

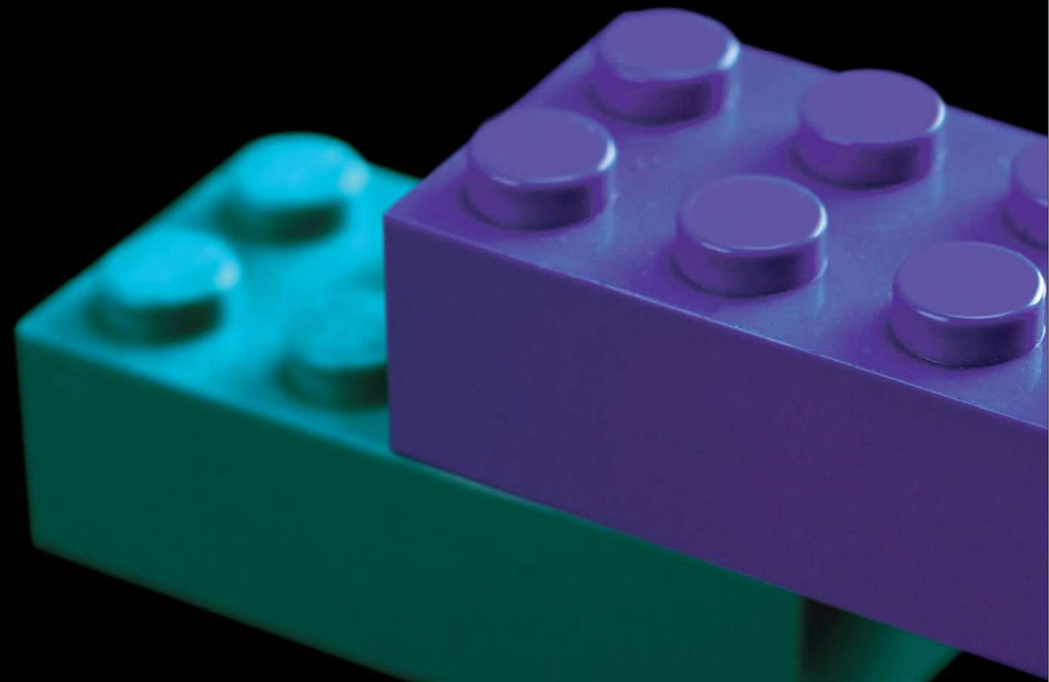
# Technology, IP and Privacy Update for Russian Companies

