Legal protection of software

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There is a high demand for software solutions in the German economy. Sales of software are expected to amount to 28.72 billion euros in Germany in 2024. Industries such as automotive, mechanical engineering, finance and healthcare are looking for high-quality, secure and user-friendly solutions. The German *Mittelstand* is known for its innovative strength. In order to strengthen its own competitiveness, SMEs are prepared to invest in high-quality software. Software enjoys legal protection.

This Compact sheds light on the law under which protection is granted and who is entitled to protection. It also explains whether the mere idea is protected and to what extent protection exists during the development phase. Finally, the possibilities for the commercial exploitation of software are explained. The Compact is based on EU law.

Copyright

Scope of protection

Copyright law protects personal intellectual creations. The idea on which software is based does not yet constitute a creation, but the finished software does. Copyright law regards it as a work of literature. Software under development and intermediate stages are also protected by copyright. The same protection applies to apps, i.e. application software for mobile devices.

Copyright protects software in various stages of development, design material (e.g. programme flow chart), source code, machine or object code, application software (e.g. *Microsoft Word* as an office application, *Mozilla Firefox* as a web browser), system software (e.g. operating systems), individual programme parts, sub-programmes and modules.

Mere collections of data that do not contain command and control instructions for the computer are not protected. This includes mere ideas and principles, work processes for solving tasks and their description (function of the software), development and programming methods, programming languages, algorithms, technical interfaces, hyperlinks, HTML (the structuring and formatting of a website) and the website itself, as well as databases, file formats, data structures and data (e.g. blockchain).

Whether user interfaces, screen masks and displays are software is controversial. User interfaces in which the creative achievement lies in the *graphical* representation are in any case not protected by copyright as software. In the case of video games, the part that controls the gameplay is copyrighted software, but not

the audiovisual presentation on the screen. However, this can be protected as a photographic work.

Rights holder

In the EU, the software programmer is automatically the author by law. He holds the moral rights (right of publication, right to be named) and the exploitation rights (right of reproduction, right of distribution, right of making available to the public, etc.). The licence fees for the use of the software are due to him. Under most legal systems, legal entities cannot be authors. If several programmers develop software together, they are co-authors. As such, they can only exercise certain exploitation rights together and are jointly entitled to the licence fees. Deviating agreements are permissible.

Software development in the context of an employment or service relationship has a special feature: The programmer is the author, not the employer. However, Article 2 para. 3 of the EU Directive on the legal protection of computer programs stipulates that the economic rights of use lie entirely and exclusively with the employer, unless the parties have agreed otherwise. If a freelancer develops software, this rule does not apply and the copyright, including rights of use, lies with the freelancer. In this case, the law stipulates that only the rights of use that are at least necessary for utilisation are transferred to the mandator. Generally, this is only a non-exclusive right of use. Therefore, a mandator should always make contractual agreements with freelancers. The same problem exists when a mandator commissions the development of software as part of an IT project. Otherwise, there is a risk that the mandator will not be able to use the software as desired, as the rights lie with the programmer.

Patent law

Scope of protection

Software is protected by copyright, but this does not protect the technical concept on which software is based. It does not protect the new, inventive solution to a technical problem. Patent law protects technical inventions that are new, involve an inventive step and are industrially applicable. Software as such is not patentable, as the performance of the programmer does not constitute a technical achievement. However, inventions that have to be realised by means of a computer, so-called *computer-implemented inventions* (CII), are patentable.

A CII is patentable if three stages are fulfilled: Firstly, the invention must be in the technical field. It is sufficient if the CII implicitly teaches the use of a data processing system. Secondly, the CII must not be excluded from patent protection. There is no exclusion if the invention contains instructions that serve to solve a specific technical problem by technical means, i.e. directly triggers a technical effect or is part of an invention that controls devices or industrial processes (e.g. navigation device, anti-lock braking system in a car). Finally, the CII must be new and represent an inventive step over the prior art.

