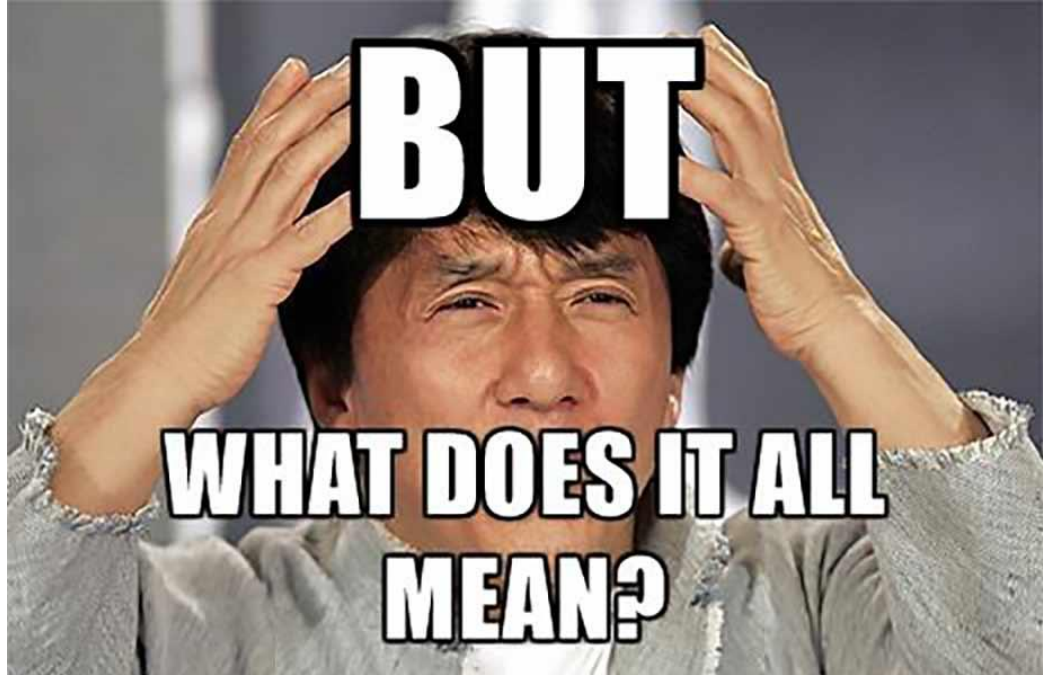


What is software?

- **General protection by § 2 para 2 of Czech Copyright Act (act no. 121/2000 Sb.)**
- **§ 65 Copyright Act (1)** A computer program, regardless of the form of its expression, including preparatory conceptual materials, is protected as a literary work, unless otherwise provided by this Act.
- **BUT**
- (2) The ideas and principles on which any element of a computer program is based, including those which are the basis for its connection with another program, are not protected under this Act.
- **+ SAS v WPL (C-406/10 SDEU)**
- **=>**
- **Functionality is not protected**



- The text of the code is protected ONE TO ONE (eg as a book)
- Source / machine code
- What is not protected?
 - Function (functionality)
 - Thoughts / ideas on which a computer program is based

Software liability?

- **Who is liable for software defect?**
- **Is the producer always liable?**
- **What about open source software and frequently used disclaimer (e.g. in MIT license)**
- **When is the producer of the software liable?**
- **What is the defective software?**
- **X Digital Content**
- **etc.**

Software liability in Czech Republic

- Liability mainly regulated by Civil Code (CC)
- Major defects can lead to offense liability, possibly even to criminal liability
- The most typical is to deal with private liability and to cover damages, contractual penalties etc.

