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# European Intellectual Property Law: An introduction

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## The Motivation

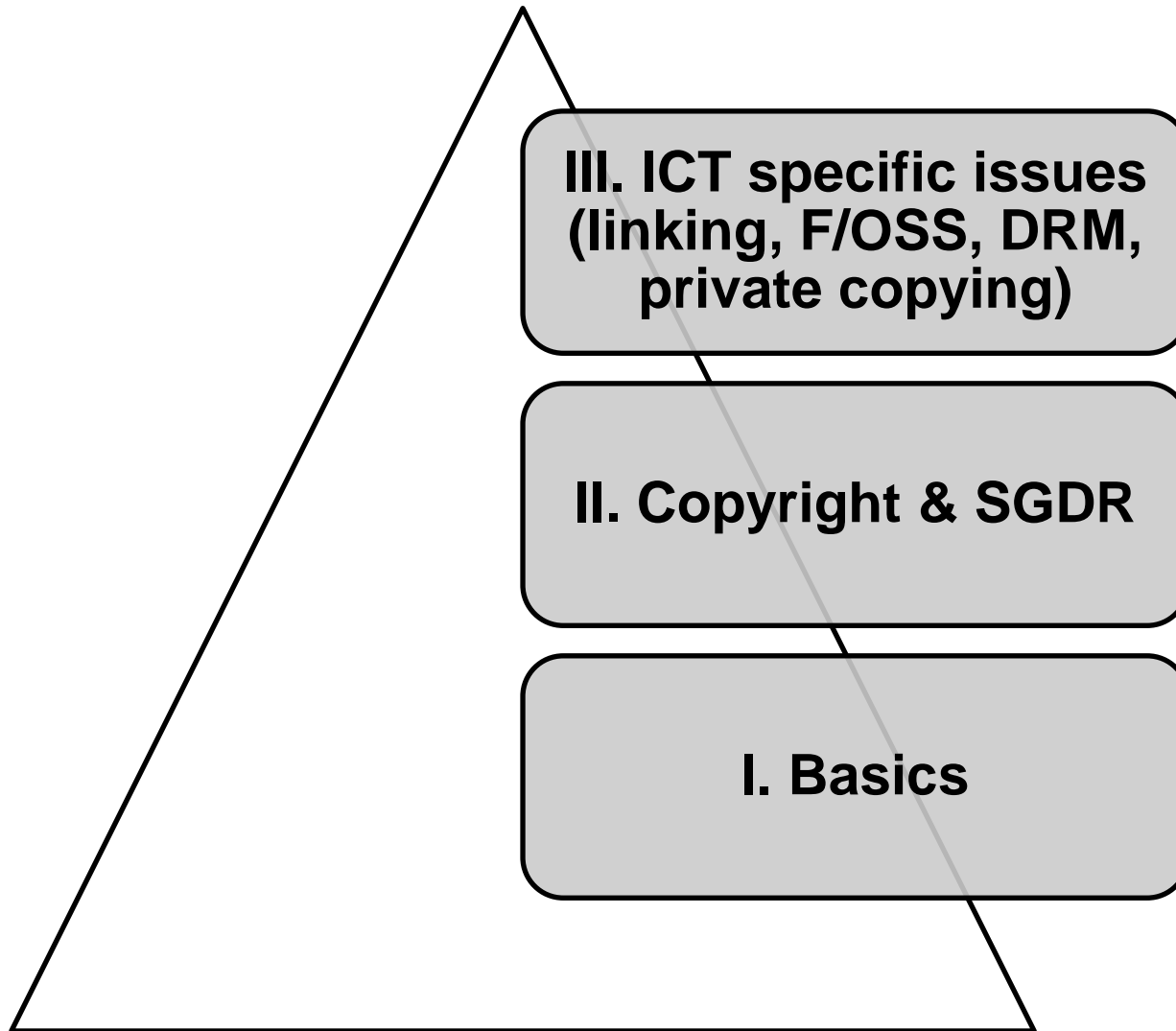
- *„Intellectual property law is, in short, a twenty- first-century discipline, focused on the future of innovation.“*

# Brief overview of the lectures

- 1) History & Theory & Basic Principles
- 2) Substantive EU Law (with focus on Copyright)
  - a) Database protection
  - b) Software protection
- 3) Specific Issues
  - a) Exceptions and Limitations: Private Copying, DRM and the Three-step test
  - b) Private Ordering: Creative Commons, F/OSS
  - c) Scope of Rights: The „Linking“ Issue



# Building the pyramid of IP knowledge





# **1) HISTORY & THEORY & BASIC PRINCIPLES**



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# GENERAL INTRODUCTION



# Subject matter

- Intangible subject matter  $\Leftrightarrow$  tangible manifestation
- Potential ubiquity (non-crowdability)
- Non-rivalry (non-depletability)
- IP rights – absolute rights in intangible subject matter



