

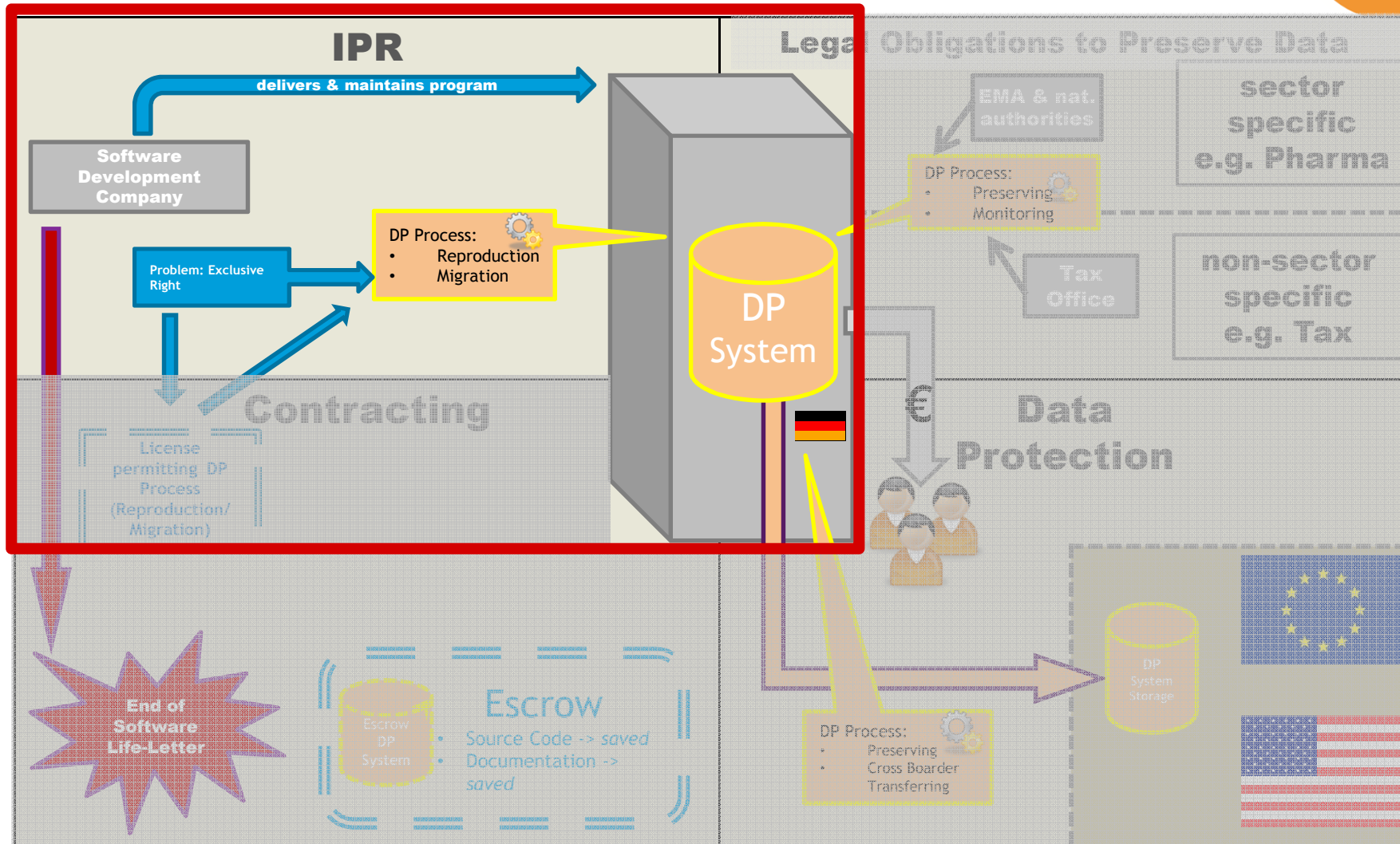


Legal Issues in Digital Preservation

Overview - Legal Aspects of DP



TIMELESS BUSINESS ◀ ● ▶



TIMBUS



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Digital Preservation and European Copyright

Copyright- Basic Concept

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- “Something” is covered by copyrights



- Author gains exclusive moral and exploitation rights

Moral Rights	Exploitation Rights
Protect the non-material interests	Protect the material interests

