MINOR DISSERTATION

‘INTERFACE BETWEEN COPYRIGHT PROTECTION AND LICENSING OF COMPUTER PROGRAMS

–

A COMPARATIVE ANALYSIS OF SOUTH AFRICAN AND SWISS LAW INCLUDING CROSS-BORDER ASPECTS’

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I INTRODUCTION

Nowadays, computer programs have become an unavoidable part of our everyday life. Be it because teenagers install the newest friends’ applications of social networks on their mobile phone, students download the latest anti-virus update or companies need a customised software solution, there is always a computer program involved in the transaction.

Against what one might expect, such a transaction does not consist of a sale in the ordinary sense of the word. Unlike a TV for instance, a computer program, though embodied on a CD, is considered as an immaterial good. This has some practical implications. For instance, a computer program can relatively easily be copied without loss of quality. As a consequence, the identical computer program could be used independently by multiple persons at the same time.

Against this background, computer programs are, in legal terms, protected by copyright.¹ This is to be understood as a legal concept giving the copyright holder exclusive rights with respect to the computer program. In other words, a ‘buyer’ of a computer program cannot do whatever he wants with the computer program. Rather, the ‘buyer’ is granted certain rights with respect to the computer program, such as the right to use it. This transaction of contractually granting rights with respect to a computer program is called licensing. The computer program’s license (attributed by the copyright holder as licensor) gives the computer program’s user (the licensee) the right to use and do certain acts with the computer program in terms and in accordance with the license agreement.

In this regard, first, the question of what rights can be granted arises. This is important as one cannot ‘[...] confer more entitlements than he himself holds.’² Hence, in order to be able to grant a right or rights, the copyright holder as licensor needs to be aware about his specific rights regarding his computer program. This

¹ The spectrum of intellectual property protection of computer programs is broad. They may be protected simultaneously by copyright, patents, trade secrets and trademarks. However, this minor dissertation focuses on the protection of computer programs by means of copyright. See also Caroline B Ncube ‘Equitable Intellectual Property Protection of Computer Programs in South Africa: Some Proposals for Reform’ (2012) 3 STELL LR 438 at 439.

knowledge will allow the copyright holder to contractually determine and control what happens with his computer program.

Another, second, aspect is that the above mentioned rights of the copyright holder are not absolute but subject to some exceptions. In other words, there are situations in which the copyright holder cannot invoke any rights in order to exercise control over its copyright protected property. In this regard, another question arises: Can a copyright holder exclude the application of these exceptions by a respective overriding contractual agreement?

These illustrations show that the transaction of licensing a computer program cannot be analysed without considering also the respective copyright regime applicable by which the computer program is protected. Rather, licensing and copyright of a computer program are closely intertwined with each other. Therefore, the topic of this work is to have a look at the interface between intellectual property rights and the transaction of granting such rights with respect to computer programs under selected legal systems.

In a first step, I will analyse the intellectual property rights of a computer program. This analysis is essential in order to understand the clauses of a license agreement. In this regard, I will restrict the extent of examination to copyright provisions that are relevant with view to licensing a computer program, in particular the scope of a legal copyright protection.

In a second step, I will analyse whether, in which way and to what extent these intellectual property rights of a computer program can then be transferred from the copyright holder of a computer program (as licensor) to the ‘purchaser’ of such computer program (as licensee). In particular, I will scrutinize typical licensing clauses with copyright implications. In other words, I will determine to what extent the copyright protection of a computer program interacts with the licensing thereof. Of particular interest will be the question whether exceptions provided by the applicable copyright legislation can be overridden by a contractual agreement.

As Swiss lawyer who has studied South African intellectual property law in the course of the LL.M. programme, I will, in terms of jurisdictions, primarily compare South African law with Swiss law. This comparative analysis will allow determining and seeing differences between a mixed common law and a continental European
country as regards copyright and licensing. Both Switzerland and South Africa have undertaken to follow certain international rules as regards copyright protection. Furthermore, transactions regarding computer programs often take place between parties from different countries and qualify thus as international transactions. Accordingly, my analysis of the interface between copyright and licensing of computer programs will also include aspects which are of importance in an international context.
II  COPYRIGHT PROTECTION OF COMPUTER PROGRAMS

(1)  Introduction

The following discussion will focus on the legal protection of computer programs by way of copyright in an international context as well as in a national context by doing a comparative analysis of South African and Swiss law. In particular and with a view to the licensing of computer programs, the following copyright issues need to be addressed:

First, it must be outlined whether and under what conditions, a copyright protection of computer programs exists at all. It will therefore be analysed whether computer programs are eligible for copyright protection (see section II(4)). Second, it is important to know, who holds the copyright in computer programs. An overview of the allocation of the copyright of a computer program can be found in section II(5). Third, the core issue is about the content and scope of the legal copyright protection of computer programs in order to determine the particular rights of the copyright holder. In particular, there must be clarity with respect to acts which the copyright holder can control as well as with respect to acts that are beyond the copyright holders’ control and, as a consequence, are ‘free’ (see section II(6)). Finally, it is also important to mention the duration of the legal copyright protection since it lapses after a specified period of time (see section II(7)).

However, before addressing these substantive issues, an overview of the relevant legal situation as well as a definition section of the relevant terms is provided (see section II(2) and II(3)).

(2)  Legal framework

(a)  International regulation

(i)  Berne Convention

During the nineteenth century the demand for printed works increased rapidly in Europe due to its economic growth at the time. This brought with it piracy of printed

work. At first, individual countries, in particular France, addressed this problem by negotiating bilateral treaties with other countries as regards the copyright protection. In a later stage, countries sought to replace these bilateral treaties with a multilateral agreement.⁴

Against this background, the Berne Convention for the Protection of Literacy and Artistic Works (hereinafter ‘Berne Convention’) was adopted in 1886 in Bern (Switzerland). It provides for an international legal copyright protection of ‘literary and artistic works’.⁵ One of the core principles is the principle of ‘national treatment’ according to which each member state accords to foreign authors the same copyright protection rights as it does to authors of its nationality.⁶

In order to handle the tasks related to the administration of the copyright protection, the Berne Convention set up an international bureau which became, in a later stage, the World Intellectual Property Organisation (hereinafter ‘WIPO’) located in Geneva (Switzerland).⁷

South Africa became a signatory to the Berne Convention in October 3, 1928 while Switzerland is a signatory since 1886 as it is one the founding members of the Berne Convention.⁸

(ii) TRIPS

One of the weaknesses of the Berne Convention was that it lacked an enforcement mechanism. This eventually led to the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter ‘TRIPS’) signed on January 1, 1995.⁹

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⁵ Berne Convention, art. 2(1).
⁷ For more details about WIPO see http://www.wipo.int/about-wipo/en/history.html.
TRIPS is part of the so called ‘covered agreements’ of the World Trade Organisation (hereinafter ‘WTO’) located in Geneva (Switzerland). The term ‘WTO covered agreements’ includes all agreements that are gathered under the agreement establishing the WTO, also known as the ‘Marrakesh Agreement’. Thus, as being a part of the WTO’s legal framework, TRIPS enjoys a powerful enforcement mechanism by means of the dispute settlement procedure.

TRIPS has been designed as a legal minimum framework regarding intellectual property rights. In other words, member states are allowed to adopt stricter rules. As regards copyright protection, TRIPS mainly refers to the Berne Convention. Furthermore, TRIPS has expanded the international copyright protection rules by introducing the authors’ right to prohibit the commercial rentals of their works.

South Africa became a member to the WTO on January 1, 1995 while Switzerland was part of the founding members of the WTO.

(iii) WCT

In December 1996, members of the WIPO adopted the WIPO Copyright Treaty (hereinafter ‘WCT’) in order to keep up with the fast development of new digital technologies, in particular the internet.

From a systematic point of view, the WCT is a special agreement under the Berne Convention. In fact, the WCT intends to bring the existing ‘international system of copyright under the Berne Convention into the internet age’. First, WCT

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12 TRIPS, art. 1(1); World Trade Organisation *Understanding the WTO* 5 ed (2011) 39.
13 TRIPS, art. 9(1).
15 See members under http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm; World Trade Organisation *Understanding the WTO* 5 ed (2011) 112.
17 WCT, art 1(1).
stipulates explicitly that computer programs are protected as literary works.\textsuperscript{19} Second, WCT deals with the rights of copyright holder regarding the distribution, rental and communication to the public.\textsuperscript{20} Third, WCT prohibits the circumvention of technological measures that are used by authors in connection with protection of their works as well as unauthorised modification of rights management information which identifies the copyright holder.\textsuperscript{21}

South Africa signed the WCT in December 12, 1997, but it has not yet ratified it. In Switzerland, WCT came into force on July 1, 2008.\textsuperscript{22}

(b) \textit{Supranational legislation}


Neither Switzerland nor South Africa are EU-member states and, as a consequence, they are not obliged to implement EU directives in their own law. However, Switzerland has in several aspects voluntarily aligned its legislation with EU law. In particular, the Swiss Copyright Act includes many clauses of the first

\begin{flushleft}
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\textsuperscript{19} WCT, art. 4.
\textsuperscript{20} WCT, arts. 6-8.
\textsuperscript{21} WCT, arts. 11-12.
\textsuperscript{22} Marlize Conroy ‘Access to Works Protected by Copyright: Right or Privilege?’ (2006) 18 \textit{South African Mercantile Law Journal} 413 at 417; see also ‘contracting parties’ under \textit{http://www.wipo.int/treaties/en/}.
\textsuperscript{24} Computer Program Directive 1991, art. 4.
\end{flushleft}
Against this background, this directive will be incorporated in the following discussion.

(c) South Africa

In 1979, the Copyright Act 98 of 1978 (hereinafter ‘Copyright Act’) came into force in South Africa. It replaced the previous Copyright Act 63 of 1965 which based on the British Copyright Act of 1956. The Copyright Act was formed on the pillars of the previous British law as well as of the Berne Convention. It has been amended several times since. In particular, the Copyright Amendment Act 125 of 1992 provided for the protection of computer programs.

(d) Switzerland

Switzerland’s copyright law is called ‘Urheberrecht’ in German, ‘droit d’auteur’ in French and ‘diritto d’autore’ in Italian which can be translated into English as the ‘author’s right’. In fact, the legal copyright protection is afforded primarily to the author as opposed to the concept of ‘Copyright’ in common law jurisdictions. The copyright law in force at present is the Swiss Federal Copyright Act of 1992 (hereinafter ‘Swiss Copyright Act’). In essence, as mentioned earlier, the Swiss Copyright Act is in broad agreement with the Computer Program Directive 1991.

It was amended on July 1, 2008 in order to incorporate the new provisions provided by the WCT.
(3) Definitions

(a) Computer programs

From a general point of view, a computer program tells the computer what to do, for example a tool to play your music-CDs on your laptop. It follows that computer programs and computers depend on each other, that is without a computer a computer program would have nothing to run on. A computer consists of several parts that can be physically touched and are also known as ‘hardware’. In contrast, a computer program consists of a collection of instructions that are executed within the hardware. A computer program is also referred to as ‘software’. However, the term ‘software’ is broader than computer programs since it comprises, in addition to computer programs, producer as well as user documentation.

After having distinguished a computer program from the computer itself (‘hardware’) and after having put it in relation to the broader term ‘software’, the term ‘computer program’ needs to be analysed more specifically. A good definition is provided by the WIPO that describes computer programs as being ‘(...) a set of instructions capable, when incorporated in a machine-readable medium, of causing a machine having information-processing capabilities to indicate, perform or achieve a particular function, task or result’.

The South African Copyright Act defines a computer program very similarly as ‘(...) a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result.’

By contrast, the Swiss Copyright Act does not provide a definition of the term computer program. Moreover, during the elaboration of the mentioned act, the Swiss

34 Copyright Act, s 1; Hennie Klopper ‘Copyright and the Internet’ in Sylvia Papadopoulos, Sizwe Snail (eds) Cyberlaw @ SA III, The Law of the Internet in South Africa 3ed (2012) 170.
Federal Council argued that a legal definition of the term ‘computer program’ should be deliberately omitted due to the fact that the area of computer science is changing rapidly and a secured terminology is lacking. As such, the Swiss Federal Copyright Act is compliant with the EU’s Computer Program Directive 1991 which does not contain a legal definition of the term ‘computer program’ either.