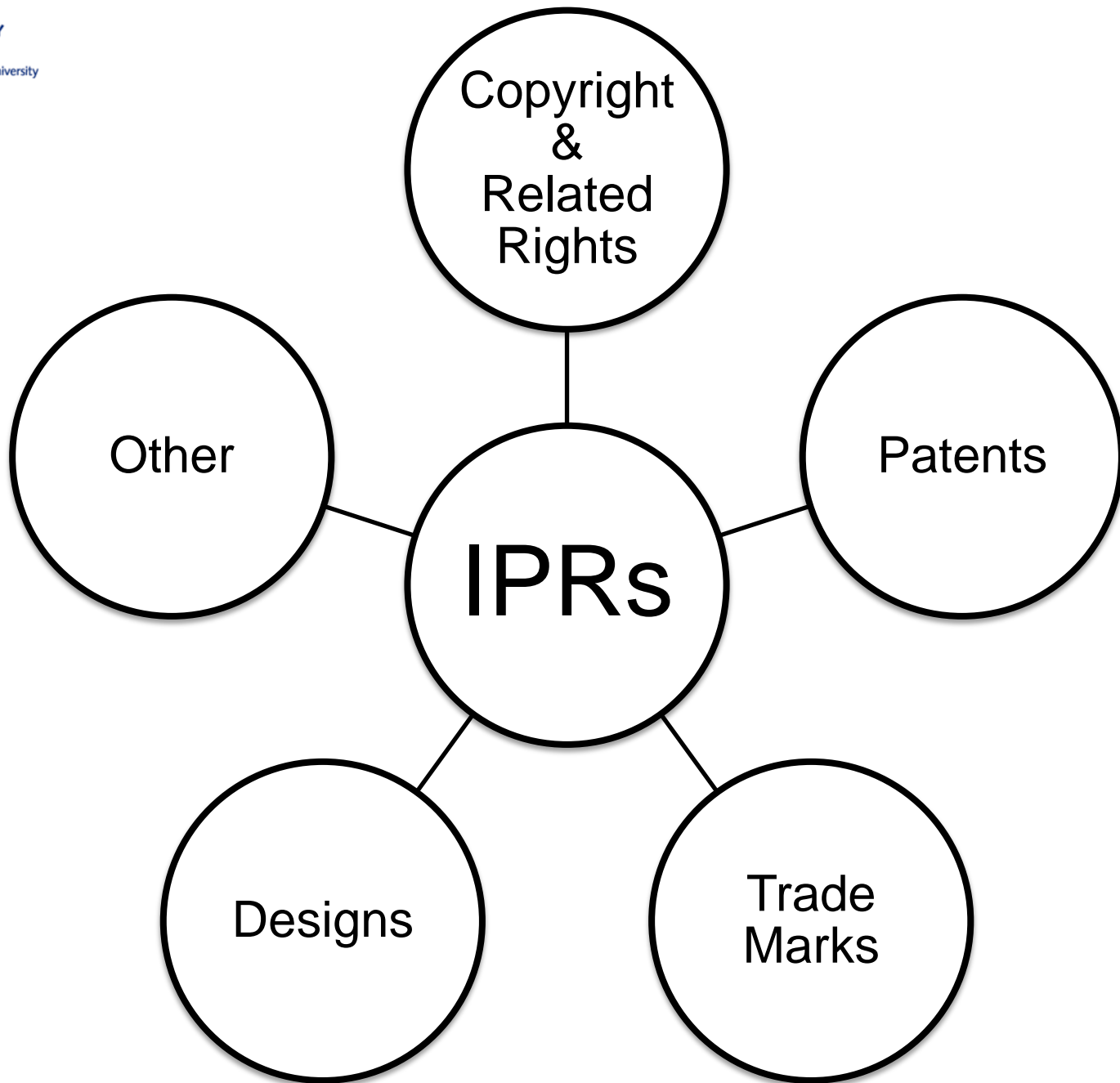
**IPRs**

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graph TD; A[IPRs] --> B[Copyright & Related rights]; A --> C[Industrial property]
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**Copyright &  
Related rights**

**Industrial  
property**





# Convention Establishing the World Intellectual Property Organization (1967)

- *literary, artistic and scientific works;*
- *performances of performing artists, phonograms, and broadcasts;*
- *inventions in all fields of human endeavor;*
- *scientific discoveries;*
- *industrial designs;*
- *trademarks, service marks, and commercial names and designations;*
- *protection against unfair competition; and*
- *all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.*

# Justification

- Non-intuitiveness => need for justification
- „Free for all“?
- Justifications
  - Personality-Based (Hegel)  
Moral claim
  - Labour theory (Locke)  
Fairness
  - Utilitarian (incentives-based)  
Promotion of creativity

# Issue of territoriality

- No “global” IPRs
- Territoriality based protection
- Overcoming territoriality
  - International treaties
    - National treatment (minimum rights)
    - Reciprocity
- Easier grant procedure
  - International, regional, national filing

# Overcoming territoriality – national treatment

- **Paris Convention (1883)**

- Article 2(1)

*Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.*

- **Berne Convention (1886)**

- Article 5(1)

*Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals . . .*



# Overcoming territoriality

- Minimum rights
- **Paris Convention (1883)**
  - Priority
- **Berne Convention (1886)**
  - *lura conventionis*



# **HISTORY & THEORY & BASIC PRINCIPLES**

# From Ancient Greece to Copyright Allocation to Works created by AI

- 500 B.C. – Sybaris colony – culinary recipes
- ~100 A.D. – Martial – literary piracy
- 1421 – Florentine Patent Status
- 1474 – Venetian Patent Law
- 1624 – Statute of Monopolies
- 1709 – Statute of Anne



# From Ancient Greece to Copyright Allocation to Works created by AI

- 1883 – Paris Convention
- 1886 – Berne Convention
- 1967 – WIPO
- 1994 – TRIPS
- 1996 – WIPO Treaties
- Napster
- Copyright Wars
- 2016 – Morgan Trailer



# Life cycle

- Regulation
- Basics
- Requirements for protection
- Grant procedure
- Protection: scope protection & term & exceptions
- Enforcement
- Termination

# Regulation

- Paris Convention for the Protection of Industrial Property (1883)
- Patent Cooperation Treaty (1970)
- Strasbourg Agreement Concerning the International Patent Classification (1971)
- Patent Law Treaty (2000)
- **European Patent Convention (1973)**
  - <http://www.epo.org/law-practice/legal-texts/html/epc/2016/e/index.html> (citations and references in this section concern this act)
- Unitary patent package: EU Regulations 1257/2012, 1260/2012 and Council Decision 2011/167/EU



# Basics

- Protection for inventions
  - A technical solution to a technical problem



# Requirements for protection

- Protectable subject-matter
- Novelty
- Inventive step
- Industrial applicability



# Patentable invention (subject matter)

- Inventions solving non-technical problems relying on subject matter void of any technical character are not eligible for a patent.

## A52(1)

European patents shall be granted for any inventions, in all fields of technology, provided that they are

- new,
- involve an inventive step and are
- susceptible of industrial application.

## A52(2)

The following in particular shall not be regarded as inventions within the meaning of paragraph 1:

- (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 **programs for computers**;
- (d) presentations of information.





## A52(3)

Paragraph 2 shall exclude the patentability of the subject-matter or activities referred to therein only to the extent to which a European patent application or European patent relates to such subject-matter or activities **as such**.



## Novelty – A54

(1) An invention shall be considered to be new if it does not form part of the state of the art.

(2) The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing of the European patent application.



## Inventive step – A56

An invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art.



## Industrial application – A57

An invention shall be considered as susceptible of industrial application if it can be made or used in any kind of industry, including agriculture.

# Grant procedure

- National
- European Patent (European Patent Convention)
  - not an EU Patent, international agreement
- Filing, Search, Examination, Grant, Opposition



# European unitary patent

- Application and grant: EPC
- Upon request of the proprietor: unitary effect (no validation)
- Unified patent court

## Protection: scope protection & term & exceptions

- EPC: bundle of national patents
  - A69 EPC – defined by claims
  - A64 EPC – *the same rights as would be conferred by a national patent granted in that State*
- 
- A3 (Regulation 1257/2012) Unitary patent: unitary effect
    - *limited, transferred or revoked, or lapse, in respect of all the participating Member States*
  - A7 (Regulation 1257/2012)

# Protection: scope protection & term & exceptions

- 20 years from filing
- Yearly fees
- Exceptions: experimental & private use (national law)





# Life cycle

- Regulation
- Basics
- Requirements for protection
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- Protection: scope protection & term & exceptions
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- Termination



# Regulation

- Paris Convention (1883)
- Madrid Agreement Concerning the International Registration of Marks (1891)
- Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989)
- Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (1957)
- Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks (1973)
- Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks
- **Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (codified version!) (citations and references in this section concern this act)**

