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Viktor Knapp  
*Charles University*

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# Some Problems of Legal Regulation of the Use of Computer Technology in Czechoslovakia

Viktor Knapp\*

## I. TECHNICAL PROGRESS AND DEVELOPMENT OF LAW— INTRODUCTION

Technical progress is one of the most important elements of social development which necessarily causes change in the law. In the past few decades computer technology has become very important. As a component of technical progress, computer technology has given rise to new social relations which require legal regulation. Such regulation, however, is not provided adequately by existing legal rules in the contemporary Czechoslovak legal system.

Computer technology consists primarily of computing units<sup>1</sup> and the information “produced” by computer systems. Both these elements are becoming independent objects of legal concern and legal protection and, as such, possess some specific features. In this paper we shall deal with some problems concerning the legal regulation of the use of computer systems with particular reference to computer programs and software.

The law, as a system of legal rules, adjusts itself to the needs of technical progress only slowly and progressively, as a rule. This means that, at first, the currently existing legal rules are applied to new phenomena as much as possible; that is, that “new wine is poured into old bottles.” Necessary adjustments are made in the legal system only after sufficient experience with the new phenomena has been amassed and digested.

This adjustment process, naturally, proceeds in a considerably different way in the written-law countries (countries where the *lex scripta* is applied exclusively) than in the judge-made law countries. In this connection, we note that Czechoslovakia is exclusively a written-law country,<sup>2</sup> which means that all Czechoslovak

\* L.L.D., Ph.D., Dr. h.c. Professor of Law, Charles University, Prague, Czechoslovakia.

1. Computing units are actually called “computing systems” in Czechoslovak legal terminology. For a discussion of the computer system, see *infra* Section II of this article.

2. The law in Czechoslovakia is not only written (statutory) law, but also codified law. The principal codes relevant to our problems are the Economic Code, the International Trade Code, and the Civil Code. THE ECONOMIC CODE NO. 109 OF 1964 (amended December 21, 1970) [ECON. C.],

law is statutory law, in which a statute may be altered only by another statute. Naturally, even in written-law systems court decisions exercise considerable influence on the development of the law, particularly by way of interpretation. However, formal changes of the law may be effected only by legislation. It follows that questions arise as to which legal rules are to regulate the use of computer technology, whether there are any gaps in that legal regulation and, if so, what they are and to what extent new legal regulation is necessary. Such doubts and gaps do exist in Czechoslovak law, and there is a need for new legal regulation concerning the use of computer technology. We shall deal with some of them below.

## II. PRINCIPAL DEFINITIONS

The fundamental legal notion in the regulation of computer technology in Czechoslovakia is the *computer system*. This system is generally viewed as a homogeneous functional unit of both technological and programmatic components of the given computing system; that is, a computer system is viewed as a homogeneous functional unit of its hardware and software. Each part of the system, however, is legally protected separately.

Both hardware and software are the result of intellectual activity and are capable of being the object of so-called "rights to immaterial goods." In Czechoslovak law, the "right of ownership" means, exclusively, having the full title to a material good. Having full title to things other than material goods is not considered ownership, even in the case of industrial property. Instead such title is considered a specific title, called immaterial personal rights, rights to immaterial goods, or personal property rights.<sup>3</sup>

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COLLECTION OF LAWS (Czechoslovakia), translated in 12 BULL. OF CZECHOSLOVAK L. 53 (1973); THE ACT NO. 101 OF 1963, CONCERNING LEGAL RELATIONS IN INTERNATIONAL TRADE (International Trade Code) [IN. T.C.], COLLECTION OF LAWS (Czechoslovakia), translated in 22 BULL. OF CZECHOSLOVAK L. 145 (1964); THE ACT NO. 40 OF 1964, THE CIVIL CODE [CIV. C.], COLLECTION OF LAWS (Czechoslovakia), translated in 17 BULL. OF CZECHOSLOVAK L. 35 (1978). The legal regulation of industrial property rights and copyright is not included in these codes, but is found in the Law of Discoveries, Inventions, Improvement Suggestions and Protected Designs, and in the Copyright Law. See LAW OF DISCOVERIES, INVENTIONS, IMPROVEMENT SUGGESTIONS AND PROTECTED DESIGNS NO. 84 [DIS. L.], COLLECTION OF LAWS (Czechoslovakia) (1972); THE ACT NO. 35 OF 1965, CONCERNING LITERARY, SCIENTIFIC AND ARTISTIC WORKS (The Copyright Law) [COP. L.], COLLECTION OF LAWS (Czechoslovakia), translated in 24 BULL. OF CZECHOSLOVAK L. 201 (1966). Certain Ordinances, issued for the implementation of the ECON. C., *supra*, regulating the delivery of computer systems, may come into consideration but will not concern our subject directly. In this respect they are of negligible importance from our viewpoint.