(b) Copyright protection

(i) Copyright protection in general

Read literally, copyright means the right to copy. However, the copyright usually comprises far more rights, for example the right to publish, perform, adapt or broadcast the work. In this regard, copyright is sometimes asserted using the words ‘all rights reserved’ though this notice is nowadays no longer required to enjoy legal copyright protection. Copyright needs to be understood as a legal concept giving the copyright holder exclusive rights with respect to the particular work, usually for a limited period of time. As such, the copyright confers on its holder a kind of a monopoly limited in time as regards the exploitation of the respective work.

(ii) Copyright protection of computer programs in particular

The development of a computer program is usually connected with large investments in terms of capital and labour. In contrast, a developed computer program can relatively easily be copied without loss of quality. From the perspective of the

38 Provided that the Berne Convention has been adopted, see Berne Convention, art. 5(2); Ivan Cherpillod ‘Art. 2’ in Barbara K Müller, Reinhard Oertli (eds) Urheberrechtsgesetz (URG) 2ed (2012) 27.
computer industry it is therefore essential that the investments made can be protected from unauthorised use or reproduction.\textsuperscript{41}

However, it has been argued whether the copyright protection is the ‘right’ means to protect computer programs. In particular, the copyright protection protects the lines of code written by the creator but it does not comprise the underlying idea or functionality of a computer program. Against this background, some argue that the protection of computer programs should better be left to patent law since such protects technical innovations. On the other hand, computer programs consist of written lines of codes. Hence, the copyright protection seems to be the ideal kind of protection, not least because the copyright protection arises automatically, without any costs for registration etc.\textsuperscript{42}

\section*{(4) Eligibility for legal copyright protection}

\subsection*{(a) Copyright requirements}

In the following, the requirements for enjoying a legal copyright protection will be discussed. Even though there are differences between the international, South African and Swiss copyright legislation, the core requirements are quite similar.\textsuperscript{43} The main differences, from a legal perspective, will be indicated in the following sections. In essence, for a computer program to be eligible for copyright protection, it must (i) form an eligible work (see section II(4)(b)), (ii) be original (see section II(4)(c)) and (iii) be reduced to a material form (see section II(4)(d)).\textsuperscript{44}

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(b) Eligible work

The first requirement is that a computer program must be one of the types of work that are eligible for copyright. A closer look to the Berne Convention reveals that computer programs are not included as part of the expression ‘literary and artistic works’. Nevertheless, European countries have, over time, brought computer programs under copyright protection as a literary work within the terms of the Berne Convention. This is partly due to the EU’s Computer Program Directive 1991 according to which ‘(...) Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention (...).’ From a broader international aspect, the lack of clarity as regards the copyright protection of computer programs was overcome with the adoption of WCT and TRIPS which both provide for the protection of computer programs as literary works within the meaning of the Berne Convention.

In accordance with aforementioned international regulations, both, South Africa and Switzerland, accord computer programs legal protection by means of the copyright. However, they do this in a way that somehow differs from the aforementioned international legal background. South Africa, for instance, grants copyright protection to an exhaustive list of categories, including computer programs. In other words, computer programs are, unlike in the international legislation, protected as a separate type of category of eligible work. Very similar

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45 Berne Convention, art. 2(1).
48 WCT, art. 4; TRIS, art. 10(1).
49 Copyright Act, s 2(1); Hennie Klopper ‘Copyright and the Internet’ in Sylvia Papadopoulos, Sizwe Snail (eds) Cyberlaw @ SA III, The Law of the Internet in South Africa 3ed (2012) 141.
to the South African approach, the Swiss Copyright Act stipulates that computer programs shall be deemed as a work eligible for copyright.\(^{51}\)

(c) Originality

The Berne Convention to which TRIPS and WCT refer, mentions a list of categories of work eligible for copyright. However, the Berne Convention does not provide a legal definition of a work which is, as a consequence, a matter for legislation in each member state.\(^{52}\)

In South Africa, for a computer program to be eligible for copyright protection, it must be ‘original’.\(^{53}\) The requirements as regards the term ‘original’ are however not further defined in the Copyright Act. According to South Africa’s jurisprudence, the term ‘original’ does not refer to original thoughts or expression of thoughts.\(^{54}\) In fact, creativity is, in line with common law tradition, not a requirement.\(^{55}\) In Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd the court stated that ‘[s]ave where specifically provided otherwise, work is considered to be original if it has not been copied from an existing source and if its production required a substantial (or not trivial) degree of skill, judgement or labour.’\(^{56}\) Thus, the term ‘original’ needs to be understood in terms of original skills. In other words, the work must be created by the author himself using his skills.\(^{57}\)

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\(^{51}\) Swiss Copyright Act, art. 2(3); Georg Rauber ‘§ 3 Software als urheberrechtlich geschütztes Werk’ in Magda Streuli-Youssef (ed) Urhebervertragsrecht (2006) 124.


\(^{53}\) Copyright Act, s 2(1).


\(^{56}\) Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd 2006 (4) SA 458 (SCA) 473A-B.

As mentioned earlier, Switzerland’s copyright legislation is in broad agreement with the EU’s Computer Program Directive 1991. As regarding the requirement of originality, the Computer Program Directive 1991 stipulates that ‘[a] computer program shall be protected if it is original in the sense that it is the author’s own intellectual creation’. A more detailed definition is however not provided. According to Switzerland’s copyright protection legislation, a work must be an (i) intellectual creation with (ii) individual character. When it comes to the requirement of intellectual creation, a work must be created by a human being. The second requirement of individual character is about particularity. In this regard, according to recent case-law, the creative freedom within the category of work must be taken into account. Where this creative freedom is rather small, as it is the case for computer programs, the requirement with respect to the individual character should not be too high. Rather, a computer program is to be considered as individual, if respective creative freedom has been used and the program, from the perspective of specialist, would not be considered as trivial or ordinary.

(d) Reduction to material form

According to the Berne Convention it shall ‘be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.’ More specifically, TRIPS and WCT stipulate that copyright protection shall extend ‘to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.’

58 See section II 2(d).
62 Regarding recent case-law, see Botschaft 1989 III, p 523, BGE 130 III 168, 170 (Supreme Court of Switzerland); Georg Rauber ‘§ 3 Software als urheberrechtlich geschütztes Werk’ in Magda Streuli-Youssef (ed) Urhebervertragsrecht (2006) 126.
63 Berne Convention, art. 2(2).
64 TRIPS, art. 9(2) and WCT, art. 2.
In this regard, according to South Africa’s Copyright Act ‘[a] work (...) shall not be eligible for copyright unless the work has been written down, recorded, represented in digital data or signals or otherwise reduced to a material form.’ The term of ‘writing’ is further described in the ‘definition’ as including ‘any form of notation, whether by hand or by printing, typewriting or any similar’. In other words, a work must exist in some or other material form in order to be eligible for copyright protection. If a programmer of computer programs for instance has a brilliant idea for a new iPhone application, he would need to write his idea down, that is type the source code in a programming language in order to be granted copyright protection. It follows that there is no copyright protection of an idea. Rather, copyright protection is only afforded to expressions as provided for in the abovementioned TRIPS and WCT. The concept that expressions are protected but not their underlying ideas is also known as the ‘idea/expression dichotomy’. It can be problematic in the field of computer programs where the expression in the form of source code and the underlying idea cannot always be clearly distinguished.

In Switzerland, again, the EU’s Computer Program Directive 1991 has to be taken into account. According to the latter, copyright protection ‘(...) 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

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65 Copyright Act, s 2(2).
66 Copyright Act, s 1(1)(iii).
interfaces, are not protected by copyright (...). In Switzerland’s copyright legislation, the requirement of material form is not explicitly stated. However, it follows from recent jurisprudence that ideas cannot be afforded copyright protection. Rather the intellectual creation needs to be materialised in any form in order to be eligible for copyright protection. 

(5) Copyright holder

As a general rule, South Africa’s copyright protection legislation provides that the ownership of any copyright shall vest in the author. Due to the fact that South Africa’s copyright legislation is based on the Anglo-American copyright model, it emphasises the economical aspect. In particular, the author is not necessarily the author in the ordinary sense of the word but the person with a financial interest in the end result. With respect to computer programs, the ‘person who exercised control over the making of the computer program’ is regarded as the author. Such a person may also be a company.

A relevant exception to the general rule that the author is the copyright holder relates to computer programs created in the course of employment. In such a case, the ownership of the copyright is conferred to the employer.

73 Copyright Act, s 21(1)(a); Hennie Klopper ‘Copyright and the Internet’ in Sylvia Papadopoulos, Sizwe Snail (eds) Cyberlaw @ SA III, The Law of the Internet in South Africa 3ed (2012) 148.
76 Copyright Act, s 1(1)(iv)(i); Roux de Villiers ‘Computer Programs and Copyright: The South African Perspective’ (2006) 123 SALJ 315 at 320.
77 Haupt v/ a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd 2006 (4) SA 458 (SCA) 474 G-H.
78 Copyright Act, s 21(1)(d); Roux de Villiers ‘Computer Programs and Copyright: The South African Perspective’ (2006) 123 SALJ 315 at 320.
Switzerland’s copyright protection legislation, in accordance with the tradition of continental European countries, affords copyright protection primarily to the author.79 Accordingly, the natural person who has created the computer program is regarded as the author.80 As a consequence, a company can only acquire copyright of a computer program by virtue of a contract.81 In this regard, an exception is made in the case that the computer program is created in the course of employment. In such a case, the copyright is deemed legally ceded from the author to the employer.82

(6) Scope of legal copyright protection

(a) Survey

In the following, the content and scope of the legal copyright protection of computer programs will be discussed. In particular and with view to licensing, the focus lies on the acts the copyright holder can control (see ‘entitlements’ in section II(6)(b)) as well as the acts that are beyond the copyright holders’ control’ (see ‘exceptions’ in section II(6)(c)). Though there exist differences between international, South African and Swiss copyright protection legislation, the nature of copyright in computer programs is quite similar. As a consequence, the following discussion will be structured in accordance with the ‘usual’ entitlements and limits that are relevant for computer programs. Particular differences from a legal perspective will be indicated.

(b) Entitlements

(i) Exclusivity

As a preliminary remark, it should be noted that the ‘[c]opyright in a computer program vests the exclusive right[s] (...)’ of the copyright holder.83 In other words,

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80 Swiss Copyright Act, art. 6; see also Computer Program Directive 1991, art. 2(1).
82 Swiss Copyright Act, art. 17; see also Computer Program Directive 1991, art. 2(3); Jacques de Werra ‘Art. 17’ in Barbara K Müller, Reinhard Oertli (eds) Urheberrechtsgesetz (URG) 2ed (2012) 164.
83 Copyright Act, s 11B; see also WCT, arts. 6-8; Berne Convention, art. 9 and art. 12; Swiss Copyright Act, art. 9-11, Computer Program Directive 1991, art. 4.
only the copyright holder is entitled to do or authorise specified acts in relation to his work, that is the computer program.\textsuperscript{84} The concept of exclusivity is essential with view to licensing. As we will see later on, in order to exercise exclusive rights, the licensee needs to be granted a permission or license from the copyright holder.\textsuperscript{85}

(ii) Reproduction right

According to article 9 of the Berne Convention, copyright holders ‘(...) shall have the exclusive right of authorising the reproduction of these works, in any manner or form’. Very similar, the South African Copyright Act grants the copyright holder the right of ‘[r]eproducing the computer program in any manner or form’.\textsuperscript{86} The act of reproducing includes ‘a reproduction made from a reproduction of that work’.\textsuperscript{87} Reproducing is not only limited to reproducing the source code of computer program but also extends to screen layout forms that are part of the computer program.\textsuperscript{88}

Switzerland’s copyright act grants the copyright holder the exclusive right to produce copies on any data storage device of a computer program.\textsuperscript{89} This reproduction right is about the classic case of producing copies of computer programs.\textsuperscript{90} Swiss legislation is in line with the EU’s Computer Program Directive 1991 according to which ‘(...) the permanent or temporary reproduction of a computer program by any means and in any form in part or in whole (...)’ is subject to authorisation by the copyright holder.\textsuperscript{91}


\textsuperscript{85} See section III(5).

\textsuperscript{86} Copyright Act, s 11B(a).

\textsuperscript{87} Copyright Act, s 1(1)(xlvi).


\textsuperscript{89} Swiss Federal Copyright Act of 1992, art. 10(2)(a); Wolfgang Straub ‘Der Sourcecode von Computerprogrammen im schweizerischen Recht und in der EU-Richtlinie über den Rechtsschutz von Computerprogrammen’ (2001) 3 Archiv für Urheber- und Medienrecht 807 at 818.