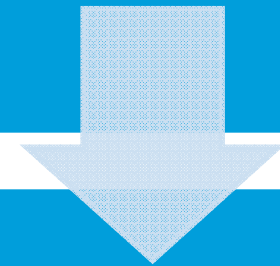
- Exclusive rights are limited by legal "exceptions & limitations"

Copyright & DP - Relevant Laws & Regulations

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- Directive 2001/29/EC - Information Society Directive (Aspects of copyright and related rights)
- Directive 2009/24/EC - Computer Program Directive
- Directive 96/9/EG - Database Directive
- Directive 2006/116/EEC - Copyright Duration Directive



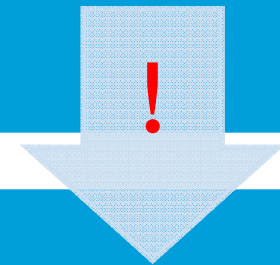
Implementation in National Law

Copyright & DP - Relevant Laws & Regulations

TIMELESS BUSINESS   



- Directive 2001/29/EC - **Information Society Directive**
(Aspects of copyright and related rights)
- Directive 2009/24/EC - **Computer Programm Directive**
- Directive 96/9/EG - Database Directive
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Implementation in National Law



Object of Protection and Relevant Exclusive Rights

Overview

Object of Protection

Directive 2001/29/EC / Directive 2009/24/EC

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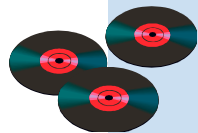
Directive 2001/29/EC - Information Society Directive



“Authors with exclusive rights regarding their works”

And also....

“performers with exclusive rights regarding the fixations of their performances”



“phonogram producers with exclusive rights regarding their phonograms;”



“producers with exclusive rights regarding the first fixations their films”

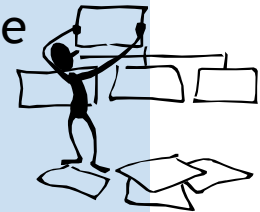


“broadcasting organisations with exclusive rights regarding the fixations of their broadcasts”

Directive 2009/24/EC - Computer Programs Directive

The Computer Program Directive provides for copyright protection of computer programs.

The protection covers any **computer program element** expressing the creativity of the author



E.g

- Data Flow Diagram
- Source Code
- Object Code

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Object of Protection: Computer Program

Directive 2009/24/EC - Computer Programs Directive

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- What is a Computer program?
- No definition of “computer program”
- Only short comment in Recital 7 of the Directive:

“For the purpose of this Directive, the term “computer program” shall include programs in any form, including those which are incorporated into hardware. This term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.”

- Giving no definition was a **conscious decision** by the European legislator
- Reason ?

Object of Protection: Computer Program

Directive 2009/24/EC - Computer Programs Directive

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- Giving no definition was a **conscious decision** by the European legislator
- Reason: Any definition would outdated very quickly

Relevant Exclusive Rights for Digital Preservation

Directive 2001/29/EC / Directive 2009/24/EC

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Directive 2001/29/EC - Information Society Directive

Art. 2 Reproduction Right 

Art. 3: Right of communication to the public of works and right of making available to the public other subject-matter

Art. 4: Distribution Right

Directive 2009/24/EC - Computer Programs Directive

Art. 4 1. a) Reproduction Right 

Art. 4 1. b) Alteration Right 

Art. 4 1. c) Distribution Right

Relevant Exclusive Rights for DP:

 **Reproduction Right and Alteration Right**



- Member States shall provide for the exclusive right to authorize or prohibit
 - direct or indirect,
 - temporary or permanent reproduction
 - by any means and in any form,
 - in whole or in part
- for authors, of their works; for performers, of fixations of their performances; for phonogram producers, of their phonograms; for the producers of the first fixations of films, in respect of the original and copies of their films; for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Very Broad Definition



Even

- direct or **indirect**,
 - **temporary** or permanent reproduction
 - by any means and in any form,
 - in whole or **in part**
- **for authors, of their works are covered** for performers, of fixations of their performances; for phonogram producers, of their phonograms; for the producers of the first fixations of films, in respect of the original and copies of their films; for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Very Broad Definition



Restricted Act: Reproduction

- “The exclusive rights of the rightholder include the right to do or to authorize
 - *the permanent or temporary reproduction of a computer program*
 - *by any means and in any form,*
 - *in part or in whole; [...]*
- => similar to **Reproduction Right - Art.2 Information Society Directive**
- *“[...] in so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorisation by the rightholder”*