3. For a discussion of these rights, see *infra* text accompanying notes 6–12 and *infra* Section V. See also PERSONAL PROPERTY RIGHTS (in Czech, with French summary) (S. Luby ed., Vydavatelstvo SAV (Publishing House of the Slovak Academy of Sciences)); K. KNAP, PRESENT PROBLEMS OF COPYRIGHT AND INDUSTRIAL PROPERTY (in Czech, with English summary) (O. Kunz ed., Ustav prava autorskeho a prav prumyslovych University Karlovy (Institute of Copyright and Industrial Property Rights of Charles University) Prague 1986).

Hardware has the legal character of material goods and is normally protected as such. In addition, as long as it represents an invention, it is simultaneously protected by patent laws, thus enjoying the legal protection of immaterial goods as well. There are few problems as far as hardware is concerned, so we shall concentrate our attention on the legal problems concerning software.

From a legal point of view, it is necessary to distinguish between the material parts of software, such as compilers and precompilers, and the immaterial parts, such as computer programs or operational systems. Regarding computer programs, it is further necessary to distinguish between the programming process consisting of several distinct steps—the system analysis, the establishment of algorithms, flow diagrams, flowcharts, the establishment of the source code, and finally the establishment, by means of a compiler, of the object code<sup>4</sup>—and the computer program itself consisting of a complete sequence of logically-linked instructions and data for the solution of a given problem.<sup>5</sup> The program is therefore the immaterial outcome of the programming process, usually recorded on a material medium. It follows that we consider software to be a unity of immaterial components and material components including the medium on which the program has been recorded (its material carrier).

The above mentioned distinction between the material and the immaterial components of the computing system (and of the software as well) and between the programming process and the resulting computer program, has relevance in determining the applicable legal regime. We shall, however, so differentiate in the following discussion only where a misunderstanding could arise.

The intellectual creator of a program (its author) is always an individual who at the same time may also be its user. In addition, the author may supply or sell the program to another person. An individual can, of course, also be the buyer of a computer program. In a socialist country, however, the entities who engage in commerce with software are typically state enterprises or other corporate bodies. Thus, we shall deal with the problem of the legal regulation of computer programs from this angle.

We must first distinguish between the *author* of a computer program and its *producer*, that is, the corporate body in which, or under whose control, the above mentioned programming process was accomplished. Then we must distinguish between the *supplier* of the computer program, that is, the corporate body furnishing it to another person, and the *user* of the program. The software supplier may be its producer or a trading organization, such as a foreign trade organization. Naturally, it is also possible that the producer of a program is simultaneously its user, as when an enterprise produces software for its own use.

4. K. RYBARIK, 4 LEGAL PROTECTION OF COMPUTERS (in Slovak) (Vedecke riadenie, Bratislava 1985).

5. Knap & Opltova, *Ochrana Programu Pocatice v Pravu Ceskoslovenskem a Zahranicnim* (On the Protection of Computer Programs in Czechoslovak and Foreign Law), 64 PRAVNÝ OBZOR 903, 904 (1981).

The respective legal regime differs depending on the relationship of the individual or the corporate body to both computer programs and software. These relationships may be governed by the Civil Code, the Economic Code, the International Trade Code, or, as the case may be, by the Ordinances issued for the implementation of the various Codes.