Rights holder

The inventor has the right to the patent. If several people have jointly made an invention, they are jointly entitled to the right. Only the patent holder is authorised to use the patented invention; use by third parties requires their consent. A patent must be entered in the patent register at the patent office (e.g. German Patent and Trade Mark Office (DPMA), European Patent Office (EPO)).

Trade mark law

Trade mark law serves to recognise the origin and to protect the quality and reputation of a product or service. It also serves the recognition value and protects against misuse. Trade mark law does not protect software directly, but it can protect the trade mark (e.g. *Microsoft*, *intel*), the title or the logo designed. Trade mark protection only comes into effect when the trade mark is registered in the trade mark register at the trade mark office (e.g. DPMA, European Union Intellectual Property Office (EUIPO), World Intellectual Property Organisation (WIPO)). The trade mark right

holder is the natural or legal person who has registered the trade mark.

Design law

Design law grants the designer the exclusive use of an aesthetic appearance (lines, contours, colours, shape, surface structure, materials). This means that no design protection applies to the software itself, but this is possible for the graphical user interface. The designer is entitled to the right to a design. A design must be entered in the design register (e.g. DPMA, EUIPO, WIPO).

Competition law

In Germany, the Act against Unfair Competition serves to protect competitors, consumers and other market participants from unfair commercial behaviour. It also protects the public interest in undistorted competition. The basis for the national laws is the EU Unfair Commercial Practices Directive.

The German Act protects software from being copied and imitated. Anyone who offers goods that are an imitation of a competitor's goods is acting unfairly if they cause customers to be avoidably deceived about the commercial origin, unreasonably exploit or impair the value of the imitated goods or services or have dishonestly obtained the knowledge or documents required for the imitation. Anyone who deliberately hinders competitors is also acting unfairly.

Trade secrets protection

Ideas that cannot be protected by copyright can be protected by trade secrets protection laws, based on the EU Directive on the Protection of Trade Secrets. The German Act on the Protection of Trade Secrets serves to protect trade secrets from unauthorised acquisition, use and disclosure. A trade secret is information that is not generally known or readily accessible and is therefore of commercial value. The information must be subject to appropriate confidentiality measures and there must be a legitimate interest in maintaining confidentiality. All information that fulfils these requirements can be protected as a trade secret, including software. The owner is the person who has lawful control over the trade secret.

Software can also be protected by individual contracts through *non-disclosure agreements* (NDAs). In this way, the underlying idea of software that is not protected by copyright can also be protected.

Commercial exploitation of the software

The rights holder may commercially exploit the software himself. Third parties can commercially exploit the software if they have acquired the rights of use, that is licence rights, from the rights holder. The focus of commercial exploitation is on generating licence income by concluding (copyright) licence agreements.

Rights of use under copyright

The exploitation rights are held by the programmer. Therefore, the duplication, editing, distribution and public reproduction of software require the authorisation of the programmer.

For all actions requiring approval, the programmer can grant third parties rights of use to his software via licence agreements. He can contractually determine the scope of the right of use, i.e. in terms of territory, time and content, and decide whether he wishes to grant a non-exclusive or an exclusive right of use. He receives licence fees for the rights of use granted in accordance with the scope of use.

By way of exception, certain actions do not require consent if they are necessary for the intended use of the software. For example, an authorised user may reproduce the software for the purpose of loading, displaying, running or saving it. He may make a backup copy and observe, examine or test the functioning of the software in order to determine the ideas and principles on which a software element is based. In addition, he may recompile the machine-readable object code into the human-readable source code, so-called

decompilation, if this is necessary to establish interoperability with other software.

(An overview is provided in the HP Compact "Software Licence Agreements", coming soon.)

Exhaustion doctrine under copyright

In European copyright law, the so-called exhaustion doctrine exists. According to this, the programmer's exploitation right of a software copy is exhausted as soon as it has been legally placed on the market within the European Union. The author can exclude the transfer of the software to third parties in individual contracts, but a general terms and conditions clause that prohibits or restricts resale is invalid.

Summary

Software is primarily protected by copyright, but other areas of intellectual property can also have a protective effect. The use of the software should be contractually regulated so that the organisational and economic interests of the parties involved can be satisfied in the best possible way.

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