# Basics

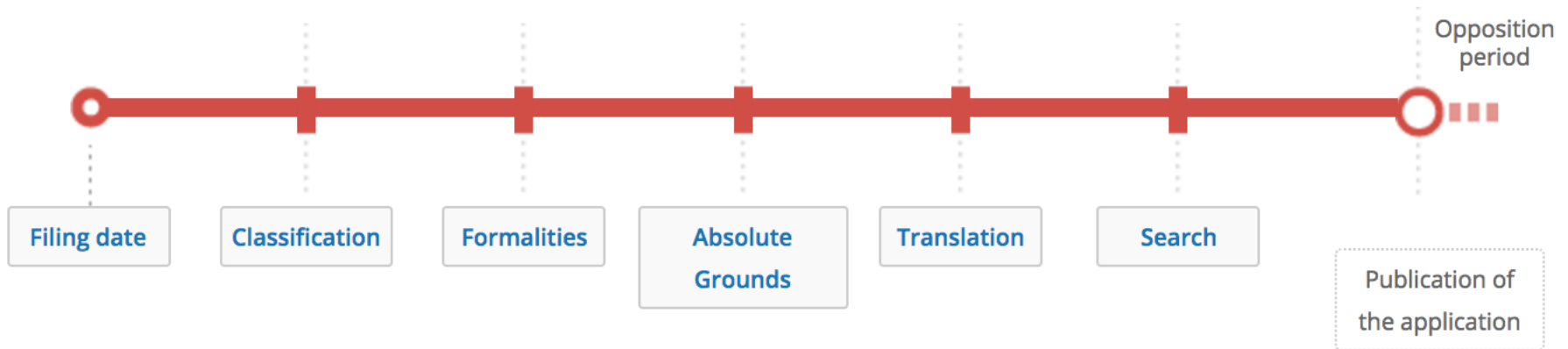
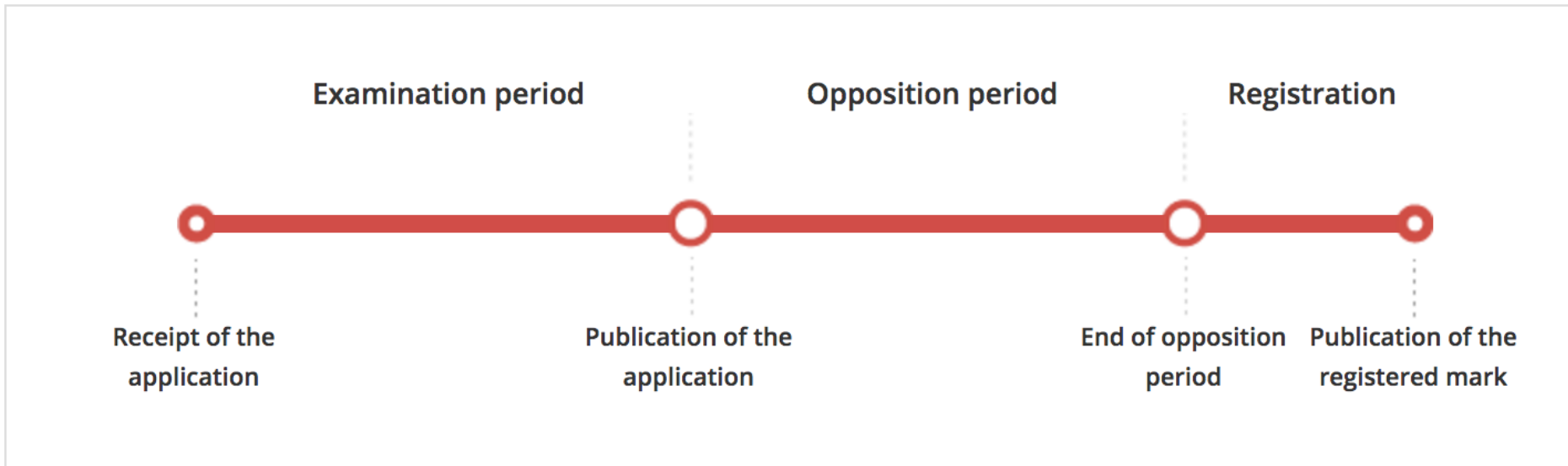
- Unitary character
- *any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:*
  - *(a) distinguishing the goods or services of one undertaking from those of other undertakings; and*
  - ***(b) being represented on the Register of European Union trade marks, (“the Register”), in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.’***
  - [shall only apply as from 1 October 2017] – as of today – graphical representation
  - **Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (codified version!)**



# Requirements for protection

- Notion of Trademark
- Distinctiveness (i.e. not general descriptive terms)

# Grant procedure



Source: <https://euipo.europa.eu/ohimportal/en/registration-process>

# Grant procedure

- Application filing (€350)
- A7 Absolute grounds
  - Public policy, morality
  - Non-distinctive (generic)
  - ...
- A8 Relative grounds – opposition proceedings
  - Conflict with prior rights
    - Similarity
    - Likelihood of confusion

## Protection: scope protection & term & exceptions

- A9 – right to exclude anybody from using the trademark in course of the trade
  - Identical – same goods/service
  - Similarity – likelihood of confusion – same goods/service
  - Trademark with reputation (and unfair advantage/detrimental) – similarity – likelihood of confusion – no limits

## Protection: scope protection & term & exceptions

- A9 right to exclude anybody from using the trademark in course of the trade
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  - Similarity – likelihood of confusion – same goods/service
  - Trademark with reputation (and unfair advantage/detrimental) – similarity – likelihood of confusion – no limits
- A9a prohibition of preparatory acts
- A13 exhaustion of rights
- A17 transfer A22 licensing



## Protection: scope protection & term & exceptions

- A12 Limits
  - [Non-relevant use (not in course of trade)]
  - Use of own name
  - “Spare parts” – indication of intended purpose
- A46 – duration of registration – 10 y, can be renewed indefinitely

# Termination

- A50 Surrender
- A51 Revocation (application to EUIPO/counterclaim)
  - Non-genuine use for 5 years
  - “Generification”
  - Misleading the public
- Invalidity
  - Absolute
  - Relative

## Bonus

- A66 EU collective mark *is applied for and is capable of distinguishing the goods or services of the members of the association which is the proprietor of the mark from those of other undertakings.*
- A74 certification trademark - shows compliance with some standard



# Enforcement

- EU Trademark courts
  - Infringement and validity jurisdiction



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# DESIGNS



# Life cycle

- Regulation
- Basics
- Requirements for protection
- Grant procedure
- Protection: scope protection & term & exceptions
- Enforcement
- Termination

# Regulation

- Hague agreement concerning the international registration of industrial designs (1934)
- Locarno agreement establishing an international classification for industrial designs (1968)
- Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs
  - Harmonization of national substantive law
- **Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (citations and references in this section concern this act)**
  - Unitary (EU wide) design protection
- Commission Regulation (EC) 2246/2002 of 16 December 2002 on the fees payable in respect of the registration of Community designs

# Basics

- Design: A3(1) *the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation;*
- Product: A3(2) *any industrial or handicraft item, including inter alia parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs;*



# Requirements for protection

- **Novelty + individual character**
- A5(1) *new if no **identical** design has been made available to the public*
  - *identical if their features differ only in immaterial details*
- A6(1) *if the overall impression it produces on the **informed user** differs from the overall impression produced on such a user by any design which has been made available to the public*
  - degree of freedom of the designer needs to be considered

# Requirements for protection

- Disclosure of design:
  - Exhibition, use in trade
  - 12-month grace period (lawful disclosure)
- *A8 designs dictated by their technical function and designs of interconnections not protected*
- *A9 no protection against designs contrary to public policy or to accepted principles of morality*

# Grant procedure

## ■ A11 Unregistered design

- Making available to the public, i.e. *if it has been published, exhibited, used in trade or otherwise disclosed in such a way that, in the normal course of business, these events could reasonably have become known to the circles specialised in the sector concerned, operating within the Community* – “confidential disclosure” not enough

# Grant procedure

- **A12 Registered design**
  - Application filing – EUIPO (€350)
  - Locarno classification
  - A45-47 Formal/material examination (refusal: definition, public policy/morality)  
**novelty/individual character are not examined**
  - A48, 49 Registration/publication

# Scope & term & exceptions

- A18 – right of the designer to be cited
- A19(1) Registered design
  - *making, offering, putting on the market, importing, exporting or using of a product in which the design is incorporated or to which it is applied, or stocking such a product for those purposes*
  - *A10 includes any design which does not produce on the informed user a different overall impression*
- A19(2) Unregistered design
  - *the right to prevent the [abovementioned] acts only if the contested use results from copying the protected design*
- A21 Exhaustion of rights
- A32 Licence + A28 transfer (registered)

# Scope & term & exceptions

- A20 Exceptions
  - Private and non-commercial purposes
  - Experimental purposes
  - Reproduction for the purpose of making citations or of teaching (must be compatible with fair trade practice and do not unduly prejudice the normal exploitation of the design + attribution of source)



# Scope & term & exceptions

- Term
  - A11 – unregistered 3 years since publication
  - A12 – registered 5 years since application  
(A13 renewal – max. 25 y)