### III. COMPUTER PROGRAM AS OBJECT OF LAW

When discussing the legal regulation of computer programs in Czechoslovak law, it is particularly important to demonstrate how a program can be an object of legal regulation. Czechoslovak law recognizes the following entities as objects of the law:

- a) material goods (things),<sup>6</sup>
- b) rights and duties (particularly claims or things in an action) if they form the object of legal traffic,
- c) the so-called immaterial goods.<sup>7</sup>

The computer program as an immaterial, or intellectual, outcome of the programming process, as distinguished from its material carrier, is considered a special kind of immaterial good.<sup>8</sup> It follows that under Czechoslovak law the right of using a computer program and of disposing of it is never considered a right of ownership, but rather represents a specific right to immaterial goods. Thus, the right of a person with full title to both use and dispose of a given computer program is indirectly limited.

From the legal viewpoint, it is necessary to differentiate between cases in which the subject of legal regulation is represented by

- the computing system as a whole, including both the hardware and the software,
- the hardware only,
- the software only,
- and the computer program only as a kind of immaterial good.<sup>9</sup>

6. Material goods in the narrow sense of the term (i.e., *res corporates*, and controllable forces of nature which serve the needs of man, such as electric power).

7. Including, also, in particular, immaterial results of qualified (scientific, artistic, etc.) human activities.

8. Rights in computer programs are classified as industrial property rights by Knap & Opltova, *supra* note 5, at 903; *Cf. Kunz, Problems of National and International Protection of Know-How* (in Czech), in *PERSONAL PROPERTY RIGHTS* (Bratislava 1968).

9. As immaterial goods (products of human intellectual activity), computer programs are practically always recorded on some material medium, which makes them communicable and negotiable. In practice, including in legal discussions, the computer program is often thought of as an integral part of its material medium (analogous to, for example, a work of plastic arts or a film). Sometimes it is even identified with its material carrier or with the term "software."

The difference in the legal regime depends to a considerable extent on the type of rights or legal relations concerned. For example, in the case of the supply of computer technology, Czechoslovak law differentiates to some extent between the delivery of a complete computing system and separate deliveries of hardware and software. Nevertheless, both cases involve legal rules of the same type, so-called economic contracts,<sup>10</sup> and therefore the differences in the legal regulation of both types of deliveries are not substantial.

On the other hand, there are substantial differences in legal regulation depending on whether one is concerned with the legal protection of rights to the material or immaterial parts of the computing system. These differences also occur in the case of software. Software considered as the program "materialized" on its carrier, that is, as a unity of its material and immaterial components, has the legal character of a material good. It is, as such, the object of ownership and consequently enjoys the legal protection of ownership. The program itself, however, as the immaterial component of software, enjoys the specific legal protection of immaterial goods.<sup>11</sup>

In regard to the legal protection of software, Czechoslovak law places a certain importance on the identification of the intended user for whom the software has initially been produced. For instance, it may have been mass produced so as to serve anybody in accordance with its purpose. Such is the case with so-called optional software, which can be obtained by anybody for a set price from the producer; consequently, different users can use the same software for the given purpose. This is also the case of standard software, which is offered by the producer or supplier to anybody who is interested in it. On the other hand, software may be made especially for the solution of a specific task of a specific user (it may be software made, so to speak, to measure). This is the case of individualized software, that is, software individualized by its user and by the problems which it has been intended to solve. If the software was made for general consumption, there is no special legal protection for the buyer, but if it is individualized software, the user is protected by several legal means.<sup>12</sup> It is irrelevant, however, whether the user of the individualized software is its pro-

10. These economic contracts would be governed under the ECON. C., *supra* note 2, § 301, at 130 and § 311, at 132.

11. The distinction between software as a material good and the computer program as an immaterial good may be difficult to understand in the U.S. where "software" and "computer program" are generally considered almost synonymous. The distinction is crucial, however, in a socialist system where only material goods are considered personal property. Thus, if a program is "stolen" by means of copying from a disk, the owner of the disk would not be protected because of his ownership, although he may be protected through other means if he is the creator of the program.

12. See COP. L., *supra* note 2, § 27, at 209 (regarding contracts concerning the creation of a work), or THE PENAL CODE (amended April 25, 1975) [PEN. C.], COLLECTION OF LAWS (1973) (Czechoslovakia), translated in 13 BULL. OF CZECHOSLOVAK L. 187, § 89(10), (11), at 214, and § 122, at 223 (regarding protection of commercial secrecy).

ducer (whether he produced it for his own specific use), or whether it was made to order for the user by another partner.