\textsuperscript{91} Computer Program Directive 1991, art. 4(a).
(iii) Distribution right

Under the Berne Convention, an exclusive distribution right is only granted explicitly with respect to cinematographic works. More clarity has been brought about by the adoption of the WCT. According to its article 6, copyright holders ‘(...) shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their works through sale or other transfer of ownership’. Very similarly, the EU’s Computer Program Directive 1991 grants the copyright holder the exclusive right with respect to ‘(...) any form of distribution to the public (...) of the original computer program or of copies thereof’.  

In line with this international background, Switzerland’s copyright act grants the computer programmer the exclusive right to distribute copies in any form. In this respect, the distribution right includes also the online distribution of copies.

In South Africa’s Copyright Act, there is no express inclusion of the distribution right. Nonetheless, the copyright holder is granted the exclusive right with respect to ‘publishing the computer program if it was hitherto unpublished’. As regards the term of ‘publishing’, ‘(...) a work a work shall be deemed to be published if copies thereof have been issued to the public.’

As it will be discussed later on, the described distribution or publishing right is limited by the concept of ‘first sale’.

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92 Berne Convention, art. 14(1)(i).
93 WCT, art. 6(1).
95 Swiss Copyright Act, art. 10 (2)(b); Wolfgang Straub ‘Der Sourcecode von Computerprogrammen im schweizerischen Recht und in der EU-Richtlinie über den Rechtsschutz von Computerprogrammen’ (2001) 3 Archiv für Urheber- und Medienrecht 807 at 815.
97 Copyright Act, s 11B(b).
99 See section II(6)(c)(ii).
(iv) Adaptation right

Pursuant to article 12 of the Berne Convention, ‘[a]uthors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works.’\(^{100}\) Accordingly, South Africa’s copyright legislation foresees an exclusive right of the computer programmer to ‘making an adaptation of the computer program’.\(^ {101}\) Adaptation of computer program includes (i) ‘(...) a version of the program in a programming language, code or notation different from that of the program (...)’ or (ii) ‘(...) a fixation of the program in or on a medium different from the medium of fixation of the program’.\(^ {102}\)

Switzerland’s copyright legislation is in line with the EU’s Computer Program Directive 1991 according to which ‘(...) the translation, adaptation, arrangement and any other alteration of a computer program and reproduction of the results thereof (...)’ constitutes an exclusive right of the copyright holder.\(^ {103}\) The adaptation includes any change of the computer program, whether it is big or small.\(^ {104}\) However, a technical conversion of a work on a different memory technology is not considered as an adaptation provided that the conversion does not compromise the work’s quality.\(^ {105}\)

(v) Rental right

With the adoption of TRIPS, international copyright rules were expanded to rental rights.\(^ {106}\) With respect to computer programs, ‘(...) a Member shall provide authors and their successors in title the right to authorise or to prohibit the commercial rental

\(^ {100}\) Berne Convention, art. 12.
\(^ {101}\) Copyright Act, s 11B(f).
\(^ {102}\) Copyright Act, s 1(1)(i)(d).
\(^ {103}\) Computer Program Directive 1991, art. 4(b) ; Swiss Copyright Act, art. 11(1)(a).
to the public of originals or copies of their copyright works.\textsuperscript{107} However, the rental rights are not applicable in the case that computer programs are not themselves the essential object of the rental.\textsuperscript{108} The aforementioned rental rights are also provided for by WCT.\textsuperscript{109}

In South Africa, in line with the cited international background, grants the computer programmer the exclusive right as regards ‘(...) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the computer program’.\textsuperscript{110} Unlike the minimum framework of TRIPS, South Africa’s copyright legislation does not limit the exclusive rental right to commercial rental only.

In Switzerland, again, the EU’s Computer Program Directive 1991 has to be taken into account pursuant to which any form of distribution to the public, including the rental, of the original computer program or of copies thereof constitutes an exclusive right of the copyright holder.\textsuperscript{111} The exclusive rental right is granted by the Swiss Copyright Act in article 10(3). The act of rental includes any form of time-limited, remunerated transfer of a computer program for use, for example a license agreement. Moreover, it doesn’t matter whether the computer program is rented in a physical form or by the means of a network, such as the internet.\textsuperscript{112} Compared to the minimum standard in TRIPS, Switzerland’s copyright legislation goes further and does not limit the exclusive rental right to commercial rental only.

\(c\) Exceptions

\(i\) Exception to exclusive rights

The above mentioned exclusive rights of the copyright holder are not absolute but limited respectively subject to some exceptions. Provided that the requirements of such exceptions are met, the copyright is not infringed and respective acts are

\textsuperscript{107} TRIPS art. 11.

\textsuperscript{108} TRIPS art. 11, last sentence.

\textsuperscript{109} WCT, art. 7.

\textsuperscript{110} Copyright Act, s 11B(h).

\textsuperscript{111} Computer Program Directive 1991, art. 4(c).

deemed lawful.\footnote{Marlize Conroy ‘Access to Works Protected by Copyright: Right or Privilege?’ (2006) 18 South African Mercantile Law Journal 413; Hennie Klopper ‘Copyright and the Internet’ in Sylvia Papadopoulos, Sizwe Snail (eds) Cyberlaw @ SA III, The Law of the Internet in South Africa 3ed (2012) 161; Roux de Villiers ‘Computer Programs and Copyright: The South African Perspective’ (2006) 123 SALJ 315 at 326.} In other words, there are some specific acts that are beyond the copyright holder’s control. From an international legal background, TRIPS, WCT and the Berne Convention provide that member states shall confine limitations or exceptions to exclusive rights to (i) certain special cases which (ii) do not conflict with a normal exploitation of the work and (iii) do not unreasonably prejudice the legitimate interests of the right holder (so called ‘three-step test’).\footnote{World Intellectual Property Organisation WIPO Intellectual Property Handbook 2ed (2004) chap 5 p 275; TRIPS, art. 13; WCT, art. 10; Berne Convention, art. 9(2); Lee-Ann Tong ‘Copyright Protection for Computer Programs in South Africa: Aspects of Sui Generis Categorization’ (2009) The Journal of World Intellectual Property 266 at 287.} Providing for limitations and exceptions is, as a consequence, a matter for legislation in each member state. In the following the focus lies on those exceptions that are particularly relevant for computer programs.

(ii) Exhaustion of the distribution right (‘First sale’ concept)

Switzerland’s copyright act follows the principle of ‘exhaustion’ according to which the right to distribute is used up or ‘exhausted’ once the computer program has been brought into circulation.\footnote{Swiss Copyright Act, art. 12; Georg Rauber ‘B. Erschöpfung des Verbreitungsrechts’ in Magda Streuli-Youssef (ed) Urhebervertragsrecht (2006) 155.} More precisely, in order for the distribution right to be exhausted, the copyright holder must have transferred the ownership of the computer program which includes sale, exchange and donation.\footnote{Herbert Pförtmüller ‘Art. 12’ in Barbara K Müller, Reinhard Oertli (eds) Urheberrechtsgesetz (URG) 2ed (2012) 112.} As such, the principle of ‘exhaustion’ is also known as the concept of ‘first sale’.\footnote{Herbert Pförtmüller ‘Art. 10’ in Barbara K Müller, Reinhard Oertli (eds) Urheberrechtsgesetz (URG) 2ed (2012) 100.} Upon ‘exhaustion’ the ownership of the computer program can then be further transferred to a third party.\footnote{Gianni Fröhlich-Bleuler ‘Urheberrechtliche Nutzungsbeugnisse des EDV-Anwenders’ (1995) 5 Aktuelle juristische Praxis (AJP) 569 at 573; Georg Rauber ‘B. Erschöpfung des Verbreitungsrechts’ in Magda Streuli-Youssef (ed) Urhebervertragsrecht (2006) 160.} However, the concept of ‘exhaustion’ does, with respect to computer programs, not
extend to rental. In other words, a legally acquired computer program cannot be rented. Switzerland’s concept of ‘exhaustion’ is consistent with the EU’s Computer Program Directive 1991, pursuant to which ‘[t]he first sale in the Community of a copy of a program by the rightholder (...) shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.’

In South Africa, the publication right is subject to the condition that the computer program was ‘hitherto unpublished’. In other words, once the computer program has been issued to the public, the respective publication right seizes. It follows that the above mentioned concept of ‘exhaustion’ is also applicable in South Africa. Furthermore, ‘exhaustion’ does not extend to rental, since ‘letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the computer program’ remains an exclusive right of the copyright holder.

(iii) Use

In South Africa, copyright is generally not infringed by any ‘fair dealing’ of the work that includes ‘(...) personal or private use (...)’. However, with respect to computer programs, ‘fair dealing’ for the purpose of personal or private use is not applicable. However, the exception to ‘use’ the computer program can be derived from section 19B of the Copyright Act according to which it is lawful to make copies for personal or private back-up purposes. In particular, this exception has to be read in conjunction with the concept of the ‘essential step defence’ that allows a person to make a copy of a computer program if such a copy constitutes an ‘essential step’ in

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119 Swiss Copyright Act, art. 10(3) and art. 13(4).
120 Computer Program Directive 1991, art. 4(c); cf. also UsedSoft GmbH v Oracle International Corp. 2012 C-128/11 (Court of Justice of the European Union) according to which the principle of exhaustion of the distribution right also applies where copyright holder distributes a computer program by means of downloads.
121 Copyright Act, s 11B(b).
123 Copyright Act, s 11B(h).
124 Copyright Act, s 12(1)(a).
125 Hennie Klopper ‘Copyright and the Internet’ in Sylvia Papadopoulos, Sizwe Snail (eds) Cyberlaw @ SA III, The Law of the Internet in South Africa 3ed (2012) 161; Copyright Act, s 19B(1).
the use of a computer program. As a consequence, the ‘use’ of a computer program is deemed lawful.

The EU follows a similar approach and defines the ‘use’ of a computer program as lawful insofar as respective acts ‘(...) are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including error correction.’ In other words, an authorisation from the copyright holder is not required for the use of the computer program. Within the EU, an explicit authorisation by the copyright holder is not required. In line with the EU’s Computer Directive 1991, Switzerland grants the acquirer of a computer program the right to use it. However, the act of copying a computer program for personal use is explicitly not considered a lawful ‘use’ of a computer program.

(iv) Decompilation

By the act of ‘decompilation’ we understand the translation from the object code back to the source code. In South Africa’s copyright legislation, ‘decompilation’ is not a recognised exception since it is considered as an exclusively reserved act of (i) reproduction and (ii) adaptation of a computer program.

As a contrast, ‘decompilation’ is deemed lawful by the EU and Switzerland under certain circumstances. In particular, the purpose of the ‘decompilation’ must be to ‘(...) obtain the information necessary to achieve the interoperability of an independently created computer program with other programs (...)’.

128 Swiss Copyright Act, art. 12(2); Gianni Fröhlich-Bleuler ‘Urheberrechtliche Nutzungsbeuugnisse des EDV-Anwenders’ (1995) 5 Aktuelle juristische Praxis (AJP) 569 at 571.
131 Copyright Act, s 11B(a) and s 11B(f); Tana Pistorius ‘Copyright Law’ in Hennie B Klopper et al Law of Intellectual Property in South Africa (2011) 222.
(v) **Back-up copy**

As mentioned earlier, section 19B of the Copyright Act provides for the lawful copying of a computer program for personal or private back-up purposes. However, once the possession of the computer program ceases to be lawful (for example resale of the computer program), the back-up copy needs to be destroyed as well.\(^\text{133}\)

Switzerland’s copyright legislation is consistent with the EU’s Computer Program Directive 1991 pursuant to which ‘[t]he making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use.’\(^\text{134}\) Unlike South Africa’s copyright legislation, an explicit obligation to destroy the back-up copy once the lawful possession ceases, is not provided.

(7) **Duration**

With view to licensing, it is important to know about the duration of copyright since it is does not last forever.\(^\text{135}\) Rather, copyright protection lapses after a specified period of time following which the computer program can no longer be controlled by the copyright holder.

Under the Berne Convention, the duration of copyright for literary and artistic work in general ‘(... shall be the life of the author and fifty years after his death.’\(^\text{136}\) With the adoption of WCT it was made clear that computer programs shall be protected as literary work. From a broader international aspect, TRIPS provides that the term for protection ‘shall be no less than 50 years from the end of the calendar year of authorised publication, or, failing such authorised publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.’


\(^{134}\) Computer Program Directive 1991, art. 5(2) ; Swiss Copyright Act, art. 24 (2).