# Enforcement

- Community design courts
  - Infringement and validity jurisdiction



# Termination

- A24-26, 52-53 Invalidation
  - Declaration of invalidity (EUIPO/counterclaim)
  - Grounds for invalidity (*inter alia* no design, no entitlement, unauthorised use of work)
  - Consequences - no effect from the outset
- A51 Surrender



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# THE EU COPYRIGHT LAW

# European Copyright Framework

- Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ("[Satellite and Cable Directive](#)"), 27 September 1993
- Directive on the legal protection of databases ("[Database Directive](#)"), 11 March 1996
- Directive on the harmonisation of certain aspects of copyright and related rights in the information society ("[InfoSoc Directive](#)"), 22 May 2001
- Directive on the resale right for the benefit of the author of an original work of art ("[Resale Right Directive](#)"), 27 September 2001
- Directive on the legal protection of computer programs ("[Software Directive](#)"), 23 April 2009
- Directive on the enforcement of intellectual property right ("[IPRED](#)"), 29 April 2004
- Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property ("[Rental and Lending Directive](#)"), 12 December 2006
- Directive on the term of protection of copyright and certain related rights amending the previous 2006 Directive ("[Term Directive](#)"), 27 September 2011
- Directive on certain permitted uses of orphan works ("[Orphan Works Directive](#)"), 25 October 2012
- Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market ("[CRM Directive](#)"), 26 February 2014

# FOCUS

- Directive on the harmonisation of certain aspects of copyright and related rights in the information society ("ISD"), 22 May 2001
- Directive on the legal protection of computer programs ("SD"), 23 April 2009
- Directive on the legal protection of databases ("DD"), 11 March 1996



# EU copyright development

- Decade of Directives (1991-2001)
  - Consolidation Decade (2001-2009)
  - Age of Judicial Activism (2009-now)
- 
- HUGENHOLTZ, P. Bernt, 2012, Copyright in Europe: Twenty Years Ago, Today and What the Future Holds. *Fordham Intellectual Property, Media & Entertainment Law Journal*. 2012. Vol. 23, no. 2, p. 503–524.

## EU Copyright principles – introduced by the ISD

- Harmonisation
- High level of protection (Recital 4)
- Appropriate reward for the use of authors' work (Recital 36)
- Communication to the public right
- Exclusive rights (broad)
- Exceptions (exhaustive)
- Three-step test



## Rights granted – ISD

- A2 Reproduction right
- A3 Communication to the public
- A4 Distribution right
- Not only for copyright, but also for related rights

## Exhaustion of distribution right (Art. 4(2) ISD)

- Case C-419/13 (Art & Allposters), 22. 1. 2015
- *Article 4(2) ISD must be interpreted as meaning that the rule of exhaustion [...] does not apply in a situation where a reproduction of a protected work, after having been marketed in the EU with the copyright holder's consent, has undergone an alteration of its medium, such as the transfer of that reproduction from a paper poster onto a canvas, and is placed on the market again in its new form.*



# ISD – basic notions

- Missing
  - Author?
  - Work?
  - Copyright contracts?
  - Moral rights?
- Judicial activism:
  - Work – criterion of originality (not general, only for databases, computer programs and photographs)
  - “author’s own intellectual creation”
  - C-5/08, Infopaq, C-403/08, C-429/08, Premier League v. QC Leisure and Murphy, C-145/10, Painer, C-604/10, Football Dataco
  - *Work: intellectual creation of the author reflecting his personality and expressing his free and creative choices (C-145/10, Painer)*

# Further rights

- + Rental/lending directive => fixation right, right of communication to the public, distribution right to performers
- Term directive => rights to photographs
- Resale right directive => droit de suite

# Orphan works directive

- Possibility to use (still copyrighted) work of unidentified or not located author(s) by specific beneficiaries (publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States) for specific purposes



# Term

- Term directive: extended term to 70 years p.m.a. (Berne requires 50 years)
- Prolonging of performers' and sound recording rights from 50 to 70 years in 2011



# DATABASE PROTECTION

# Outline

- Regulation
- Protection of databases and exceptions/limitations thereof
- CJEU Case Law: exploring the boundaries of protection
- Ryanair v PR Aviation case and its consequences – Less is more or more is less?

# Regulation

- No international instrument for mere amassments of data
- Berne Convention
- Protection of **collections (works)**
  - *2(5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.*
- Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases



# Database

“Database” shall mean:

1. a collection of independent works, data or other materials
2. arranged in a systematic or methodical way and
3. individually accessible by electronic or other means.



## Ratio: 31996L0009 Rec. (6)

- *(5)...copyright remains an appropriate form of exclusive right for authors who have created databases;*
- *(6)...in the absence of a harmonized system of unfair-competition legislation or of case-law, other measures are required in addition to prevent the unauthorized extraction and/or re-utilization of the contents of a database;*
- => two-tier protection

# Requirements for protection

- Chapter II – Copyright + limitations on the scope
  - *“by reason of the selection or arrangement of their contents, constitute the **author's own intellectual creation**”*
- Chapter III – Sui generis rights + exceptions
  - *“qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents”*

# Restricted acts

- Copyright: reproduction, translation, adaptation arrangement, alteration, distribution to the public, communication, display or performance to the public of the original or altered database
- Sui generis: extraction + re-utilization



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# EXCEPTIONS

## Exceptions – © – A6(1)

*The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall*

## Exceptions – SGDR – A8(1)

*The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever.*



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# CJEU CASE LAW



# CJEU – protected subject matter

- Investment
  - Obtaining
  - Verification
  - Presentation



# Obtaining I

- NO spin-off databases (C-203/02 (BHB), C-46/02, C-338/02 (Fixtures/Svenska), C-444/02 (Fixtures/OPAP))
- British Horseracing Board: aim of the directive: *„promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database.“* (C-203/02 (BHB). Also: C-444/02 (Fixtures/OPAP))

## Obtaining II

- No obstacle for the creator of the elements that would hinder the acquiring of SGDR protection
- IF
- *he establishes that the obtaining of those materials, their verification or their presentation, [...], required substantial investment in quantitative or qualitative terms, which was independent of the resources used to create those materials.*
- C-444/02 (Fixtures/OPAP), C-338/02 (Fixtures/Svenska)

# Verification

- AIM: ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation.
- Correction of duplicities, removal of typing errors and keeping the contents up-to-date => ensuring the reliability of the data in their long-term use
- C-338/02 (Fixtures/Svenska), also: C-46/02

# Presentation

- Structure and arrangement of the data in communication to the public
- *„Resources used for the purpose of giving the database its function of processing information, that is to say those used for the systematic or methodical arrangement of the materials contained in that database and the organisation of their individual accessibility.“*
- C-338/02 (Fixtures/Svenska)

# Substantial investment

- R7: *„considerable human, technical and financial resources“*
- R39: *„results of the financial and professional investment“*
- R40 *„investment may consist in the deployment of financial resources and/or the expending of time, effort and energy“*



# C-30/14, RYANAIR

## PR Aviation - service

- PR Aviation: comparison of flight ticket prices – screen scraping of other websites
- E.g. – Ryanair Ltd.
- Ryanair required an explicit consent with T&C:
  - NO screen-scraping + „*right of distribution of flight tickets reserved exclusively to Ryanair*“
- PR Aviation allegedly infringed these conditions - no contract with Ryanair
- Previous case law: Innoweb, C-202/12

# National courts

- **Gerechtshof te Amsterdam** – PR Aviation - no infringement PR Aviation, its acts were covered by standard exceptions
- **Hoge Raad der Nederlanden** – reference for a preliminary ruling – According to the DD does a database exist that is not protected by any of the protection regimes?