Restricted Act: Alteration:

- “the translation,
- adaptation,
- arrangement and
- any other alteration of a computer program”

- Result:
 - Any alteration, error correction, maintenance of the of the program, is covered by the exclusive rights determined in Art.4 Computer Program Directive and require authorization
 - only exceptionally they do not

Adaptation/Alteration Right - Art.2 Directive 2001/29/EC

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- **Art. 2 Directive 2001/29/EC does not include an explicit adaptation/alteration right**
- **But: common ground that covered by the reproduction rights in Art.2 of the Directive 2001/29/EC**

Authorship of Computer Programs

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- The authorship of computer programs is defined in Art.2 of the Computer Program Directive:
 - *“The author of a computer program shall be the natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation”*
 - *“In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly.”*
 - *“Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.”*

Copyright holder / Employees

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Directive 2001/29/EC - Information Society Directive

- “The Authors of their works...”
- Also applies to employees, **unless** otherwise provided by contract
- Also depends on how national legislation regarding conclusive actions and implicit declarations is interpreted by courts

Directive 2009/24/EC - Computer Programs Directive (Art. 2)

- Author of a computer program is the natural person or group of natural persons who has created the program [...]
- **If** the computer program is created by an employee in the execution of his duties [...], the employer is exclusively entitled to exercise all **economic rights** in the program [...], **unless** otherwise provided by contract



Basics Done!

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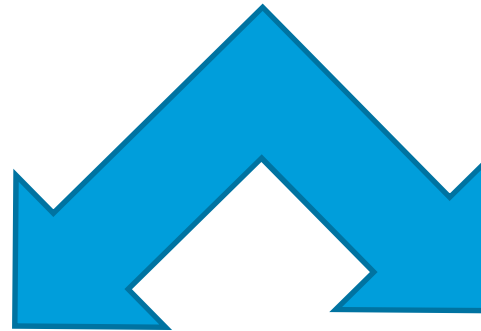


BASICS 

QUESTIONS?



Intention for preservation?

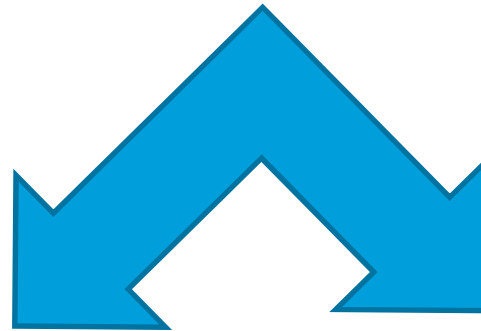


Conservation
of **data**
substance

Conservation of
operability
(of services, processes or
programms)



Intention for preservation?

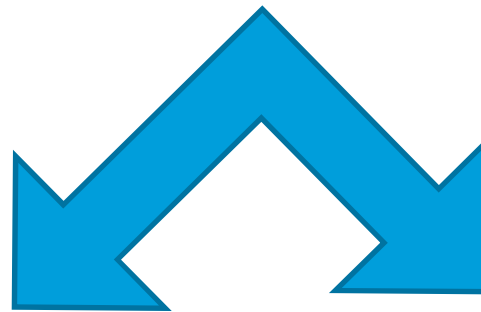


Conservation
of **data**
substance

Conservation of
operability
(of services, processes or
programms)



How to preserve data substance?



Data Carrier Renewal

Renewal = Identical copy
of the binary code on new
carrier

Data Conversion

=> translation into another
format

Intention for preservation?

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Just one MicroSd card stores more than the rest combined.





How to preserve substance?

Data Carrier
Renewal

Renewal = Identical copy of the
binary code on new carrier



Copy of binary code => the
permanent or temporary
reproduction of a computer
program by any means and in
any form, in part or in whole
(Art. 4 Nr. 1. a) Directive 2009/24/EC)



**Infringement of the exclusive
reproduction right of the
copyright holder**

Data Conversion



=> translation into another format

the translation, adaptation, arrangement
and any other alteration of a computer
program and the reproduction of the
results thereof, without prejudice to the
rights of the person who alters the
program

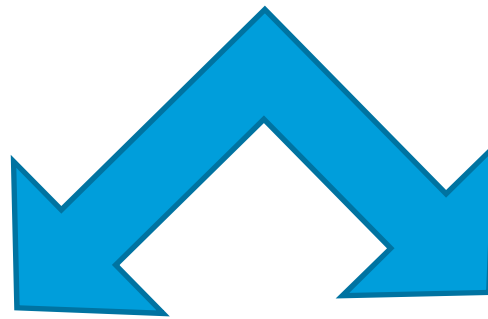
(Art. 4 Nr. 1. a), b) Directive 2009/24/EC)



**Infringement of the exclusive
reproduction right/adaption
right of the copyright holder**



Intention for preservation?