In Czechoslovak law, legal protection can be separated chiefly into civil law (including the Economic Code, the Civil Code, the International Trade Code, and others), administrative law, and penal law protection. Civil law protection can be classified either as *general protection* or *specific protection*. By general protection we mean the legal protection afforded generally to any right.<sup>13</sup> This protection means that anybody, including individuals or corporate bodies, whose rights were violated or threatened by another individual or corporate body, can sue the infringer for prohibition of further infringement of his rights, for restoration by the infringer, if possible, of the previous state (*restitutio in integrum*) and, as the case may be, for damages. In contradistinction to the general protection afforded to any right, specific civil law protection consists of the legal remedies available specifically for the legal protection of certain rights only, such as copyright.

We must further consider two other general means of civil legal protection: actions *in rem*, that is, actions by which the plaintiff claims the return of goods unjustly taken away from him or an injunction against any other violation of his ownership, and actions *in personam*, such as actions for damages and specific actions in the case of a breach of contract (for instance the delivery of defective goods, or delayed delivery).

It can be concluded that hardware, as a material thing, enjoys only general protection.<sup>14</sup> Software, however, enjoys either the general protection of a material good (if protection of it as a whole is claimed) or specific legal protection (if only the protection of the computer program is claimed).

#### IV. SPECIFIC LEGAL PROTECTION OF COMPUTER PROGRAMS

In Czechoslovakia, specific legal protection of computer programs is not prescribed. This means that a computer program enjoys specific legal protection only if it can qualify simultaneously as an immaterial good which is expressly protected by the law. Here we will examine possible areas where computer programs may qualify for specific legal protection. We will see that in theory

13. General protection is considered as self-evident since it follows from the fact that each right implies a legal duty for everyone not to violate it. In some codes, general protection is implied expressly, as in Civ. C., *supra* note 2, § 4, at 39: "Protection may be sought against those who have endangered or violated a right with the competent organ. If the present Code does not provide otherwise, such organ shall be the court."

A similar rule can be found in ECON. C., *supra* note 2, § 119a, at 81, which explicitly prohibits some unfair business practices which are detrimental to the interests of consumers and/or other enterprises.

14. It is obvious that the *invention* of new hardware, if the legal prerequisites are satisfied, can be considered an invention under Dis. L., *supra* note 2, § 24, and can enjoy legal protection as such. See paragraph of text following *supra* note 3; text accompanying *supra* note 10. In such a case, however, the hardware is not protected as a *material* object, but as an invention of a material object.

computer programs are protected by copyright, if the legal prerequisites are present, and at the same time they enjoy legal protection as know-how. Some other less important means of protection of immaterial goods may also apply. On the other hand, neither patent law protection nor the legal protection of improvement suggestions, in practice, applies to computer programs.

There is, however, no unanimity in legal writings on these questions and there are some problems which we shall discuss in more detail below.

## V. CIVIL LAW PROTECTION

### A. Copyright

The creation of a computer program is, or at least most closely resembles, authorship. Consequently, the first question to be asked is whether and to what extent the creation and use of a computer program is protected by copyright. The answer to this question is not indisputable.

Certain doubts as to the suitability of copyright for computer programs spring directly from the formulation of the Copyright Law of 1965 which is concerned with the classical forms of authorship rather than the authorship of a computer program. Of decisive significance in the matter is § 2 of the Copyright Law which reads as follows:

The object of the copyright includes literary, scientific and artistic works which are the result of the creative activities of the author, particularly literary, theatrical, musical works, the works of creative arts including the works of architectural art and of applied art, film, photographic, and cartographic works.<sup>15</sup>

There is no doubt that the creation of a computer program is (with the exception of purely routine work) the result of the creative activity of its author. More doubtful is the problem of whether it is possible to qualify a computer program as a "work" within the meaning of the Copyright Law. The quoted section exclusively concerns the above mentioned three kinds of works: literary, scientific and artistic. In practice, a computer program can hardly be qualified as either a literary or an artistic work. There remains the question of whether it can be classified as a scientific work.