## C-30/14, Ryanair

- Database *per se* does not fulfill the requirements of protection => no protection and exceptions thereof
- IF no tier of the protection => Directive as such does not preclude the author/maker of such database from laying down contractual limitations on its use by third parties

# Privity of the Contract

- precludes the imposition of the contractual obligations on third parties
- information extracted from a contractually protected database => further disseminated online – no claim for breach against the third party by the producer/author
- absolute rights to information? (no ©/SGDR) – only contract

# Substantial investment

- Waiving SGDR to get more protection?
- Substantial investment – cannot claim that there is none?
- Unfair contract clauses? Unfair protection?

# Copernican Revolution

- 39: “ ..it is clear from the purpose and structure of Directive 96/9 that Articles 6(1), 8 and 15 thereof, **which establish mandatory rights for lawful users of databases**, are not applicable to a database which is not protected either by copyright or by the sui generis right under that directive, so that it does not prevent the adoption of contractual clauses concerning the conditions of use of such a database”.

# Copernican Revolution

- 40: *„directive sets out to achieve a balance between the rights of the person who created a database and the rights of lawful users of such a database, that is third parties authorised by that person to use the database....”*.

X

ACI Adam BV and Others v Stichting de Thuis kopie Stichting Onderhandelingen Thuis kopie vergoeding ruling, Case C-435/12 – restrictive interpretation

# Further consequences

- “Spin-off” database is again alive = contract
- “Public” databases (PSI databases) = stronger contractual protection?
- Less is more or more is less?



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# SOFTWARE PROTECTION

# Outline

- Historical overview
  - What form of IP protection?
- IP Basics
- Legal Framework
  - Berne Convention, TRIPS, WIPO World Copyright Treaty
  - European Software Directive (“SD”)



# Development of protection I

- 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

# Development of protection

- 1991 – EU Software Directive
- 1996 – WIPO World Copyright Treaty
- 2002 – Proposal for Directive on the protection by patents of computer-implemented inventions - FAIL
- 2009 - Recodification



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# What to protect?

## IP Basics - repetition

### Copyright Law

- › Idea-Expression dichotomy
- › Sufficient level of creativity or originality (!)
- › Original works of authorship
- › 70y p.m.a.

### Patent Law

- › Defined by claims
- › new, non-obvious, and useful or industrially applicable implementation (innovative step) of ideas
- › 20y since filing



# The Difference

- Droit d'auteur
  - Civil Law
  - Author
- Copyright
  - Common law
  - Rightholder

# Legal framework I

- Berne Convention
  - A2 – Definitions – literary works
  - A9 – 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

- WIPO World Copyright Treaty (A4)
  - *...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 (“SD”) 2009/24/EC



# Copyright protection

- Computer programs as literary works



# European Patent Convention

- A52
- 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**;*



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# SOFTWARE PATENTS IN EUROPE



# Technical effect

further technical effect	no further technical effect
control of a brake in a car	aesthetical effects of music or a video
faster communication between mobile phones	new rules for an auction scheme
secure data transmission (encryption of data)	selling and booking sailing cruise packages
resource allocation in an operating system	calculation of a pension contributions

As defined in: MACHEK, Jörg. Computer Implemented Inventions at the EPO

Available at:

<http://www.pks.rs/SADRZAJ/Files/Biro%20za%20saradnju%20sa%20EU/Inovacije%20u%20kompjuterskoj%20tehnicu%20u%20EPZ.pdf>

# No business methods patents

- Pure business methods as such are not patentable (Article 52 (2) (c) and (3) EPC, e. g. T 931/95 "PBS").
- An auction method carried out by means of the Internet
  - Denied - no technical contribution to the prior art (T 258/03 "Hitachi") => technical implementation of the improved auction rules was done by the conventional means of a computer and a computer network

## Jinseok Park: Has Patentable Subject Matter Been Expanded? -A Comparative Study on Software Patent Practices in the European Patent Office, the United States Patent and Trademark Office and the Japanese Patent Office. I. J. Law and Information Technology 13(3): 336-377 (2005), p. 341.

Case	Claimed Invention	Main Holding	Patentable
<i>Koch &amp; Sterzel</i> X-ray Apparatus T 0026/86 - 3.4.1	A data processing unit to control x-ray apparatus to achieve optimum exposure while protecting against overloading of the x-ray tubes	- 'An invention must be assessed as a whole. The use of non-technical means does not detract from the technical character of the overall teaching.' - 'If the computer program controls the operation of a conventional general-purpose computer so as technically to alter its functioning, the unit consisting of program and computer combined may be a patentable invention'	Yes
<i>Vicom</i> Digital Image Processing T 0208/84 - 3.5.1	A method of digitally processing images in the form of two-dimensional data array having elements in rows and columns...	'Even if the idea underlying an invention resides in a mathematical method, the invention may be patentable so long as the claim is directed to a technical process and does not seek protection for the mathematical method as such.'	Yes
<i>IBM</i> Text Processing T 65/86 -	A method for automatically detecting and correcting contextual homophone errors in a text document...	'The processing of abstract data, for a non-technical purpose, by means of computer programs running on conventional hardware' is not patentable.	No
<i>Sohei</i> General-purpose Management System User Interface T 769/92 - 3.5.1	A method for processing of both financial and inventory data in a system which used a single, common form, 'transfer slip', which was displayed to the user on a computer screen for the input of data	'An otherwise patentable computer program would not be rejected merely because of additional features that are excluded under Article 52 (2) of the EPC.'	Yes
<i>Phillips</i> Picture Retrieval System T 1194/97	A picture retrieval system comprising a record carrier and a read device, a coded picture composed of...	'A record carrier characterised by having functional data recorded thereon is not a 'presentation of information as such' and hence not excluded from patentability.'	Yes



## Jinseok Park: Has Patentable Subject Matter Been Expanded? -A Comparative Study on Software Patent Practices in the European Patent Office, the United States Patent and Trademark Office and the Japanese Patent Office. *I. J. Law and Information Technology* 13(3): 336-377 (2005), p. 342.

Case	Claimed Invention	Main Holding	Patentable
<i>IBM</i> Recovery from Resource Failure T 1173/97	A computer program product stored on a computer usable medium, comprising computer program means for causing the computer to control...	- 'A computer program is not excluded from patentability, irrespective of whether it is claimed by itself or as a record on a carrier.' 'A computer program is within the definition of Article 52 EPC if the program is capable of bringing about a 'further technical effect' going beyond normal physical effects when running on a computer.'	Yes
<i>PBS Partnership</i> <i>Controlling Pension</i> <i>Benefit Systems</i> T931/95-3.5.1	A method of controlling a pension benefits program by administering at least one subscriber employer account...	'Specifying the technical means for a purely non-technical purpose and/or for processing purely non-technical information does not necessarily confer a technical character on any such individual step of use or on the method as a whole.'	No
<i>COMVIK</i> Two Identities T 641/00	GSM type mobile telephone systems involving subscriber identity modules that are inserted by a user into his mobile unit to activate service in the respective telephone system by a subscriber identity IMSI	The features that make no technical contribution cannot be considered for the assessment of inventive step of the invention	No

## To sum up...

- „Further technical effect“
  - Not the „inevitable psychical effect” – i.e. running of the program (current changes)
  - *„what is achieved beyond this normal technical effect“*
- [EP0771280](#) – „ABS“ patent
  - METHOD AND SYSTEM FOR DETECTING THE PROPER FUNCTIONING OF AN ABS CONTROL UNIT UTILIZING DUAL PROGRAMMED MICROPROCESSORS

