Software Protection

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MVV59K Software Law

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- **Classic means of protection**
  - Workload distribution
  - Technical Measures

- **Legal protection**
  - Trade Secret Protection + Unfair Competition Law
  - Contractual Clauses (internal, B2B)
  - Intellectual Property Protection

Classic Means of Protection

- **Well-thought distribution of individual tasks**
- **Technical Measures**
  - Internal
  - External
- **General confidentiality**

- **Always applicable**
- **Not regulated by law**
  - ⇒No specific restrictions
  - ⇒No legal enforceability

- **Possible decrease of work efficiency**
- **Some measures might be expensive**

Trade Secret Protection

Definition (USA)

(4) "Trade secret" means <u>information</u>, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives <u>independent economic value</u>, actual or <u>potential</u>, from <u>not being generally known</u> to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to <u>maintain its secrecy</u>.

(Art. 1 para 4 Uniform Trade Secrets Act of 1985)

Definition (CZE)

Trade secrets include commercial, manufacturing and technological <u>facts relating to the enterprise</u> which have actual or potential material or nonmaterial <u>value</u>, are <u>not commonly available</u> in the business circles in question, and are to be kept confidential at the discretion of the entrepreneur, who ensures that his enterprise's secrets are <u>protected</u> in a suitable manner.

(section 17 of the law no. 513/1991 Coll., Commercial Code)

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- **An activity of the trade secret owner is required => adequate/suitable protection**

- **Requirement for nonavailability => information is not generally known**

What about software that is distributed at the massmarket.

Enforceability:

An entrepreneur has the right to legal protection against violation or jeopardising of his trade secrets, as in the case of unfair competition.

(section 20 of the law no. 513/1991 Coll., Czech Commercial Code)

- **Through the means of Unfair Competition Law**

- **Works as a legal extension of the classic means of protection**
- **Flexibility**
- **Guarantees no protection against independent discoveries**
- **Doubtful effectiveness in case of the software distributed at the massmarket**

The aim is to …

… prevent unfair exploitation of the other person's effort and resources

… promotion of the research and innovation

Contractual Clauses

- **Not available automatically => the parties have to enter into a contract**

- **Whole contracts or individual clauses (usually license, sale or lease agreements)**

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Types:

- **Confidentiality clause**

- **Confidential information**

- **Non-competition agreement**

- **Flexibility**

- **Corresponds to the intentions of the parties**

- **Effective only** *inter partes*

- **Unclear validity of certain clauses**

Intellectual Property Protection

- **Copyright Protection**
  - Berne Convention

- **Patent Protection**
  - Paris Convention

- **Trademark Protection**
  - Paris Convention, Madrid Protocol, Madrid Agreemnet

Individual types of Intellectual Property Protection does not protect software as a whole.

X

They rather protect individual elements of Software.

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- **At the beginning of the 70's there were three potential ways to approach the question of IP Protection of SW:**

  – Copyright protection
  – Patent Protection
  – *Sui Generis* Protection

Intellectual Property Protection

Copyright Protection

- In **USA** the **National Commission on New Technological Uses of Copyrighted Works** (CONTU) appointed in the 70's.

- The outcome of its research
= **recommendation to extend the applicability of copyright protection to SW**

- Nowadays = **most dominant type** of Intellectual Property Protection

- In **EU** 2009/24/EC directive **on the legal protection of computer programs**

- In **Czech Republic** implemented by law no. 121/2000 Coll. (**Copyright Act**)

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Extent of the Protection:

- **Right to make a copy**
- **Right to make available**
- **Right to lease an original or a copy**
- **Right to lend an original or a copy**
- **Right to display …**
- **Right to broadcast …**
- **etc.**

Limits of the Protection:

- **Operation of computer programs**

- **Reverse Engineering**

- **Applies automatically**

- **Does not give rise to software monopolies**

- **Protects a material form of the work**

- **Does not make information inaccessible**

Intellectual Property Protection

Patent Protection

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- Does not protect the work in material form => protects **underlying ideas and principles**
- Necessary to undergo lengthy and expensive application process
- May lead to software **monopolies**
- Promotes free access to information

- Tendencies to allow software patentability appeared in the time when copyright protection was being introduced.

- **Invention =** any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement

- The definition was **narrowed** by the courts => software was excluded from the patent protection.

Landmark cases:

- In re Bredley (1979)

- In re Diehr (1981)

- In re Abele (1982)

- In re Alappat (1994)

- **In Czech Republic software excluded from patent protection**

The following in particular <u>shall not be regarded as inventions</u>:

a) discoveries, scientific theories and mathematical methods;

b) aesthetic creations;

c) schemes, rules and methods for performing mental acts, playing games or doing business and <u>programs for computers</u>;

d) presentations of information.

(Section 3 para 2 of Czech Patent Act)

Intellectual Property Protection

Trademark Protection

Definition:

"A trade-mark is a <u>word, design, number, two-dimensional or three-dimensional form, sound or color</u>, or a <u>combination</u> of two or more of these elements which a trader uses to <u>distinguish his/her products</u> or services from those of his/her competitors and serves to establish <u>goodwill</u> with the consumer."

(Intellectual Property Institute of Canada)

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- **Protects exclusive connection between the manufacturer or reseller of the software and the software itself (as goods or service)**

- **Prevents an unfair misuse of the Trademark during the distribution of the software**