\(^{136}\) Berne Convention, art. 7(1).
South Africa’s copyright legislation is in line with the minimum requirement of TRIPS. With respect to computer programs, copyright subsists for ‘(...) fifty years from the end of the year in which the work (i) is made available to the public with the consent of the owner of the copyright; or (ii) is first published, whichever term is the longer, or failing such an event within fifty years of the making of the work, fifty years from the end of the year in which the work is made’. 137

In contrast, Switzerland’s copyright legislation calculates the term of protection on the basis of the authors’ life. In particular and in consistency with both the EU’s Computer Program Directive 1991 and the above mentioned international background, protection is granted for the life of the author and for fifty years after his death. 138

(8) Interim summary and conclusion

The results of the research regarding legislative provisions concerning copyright protection of a computer program (that are of relevance with view to licensing a computer program) under different legal systems, are summarised in the following table:

<table>
<thead>
<tr>
<th>Jurisdictions</th>
<th>South Africa</th>
<th>Switzerland / EU</th>
<th>International</th>
</tr>
</thead>
</table>
| Copyright issues
| Definition of computer program | Provided | Not provided | Provided by WIPO |


138 Computer Program Directive 1991, art. 8(1); Swiss Copyright Act, art. 29(2)(a); Christina Reutter Gerster ‘Art. 29’ in Barbara K Müller, Reinhard Oertli (eds) Urheberrechtsgesetz (URG) 2ed (2012) 385 et seqq.
<table>
<thead>
<tr>
<th>Eligibility for legal copyright protection</th>
<th>Eligible work</th>
<th>Computer programs protected as a separate type of category of eligible work</th>
<th>Computer programs deemed as a work eligible for copyright</th>
<th>Computer programs protected as literary works within meaning of Berne Convention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Originality</td>
<td>Term ‘original’ needs to be understood in terms of original skills → computer program must be created by the author himself using his skills</td>
<td>Creative freedom must be taken into account which is rather small for computer programs → requirement for individual character should not be too high</td>
<td>-</td>
<td>It is referred to national legislation</td>
</tr>
<tr>
<td>Material form</td>
<td>A work must exist in some or other material form → ideas not protected</td>
<td>-</td>
<td>Unlike the EU’s Computer Program Directive 1991, the requirement of material form is not explicitly stated but nevertheless a necessity according to jurisprudence</td>
<td>Copyright protection shall extend to expressions and not to ideas (TRIPS and WCT)</td>
</tr>
<tr>
<td>Copyright holder</td>
<td>Person who exercised control over the making of the computer program; such a person may also consist of a company</td>
<td>Natural person who has created the computer program</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Scope of legal copyright protection / Entitlements</td>
<td>Reproduction right</td>
<td>Distribution right</td>
<td>Adaptation right</td>
<td>Rental right</td>
</tr>
<tr>
<td>-------------------------------------------------</td>
<td>--------------------</td>
<td>--------------------</td>
<td>------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Granted</td>
<td>Known as the publication right</td>
<td>Granted</td>
<td>Both commercial and private rental</td>
<td>Once the computer program has been issued to the public, respective publication right ceases; exhaustion does not extend to rental</td>
</tr>
<tr>
<td>Granted by Berne Convention</td>
<td>Right includes the online distribution of copies</td>
<td>Granted by WCT</td>
<td>Both commercial and private rental</td>
<td>Commercial rental (TRIPS)</td>
</tr>
<tr>
<td></td>
<td>Granted by WCT</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
A comparison of the copyright requirements applicable in South Africa and in Switzerland reveals that they are quite similar. In essence, for a computer program to be eligible for copyright protection, it must form an eligible work, be original and be reduced to a material form. When it comes to the requirement of an eligible work, both jurisdictions protect a computer program as a separate type of category and thus, differ from the international legislation according to which computer programs should be protected as a literary work. As regard the requirement of originality, Switzerland has slightly stricter conditions to be met. Switzerland requires an ‘individual character’ of the computer program whereas South Africa understands ‘originality’ in terms of original skills. Finally, both South Africa and Switzerland demand that the computer program must be fixed in material form though this requirement is not explicitly mentioned in Switzerland’s copyright legislation but derives from case law.

As regards the copyright holder, Switzerland, in accordance with the tradition of continental European countries, affords copyright protection primarily to the author of the computer program. By way of contrast, the author in South Africa is not necessarily the author in the ordinary sense of the word but the term needs to be understood as the person who exercised control over the making of the computer program.

With respect to the scope of legal copyright protection of a computer program, the entitlements of the copyright holder have been shown as well as the exceptions
provided by the respective copyright legislation. In this regard, reference is made to the comprehensive table above. In terms of entitlements, both South Africa and Switzerland confer the copyright holder quite similar exclusive rights though they differ sometimes in their names. In particular, and with relevance to computer programs, the copyright holder has the exclusive right to reproduce, distribute, adapt and rent its computer program. As regards the exceptions, the research has however revealed some differences. First, decompilation is not deemed to be an exception in South Africa. Second, the exception ‘right of use’ is not explicitly mentioned in South Africa’s copyright legislation but needs to be derived from the right to make back-up copies by applying the ‘essential step defence’. Third, the exception ‘principle of exhaustion’ is not clearly mentioned in South Africa’s copyright legislation but needs to be deduced from the fact that the copyright holder’s publication right is subject to the condition that the computer program was ‘hitherto unpublished’. As for the exception respectively the right to make a back-up copy, South Africa’s and Switzerland’s copyright legislation is again quite similar.

Concerning the duration of copyright, Switzerland follows the Berne Convention by according copyright during the author’s life plus 50 years whereas South Africa sticks to the minimum requirements of TRIPS and accords copyright during 50 years after publication respectively making of the computer program.

As mentioned in the beginning, it is essential to be clear about the essential content of the applicable copyright framework in order to be able to analyse the transaction of licensing. Hence, the following section will put the elaborated copyright findings in relation to the contractual licensing of computer programs. In particular, I will analyse to what extent copyright protection interacts with the licensing of a computer program.
III LICENSING OF COMPUTER PROGRAMS

(1) Introduction

The previous section focused on the intellectual property rights of computer programs. In particular, the content and scope of the legal copyright protection of computer programs were discussed in order to determine particular rights of the copyright holder. This allows us to analyse further how the copyright holder entitles a contracting party to a license agreement to use the computer program. Of particular interest is the question to what extent the copyright holder can control or restrict such use of the computer program. The following discussion will therefore focus on contractual clauses contained in license agreements having copyright implications in a national context by doing a comparative analysis of the relevant law applicable of South Africa and Switzerland as well as under international law. So as to understand the relevance of such clauses from a copyright perspective, it will be referred back to the previous section where necessary. Against this background, the following issues need to be addressed:

First, the relevant legal situation must be outlined (see section III(2)). Second, a definition section of the relevant terms is given. In particular, an overview over the different types of licensing a computer program is provided (see section III(3)). Third, it is important to highlight that a license agreement can be concluded in different ways. An overview over these different kinds of formation of such a contract can be found in section III(4). Fourth, the core issue of this section is the contractually conferred rights of use of the computer program. In particular, there must be clarity with respect to the legal validity of agreed contractual clauses from a copyright perspective (see section III(5)). Finally, some aspects of an international transaction of computer programs will be discussed. In particular, it will be analysed which the competent court is, which the applicable law is and whether the existing international uniform contract law, the Vienna Convention on the International Sale of Goods, could be an alternative (see section III(6)).

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139 As regards the interface between copyright aspects and contractual issues, see Georg Rauber ‘§ 1 Überblick’ in Magda Streuli-Youssef (ed) Urhebervertragsrecht (2006) 193.
(2) Legal framework

(a) International legislation

On April 11, 1980 the United Nations Convention on Contracts for the International Sale of Goods (hereinafter ‘CISG’) was adopted in Vienna, Austria. Its purpose is to provide a uniform international sales law. In other words, CISG offers ‘substantive rules on which contracting parties, courts, and arbitrators may rely’. CISG has not yet been ratified by South Africa. Nevertheless, enterprises which are parties to an international sale contract may choose CISG as the applicable law. In Switzerland, CISG came into force on March 1, 1991.

(b) South Africa

In general terms, the transaction of licensing a computer program is a matter of contract law in terms of which two or more persons reach a legally binding agreement. Unlike in civil law countries, South Africa’s contract law is not comprehensively codified. Its sources largely encompass both Roman-Dutch and English law that are together frequently referred to as common law. Furthermore, statute law as well as judicial precedents need to be considered in contract law issues. Thus, South Africa’s contract law is also known as a ‘mixed’ legal system. As regards license agreements in particular, they are unknown to South Africa’s common law and therefore considered as an innominate contract.

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In the discussion about cross-border transactions regarding computer programs, it will be referred to South Africa’s private international law. Though its name may suggest an international law, private international law is in fact national law that deals, *inter alia*, with the question which national law should be applicable.\(^{149}\) Again, South Africa’s private international law is not codified but rather has its roots in the common law as well as case law.\(^ {150}\)

\[(c)\] **Switzerland**

Switzerland’s contract law derives from Roman law and is codified in the Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations, hereinafter ‘Code of Obligations’). The license agreement is not expressly dealt with in the Code of Obligations. Therefore, it is considered as an innominate contract that is ruled by the parties’ agreement as well as by the general principles of the Code of Obligations.\(^ {151}\)

When it comes to Switzerland’s private international law, it is codified within the Swiss Federal Act on International Private Law of 1987.\(^ {152}\)

(3) **Definition**

\[(a)\] **License agreement in general**

The term ‘license’ is derived from the Latin word ‘licere’ which can be translated as ‘to be allowed’. In fact, a license is a permission to do things that would, in the absence of a license, be prohibited. Referring back to the previous section, ‘[c]opyright in a computer program vests the exclusive right[s] (...)’ with the copyright holder.\(^ {153}\) Accordingly, a license agreement is a contractual relationship in terms of which the copyright holder (the ‘licensor’) grants his contracting party (the

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\(^{152}\) Original title in German is ‘Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987’.

\(^{153}\) Copyright Act, s 11B; see also section II(6)(b).
‘licensee’) the right to exercise an exclusive right regarding the computer program.\textsuperscript{154} In return, the licensee usually agrees to pay a license fee.\textsuperscript{155} In other words, by means of a license agreement, the licensee acquires an entitlement in respect of exercising an exclusive right of the copyright holder against payment. In this regard, it should however be noted that the licensor remains the copyright holder of the computer program.\textsuperscript{156}

\textit{(b) Distinctions}

\textit{(i) Transfer of copyright (Assignment)}

As noted above, the licensor remains the copyright holder. In other words, a license agreement does not transfer any ownership in copyrights.

In contrast, ‘[…] copyright shall be transmissible as movable property by assignment […]’.\textsuperscript{157} A copyright holder may in fact choose to fully or partially transfer his ownership in the copyrights in respect of the computer program by way of assignment. In this case and unlike in licensing, the copyright holder loses respective copyrights.\textsuperscript{158} This distinction is made just as an aside since the following discussion focuses primarily on license agreements.

\textit{(ii) Mass ware and bespoke computer programs}

A further distinction needs to be made as regards the way in which the licensee acquires a copy of a computer program. Basically, two different kinds of acquisition of a computer program can be distinguished:

First, computer programs that are mass produced are usually ‘sold’ either in stores (also known as ‘off-the-shelf’ computer programs) or over the internet by


\textsuperscript{157} Copyright Act, s 22(1); see also Swiss Copyright Act, art. 16.

means of downloading.\textsuperscript{159} In these scenarios, the user of a computer program on the one hand ‘purchases’ a copy of the computer program from the distributing seller and on the other hand enters into a license agreement with the copyright holder. The user of a computer program becomes the legal owner of the copy of the computer program, whereas the copyrights in the computer program remain with the copyright holder.\textsuperscript{160} For the sake of easier legibility, when terms such as ‘sale’, ‘buying’ or ‘purchase’ are mentioned in the following, they shall refer to the ‘purchase’ of the copy of the computer program and not the computer program itself. Accordingly, such terms are put in quotation marks.

Second, computer programs that are individually written for a user (also known as ‘bespoke’ computer programs) are, by way of contrast, made available by the copyright holder by way of a license agreement for a certain period of time. After lapse of such time, the user is usually obliged to return or destroy the respective copy of the computer program.\textsuperscript{161} The user does, in other words, not become the legal owner of the copy of the computer program.\textsuperscript{162}

Hereinafter, it shall be returned to this distinction since South African and Swiss copyright law deals with these two ways of acquisition differently in the context of licensing.