Liability before closing the contract

- § 1728 et seq. CC
 - If the negotiations are ongoing, it is not possible to end it without reasonable reason
 - It is necessary to well define what is expected from the producer of the software and what are the purpose and functions of the software
 - Also information duty – both parties have to inform each other by all relevant facts (not only concerning software but also the capabilities of the parties etc.)
 - *Example: the seller of computer has to inform unexperienced consumer that necessary software to run the computer can be expensive (German decision)*
 - *Example: the negotiations have to lead to suitable software solution, if the producer cannot offer such on the basis of lack of information from the customer, the customer has to specify*

Software defects

- Software malfunction (*it does not work*)
- Modules malfunction (*some parts of the software don't work*)
- Exchanging information malfunctions (*delayed sending of data, ping, different standards etc.*)
- Purpose malfunction (*software is working, but not serving the purpose*)

- 2095 CC and 2615 et seq. CC etc.

Factual defects X legal defects

- The software has to have quality as indicated in the contract or as was expected
- If not, than the producer is liable
- Necessary to asses this when handing over and accepting of the software
- *If the product (SW) was tested and did not show any defects, the producer did not intend to cause damage, but the damage still occurred (e.g. improper use of the SW by the buyer), the producer may not be liable for this.*
- Legal defects – *the software is owned by someone else, it is illegal (dual use) etc.*

Defects while handing over / later

- When the software is handed over:
 - The customer has right to: flawless performance (possible additional period for rectification), withdraw from contract, issue damages
- The defect appears later:
 - The customer has the right to: elimination of the defect, withdraw from the contract, reasonable discount, claim damages
- Warranty / quality guarantee:
 - 6 months business, 2 years consumer / could be even longer (by contract)
 - §§ 2099 CC et seq., 2616 CC, 2113 CC et seq., etc.

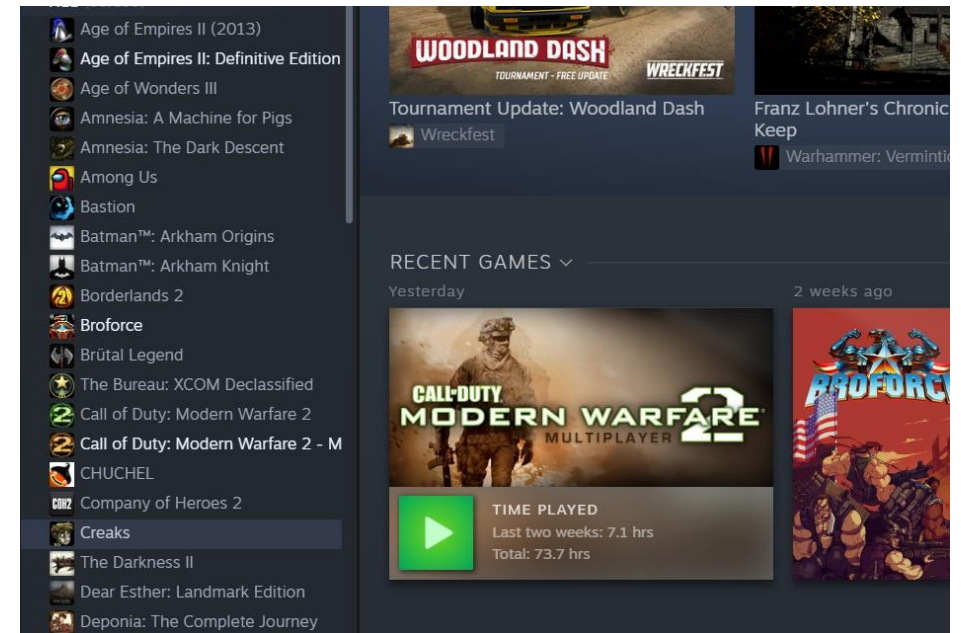
Dealing with defects

- Communication, best possible description, documentation, relevant information
- When the producer is not liable (exceptions)?
 - Unexpected circumstances (vis mayor, electricity failure etc.) - § 2913 CC
 - Limitation of liability, waiver of claim for defective performance
 - Legal defects – the producer has to prove, that he was not aware of the problem
 - Limited damages when the damage was unexpected
- In agreement, almost everything can be different = SLA
 - Different periods, mechanisms to hand over software, limited / extended damages etc. (there are however always some limits – it cannot be excessive)

Digital services / quality – EU legislation

- What happens when digital content is not working as indicated?
- What are the specifics compared to material things?