Czechoslovak legal writings interpret the notion of "scientific work" rather broadly and, as a rule, recognize as a scientific work within the meaning of § 2 every spiritual work elevating human knowledge. On the other hand, most writers are fairly reluctant to consider a computer program as a scientific work.<sup>16</sup> It is generally admitted that only some parts of the above mentioned programming

15. COP. L., *supra* note 2, § 2, at 203.

16. Knap & Opltova, *supra* note 5, at 913. See also K. KNAP & M. OPLTOVA, 5 PROBLEMS OF LEGAL PROTECTION OF COMPUTER PROGRAMS 307 (in Czech) (Pravnik, Prague 1969).

process, particularly systems analysis and algorithms, but not the computer program as a unit, can be considered a scientific work elevating human knowledge, and consequently an object of copyright. It follows, according to this opinion, that only certain parts of the programming process are copyrightable, not the program itself.

The author of this study does not share this opinion and believes that there is no reason for a restrictive interpretation of § 2 of the Copyright Law when assessing whether, and to what extent, it is possible to consider a computer program as an object of copyright. Section 2 states two general prerequisites for copyright (the second of which is implied by the first); the object must concern a *work* (in this particular case a scientific work) which is the result of the *creative activity* of its author. Consequently, if the creation of a computer program fulfills both conditions, the determination of which is a question of fact, there is no reason why the given computer program itself could not be considered as an object of copyright. In our opinion, programs are copyrightable under Czechoslovak law. Authors and producers of computer programs generally have all the rights granted to authors by the Copyright Law<sup>17</sup> and, if the legal prerequisites are satisfied, the right to claim damages.<sup>18</sup>

In Czechoslovakia, however, computer programs are as a rule created only by employees of an enterprise in fulfillment of their duties laid out in their employment contracts. As a consequence of this situation, even if the creation of a computer program could be an object of copyright, § 17 of the Copyright Law would apply, according to which the employer (as a state or other enterprise) "can use a scientific work or a work of art created by his employee in the fulfillment of his duties following out of his employment contract, for the fulfillment of his [the employer's] own targets without further permission from the author."<sup>19</sup>

It can be concluded that according to present Czechoslovak law a computer

17. [1] An author whose copyright has been violated may demand in particular that its further violation be prohibited, the consequences of the violation be removed, and that he be given an appropriate satisfaction.

[2] If the author suffered damage through the violation of his copyright, he may claim compensation under the Civil Code.

[3] In the case of a work created jointly by several co-authors, the title under paragraphs 1 and 2 above also appertains to the individual co-authors separately.

COP. L., *supra* note 2, § 32(1), at 210.

18. COP. L., *supra* note 2, § 32(2), at 210. For the text of COP. L. § 32(2), see *supra* note 17. See generally CIV. C., *supra* note 2, ch.h2, §§ 420–421, at 117–18. The injured party can also claim indemnity under CIV. C., *supra* note 2, § 422(1), at 118.

19. Since the employer is nearly always a state, cooperative or other social organization, the employer, in practice, does not use the program outside his statutory authorization. Should this occur, the employer would be liable to the injured party, i.e., the author would have the right to sue the employer to prohibit illegal use of the author's work, to claim damages.

program or at least parts of it, or the documentation used for its creation, can be an object of copyright thus receiving copyright protection. At the same time, one cannot overlook the fact that several provisions of the Copyright Law, due to their aforementioned orientation towards traditional works, are not well suited to the use of software.<sup>20</sup>

### B. Patent Law

Patent law (or, as it is called in the Czechoslovak legal system, the law of inventions) is regulated in Chapter Two of the the Law of Inventions which defines an invention as "a solution of a technical problem which is new and, in comparison with the state of technology on a world scale, means progress manifesting itself by a novel or higher effect."<sup>21</sup> Another prerequisite enabling the solution of a technical problem to be considered an invention is that there must be the possibility of industrial production of the invention or the ability to use it in production.<sup>22</sup>

Czechoslovak literature and practice assume that the creation of a computer program does not represent the solution of a technical problem within the meaning of the Law of Inventions and, therefore, does not form an object of the Law of Inventions. This assumption means that neither a patent nor an author's certificate can be issued for software.<sup>23</sup>

The author of this study, on the other hand, presumes that the creation of a computer program always represents the solution of a certain technical problem. However, it is true that the solution of a technical problem as understood by § 24 of the Law of Inventions has a specific meaning which does not fully coincide with the development of a computer program. Moreover, the creation of a computer program does not obviously comply with the industrial production requirement of § 24(2). Therefore, it is necessary to accept the prevailing opinion that software, according to the contemporary state of law in Czechoslovakia (as in the majority of other countries), cannot form the object of the Law of Inventions. This means that a computer program will not have priority as an invention under Czechoslovak law.<sup>24</sup>

20. See Cop. L., *supra* note 2, § 3, at 203 (concerning the translation of a work into another language), § 6, at 204 (concerning motion pictures), and § 10(2), at 205 (concerning the edition and publication of a work).