(4) Ways of forming a license agreement

(a) Overview

As mentioned above, mass produced computer programs are ‘sold’ over the counter or by means of a download. By way of contrast, bespoke computer programs are made available by the copyright holder. In the latter case, a license agreement is agreed directly between the user and the copyright holder (see section III(4)(b)),


\textsuperscript{162} Dana van der Merwe Computers and the Law 2ed (2000) 140 et seqq.
whereas in the former case the copyright holder needs to find a way to contractually bind the user of a computer program as regarding the use of the computer program (see section III(4)(c)).\textsuperscript{163} Respective contractual relationships are shown graphically hereafter:

<table>
<thead>
<tr>
<th>Mass produced computer programs</th>
<th>Bespoke computer programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Distributing seller</td>
<td></td>
</tr>
<tr>
<td>Sale contract</td>
<td>License agreement</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Copyright holder</td>
<td></td>
</tr>
<tr>
<td></td>
<td>License agreement</td>
</tr>
<tr>
<td></td>
<td>User</td>
</tr>
<tr>
<td>User</td>
<td></td>
</tr>
</tbody>
</table>

\textbf{(b) Bespoke computer programs}

In the case of bespoke computer program, the copyright holder concludes a license agreement directly with the user. Hence, the contractual relationship is bipartite. In practice, such a license agreement is either negotiated in detail by the both parties if there is some sort of balance between the parties. Or, the copyright holder is in a position to induce his own terms and conditions on the other party.\textsuperscript{164}

\textbf{(c) Mass produced computer programs}

As regards mass produced computer programs, the copyright holder and the user are usually not in direct contact with each other. Rather, the user deals only with the distributing seller of a computer program. Hence, the copyright holder tries to find a way to legally bind the user as regards the use of the computer program. In particular, copyright holders attempt to induce their terms and conditions in the contractual relationship with the user. Such terms and conditions are frequently described as End User License Agreements (hereinafter short ‘EULA’). In order to

\textsuperscript{163} As regards the definition of the copyright owner, see section II(5).

get the user to agree to such EULAs, copyright holders rely, in practice, on the following two methods:\textsuperscript{165}

- Shrink-wrap-licenses or tear-me-open-licenses: A shrink-wrap-license usually consists of a license agreement printed on the outside of a computer program package that is sealed with a transparent cellophane wrapping. The license agreement informs the user that tearing the cellophane wrapping off of the computer program package is deemed as an acceptance of the licensing terms, that is the EULA. By their design, shrink-wrap-licenses are used in cases where a computer program is ‘sold’ over the counter (off-the-shelf).\textsuperscript{166}

- Click-wrap-license or Click-to-accept-license: A click-wrap-license is usually shown on a screen of a website from which the end-user would like to download the computer program. In order to proceed with the downloading of the computer program, the user is required to click on an ‘accept’ icon.\textsuperscript{167} Click-wrap licenses are, in addition, also used by off-the-shelf computer programs in the course of the installation procedure.

From a legal perspective, shrink-wrap and click-wrap licenses constitute so-called contracts of adhesion. They are characterised by the fact that the possibility of negotiation is excluded. Either the end-user accepts the EULA or not.\textsuperscript{168} In both Switzerland and South Africa, there is a debate ongoing among legal scholars whether shrink-wrap and click-wrap licenses are enforceable.\textsuperscript{169} So far, the validity of such licenses has not been judicially tested in South Africa. However, they seem

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{169} See for instance Dana van der Merwe \textit{Computers and the Law} 2ed (2000) 141-42.
\end{itemize}
\end{footnotesize}
to be enforceable in terms of South African contract law.\textsuperscript{170} In Switzerland however, high standards are set as regards the validity of pre-formulated terms and conditions such as the EULA. In particular, the user needs to be aware of terms and conditions before he concludes the contract. In the case of shrink-wrap-licenses, the user has usually already bought the computer program by the time he is confronted with the EULA. As a consequence, unwrapping the transparent cellophane does not constitute an acceptance as regards the EULA but, if at all, rather an acceptance to use the previously bought computer program. By way of contrast, click-wrap licenses are in general valid since the user is in a position to read the EULA before he proceeds with the ‘purchase’ of the computer program.\textsuperscript{171}

(5) Restrictions of rights of use regarding a computer program

(a) Introduction

Within a license agreement, the copyright holder usually defines the terms and conditions according to which the licensee is allowed to use the computer program. In the previous section about copyright protection we have stated that there are, on the one hand, acts which the copyright holder can control, such as the exclusive right of reproduction.\textsuperscript{172} On the other hand, the copyright holder’s rights are limited in some instances, for instance the exception granting the licensee the right to make a back-up copy. Respective acts are, from a copyright perspective, beyond the copyright holder’s control.\textsuperscript{173} In practice however, the licensee’s rights as regards the use of a computer program are often curtailed in different kind of ways. In the following, typical contractual clauses of a license agreement will be analysed from a copyright perspective in order to spotlight the interface between copyright protection and licensing of computer programs.


\textsuperscript{172} See section II(6)(b).

\textsuperscript{173} See section II(6)(c).
Structural-wise, contractually agreed user restrictions can be grouped as follows.\textsuperscript{174}

- In personal terms: Group of persons authorised to use the computer program.

- In terms of substance: Manner in which the computer program ought to be used.

- In local terms: Territory where the computer program can be used.

- In temporal terms: Use of a computer program for a limited or unlimited time.

User restriction in terms of substance will be the core issue in the following discussion. In the beginning of each of the following kinds of user restriction, a typical clause of a license agreement will be quoted from the following two computer programs for illustrative purposes:

- Microsoft’s Windows 8 Pro (Full and preinstalled version)

- Avast Software’s Avast! Internet Security

\textit{(b) User restriction in personal terms}

‘The software is not licensed to be used as server software or for commercial hosting - so you may not make the software available for simultaneous use by multiple users over a network.’\textsuperscript{175}

‘You may install and use the Software on up to the agreed number of computers indicated in the Documentation or other transaction materials made available to you at the time you purchase the Software (the “Permitted Number of Computers”).’\textsuperscript{176}


In practice, copies of computer programs are distributed either as a single-user or multiple-user version.\textsuperscript{177} The first of the abovementioned clauses refers to a typical single-user version whereas the second clause is applicable to either single-user or multiple-user versions depending on the agreed number of computers.

From a copyright perspective, the use of a computer program on multiple computers may consist in the user making multiple copies of the computer program for each computer.\textsuperscript{178} As we have seen in the previous section, the right to reproduce constitutes in both South Africa and Switzerland an exclusive right of the copyright holder.\textsuperscript{179} Accordingly, it is at the discretion of the copyright holder to grant multiple-user licenses. Clauses that restrict the use of a computer program on a specific number of computers are therefore legally valid.\textsuperscript{180}

However, multiple-use may also consist in installing just one computer program on a server that is hereafter used by multiple users.\textsuperscript{181} In this way, technically speaking, the user does not make multiple copies of the computer program. In this regard, it is distinguished in Switzerland whether different persons can use the computer program simultaneously or not. Simultaneous use is regarded as a qualitatively different kind of use than single-use. Therefore, simultaneous use is only permitted in accordance with the respective terms of the license agreement.\textsuperscript{182}

By way of contrast, a computer program installed on a server in a way that use by different persons is possible just once at a time is regarded as single-use. Respective use could not be legally excluded since the use of a computer program constitutes a


\textsuperscript{179} See section II(6)(b)(ii).


mandatory right of the user under Swiss copyright law.183 In South Africa, by way of contrast, a restriction of a single-use as described before would be legally binding since the right to use is not of mandatory nature.184

(c) User restrictions in terms of substance

(i) Use in particular

'Under our license, we grant you the right to install and run that one copy on one computer (the licensed computer), for use by one person at a time, but only if you comply with all the terms of this agreement. Typically, this means you can install one copy of the software on a personal computer and then you can use the software on that computer.'185

Aforementioned clause suggests that the use of the computer program is only permitted provided that such use is granted by the means of license agreement. In other words, the user would not be in a position to use the computer program on his computer without a license agreement. This preliminary assumption needs to be analysed from a copyright perspective.

According to Swiss legislation, the lawful acquirer of a computer program is granted the right to use it.186 In other words, a contractually agreed license from the copyright holder is not required. By the term of a lawful acquirer the Swiss law refers to the case where the ownership of a copy of the computer program has been transferred to the user, that is by ‘sale’ for instance.187 Furthermore, the right to use is a mandatory right which means that parties cannot deviate from this principle by

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184 See hereinafter section III(5)(f)(i).


186 See section II(6)(c)(iii).

187 See above section III(3)(b)(ii). By way of contrast, within EU the mandatory right to use is also granted in the case where a computer program is not ‘sold’ but only licensed, cf. in this regard Georg Rauber ‘C. Gesetzliche Gebrauchsbefugnis für Software’ in Magda Streuli-Youssef (ed) Urhebervertragsrecht (2006) 162 et seqq.
agreement. This leads to the following conclusion: Off-the-shelf computer programs confer on the user a mandatory right to use the computer program. The right to use does not need to be granted by the copyright holder. Aforementioned clause is in other words redundant from a Swiss copyright law perspective and is to be interpreted as a simple confirmation of the rights the user already enjoys due to the mandatory terms of the Swiss copyright legislation. For bespoke computer programs, the legal situation is however different since the computer program is, in this situation, not ‘sold’ but only licensed. Unlike in the case of a ‘sale’, the licensee does not enjoy a mandatory right to use the computer program. However, with reference to EU legislation, it is argued that a licensee should also benefit from the right to use, unless otherwise provided by contractual provisions. Accordingly, the licensee as regards bespoke computer programs is similar to off-the-shelf computer programs not in need for a clause as mentioned above in order to lawfully use the computer program. However, such right of use could be restricted by means of contractual provisions.

In South Africa, the use of a computer program is not explicitly mentioned in the applicable copyright act but can however be derived from the right to make a backup copy. It is however not clear whether the right to use is applicable for only computer programs that are ‘sold’ or also for computer programs that are licensed. In this regard, reference is often made to the US concept of the ‘essential step defence’ that allows a person to make a copy of a computer program if such a copy constitutes an ‘essential step’ in the use of a computer program. However, the mentioned ‘essential step defence’ does only apply when the user is the legal owner of a copy of

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189 Markus Wang ‘Software-Überlassungsverträge, Teil III: Nutzungsbeschränkungen, Leistungstörungen, Gewährleistung und Haftung’ in Hans Rudolf Trüeb (ed) Softwareverträge (2004) 107; see also Georg Rauber ‘C. Gesetzliche Gebrauchsbefugnis für Software’ in Magda Streuli-Youssef (ed) Urhebervertragsrecht (2006) 169 et seqq according to which a mandatory right to use should also be granted in cases where a computer program is only licensed.

190 See section II(6)(c)(iii).

the computer program. In other words, the ‘essential step defence is ‘[…] unavailable to those who are only licensed to use their copies of copyrighted works.’ Against this background it may be concluded that in South Africa the right to use a computer program is given provided that the user has acquired respective copy by ‘sale’ for instance. As a consequence, in the case of an ‘only’ licensed computer program, the user would be in need of a clause as mentioned above in order to be able to use the computer program in a legal manner. A further question arises, whether the discussed right to use could be restricted by contractual provisions. Unlike in Swiss law, the South African Copyright Act does not contain any clauses stating if or which exceptions and limitations are mandatory. It is rather commonly argued that license agreements can override statutory exceptions and limitations. From this it follows that the copyright holder may lawfully define the terms and restriction as regards the use of the computer program.

(ii) Central Processing Unit-Clause (hereinafter ‘CPU-Clause’)

‘You may transfer the software directly to another user, only with the licensed computer.’

Aforementioned clause comes from the preinstalled version of Microsoft’s ‘Windows 8 Pro’. It provides that a user can only transfer his copy of ‘Windows 8 Pro’ if such a transfer includes the hardware device, that is the computer. In other words, the computer program ‘Windows 8 Pro’ is inextricably bound to the computer.