- = **consumer protection!**



Digital services / quality

- Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services
- Art. 2:
 - (1) 'digital content' means data which are produced and supplied in digital form;
 - (2) 'digital service' means: (a) a service that allows the consumer to create, process, store or access data in digital form; (b) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service
- For example in Czech implementation, there is nothing as a definition of **digital service**
- Problematic, what is difference between **information society service** and **digital service** (however different scopes of legal regulation)..... any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services

Digital services / quality

Article 7

Subjective requirements for conformity

In order to conform with the contract, the digital content or digital service shall, in particular, where applicable:

- (a) be of the description, quantity and quality, and possess the functionality, compatibility, interoperability and other features, as required by the contract;
- (b) be fit for any particular purpose for which the consumer requires it and which the consumer made known to the trader at the latest at the time of the conclusion of the contract, and in respect of which the trader has given acceptance;
- (c) be supplied with all accessories, instructions, including on installation, and customer assistance as required by the contract; and
- (d) be updated as stipulated by the contract.

Article 8

Objective requirements for conformity

1. In addition to complying with any subjective requirement for conformity, the digital content or digital service shall:

- (a) be fit for the purposes for which digital content or digital services of the same type would normally be used, taking into account, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct;
- (b) be of the quantity and possess the qualities and performance features, including in relation to functionality, compatibility, accessibility, continuity and security, normal for digital content or digital services of the same type and which the consumer may reasonably expect, given the nature of the digital content or digital service and taking into account any public statement made by or on behalf of the trader, or other persons in previous links of the chain of transactions, particularly in advertising or on

- Strong emphasis on the quality of services!
- Art. 7 and 8 – Subjective and Objective requirements for conformity

Digital services / quality

- **digital content should be without defect?** (problematic concept) - SW always has some imperfections and defects and the primary question is what purpose it should serve (the authors of the directive also tried to define the border, in the end it failed - *hence the subjective and objective aspect*)
- If digital content or service is not in conformity – reduction of payment / cancellation / money chargeback etc. (however the lack of conformity cannot be only pretext for consumer)

Digital services / quality

Article 13

Remedy for the failure to supply

1. Where the trader has failed to supply the digital content or digital service in accordance with Article 5, the consumer shall call upon the trader to supply the digital content or digital service. If the trader then fails to supply the digital content or digital service without undue delay, or within an additional period of time, as expressly agreed to by the parties, the consumer shall be entitled to terminate the contract.
2. Paragraph 1 shall not apply, and the consumer shall be entitled to terminate the contract immediately, where:
 - (a) the trader has declared, or it is equally clear from the circumstances, that the trader will not supply the digital content or digital service;
 - (b) the consumer and the trader have agreed, or it is clear from the circumstances attending the conclusion of the contract, that a specific time for the supply is essential for the consumer and the trader fails to supply the digital content or digital service by or at that time.
3. Where the consumer terminates the contract under paragraph 1 or 2 of this Article, Articles 15 to 18 shall apply accordingly.

Article 14

Remedies for lack of conformity

1. In the case of a lack of conformity, the consumer shall be entitled to have the digital content or digital service brought into conformity, to receive a proportionate reduction in the price, or to terminate the contract, under the conditions set out in this Article.
2. The consumer shall be entitled to have the digital content or digital service brought into conformity, unless this would be impossible or would impose costs on the trader that would be disproportionate, taking into account all the circumstances of the case including:
 - (a) the value the digital content or digital service would have if there were no lack of conformity; and
 - (b) the significance of the lack of conformity.
3. The trader shall bring the digital content or digital service into conformity pursuant to paragraph 2 within a reasonable time from the time the trader has been informed by the consumer about the lack of conformity, free of charge and without any significant inconvenience to the consumer, taking account of the nature of the digital content or digital service and the purpose for which the consumer required the digital content or digital service.
4. The consumer shall be entitled to either a proportionate reduction of the price in accordance with paragraph 5 where the digital content or digital service is supplied in exchange for a payment of a price, or the termination of the contract in accordance with paragraph 6, in any of the following cases:
 - (a) the remedy to bring the digital content or digital service into conformity is impossible or disproportionate in accordance with paragraph 2;
 - (b) the trader has not brought the digital content or digital service into conformity in accordance with paragraph 3;
 - (c) a lack of conformity appears despite the trader's attempt to bring the digital content or digital service into conformity;
 - (d) the lack of conformity is of such a nature that it justifies immediate termination of the contract.