## „The Little Man test“

*“The question to ask should be: is it (the artefact or process) new and non-obvious merely because there is a computer program? Or would it still be new and non-obvious in principle even if the same decisions and commands **could somehow be taken and issued by a little man at a control panel**, operating under the same rules? For if the answer to the latter question is 'Yes' it becomes apparent that the computer program is merely a tool, and the invention is not about computer programming at all.”*

CFPH LLC, Patent Applications by [2005] EWHC 1589 (Pat) (21 July 2005)  
URL: <http://www.bailii.org/ew/cases/EWHC/Patents/2005/1589.html>





# Terminology

- Proprietary Software
- Shareware
- Freeware
- Abandonware
- Adware
- Public Domain Software

# Proprietary Soft

- “Traditional”
- Non-free
- Closed source code
  - Only binaries distributed
  - Source code – how could it be protected?
- Licensing



# Shareware

- Proprietary software
- Business model
- Trialware, demoware, added functionality (levels)



# Freeware

- “Fully” copyrighted
  - i.e. no modification, redistribution possible
- Available for use at no cost or for an optional fee
- No disclosure of source code



# Public Domain Soft

- Disclaimed copyright
- Not possible under Berne Convention
- Quasi public domain Software
  - After 70y – Free work

# Abandonware

- Copyrighted software
- Copyright infringement (!)
- No enforcement
- *"When we become aware of these instances of piracy, we go to these sites and pursue our IP (intellectual property) rights," "It's not something we go after on a day-to-day basis, but if it's our IP, then it's our IP."*

Nancy Bushkin, (former) Infogrames  
vice president of corporate communications

<https://www.wired.com/2002/01/abandonware-dead-games-live-on/>

# SD

- Overview
  - **A1 Object of protection**
  - A2 Authorship
  - A3 Beneficiaries of protection
  - A4 Restricted acts
  - A5 Exceptions
  - A6 Decompilation
  - A7 Special measures of protection
  - Term of protection

## SD A1

- (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**.*



# SD A1

- (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.*

# SD A1

- (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.***

## What is protected?

### YES

- Expression of a computer program
- Binary Code
- Source code
- Preparatory underlying materials

### No

- Ideas
- Principles
- Logic
- Algorithms
- Programming languages
- Data formats
- GUI

## C-406/10, SAS v WPL

- [39] *„Neither the functionality of a computer program nor the programming language and the format of data files used in a computer program ... constitute a form of expression of that program*
- *and*
- *as such, are not protected by copyright“.*

## C-393/09, BSA v Ministerstvo kultury

- [38] *„any form of expression of a computer program must be protected from the moment when its reproduction would engender the reproduction of the computer program itself*
- [40] *graphic user interface is an interaction interface which enables communication between the computer program and the user*
- [42] *does not constitute a form of expression of a computer program*
- [42] *cannot be protected specifically by copyright in computer programs by virtue of that directive“*

## C-393/09, BSA v Ministerstvo kultury

- [46] *„graphic user interface can, as a work, be protected by copyright if it is its author’s own intellectual creation.“*
- [44] *„graphic user interface of a computer program can be protected by the ordinary law of copyright“*
- [49] *„where the expression of those components is dictated by their technical function, the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable“*

# Originality

- 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)

# SD

- Overview
  - A1 Object of protection
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  - A6 Decompilation
  - A7 Special measures of protection
  - Term of protection



## SD A2,3

- 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

# SD

- Overview
  - A1 Object of protection
  - A2 Authorship
  - A3 Beneficiaries of protection
  - **A4 Restricted acts**
  - A5 Exceptions
  - A6 Decompilation
  - A7 Special measures of protection
  - Term of protection

## SD A4

- (1) Exclusive acts (rights)
  - Reproduction (a)
  - Integrity (b)
  - Distribution (c)
  
- (2) Exhaustion of Rights
  - UsedSoft GmbH v. Oracle International Corp..

# SD

- Overview
  - A1 Object of protection
  - A2 Authorship
  - A3 Beneficiaries of protection
  - A4 Restricted acts
  - **A5 Exceptions**
  - A6 Decompilation
  - A7 Special measures of protection
  - Term of protection

## SD A5 (1)

- 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.*

## SD A5 (2)

- 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.*

**X**

- ISD A5 (2)(b)
  - *made by a natural person for private use*

## SD A5(3)

- *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**.*

# SD

- Overview
  - A1 Object of protection
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  - A5 Exceptions
  - **A6 Decompilation**
  - A7 Special measures of protection
  - Term of protection



## SD A6

### › 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

# SD

- Overview
  - A1 Object of protection
  - A2 Authorship
  - A3 Beneficiaries of protection
  - A4 Restricted acts
  - A5 Exceptions
  - A6 Decompilation
  - **A7 Special measures of protection**
  - Term of protection

## SD A7

- 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.

# SD

- Overview
  - A1 Object of protection
  - A2 Authorship
  - A3 Beneficiaries of protection
  - A4 Restricted acts
  - A5 Exceptions
  - A6 Decompilation
  - A7 Special measures of protection
  - **Term of protection**

# Term of protection

- WAS 50y
- Council Directive **93/98/EEC** harmonising the term of protection of copyright and certain related rights
- NOW **70y** p.m.a.
- Justification X life-span
- New versions? – derivative works



# EU Copyright Acquis

- Exclusive rights (broad)
- Exceptions (exhaustive)
- Three-step test

## 5(5) ISD

The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 **shall only be applied in**

- 1) certain special cases which
- 2) do not conflict with a normal exploitation of the work or other subject-matter and
- 3) do not unreasonably prejudice the legitimate interests of the rightholder.

# The Exceptions (overview):

## REPRODUCTION RIGHT (5)(2)

- **Mandatory** for for transient and incidental copies (5)(1)
- (a) Photocopies (no music sheets) – Fair comp.
- (b) Private copying – Fair comp.
- (c) NC – specific acts of reproductions by EDU&LIB&MUS
- (d) Ephemeral recordings by broadcasters
- (e) reproductions of broadcasts for NC social institutions – Fair comp.

## REPRODUCTION & CTP (MAP) (5)(3)

- (a) Teaching & scientific
- (b) Disabled
- (c) Reporting of current events
- (d) Quotations
- (e) Public security
- (f) Political & public speeches
- (g) Religious & off. celebrations
- (h) Freedom of panorama
- (i) Incidental inclusion
- (j) Advertising of Art
- (k) Parody
- (l) Repair & Demonstration
- (m) Reconstruction
- (n) Terminal access
- (o) Other minor cases



# One mandatory

- **transient or incidental**
- integral and essential part of a technological process
- whose sole purpose is to enable:
  - (a) a transmission in a network between third parties by an intermediary, or
  - (b) a lawful use of a work or other subject-matter to be made,
- **no independent economic significance**

# Meltwater (C-360/13)

- **Browsing is ok...**
- *„copies on the user’s computer screen and the copies in the internet ‘cache’ of that computer’s hard disk, made by an end-user in the course of viewing a website, satisfy the conditions that those copies must be temporary, that they must be transient or incidental in nature and that they must constitute an integral and essential part of a technological process, as well as the conditions laid down in Article 5(5) of that directive, and that they may therefore be made without the authorisation of the copyright holders.“*



# EXCEPTIONS TO THE REPRODUCTION RIGHT



# “Private copying”

- on any medium
- made by a natural person for private use and for ends that are neither directly nor indirectly commercial
- fair compensation which takes account of the application or non-application DRM



## Padawan case (C-467/08)

- Fair compensation – autonomous concept
- Indiscriminate payment – not EU coherent