Conservation of
data substance

Conservation of
operability
(of services, processes or
programms)

 Porting /
Migration

Differentiate between Data and Software Migration

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Data Migration



Directive 2001/29/EC -
Information Society
Directive
(Aspects of copyright
and related rights)

Software
Migration



Directive 2009/24/EC
Computer Programm
Directive

Infringement of the exclusive reproduction right/adaption right of the copyright holder

Differentiate between Data and Software Migration

TIMELESS BUSINESS   



Data Migration



Directive 2001/29/EC -
Information Society
Directive
(Aspects of copyright
and related rights)

Software
Migration



Directive 2009/24/EC
Computer Programm
Directive

Infringement of the exclusive reproduction right/adaption right of the copyright holder



Preservation with Consent of the Copyright Holder?



Exceptions and Limitations

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- Something is covered by copyrights



- Author gains exclusive moral and exploitation rights

Moral Rights	Exploitation Rights
Protect the non-material interests	Protect the material interests

- Exclusive rights are limited by legal "exceptions & limitations"



Exceptions and Limitations

Information Society Directive

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■ Article 5 (1) Information Society Directive

- only applies to temporary acts of reproduction,
„Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
 - Reproductions of copyright protected data in the RAM and reproductions on local cache-memories, online routers or proxy servers
- (a) *a transmission in a network between third parties by an intermediary, or*
 - E.g. If the digital preservation system automatically reproduces files as part of its regular system operation,
- (b) *a lawful use*
 - this does not lead to an infringement of exclusive rights of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.“
 - But exception is **not** applicable to the primary purpose of the long term digital preservation system

Exceptions and Limitations

Information Society Directive


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■ Article 5 (2) lit. b) Information Society Directive

- *“Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the case of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial [...]”*

- **Private use?**

 **Personal purposes**
of a natural person
in private sphere



Business Company

Process Preservation

Exceptions and Limitations

Information Society Directive

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■ Article 5 (2) lit. c) Information Society Directive

- covers reproductions regarding specific acts of reproduction made by *publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage; [...].*
- *Not the TIMBUS approach*
 - => TIMBUS = “*business processes and services*”

Exceptions and Limitations

Computer Program Directive

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- **Article 5 - Computer Program Directive - Overview**
 - **Article 5 (1) - Computer Program Directive**
 - “...where they are necessary for the use of the computer program by the lawful acquirer”
 - **Article 5 (2) - Computer Program Directive**
 - „Backup Copy“
 - **Article 5 (2) - Computer Program Directive**
 - „Decompiling“

Exceptions and Limitations

Computer Program Directive

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- **Article 5 (1) - Computer Program Directive**
 - In the absence of specific contractual provisions,
 - the acts referred to in points (a) and (b) of Article 4(1) 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

Exceptions and Limitations

Computer Program Directive

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■ Article 5 (1) - Computer Program Directive

- In the absence of specific contractual provisions,
- the acts referred to in points (a) and (b) of Article 4(1) shall not require authorisation by the rightholder

- when the reproduction is necessary for the functioning of the computer program
- in a form which does not permit any other reproduction

Restricted Acts - Art. 4 Directive 2009/24/EC (Computer Program Directive)


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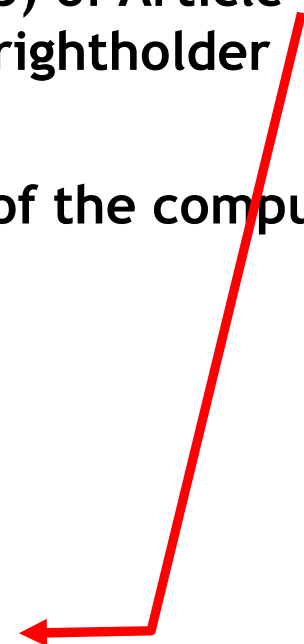
Restricted Act: Reproduction

- “The exclusive rights of the rightholder include the right to do or to authorize
 - *the permanent or temporary reproduction of a computer program*
 - *by any means and in any form,*
 - *in part or in whole; [...]*