The reason here for is to be understood in the context of OEM that stands for ‘Original Equipment Manufacturer’. In an OEM context, the developer of a


computer program enters into a contractual relationship with the manufacturer of computers and agrees to make available a cheaper and sometimes, in terms of functionality, a slightly reduced computer program. In return, the computer manufacturer equips its computers with respective computer program (so called ‘bundling’). Computer programs licensed under OEM usually have all the same product key which is required during the installation process. The identical OEM product key made it easy for users to copy and share OEM computer programs. For ‘Windows 8’ however, Microsoft chose another way. Its preinstalled versions of ‘Windows 8 Pro’ all come with a unique key that is not handed out to the user but instead embedded in a specific hardware part of the computer, in particular on the mainboard. Microsoft argues that users benefit from this new regulation since the product key is automatically read by the computer program during the installation. In other words, the user would no longer have to care about entering the product key. However, this new regulation, has in my opinion, significant downsides: First, according the licensing scheme, a user can only transfer his copy of ‘Windows 8 Pro (preinstalled version)’ by transferring the computer as well which constitutes a huge disadvantage compared to previous versions of Windows. The computer program can no longer be legally ‘unbound’ from the computer. Second, since the product key is embedded in the mainboard of the computer, the question rises what happens when the mainboard needs to be replaced in case of a failure. In the case that a user does not get a new mainboard from the computer manufacturer with a new product key or if he chooses to install a mainboard from another computer manufacturer, the copy of ‘Windows 8 Pro (preinstalled version)’ is simply lost due to the lack of knowledge of the product key. To put it more simply, the user is, in such a situation, deprived from his own and legally acquired copy of Windows 8 Pro and needs to ‘buy’ a new

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197 See for instance Microsoft’s OEM Partner Centre under http://www.microsoft.com/oem/en/pages/index.aspx#fpid=NSFBY6D1CsT.
The aforementioned clause that binds the computer program with the computer is also known as a so called CPU-clause.\footnote{As regards licensing issues of ‘Windows 8’ see also Axel Vahldiek ‘Verdongelt - Lizenzärger bei Windows 8’ (2013) 1/13 c’t 16, available at http://heise.de/-1766977, accessed on October 4, 2013.}

Whether CPU-clauses are in legal conformity with Swiss copyright law aspects needs to be analysed in the context of the previously mentioned use of the computer program.\footnote{See above section III(5)(c)(i).} It was particularly stated that the right to use a bought computer program is mandatory and cannot be excluded by a license agreement in Switzerland. There has been a debate going on, whether CPU-clauses restrict the use of a computer program in a way that would result in an exclusion of the mandatory right to use. With reference to judgements within the EU, it is commonly argued that CPU-clauses are not, \emph{per se}, illegal from a copyright perspective in the case of bought computer programs. Provided that the core of the right to use is maintained, CPU-clauses are considered as valid.\footnote{BGH, Judgment of October 24, 2002 (I ZR 3/00) regarding CPU-clause (Supreme Court of Germany); Georg Rauber ‘§ 4 Nutzungsbeschränkungen in Softwareüberlassungsverträgen ‘ in Magda Streuli-Youssef (ed) \textit{Urhebervertragsrecht} (2006) 232; Markus Wang ‘Software-Überlassungsverträge, Teil III: Nutzungsbeschränkungen, Leistungsstörungen, Gewährleistung und Haftung’ in Hans Rudolf Trüeb (ed) \textit{Softwareverträge} (2004) 111.} In the case of ‘Windows 8 Pro (preinstalled version)’ it could be argued that the CPU-clause is valid provided that the user is assisted in the case of change of mainboard so that a continuous use of ‘Windows 8 Pro’ remains possible. CPU-clauses in license agreements in the case of bespoke computer programs do, by contrast, not raise any legal issues.\footnote{Georg Rauber ‘§ 4 Nutzungsbeschränkungen in Softwareüberlassungsverträgen ‘ in Magda Streuli-Youssef (ed) \textit{Urhebervertragsrecht} (2006) 228; Markus Wang ‘Software-Überlassungsverträge, Teil III: Nutzungsbeschränkungen, Leistungsstörungen, Gewährleistung und Haftung’ in Hans Rudolf Trüeb (ed) \textit{Softwareverträge} (2004) 110.}

When it comes to CPU-clauses and their validity in South Africa, it is referred to the chapter with respect the use of computer programs.\footnote{See above section III(5)(c)(i).} As the use of a computer program is not a mandatory exception in favour of the user of the computer program, CPU-clauses are at the discretion of the copyright holder.

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\footnote{198 As regards licensing issues of ‘Windows 8’ see also Axel Vahldiek ‘Verdongelt - Lizenzärger bei Windows 8’ (2013) 1/13 c’t 16, available at http://heise.de/-1766977, accessed on October 4, 2013.}
(iii) Adaptation

‘You agree not to modify, adapt, translate [...] the Software [...]’.204

The majority of license agreements do not allow the user to undertake any changes with respect to the computer program.205 From a copyright perspective, the right to adapt constitutes an exclusive right of the copyright holder both in South Africa and Switzerland.206 As a consequence, the aforementioned clause is valid from a South African and Swiss copyright law aspect.207 Even if a license agreement did not include such a clause, the licensee would not be allowed to make any adaptations since the exclusive right of the copyright holder exists independent of the existence of a license agreement.208

(iv) Resale

‘You may also transfer the software (together with the license) to a computer owned by someone else if a) you are the first licensed user of the software and b) the new user agrees to the terms of this agreement.’209

Aforementioned clause allows the resale of a computer program provided that some requirements are met. In particular, the licensee needs to be the first licensed user and the new licensee has to agree to the terms of the license agreement. In other words, aforementioned clause constitutes in fact a reselling restriction.

In the previous section about copyright protection we have discussed the principle of ‘exhaustion’ or ‘first sale’ according to which the right of the copyright

206 See section II(6)(b)(iv).
holder to distribute is used up once the computer program has been brought into
circulation. For the principle of ‘exhaustion’ to apply, the copyright holder must have
transferred the ownership of the copy of the computer program by means of sale,
exchange or donation. Upon ‘exhaustion’, the ownership of the computer program
can then be freely transferred to a third party. The principle of ‘exhaustion’ is
explicitly mentioned in Swiss legislation and results as well indirectly from South
Africa’s copyright law.  

At a first glance, it seems that the aforementioned resale restricting clause
clashes with copyright legislation. However, the principle of ‘exhaustion’ does only
apply to a transfer of ownership, that is, sale, exchange or donation. If however a
computer program is not ‘sold’ but licensed, the principle of ‘first sale’ does, by
nature, not apply. In this regard, aforementioned clause has to be read in the context
of another clause of the same license agreement:

‘We do not sell our software or your copy of it – we only license
it.’

From a legal perspective, a copyright holder can indeed choose not to ‘sell’ his
computer program and rather license it. In this regard however, it must be analysed
how the user acquires the computer program. In the case of a ‘pure’ license
agreement, that is an agreement reached directly between the copyright holder and
the licensee, the computer program is indeed licensed and not ‘sold’. By way of
contrast, mass produced computer program such as ‘Windows 8 Pro (preinstalled
version)’ from which the aforementioned clauses are cited, are in fact not licensed
but ‘sold’ in the first place in stores. And if a computer program is ‘sold’, the
principle of exhaustion applies pursuing to the respective copyright legislation.

The remaining question is whether ‘opting out’ is permitted. Neither Swiss nor
South African legislation regard the principle of ‘first sale’ as a mandatory clause. In

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210 See section Il(6)(c)(ii).
212 Microsoft ‘Microsoft Software License Agreement, Windows 8 Pro’ available at
September 30, 2013, para 3 p 1.
other words, opting out is, from a contractual point of view, legally valid. In other words, if a user ‘sells’ his copy of ‘Windows 8 Pro’ to a third person without meeting the agreed requirements, Microsoft would have legal remedies available against this user for breach of contract. However, from a copyright perspective, Microsoft could not sue the third party and new licensee as the latter is not bound by a contract with Microsoft which is why the concept of ‘first sale’ would serve him as a defence.

(v) Sublicensing

‘You may not rent, lease, sub-license, or lend the Software [...].’

The aforementioned principle of ‘exhaustion’ does, with respect to computer programs, not extend to rental. In other words, a legally acquired computer program cannot be rented unless authorisation to do was given in the underlying license agreement. Against this copyright background, a clause prohibiting renting is legally valid under Swiss and South African copyright law.

The same goes for leasing and sub-licensing that consists, like renting, of an act, by which a computer program is made available to a further party for use for a limited period of time against payment.

By way of contrast, lending lacks a financial compensation. Accordingly, lending is not considered as renting and therefore cannot be prohibited from a copyright perspective. Contractually, the same principles apply as for a prohibition of resale.

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216 See section II(6)(c)(ii).


(vi) **Back-up**

‘You may also make one backup copy of the Software.’

In practice, license agreements usually grant the user the right to make a backup copy.

From a Swiss copyright law perspective, the right of a back-up copy is mandatory. From this it follows that a user can make a back-up copy regardless of the respective terms of a license agreement. In addition, parties to a license agreement cannot legally exclude the right to make a back-up copy.

Under South African copyright law, the user enjoys as well the right to make a back-up copy. However, the respective provision is not mandatory, which is why the parties to a license agreement could theoretically ‘opt out’ and prohibit the right to make a back-up copy.

(vii) ** Decompilation**

‘You agree not to [...] reverse engineer, decompile or disassemble the Software or otherwise attempt to discover the source code of the Software or algorithms contained therein [...]’.

Computer programs are usually made available in object code. An object code is machine-readable but unreadable by human beings. Providing a computer program only in object code is perfectly understandable from the perspective of a copyright holder. As long as he does not disclose the underlying source code, he enjoys a trade secret. Against this background, copyright holders usually tend to contractually prohibit the translation from the object code back to the source code, that is the act of decompilation.

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220 See section II(6)(c)(v).

221 See section II(6)(c)(v).

222 See as well above section III(5)(c)(i).


From a South African copyright law perspective, the act of decompilation is not recognised as an exception in favour of the licensee which is why aforementioned clause would be enforceable from a South African law perspective.\(^{225}\)

In Switzerland however, the act of decompilation is deemed lawful in certain circumstances. In particular, the licensee is allowed to decompile a computer program in order to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs.\(^{226}\) Furthermore, the act of decompilation is deemed as a mandatory provision.\(^{227}\) Accordingly, parties to a license agreement cannot validly exclude decompilation of a computer program by agreement. Aforementioned clause would, as a consequence, not be enforceable in Switzerland. A legally valid clause under Swiss copyright law would have to be stipulated as follows:

‘[...] and you may not [...] reverse engineer, decompile, or disassemble the software, except if the laws where you live permit this even when our agreement does not. In that case, you may do only what your law allows.’\(^{228}\)

\[(d)\] **User restriction in local terms**

‘If there is a geographic region indicated on your software packaging, then you may activate the software only in that region.’\(^{229}\)

Aforementioned clause restricts the use of the computer program to certain regions. As regards the legal validity of such clauses under South African and under Swiss

\(^{225}\) See section II(6)(c)(iv).

\(^{226}\) See section II(6)(c)(iv).


copyright law, it is referred to the above mentioned discussion of CPU-clauses.\footnote{See above section III(5)(c)(ii).} In general, user restrictions in local terms are valid.

\textit{(e) User restriction in temporal terms}

‘AVAST grants to you [...] license to use the Software and the
Documentation for the agreed term indicated in the Documentation

User restrictions in temporal terms have to be understood in two respects:

First, duration of copyright does not last forever. Whereas in South Africa copyright protection for computer programs subsists for 50 years after publication respectively making of the computer program, Switzerland grants copyright protection during the author’s entire life plus an additional period of 50 years. After these mentioned periods of times, copyright protection of computer programs seizes to exist.\footnote{See duration of copyright protection in section II(7).} Accordingly, a copyright holder would then no longer be in a position to license respective computer program as one cannot ‘[...] confer more entitlements than he himself holds.’\footnote{Hennie Klopper ‘Copyright and the Internet’ in Sylvia Papadopoulos, Sizwe Snail (eds) \textit{Cyberlaw @ SA III, The Law of the Internet in South Africa} 3ed (2012) 166.} From this it follows that a computer program cannot – from a legal perspective – be licensed after copyright protection has lapsed. A respective license agreement would therefore be null and void. However, this is rather a theoretical remark since computer programs have, in general, a much shorter life cycle than the copyright periods provided by the applicable copyright legislation.

Second, computer programs can either be licensed for a (i) limited or an (ii) unlimited period of time.\footnote{Lukas Morscher ‘Software-Überlassungsverträge, Teil I: Vertragsschluss, Rechtseinführung, Typisierung, Anknüpfung’ in Hans Rudolf Trüeb (ed) \textit{Softwareverträge} (2004) 74.} A limited license period is usually agreed upon for bespoke computer programs that are made available to the user for a certain period of time after which the user is obliged to return the copy of the computer program. From a copyright perspective, such a limitation of time is legally valid. ‘Sold’ mass produced computer programs however result in a transfer of ownership as regards the
copy of the computer program. As a consequence, Swiss as well as South African law confer the ‘buyer’ and licensee of such a computer program a right to use it. A limitation with respect to a specific time period during which the computer program can be used would curtail the ‘buyer’s’ and licensee’s right to use the computer program. As a consequence, respective license clause would be unenforceable in Switzerland since the right to use is deemed mandatory. By way of contrast, in South Africa the same clause would probably be enforceable since parties of license agreement can opt out from the copyright provisions.235

Against this background, how is aforementioned clause to be qualified? The clause is cited from Avast’s mass produced anti-virus computer program called ‘Avast! Internet Security’. As such, it seems at first glance that a transfer of ownership takes place when a user ‘buys’ a copy online. This would, as a consequence, confer the user in Switzerland the mandatory right to use the computer program for an unlimited time-period.