**C-435/12 ACI ADAM (par. 54-58)**

**C-463/12 Copydan (par. 74-79)**

- Obligation to pay fair compensation = only for private copies of lawfully acquired works

## DRM A6 ISD

- *3. For the purposes of this Directive, the expression "**technological measures**" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC.*
- *Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.*

## DRM A6 ISD

- *4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.*



## C-355/12 - NINTENDO

- *It is for the national court to determine whether other measures or measures which are not installed in consoles could cause less interference with the activities of third parties or limitations to those activities, while still providing comparable protection of the rightholder's rights. Accordingly, it is relevant to take account, inter alia, of the relative costs of different types of technological measures, of technological and practical aspects of their implementation, and of a comparison of the effectiveness of those different types of technological measures as regards the protection of the rightholder's rights, that effectiveness however not having to be absolute. That court must also examine the purpose of devices, products or components, which are capable of circumventing those technological measures. In that regard, the evidence of use which third parties actually make of them will, in the light of the circumstances at issue, be particularly relevant.*
- **The national court may, in particular, examine how often those devices, products or components are in fact used in disregard of copyright and how often they are used for purposes which do not infringe copyright.**



# REPRODUCTION AND COMMUNICATION TO THE PUBLIC



# Teaching & Science

- sole purpose of illustration for teaching or scientific research,
- **source indication**
- to the extent justified by the **non-commercial purpose** to be achieved;



# Teaching & Science

- International teaching: Applicable law – both Uni and student
- Fair compensation (?)
- European Research Area (?)

# Reporting of current events

- (c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character,
- in cases where such use is not expressly reserved, and
- as long as the source, including the author's name, is indicated, (E.g.: <http://www.bbc.co.uk/terms/business.shtml#2>)
- Or
- use of works or other subject-matter
- in connection with the reporting of current events,
- to the extent justified by the informatory purpose and
- as long as the source, including the author's name, is indicated, unless this turns out to be impossible;



## Quotation

- (d) quotations for purposes such as criticism or review:
  - [i] relation to work
  - [ii] lawfully made available to the public,
  - [iii] source indicated
  - [iv] in accordance with fair practice
  - [v] extent required by the specific purpose;

## Painer

- Article 5(3)(e) + 5(5) ISD
- Par. 116 *“media, such as newspaper publishers, may not, on their own initiative, use a work protected by copyright by invoking an objective of public security.”* – however – may contribute
- Art. 5(3)(d) “quoting work“ – even press report
- Indicating author - indicating source (5)(3)(e)



# Freedom of panorama

- [i] use of works, such as works of architecture or sculpture,
- [ii] made to be located permanently in
- [iii] public places;





# Parody

- use for the purpose of caricature, parody or pastiche;

## Deckmyn case

- Parody – autonomous concept
- *«work whose essential elements are the evocation of an existing work in a noticeably different manner and the expression of humour or mockery»* (par. 19-20)
- **fair balance** between the interests of the copyright holders and the freedom of expression of the user





# **SPECIAL PROTECTED SUBJECT MATTER: SOFTWARE & DATABASES**

# SOFTWARE – A5,6 SD

- All mandatory (!)
- Lawful acquirer
  - Proper functioning
  - Back-up copy – must not be contracted out
  - Reverse engineering – observe, study or test the functioning in order to determine the underlying ideas – must not be contracted out
- Decompilation – must not be contracted out
  - Interoperability
- No private copying
- No exception for education or research (!) – but Reverse engineering

## Databases A6,8,9 DD

### COPYRIGHT

- Mandatory:
- Lawful user – if restricted acts necessary for access to content and normal use
- Optional:
- Non-electronic databases for private use
- NC teaching
- Public security
- + 3ST

### SUI GENERIS DATABASE RIGHTS

- Mandatory: DB made available – lawful user – extraction/re-utilization insubstantial parts
- Optional:
- Extraction for non-electronic databases for private use
- Extraction for NC teaching
- Extraction/re-utilization for public security
- + 3ST

**MUST NOT BE OVERRIDDEN BY CONTRACT!**



# Sum up

- Member States – free choice
- 3ST – issue
- Member States – responsible for finding the balance



# THE THREE-STEP TEST

## Art. 5(5) InfoSoc Directive

*The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in*

- 1) certain special cases which*
- 2) do not conflict with a normal exploitation of the work or other subject-matter and*
- 3) do not unreasonably prejudice the legitimate interests of the rightholder.*



## Fair Use 17 U.S.C. § 107

- 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- 2. the nature of the copyrighted work;*
- 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;  
and*
- 4. the effect of the use upon the potential market for or value of the copyrighted work*

## Comparison: legal traditions

### *Anglo-America*

- *open limitations*
- *factor analysis*
- *case-by-case approach (judge)*
- *flexibility*
- *quick reactions to new developments*

### *Continental Europe*

- *specific limitations*
- *fixed requirements*
- *closed catalogue of limitations (legislator)*
- *legal certainty*
- *slow reactions to new developments*

# EU legal framework

*European Union* = *worst case scenario*

- *closed catalogue*
- *controlled by open factors*
- *no flexibility*
- *no legal certainty*
- *very slow reactions to new developments*
- *structural problem*
- *not only if three-step test in national law (+) (France)*
- *but also if three-step test in national law (-) (The Netherlands)*



# THE PROBLEM

# Problems

- 1. Territoriality of (C)
- 2. Non-mandatory character
- 3. Restrictive interpretation (?)
- 4. Contractual overridability
- => disharmonisation



# Ad 1. Territoriality

- 28 different sets of national rules and regulations



# Ad 1. Territoriality

- Jurisdiction – Brussels I (2015/2012/EU)
- Applicable law – Rome II (864/2007/EU)

# Jurisdiction & Applicable Law

- *Wintersteiger AG v. Products 4U Sondermaschinenbau* (C-523/10)
- Art. 5(3) – Art. 7(2)
- “Center of interests“
- Rome II Art. 8