=> similar to Reproduction Right - Art.2 Information Society Directive

- “[...] *in so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorisation by the rightholder*”

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Exceptions and Limitations

Computer Program Directive

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■ Article 5 (1) - Computer Program Directive

- In the absence of specific contractual provisions,
- the acts referred to in points (a) and (b) of Article 4(1) shall not require authorisation by the rightholder
- where they are necessary for the use of the computer program by the lawful acquirer
 - Lawful Acquirer = intends to cover anyone who is legitimately in the possession of a copy of a program with the right to use the program
 - Necessary = An act is necessary pursuant to Art. 5 (1) if the use in accordance with the intended purpose remains impossible by other reasonable actions
- in accordance with its intended

Exceptions and Limitations

Computer Program Directive

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- **Article 5 (2) - Computer Program Directive - Backup Copy**
 - *“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”*
 - A person having a right to use the computer program” = “lawful acquirer”
 - A backup copy is a copy of the sold or licensed program in its original version.
 - Still a backup copy can never be necessary for the use of a program.
 - The Directive obviously means that the making of backup copies is permitted if they are necessary to ensure continued use
 - May work for DP
 - BUT no alteration; and only a few copies
 - User has to prove, that one copy is insufficient

Exceptions and Limitations

Computer Program Directive

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- **Article 6 - Computer Program Directive - Decompiling**
 - **Decompiling => „Re-translation“ Source Code/Object Code**



- Covered by Art. 6 Computer Program Directive
- Problem: Art. 6 is very restrictive

Exceptions and Limitations

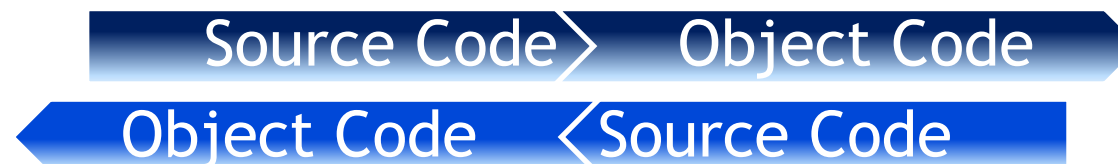
Computer Program Directive

TIMELESS BUSINESS 



Article 6 - Computer Program Directive - Decompiling

- The authorisation of the rightholder is **not** required where **reproduction** of the code and **translation** of its form
 - **indispensable** to obtain the information necessary to achieve the **interoperability**
 - of an **independently created** computer program **with other programs**,
 - provided that the following **conditions** are met:
 - those acts are **performed by the licensee** **or** by another person having a right to use a copy of a program, **or** on their behalf by a person authorised to do so;
 - the **information necessary to achieve interoperability** has not previously been readily available to the persons referred to in point (a); and
 - those acts are **confined** to the parts of the original program which are **necessary** in order **to achieve interoperability**.



Exceptions and Limitations

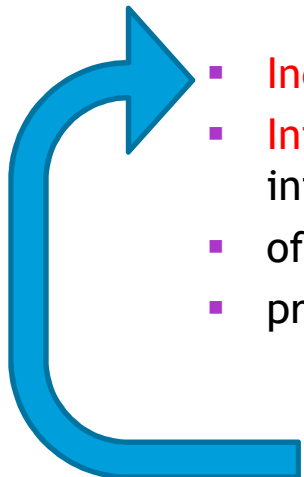
Computer Program Directive

TIMELESS BUSINESS 



Article 6 - Computer Program Directive - Decompiling

- The authorisation of the rightholder is **not** required where **reproduction** of the code and **translation** of its form
 - **Indispensable** = Decompilation is “ultimo ratio”
 - **Interoperability** = the ability to exchange information and mutually to use the information which has been exchanged
 - of an **independently created** computer program **with other programs**,
 - provided that the following **conditions** are met:
 - Decompiling is **performed by the licensee**
 - **information necessary to achieve interoperability**
 - those acts are **confined** to the parts of the original program which are **necessary** in order **to achieve interoperability**.



„double“



Check, Check, Check ...

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- Something is covered by copyrights 



- Author gains exclusive rights 

Moral Rights	Exploitation Rights
Protect the non-material interests	Focus: Reproduction and Alteration Rights

- Exclusive rights are limited by legal "exceptions & limitations"
 - Temporary reproduction, private use, lawful acquirer, backup, decompiling 

Mh... well, a lot of Problems...