However, as anti-virus programs need to be updated regularly in order to combat viruses, the user ‘buys’ a service rather than a computer program. In addition, the user is given the choice as regards the time period during which anti-virus protection is granted. Against this background, the agreed term during which the computer program can be used, seems indeed to be legally binding provided that the computer program can be used during the agreed time period.

(6) International transaction of computer programs

(a) Overview

Nowadays, transactions as regards computer programs often take place in an international context. Be it because a Swiss company for instance needs a customised software solution developed by a South African company or South African students install a fancy application, produced by a Swiss start-up, on their mobile phones, there is an international aspect involved in these transactions. Usually, parties involved in an international transaction of a computer program are not aware of the international aspect as long as the computer program works perfectly and the

235 See in this regard discussion above in section III(5)(c)(i).
copyright holder gets paid as agreed. However, in case of a dispute, several questions rise.

Referring back to the above mentioned examples of international transactions as regards computer programs, how could the South African company prevent its Swiss business customer from making illegal copies of the licensed computer program? Could the South African Company seize a local South African court? And if the South African students’ mobile application suddenly ceased to work, which rules would apply if they sued the Swiss start-up company in court? Guided by these kind of questions, the following section will focus on the following issues:

- In case of a dispute, which court is competent (see section III(6)(b))?
- Which rules of law will the court apply (see section III(6)(c))?
- Could the CISG provide for a solution (see section III(6)(d))? (b) Competent court

The courts located within the county of Santa Clara, California shall be the exclusive jurisdiction and venue for any dispute or legal matter arising out of or in connection with this Agreement or your use of the Software and the Documentation.

All disputes arising out of or in connection with this Agreement shall be exclusively submitted to the jurisdiction of the competent courts of Zurich, Switzerland, with appeal possibilities provided for by the applicable laws.

In practice, a court seized in a dispute will apply its own principles of private international law in order to determine the applicable law. Hence, before addressing the question which rules of law are applicable, it must be clear which court has jurisdiction to hear the dispute.

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237 Choice-of-forum clause I have used while working at the law firm Hodler Attorneys-at-Law, Switzerland, see for more information http://www.hodler.ch/, accessed on October 16, 2013.

In case of a dispute, the party wishing to litigate must select the proper court or forum in which to proceed. In this regard, the most convenient option for such party is to have the dispute heard by its local court. This option has the advantage that the party wishing to litigate is not forced to travel abroad, is familiar with the procedural rules or has, to put it short, home advantage. However, the interest of the counterparty as regards the competent court, are often quite opposite. Against this background, it is wise to deal in advance with the question which court will be competent in case of a dispute. In particular, parties to a contract are generally free to agree on the court of their choice that would be competent in case of a dispute. Such a choice-of-forum clause, as cited above, is usually given effect by a court seized to hear the dispute if there are at least some minimum links to it.

(c) Applicable law

‘The laws of the State of California, excluding its conflicts of law rules, govern this Agreement and your use of the Software and the Documentation.’

‘This Agreement shall be governed by and construed under the substantive laws of Switzerland.’

Once a court has jurisdiction to hear a dispute, the question arises which law is applicable. In this regard, courts refer to their private international law in order to find an answer to this question. In essence, both South African and Swiss law, rely on the following methods so as to determine the applicable law:

- The main rule is that a contract is governed by the law chosen by the parties (express choice of law).
- In absence of an express choice of law, the court tries to determine the parties’ unexpressed or so called tacit choice of law.


242 Choice-of-forum clause I have used while working at the law firm Hodler Attorneys-at-Law, Switzerland, see for more information http://www.hodler.ch/, accessed on October 16, 2013.
If there is neither an express nor a tacit choice of law, the court assigns the proper law by taking into consideration several 'connecting' factors, such as the nationality of the parties, the place where the contract has been concluded, etc.\textsuperscript{243}

For the sake of certainty, it is wise for the parties to agree in advance on the applicable law that will govern their contractual relationship. Hence, in the following, the focus lies on the express choice of law.

According to South Africa’s private international law, parties in an international context are usually free to choose the applicable law.\textsuperscript{244} Thus, a South African court will, in general, give effect to the parties’ choice of law.\textsuperscript{245} However, in terms of South Africa’s private international law, the way in which foreign law is treated differs depending on its origin. In particular, if the foreign law is ‘readably ascertainable’, which is the case for Australian law for instance, it will be applied without further ado.\textsuperscript{246} However, if the particular foreign law is not deemed ‘readably ascertainable’, for instance in the case of Swiss law, a rebuttable presumption applies according to which South African law and the particular foreign law are the same (if the parties do not succeed to prove the foreign (Swiss) law as a fact). Hence, a party wishing to have foreign applied pursuant to a contractual choice of law, needs to bring forward evidence that the South African and the particular foreign law differ from each other, for instance by providing respective foreign statutes or cases. Otherwise, a South African court will simply apply South African law despite a foreign choice-of-law clause being agreed.\textsuperscript{247}

In Switzerland, the competent court will refer to the Swiss Federal Act on International Private Law of 1987. According to section 122 of the mentioned act,

\begin{itemize}
\item \textsuperscript{243} JP van Niekerk & W G Schulze \emph{The South African Law of International Trade: Selected Topics} 3e (2011) 313 and 60 et seqq; Swiss Federal Act on International Private Law of 1987, art. 116-17.
\item \textsuperscript{244} François du Bois (ed.) \emph{Wille’s principles of South African law} 9ed (2007) 791.
\item \textsuperscript{245} JP van Niekerk & W G Schulze \emph{The South African Law of International Trade: Selected Topics} 3e (2011) 60.
\item \textsuperscript{246} Kwikspace Modular Buildings Ltd v Sabodala Mining Co SARL & Another 2010 (6) SA 477 (SCA); JP van Niekerk & W G Schulze \emph{The South African Law of International Trade: Selected Topics} 3e (2011) 59.
\item \textsuperscript{247} Asco Carbon Dioxide Ltd v Lahner 2005 (3) SA 213 (N); JP van Niekerk & W G Schulze \emph{The South African Law of International Trade: Selected Topics} 3e (2011) 59.
\end{itemize}
parties to an international contract about computer programs are free to choose the law. The Swiss court is in general bound by the choice of law but may ask the parties to provide material of the particular foreign law.

The aforementioned clauses mention both a particular foreign law. However, the first cited clause excludes ‘conflicts of law rules’ whereas the second refers to ‘substantive’ laws. Both clauses follow the same goal which is to exclude the private international law respectively refer to municipal foreign law only. The reason behind is to be understood as follows: Would foreign private international law be applicable as well, it could be possible that such refers to another foreign jurisdiction including its private international law. This circularity is also referred to as ‘renvoi’ and should be avoided by the parties by diligently drafting their choice-of-law clauses.

(d) Applicability of CISG

(i) Overview

Instead of choosing a particular foreign national law system, parties to an international contract as regards a computer program could as well decide that their relationship should be governed by CISG. As mentioned earlier, CISG provides for a uniform international sales law.

At first glance, it seems that CISG is an ideal solution. There wouldn’t be any more issues arising from the application of the complex private international law rules.

Furthermore, in terms of fairness, no party would be forced to accept that a foreign, unfamiliar system of law would be applicable in case of a dispute. Against this background, I find it worthwhile to have a look at CISG in the following section.

(ii) Applicability of CISG in general

Pursuant to article 1 of CISG, the CISG applies to contracts of sale of goods between parties whose places of business are in different states. In other words, CISG is only

248 Swiss Federal Act on International Private Law of 1987, art. 122(2); BGE 101 II 293, 298 (Supreme Court of Switzerland); Thomas Probst ‘Der Lizenzvertrag: Grundlagen und Einzelfragen’ (2013) Jusletter of September 2, 2013 12.

249 Swiss Federal Act on International Private Law of 1987, art. 16(1).

250 See above section III(2)(a).
applicable in an international context. In addition, it is required that the ‘[...] States are Contracting States [...]’ or that ‘[...] the rules of private international law lead to the application of the law of a Contracting State.’ Against this legal background, from a Swiss perspective, a specific clause that chooses CISG as the applicable law is not required, since Switzerland is a contracting state of CISG. By way of contrast, CISG has not yet been ratified by South Africa which is why contracting parties would have to specifically define CISG as the applicable law.

(iii) Applicability of CISG for computer programs in particular

According to article 1 of CISG, the convention applies to sale of goods only. The term of ‘goods’ is not defined by CISG. It is however commonly accepted that the term ‘goods’ refers to tangible or movable, corporeal property. By way of contrast, rights, ‘in particular industrial or intellectual property rights are, in themselves, not goods in the meaning of the Convention.’ This leads us to the question whether computer programs could be qualified as ‘goods’ in terms of the convention.

Referring back to the definition of a computer program, a computer program has been described in relation to its counterpart, the computer. Whereas the computer is commonly known as ‘hardware’ and thus forms a tangible good, the computer program consists of a collection of instructions that are executed within the hardware. From this it could be followed on the one hand, that a computer program is not a tangible good.

On the other hand, it could be argued that in the case of computer program ‘sold’ over the counter (off-the-shelf), the user acquires a computer program that is embodied in a CD or DVD, which undoubtedly consists of a tangible good. However, as we have discussed before, the sale of the CD or DVD is only one part of

251 CISG, art. 1(1)(a) and (b).
253 CISG, art. 1(1).
256 See above section II(3)(a).
the transaction with respect of a computer program. The moment, the user desires to use the acquired computer program, he enters into a license agreement with the copyright holder who sets the terms and conditions as regards the use of its computer program.257 Since license agreements are not governed by CISG, the convention, if applicable at all, could only provide answers with respect to the contractual relationship between the distributing seller and the user who buys the CD or DVD.258 In other words, CISG would be applicable for the sale part of the transaction whereas a national law would deal with license issues. In my opinion, such a solution would not really make things easier. Furthermore, pursuant to article 3 of CISG, the convention ‘[…] does not apply to contracts in which the preponderant part of the obligation of the party who furnishes the goods consists in the supply of labour or services.’259 In the above mentioned example of ‘sale’ of a computer program over the counter, the price paid by the user of the computer program is not primarily destined for the material consisting of the DVD, CD or package, but rather for its content, that is the computer program which the user can use according to the terms of the licensing agreement. From this it appears that even if the ‘sale’ of a computer program over the counter could be qualified as a sale transaction in terms of the CISG, the transaction as a whole might escape from the scope of application of CISG pursuant to its article 3 if the use of the computer program is qualified as a kind of service.260

The same arguments can of course be raised for bespoke computer programs that are not ‘sold’ but only licensed. Here, because of the lack of a sale element, CISG appears to be even less applicable. Against this background, CISG does not really seem to fit transactions whose subject-matters are computer programs, even if they are ‘sold’ over the counter. Last but not least, CISG does not apply for ‘ […]

257 See above section III(4)(c).


259 CIST, art. 3(2).

goods bought for personal, family or household use […]’, that is consumer sales. Hence, CISG is, for the time being, not an ideal solution respectively choice of law. This is also a reason why license agreements often expressly exclude the application of CISG in their choice-of-law clause:


‘This Agreement shall be governed by and construed under the substantive laws of Switzerland, to the exclusion of the United Nations Convention on Contracts for the International Sale of Goods of 1980.’

(e) Conclusion

In a cross-border transaction as regards computer programs the parties must be aware in the first place that there could be several courts which could have jurisdiction in the case of a dispute. In this regard, it is advisable to include a choice-of-forum clause in a contractual relationship. Second, the fact that a court has jurisdiction to hear the dispute does not mean that the law of the same jurisdiction will apply. Hence, the parties should as well incorporate a choice-of-law clause in their contract. Usually and ideally, the parties’ choice is such that the chosen court and chosen law refer to the same jurisdiction. Finally, since CISG does, pursuant to its wording, not provide any solutions as regards the subject-matter computer programs, it should be excluded explicitly.