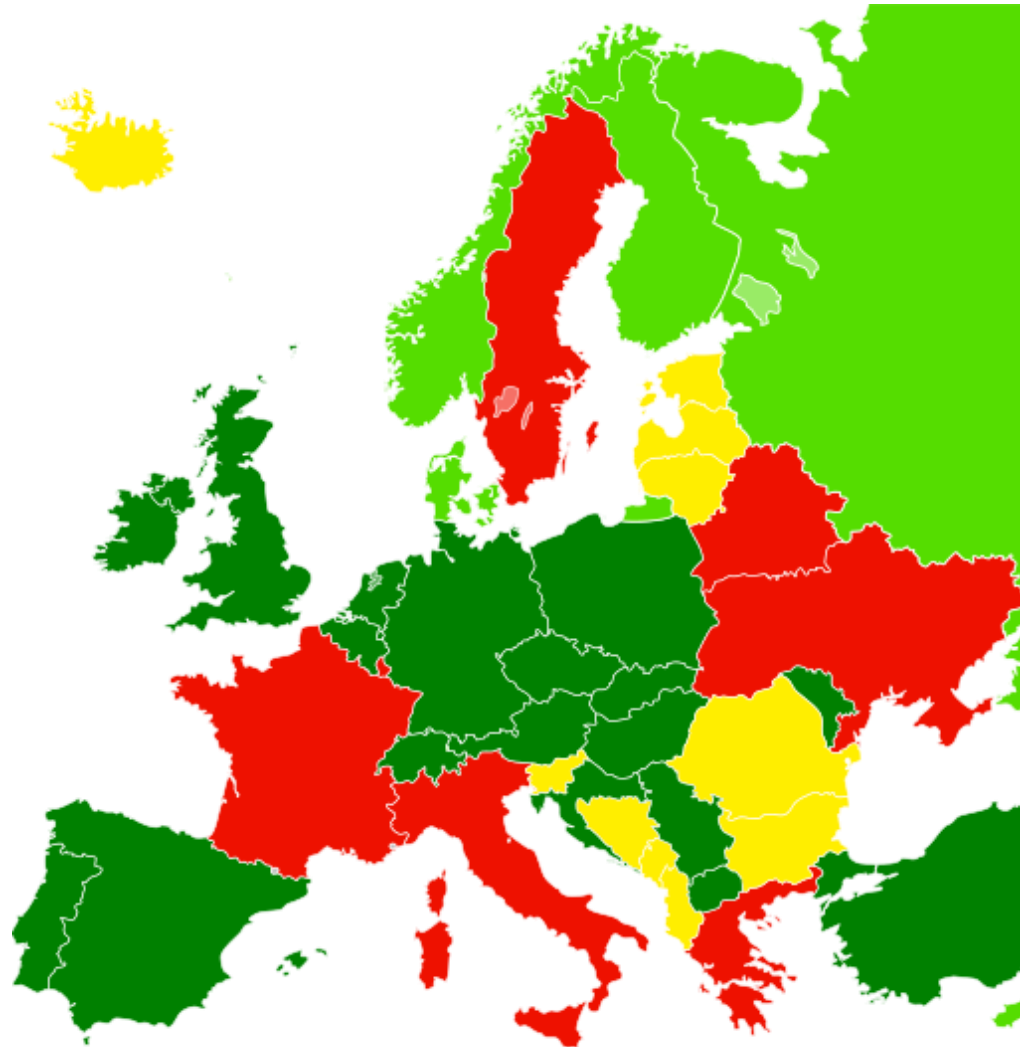


## Ad 2. Optional character

- Excessive amount of possible combinations



# Freedom of Panorama



[https://commons.wikimedia.org/wiki/File%3AFreedom\\_of\\_Panorama\\_in\\_Europe\\_NC.svg](https://commons.wikimedia.org/wiki/File%3AFreedom_of_Panorama_in_Europe_NC.svg)

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## Ad 3. Interpretation

- From restrictive interpretation (*Infopaq (56-57)*) to acknowledging technology (*FAPL*) and user's rights and freedoms (*Deckmyn*)

# Missing harmonization

- Transposition *“in an inconsistent and unharmonised manner which may vary from one Member State to another, would be incompatible with the objective of that directive“*
- C-467/08, *Padawan*, para. 36;
- C-510/10, *DR and TV2 Danmark*, para. 36



# Ad 4. Contractual overridability

- No regulation
- But software and DB
- (*Ryanair!*)



# “PUBLIC” LICENSES



# Open Content Definition v2

- RETAIN
  - REUSE
  - REVISE
  - REMIX
  - REDISTRIBUTE
- 
- David Wiley, <http://opencontent.org/definition/>

# Open Definition

- *“A piece of data or content is open if anyone is free to use, reuse, and redistribute it — subject only, at most, to the requirement to attribute and/or share-alike.”*
- Open Knowledge Foundation (old)
- New: *Knowledge is open if anyone is free to access, use, modify, and share it — subject, at most, to measures that preserve provenance and openness.*
- Source: <http://opendefinition.org/od/2.1/en/>



# Public licences – characteristics

- Allow sharing (modification)
- Under specific conditions
- Always attribution
- Irrevocable
- Automatic termination upon breach
  
- Creative Commons
- <https://creativecommons.org/choose/>



## Recommended reading:

- Pila, Justine, and Paul Torremans.  
2016. *European Intellectual Property Law*.  
Oxford: Oxford University Press.



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OF LAW  
Masaryk University

# FREE AND OPEN SOURCE SOFTWARE

# The Idea of FS

4 essential freedoms:

- *run the program, for any purpose,*
- *study how the program works (through access to the source code) and change it at will,*
- *copy and share the program with others*
- *share modifications with others*
- Source: <https://www.gnu.org/philosophy/free-sw.en.html>

# Idea of OSS

- Business oriented
- No ethical call
- System of software development
- Eric S. Raymond, 1997,  
<http://www.catb.org/~esr/writings/cathedral-bazaar/cathedral-bazaar/index.html>
  - Cathedral
    - "carefully crafted by individual wizards or small bands of mages working in splendid isolation"*
  - Bazaar
    - "a great babbling bazaar of differing agendas and approaches."*

# The Difference

- *“The fundamental difference between the two movements is in their values, their ways of looking at the world. For the Open Source movement, the issue of whether software should be open source is a practical question, not an ethical one.”*
- Source: <http://www.gnu.org/philosophy/free-software-for-freedom.html>



# LEGAL ASPECTS OF FOSS



# Legal Aspects

- Copyright
- Licences
  - Copyleft effect / Share-alike
- Various types of licences
  - [opensource.org/licenses/alphabeticlist](https://opensource.org/licenses/alphabeticlist)



# Copyleft Effect

- GNU GPL v2.0
- *“Art. 2 b) You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, **to be licensed** as a whole at no charge to all third parties **under the terms of this License.**”*

# Legal typology

- Strongly protective licences
  - “viral licences”
  - GNU General Public License
- Weakly protective licences
  - Lesser General Public License (LGPL)
- Permissive licences
  - Author’s crediting
  - BSD License, MIT License



# GNU LICENCES

- GNU GPL
- LGPL
- GNU Free Documentation License

# BSD License

- *Copyright (c) <year>, <copyright holder> All rights reserved.*
- *Redistribution and use in source and binary forms, with or without modification, are permitted provided that the following conditions are met:*
  - *\* Redistributions of source code must retain the above copyright notice, this list of conditions and the following disclaimer.*
  - *\* Redistributions in binary form must reproduce the above copyright notice, this list of conditions and the following disclaimer in the documentation and/or other materials provided with the distribution.*
  - *\* Neither the name of the <organization> nor the names of its contributors may be used to endorse or promote products derived from this software without specific prior written permission.*
- <https://opensource.org/licenses/BSD-3-Clause>
- + DISCLAIMER

# Legal Issues

- Enforceability
- Multi-licensing
  - Mozilla Suite / tri-license
- Liability and Warranty Disclaimers
- Copyright / Droit d'auteur
- Dynamic linking
  - GNU GPL no – derivative works?
  - LGPL yes



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# COMMUNICATION TO THE PUBLIC

# The right

- A3(1) ISD: *Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.*
- **New public**

## Linking after *GS Media*, C-160/15

Accessibility of content	Content published with rightholder's consent	Profit-making intention	Knowledge that content linked to is unlawful	Act of communication to the public	Potential infringement
Freely accessible	Yes	n/a	n/a	No ( <i>Svensson, GS Media</i> )	No
Not freely accessible	Yes	n/a	n/a	Yes ( <i>BestWater, GS Media</i> )	Yes
Freely accessible	No	No	No	No ( <i>GS Media</i> )	No
Freely accessible	No	No	Yes (eg because notified)	Yes ( <i>GS Media</i> )	Yes*
Freely accessible	No	Yes	Presumed (rebuttable presumption)	Yes ( <i>GS Media</i> )	Yes*
Not freely accessible	No	n/a	n/a	Yes	Yes

\*If rightholder notifies link provider (without prior knowledge of unlawfulness) that content linked to is unlawful and he refuses to remove the link, and exceptions in Article 5(3) InfoSoc Directive are inapplicable

Source: Eleonora Rosati: <http://ipkitten.blogspot.cz/2016/09/linking-after-gs-media-in-table.html>





# Notes

- A = Article of the respective act
- R = Recital of the respective directive