21. Dis. L., *supra* note 2, § 24(1).

22. *Id.* § 24(2).

23. Knap & Opltova, *supra* note 5, at 905.

24. Priority could be, however, relevant as far as copyright is concerned; legal protection will be, granted to copyrighted programs against plagiarizing, pirating, etc., if other prerequisites are satisfied. The works of foreign authors fall under the provisions of Cop. L., *supra* note 2, according to international agreements which guarantee reciprocity and/or if the author concerned is a resident of Czechoslovakia or if the work concerned was edited or published for the first time in Czechoslovakia.

*C. Improvement Suggestions*

Czechoslovak law recognizes "improvement suggestions," which are defined as "the solution of a production-technical, technical-organizational or organizational-economic problem of an enterprise, which is new in the enterprise and whose utilization brings social profit."<sup>25</sup> In contradistinction to an invention, only relative novelty is required for an improvement suggestion. The only other prerequisite is social usefulness, without the industrial production requirement of the patent law. Therefore, the creation of a computer program can have the legal character of an improvement suggestion. However, the provisions relative to improvement suggestions concern only the relationship between employee and employer. Furthermore, the applicant can be a person other than the author of the computer program concerned. Therefore, improvement suggestion provisions are not considered suitable for computer programs and are not applied to them.

*D. Know-How*

Generally speaking, commentators agree that a computer program has the legal character of know-how.<sup>26</sup> The subject entitled to dispose of know-how and to claim the right of protection to it is indubitably the enterprise in which the know-how has been produced. However, these more or less generally accepted conclusions far from resolve all the legal problems concerning the use of computer programs and their protection. As in numerous other countries, there is no specific Czechoslovak legal regime concerning know-how, although Czechoslovak law obviously recognizes the concept of know-how.<sup>27</sup> Authors disagree whether know-how indubitably is a type of immaterial good to which general legal protection may apply.<sup>28</sup> Specific legal protection, however, such as the protection against unfair competition and possibly the protection of economic secrets (which will be mentioned briefly below), can be applied.

25. Dis. L., *supra* note 2, ch. 3, § 58(1).

26. Know-how is: [a]n undivulged agglomeration of technical information, whether patentable or not, which is necessary for direct industrial reproduction in the same conditions of a product or process; based on experience, know-how complements what an industrialist cannot ascertain from mere examination of the product and knowledge of the present state of technique.

THE PROTECTION OF KNOW-HOW IN 13 COUNTRIES, REPORTS TO THE VIII<sup>TH</sup> INTERNATIONAL CONGRESS OF COMPARATIVE LAW—PESCARA, 1970, at 2 (H. Jehoram ed. 1972).

27. See *infra* note 38 and accompanying text.

28. See, e.g., Ringl, *Some Problems of the So-Called Know-How* (in Czech), 50 PRAVNÝ OBZOR 819 (1967); Borsky, *License Contract on Patents and Know-How* (in Czech), in 1 PERSONAL PROPERTY RIGHTS 287, 288 (Bratislava 1968); Knap & Oplava, *License Contract* (in Czech), 18 ACTA UNIVERSITATIS CAROLINAE—IURIDICA 5, 21–22 (1972).

With respect to the disposal of know-how, it is generally recognized that the legal means of disposal of know-how as a type of immaterial good is represented by the license contract. Czechoslovak law, however, mentions license contracts generally only in the Law on Economic Relations with Foreign Countries and regulates them specifically only with regard to patent disposal.<sup>29</sup> Since patent law does not apply to computer programs, it follows that only the Law on Economic Relations with Foreign Countries can be applied to license contracts involving computer programs. This law, as with the law on patent disposal, limits its provisions to the most general characteristics of the license contract as a contract, by means of which he who is entitled to dispose of the given personal immaterial right permits the other contracting party to use that right.<sup>30</sup> Detailed regulation of the mutual rights and duties of both parties to the contract is left to the contract itself.