263 Choice-of-forum clause I have used while working at the law firm Hodler Attorneys-at-Law, Switzerland, see for more information http://www.hodler.ch/, accessed on October 16, 2013.
(7) Interim summary and conclusion

The findings regarding licensing of a computer program against the background of the South African and the Swiss copyright protection legislation are summarised in the following chart:

<table>
<thead>
<tr>
<th>Licensing issues</th>
<th>South Africa</th>
<th>Switzerland</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal background</td>
<td>License agreement is considered as an innominate contract; contract law and private international law are not comprehensively codified, but arise from common law and case law</td>
<td>License agreement is considered as an innominate contract, ruled by the principles of the Code of Obligations; the private international law is as well codified (Swiss Federal Act on International Private Law of 1987)</td>
</tr>
<tr>
<td>License agreement</td>
<td>Contractual relationship in terms of which the copyright holder (the ‘licensor’) grants his contracting party (the ‘licensee’) the right to exercise an exclusive right regarding the computer program against payment of a license fee</td>
<td></td>
</tr>
<tr>
<td>Assignment</td>
<td>Transfer of copyrights in respect of a computer program by way of assignment</td>
<td></td>
</tr>
<tr>
<td>Mass produced v bespoke computer programs</td>
<td>Mass produced computer programs are usually ‘sold’ in stores over the counter (off-the-shelf) or over the internet by downloading; user becomes owner of the copy of the computer program</td>
<td>Bespoke computer program are by contrast made available for a certain period of time after which the use of the computer program is no longer permitted</td>
</tr>
<tr>
<td>Ways of forming a contract</td>
<td>Bespoke computer programs</td>
<td>Copyright holder concludes a license agreement directly with the user</td>
</tr>
<tr>
<td>----------------------------</td>
<td>---------------------------</td>
<td>------------------------------------------------------------------</td>
</tr>
<tr>
<td>Mass produced computer programs</td>
<td>User ‘buys’ the copy of the computer program from the distributing seller (sale contract); in addition, user enters into second contractual relationship with copyright holder (EULA)</td>
<td></td>
</tr>
<tr>
<td>Both shrink-wrap and click-wrap licenses are valid</td>
<td>Click-wrap licenses valid, but shrink-wrap are not valid</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Restrictions of rights of use regarding a computer program</th>
<th>In personal terms</th>
<th>Valid</th>
<th>Valid; however a computer program installed on a server in a way that use by different persons is possible just once at a time is regarded as single-use and cannot be permitted due to the mandatory right to use</th>
</tr>
</thead>
<tbody>
<tr>
<td>In terms of substance:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Use in particular</td>
<td>Valid</td>
<td>Valid</td>
<td>Not valid for mass produced computer program since they include a mandatory right of use; Bespoke computer programs include as well a right to use which can however be legally restricted</td>
</tr>
<tr>
<td>Right of use applies only for mass produced computer programs and can be legally restricted; Bespoke computer programs can only be used if authorised by the copyright holder</td>
<td>Valid</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• CPU-Clause</td>
<td>Valid</td>
<td>Valid</td>
<td>Valid, provided that the core of the right of use is maintained</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Adaptation</td>
<td>Valid, since adaptation is an exclusive right of the copyright holder</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>------------</td>
<td>---------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Resale</td>
<td>Valid in the case of bespoke computer programs that are not ‘sold’; with respect to mass produced computer program, the principle of ‘exhaustion’ applies which is however not mandatory and can be curtailed by an agreement; still, the principle of ‘exhaustion’ could serve a third party as a defence against the copyright holder in case of a resale</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sublicensing</td>
<td>Valid since the principle of ‘exhaustion’ does not extend to rental</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Back-up</td>
<td>Valid; back-up right can be legally restricted</td>
<td>Not valid as the back-up right is mandatory</td>
</tr>
<tr>
<td></td>
<td>Decompilation</td>
<td>Valid, since decompilation is not regarded as an exception</td>
<td>Not valid as the right of decompilation is mandatory</td>
</tr>
<tr>
<td></td>
<td>Restrictions in local terms</td>
<td>Valid, see above ‘CPU-Clause’</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Restrictions in terms of time</td>
<td>Not valid after copyright has lapsed</td>
<td>Valid</td>
</tr>
</tbody>
</table>
When focusing on licensing of computer programs, it must be distinguished whether a mass produced computer program or a bespoke computer program is concerned. The latter is developed in a direct relationship between the user as licensee and the copyright holder as licensor. Accordingly, the formation of a respective license agreement is not a big legal issue. By way of contrast, a mass produced computer program is ‘sold’ either over the counter (off-the-shelf) or over the internet by means of a download. Hence, the computer program user concludes a sale contract with a distributing seller of the computer program. In this scenario, the

<table>
<thead>
<tr>
<th>Competent court</th>
<th>Parties of an international contract are generally free to agree on the court of their choice (choice-of-forum clause)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicable law</td>
<td>Parties in general free to the choose the applicable law (choice-of-law clause); if foreign law is not ‘readably ascertainable’ parties have to bring forward evidence that foreign law differs from national law</td>
</tr>
<tr>
<td>CISG</td>
<td>Parties in general free to the choose the applicable law</td>
</tr>
<tr>
<td></td>
<td>As South Africa is not a contracting state, CISG would have to defined by the parties as the applicable law</td>
</tr>
<tr>
<td></td>
<td>CISG applies without further ado</td>
</tr>
<tr>
<td></td>
<td>In case of mass produced computer programs (off-the-shelf), CISG could be applied theoretically as the user acquires the computer program embodied in a CD for instance; however, CISG does not apply for consumer sales; furthermore, CISG does not provide any answer as regards licensing issues; therefore, CISG does, for the time being, not really suit transaction involving computer programs; hence, CISG should be explicitly excluded within a choice-of-law clause</td>
</tr>
</tbody>
</table>
copyright holder needs to find a way to legally bind the computer program user to his terms and conditions as regards the use of the computer program. In this regard, the shrink-wrap and click-wrap license are of relevance. Whereas click-wrap licenses are in general deemed as being valid from a contract law perspective, there is a debate going on whether or not shrink-wrap licenses are binding as well.

The distinction between a mass produced and bespoke computer program is also relevant with view to the validity of licensing clauses. In general, the user of a mass produced computer program is, due to the sale element, in general accorded more rights than the user of a bespoke computer program is. For example, a ‘buyer’ of a mass produced computer program has, according to South African and Swiss copyright legislation, the right to use or ‘resell’ the computer program. Consequently, a license agreement that grants such a user the right of use or resale is, due to the residual terms in the legislations, not really necessary from a contract law perspective. By way of contrast, in the case of a bespoke computer program, the use or resale is only lawful if authorised by a license agreement. In this regard, it needs to be mentioned that Switzerland accords the right to use to a user of a bespoke computer program whereas South Africa does not.

Aforementioned examples of use and resale are related to the exceptions provided by the respective copyright legislation applicable. By way of contrast, licensing clauses with which the copyright holder allows the licensee to do exercise exclusive rights, do not confirm rights the user already has but rather grant new rights. An example would be the right to adapt or rent. A user can only make modifications or sublicense a computer program provided that he is authorised to do so by a license agreement.

What stands out when comparing the Swiss copyright legislation to South Africa’s is the fact that Switzerland qualifies certain exceptions as so called ‘core rights’ that are deemed to be mandatory. This has practical implications in the context of licensing as the holder of ‘core rights’ cannot renounce these validly by a license agreement. As we have seen, both the copyright legislation of South Africa and of Switzerland confers the ‘buyer’ of a mass produced computer program the right to use it. However, a license agreement could, from a South African copyright perspective, override this exception. By way of contrast, such a license clause would
be null and void under the copyright legislation of Switzerland due to the mandatory, ‘core right’ aspect of the right to use.

For further examples as regards the validity of user restriction clauses, reference is made to the comprehensive table above.
IV CONCLUSION

The first section of this minor dissertation has been dedicated to the intellectual property rights of a computer program. Being an immaterial good, a computer program is mainly protected by copyright. As we have seen, 'copyright' involves far more rights than just the right to copy and extends to the rights to adapt, distribute and rent. These rights belong exclusively to the copyright holder and thus, confer the copyright holder a kind of a monopoly as regard the exploitation of its computer program.

The legal concept of copyright is sometimes referred to as 'all rights reserved'. However, this general rule is not absolute but subject to some exceptions. Of particular interest with respect to computer programs is the principle of 'exhaustion' according to which the copyright holder's exclusive right to distribute is limited to the 'first sale'. Once the computer program is 'sold', the 'buyer' respectively user is entitled to 'resale' it to a third party. Furthermore, such user is also granted by the laws of South Africa and Switzerland the right to use and to make a back-up copy of the computer program. In addition, Switzerland, allows for decompilation. These exceptions to the exclusive copyrights of the copyright holder have the purpose to create a balance between the rights of the copyright holder and the rights of the user of the computer program.

The legislative background of copyright is one aspect. In practice however, copyright holders usually do not leave it to the national or international copyright legislation to define what the users of the computer program should or should not do with the computer program. Rather, copyright holders try to control how their computer program ought to be used by binding the users of the computer program to a license agreement. This topic was dealt with in the second section of this minor dissertation. In this regard, the focus lay on the relationship between copyright and licensing of a computer program. It was specifically analysed to what extent copyright interacts with licensing under South African and under Swiss copy right law.

On the one hand, insofar as exclusive copyrights are concerned, they remain totally at the disposal of the copyright holder. A user of a computer program wishing
to sublicense such to a third party is only entitled to so if authorised by the copyright holder since the right to rent constitutes an exclusive right of the copyright holder.

On the other hand, several license clauses concern the exceptions that are provided by the respective copyright legislation in favour of the user of a computer program. A typical example is a license clause that grants the user the right to use the computer program. As we have seen, the right to use is already provided by copyright legislation of South Africa and Switzerland. Hence, it seems that such a clause is just a confirmation of the rights the user already has due to the residual terms of the legislation.

However, license agreements often do not only confirm the rights of a user of the computer program but also curtail them in different ways. A typical example is the CPU-clause of ‘Windows 8 Pro (preinstalled version)’ according to which the user can only transfer his copy of ‘Windows 8 Pro’ if such a transfer includes the hardware part. In other words, the computer program ‘Windows 8 Pro (preinstalled version)’ is bound to the computer and a user of ‘Windows 8 Pro (preinstalled version)’ cannot use his copy of ‘Windows 8 Pro (preinstalled version)’ on a new computer for instance. Undoubtedly, such a clause is a restriction of the user’s right to use his copy of the computer program. Accordingly, there is a disparity between the license agreement and the copyright legislation of South Africa and Switzerland which both provide for the right to use. In this regard, the question arises whether such derogation by the license agreement is valid under the copyright legislation of South Africa and Switzerland. The short answer here is: It depends.

As we have seen, Switzerland qualifies certain exceptions as mandatory ‘core rights’ with the consequential implication that these rights cannot be validly excluded by concluding a license agreement. A respective license clause would be null and void under Swiss copyright law. The main ‘core right’ is the right to use which cannot be restricted in the case of a mass produced computer program. In the above mentioned example, a user of ‘Windows 8 Pro (preinstalled version)’ could not be validly restricted by contract of his right to use the copy of the computer program. Whether a CPU-clause already excludes the ‘core right’ of use is debatable. In my opinion, the clause should be considered null and void if, in case of failure of the
hardware device for instance, the user would be forced to ‘buy’ a new copy of the same computer program which he had ‘bought’ already previously.

By way of contrast, South Africa’s copyright legislation does not contain mandatory provision in favour of the user. In other words, parties to a license agreement could contractually override or ‘opt-out’ of the copyright legislation.

Taken together, copyright and licensing of a computer program are intertwined and are in a woven relationship with each other. Whereas copyright legislation in Switzerland restricts to some extent the contractual freedom, license agreements can validly derogate and override the South African copyright legislation.

Against this background, it appears that the present copyright legislation of South Africa which allows for restrictive licensing clauses in favour of the copyright holder can be to the detriment of the computer program’s user. In other words, there is a disparity in terms of legal balance between the rights of the copyright holder and the rights of the user of a computer program under South African copyright law – a disparity that is, by the way, worsened by the fact that South Africa’s legislative regime regarding technological protection measures does not allow for raising any exceptions at all. This makes it, for instance, harder to access knowledge contained in a computer program in a legal manner, a key aspect in terms of research and education.264 A great deal towards a more equilibrated balance would be achieved if South African copyright law contained a clear right to use and if it gave exceptions mandatory effect so that a restriction by a contractual agreement to the detriment of the user would no longer be permissible and valid.

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