And now..?

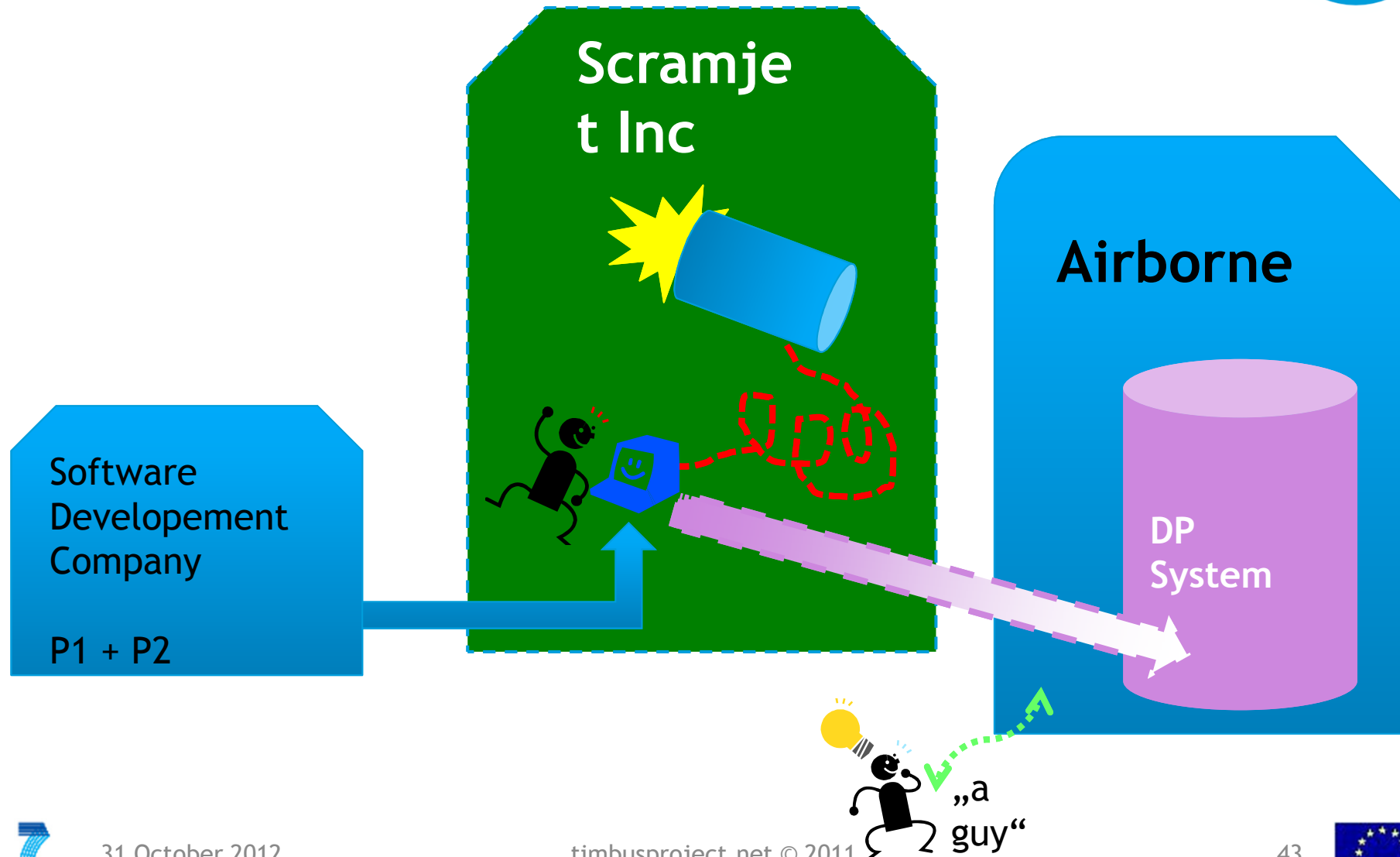
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- Risk of Copyright infringement during DP: high
- Exceptions & Limitations do not work for many DP Issues
- Consequences:
 - for the ones who want to install and run a DP-System
 - Be aware of this issues and address them early during DP planning phase
 - for those who are convinced by the necessity of DP Systems
 - continue to raise this problems
- Out NOW! Brand New!
- The DPC Technology Watch Report on IP Rights for DP by Andrew Charlesworth (UK Law)

„The Case“

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Thank you for your attention!