It can be concluded that, in accordance with the prevailing opinion, computer programs are considered to be know-how. In the absence of specific legal regulation, the legal regime in this situation is determined by the license contract. The license contract, as *lex contractus*, determines the rights and duties of both contracting parties and thus defines also the specific legal protection of the rights concerning know-how.

### *E. Unfair Competition*

As mentioned above, computer programs are also protected without any doubt, by the legal means of protection against unfair competition. The particular legal rule states that:

[H]e who finds himself, in the course of economic relations, at variance with good manners of competition by his action capable of damaging his competitors, can be ordered by every competitor who has suffered damage by this action or who is directly threatened with damage, to desist from such action and to remedy the faulty state caused thereby. He who has known that this action is capable of

29. Dis. L., *supra* note 2, § 58.

30. Act No. 42 of 1980, §§ 33–36, Concerning Economic Contacts with Foreign Countries, COLLECTION OF LAWS (Czechoslovakia), translated in 21 BULL. OF CZECHOSLOVAK L. 99, 111–12. These sections concern the disposal of industrial rights and production-technical knowledge in foreign trade. Section 34(1) deals specifically with the license contract. Regarding the notion of license contract in Czechoslovak literature see K. Knap & Opltova, *supra* note 28; see also E. BORSKY & V. DOLEZIL, LICENSE CONTRACT (in Czech) (Prague 1954); E. BORSKY, 10 SOME PROBLEMS OF LICENSE CONTRACTS 214 (in Czech) (Vynalezy, Prague 1968). From the writings of other socialist countries, see, e.g., M. BORODISSKII & I. IVANOV, LITSENTSIONNYI DOGOVOR (LICENSE CONTRACT) (Moscow 1961); S. SOLTYSINSKI, LICENCJE NA KORZYSTANIE Z CUDZYCH ROZWIAZAN TECHNICZNYCH (LICENSE FOR THE UTILIZATION OF FOREIGN TECHNICAL ACHIEVMENTS) (Warsaw 1970).

damaging the competitor, is bound to compensate him for the damage thus caused.<sup>31</sup>

This protection, which can be useful particularly in the field of foreign trade, is in accordance with Art. 10 of the Paris Convention on the Protection of Industrial Property of 1883, as amended by the Stockholm revision of 1967.<sup>32</sup>

Analogous protection can be derived also from the provisions of the Economic Code which prohibit, in brief, enterprises from:

- misusing their economic situation to derive undue advantages to the detriment of other enterprises,
- acting, at variance with the interests of the national economy, in a way restricting or otherwise disadvantageously influencing the activities of other enterprises.<sup>33</sup>

### *F. Administrative and Penal Law Protection*

Czechoslovak law differentiates between state, official and economic secrets. Such secrets are protected by a law specifying the duties of persons who come into contact with individual types of restricted information.<sup>34</sup> Computer programs used in economic activities, as a rule, will form the object of economic secrets.

In addition to administrative law protection provided by the aforementioned law, economic secrets are also protected by penal law. The Criminal Code provides for punishment of up to one year of penal servitude for the intentional or negligent jeopardy or betrayal of an economic secret.<sup>35</sup> In addition, the Criminal Code also grants protection against unfair competition, which can be punished by a fine, reformatory measure or, under special conditions, by penal servitude of up to one year.<sup>36</sup>

31. Law No. 141, § 352, COLLECTION OF LAWS (1950) (Czechoslovakia); Cf. CIV. C., *supra* note 2, § 509(1), at 134 (excepting § 352 from the abolishment of Law No. 141). *See also* Kunz, *supra* note 8, at 284.

32. Czechoslovakia is a member of both the 1883 Convention and the 1967 Stockholm revision. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, T.I.A.S. No. 6923, *last revised* at Stockholm, July 14, 1967, 24 U.S.T. 2140, T.I.A.S. No. 7727.

33. ECON. C., *supra* note 2, § 119a(2), (3), at 81-82. Subsection 3 provides for several remedies including compensation for lost profits. Foreigners, however, cannot make use of the the Economic Code since it exclusively concerns Czechoslovak enterprises. Foreigners can sue for damages according to the IN. T.C., *supra* note 2, § 251 et seq., at 251, or, as the case may be, § 719, at 321. Such disputes would not be heard by the courts, but by the State's Economic Arbitration Tribunal where lawyers are not admitted.