Digital services / quality

Article 15

Exercise of the right of termination

The consumer shall exercise the right to terminate the contract by means of a statement to the trader expressing the decision to terminate the contract.

Article 16

Obligations of the trader in the event of termination

1. In the event of termination of the contract, the trader shall reimburse the consumer for all sums paid under the contract.

However, in cases where the contract provides for the supply of the digital content or digital service in exchange for a payment of a price and over a period of time, and the digital content or digital service had been in conformity for a period of time prior to the termination of the contract, the trader shall reimburse the consumer only for the proportionate part of the price paid corresponding to the period of time during which the digital content or digital service was not in conformity, and any part of the price paid by the consumer in advance for any period of the contract that would have remained had the contract not been terminated.

2. In respect of personal data of the consumer, the trader shall comply with the obligations applicable under Regulation (EU) 2016/679.

3. The trader shall refrain from using any content other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader, except where such content:

- (a) has no utility outside the context of the digital content or digital service supplied by the trader;
- (b) only relates to the consumer's activity when using the digital content or digital service supplied by the trader;
- (c) has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts; or
- (d) has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content

Digital services / quality

Sony is pulling Cyberpunk 2077 from the PlayStation Store and offering full refunds

You can request a refund now

By Jay Peters | @jaypeters | Dec 17, 2020, 8:13pm EST

f   SHARE



Cyberpunk story continues



- *„As players were dissatisfied with the quality of Cyberpunk, company shareholders felt similarly bewildered by the release—resulting in the current class action. The plaintiff alleges, on behalf of the class, that the company and the individual defendants violated §10(b) and Rule 10b-5 of the Securities and Exchange Act of 1934. The defendants allegedly did this by employing devices, schemes, and artifices to defraud investors. Further, the complaint asserts they made untrue statements of material facts or omitting material facts that defrauded the purchasers of company stock.“*

[Whole plot here](#)

.. and it is not only Cyberpunk

- GTA Trilogy Remastered: <https://www.denofgeek.com/games/gta-trilogy-definitive-edition-problems-bugs-glitches-reactions/>
- Battlefield 2042: <https://www.washingtonpost.com/video-games/2022/02/18/battlefield-2042-fixes-bugs-petition/>

And many more...

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- OK x NOK?

Disclaimer

- § 2898 CC
- *“An arrangement which precludes or limits in advance the obligation to compensate a person for his natural rights or which is caused intentionally or through gross negligence shall not be taken into account; nor does it take into account an arrangement which precludes or limits the weaker party's right to compensation for any damage. In these cases, the right to compensation cannot even be validly waived.”*
- The disclaimer is not valid when caused intentionally, also professional knowledge shifts the limitation of liability from the experienced producer, so be aware of that!

Disclaimer

+

- § 5 CC
- *Whoever, in public or in dealings with another person, declares himself to be a member of a particular profession or condition, thereby shows that he is capable of acting with the knowledge and care which is inherent in his profession or condition. If he acts without such professional care, he shall be held liable.*

Another examples / balancing of liability

- *I am owner of a company, I have hired contractors to write the code. Who is responsible for their fault?*
- *I am open source developer and I used faulty code (which was reported) under MIT license. Yet, without any change, I use it further. Am I liable (even though there is disclaimer)?*
- *Is there anything like adequate testing which limits my liability?*
- *What is the difference in the liability for commercial software and open source software?*