34. Law No. 102, COLLECTION OF LAWS (Czechoslovakia) (1971) (especially §§ 2, 3, and 23) and DECREE OF THE FEDERAL GOVERNMENT NO. 148, COLLECTION OF LAWS (Czechoslovakia) (1971).

35. PEN. C., *supra* note 12, § 122, at 223. Penal servitude can be extended to 3, or even 5, years in particularly serious cases.

36. PEN. C., *supra* note 12, § 149, at 230.

## VI. EXPORT OF SOFTWARE

Foreign trade activities in Czechoslovakia are regulated by the International Trade Code, which regulates contractual relations between Czechoslovak and foreign partners, as well as the Law on Economic Relations with Foreign Countries, which regulates the organization of foreign trade and defines the competence of individual legal entities in the field of export and import.<sup>37</sup>

The Law on Economic Relations with Foreign Countries defines the forms of foreign trade activities and expressly provides for the disposal of rights to inventions and industrial designs (calling them summarily "industrial rights"), as well as the disposal of rights to "production-technical knowledge." "Production-technical knowledge" undoubtedly also implies coverage of know-how, and consequently will encompass computer programs or software as well.<sup>38</sup>

The disposal of production-technical knowledge to foreign countries is understood as "the acceptance and supply for use" of such knowledge. Acceptance or supply can only be effected by means of a contract called by the law a "license contract." The conclusion of such a contract, which must be in writing, necessitates the previous consent of the respective Czechoslovak central authority (unless such consent is exceptionally not required by the law).<sup>39</sup>

From these provisions it follows that the export of software can be effected under Czechoslovak law only by an exporter authorized by the law<sup>40</sup> exclusively on the basis of a written license contract approved by the proper central authority.

## VII. CONCLUSIONS

Under Czechoslovak legal theory and practice, computer programs have the character of immaterial goods. The rights to these goods fall in the category of so-called "rights to immaterial goods." The law, however, does not state expressly which type of right to immaterial goods applies. Legal theory is not united in this respect, either. According to the prevailing opinion, computer

37. Act No. 42, COLLECTION OF LAWS (Czechoslovakia) (1980), translated in 21 BULL. OF CZECHOSLOVAK LAW 99 (1982).

38. *Id.* § 4(e), at 101.

39. *Id.* §§ 33-34, at 111-12. For a discussion of international license contracts, see e.g., E. BORSKY, INTERNATIONAL LICENSE OPERATIONS (in Czech) (Prague 1969); E. BORSKY, LICENSE CONTRACT AND ITS SIGNIFICANCE IN INTERNATIONAL TRADE (in Czech) (Prague 1966); V. DOLEZIL, M. HNIZDO & I. SRONEK, LICENSE OPERATIONS IN FOREIGN TRADE (in Czech) (Prague 1964). For discussions specifically on license contract of know-how, see E. Borsky, *supra* note 30. From the literature of other socialist countries, see e.g., M.M. BOGUSLARSKII, PRAVOVYE VOPROSY TEKHNIЧЕСКОИ ПОМОЩИ СССР ИНОСТРАННЫМ ГОСУДАРСТВАМ И ЛИЦЕНЗИОННЫЕ ДОГОВОРЫ (LEGAL PROBLEMS OF TECHNICAL ASSISTANCE BY THE U.S.S.R. TO FOREIGN STATES AND LICENSE CONTRACTS) (Moscow 1963).

40. Act No. 42, § 7, COLLECTION OF LAWS (Czechoslovakia) (1980), translated in 21 BULL. OF CZECHOSLOVAK LAW 99, 103 (1982).

programs have the character of know-how, the definition of which has not been definitely settled either in Czechoslovak law or in the law of numerous other countries. Furthermore, the legal regime which protects know-how is generally rather meager at present. However, the issue regarding computer program protection forms the subject of discussions *de lege ferenda*, and it can be expected that after sufficient experience has been amassed, explicit legal regulation by a special law regulating systematically the use of computer technology, including the use of computer programs, their disposal and protection, will follow in due time.