Nick Holland

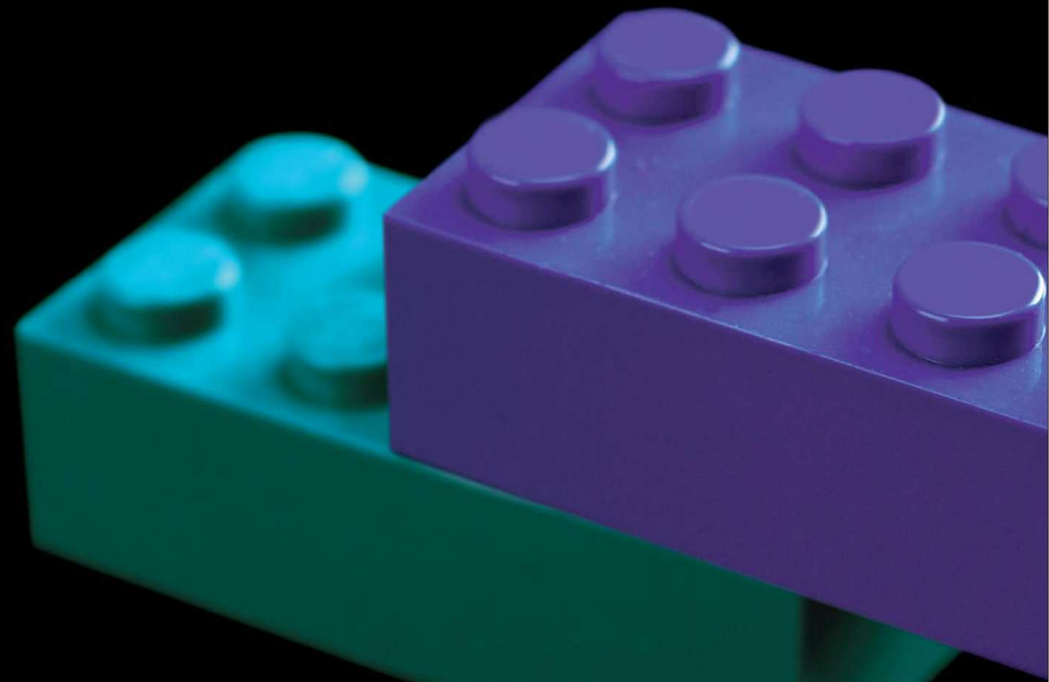
Moscow, 14 March 2013



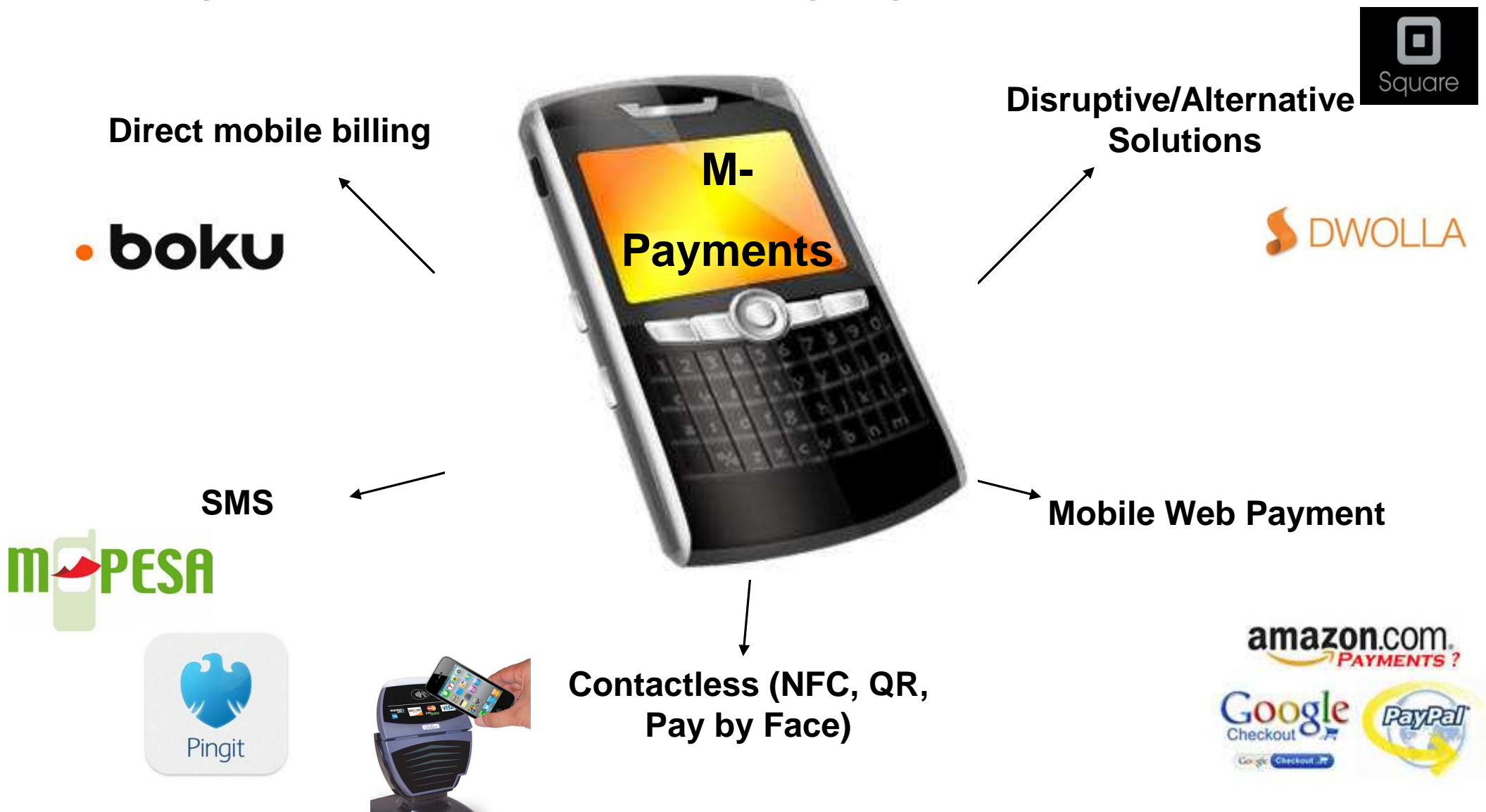
Field Fisher Waterhouse



# Cashless Societies – the legal world of M-Payments



# Going cashless – the emerging world of m-payments



# NEWS

Stagecoach  
and  
Everything  
Everywhere  
launch mobile  
ticketing

May, 2012

# NEWS

Telefonica in  
major  
M-commerce  
push with  
partners

July, 2012

# NEWS

Starbucks  
invests \$25  
million in  
Square

August, 2012

# NEWS

Moneto NFC  
payment  
service for  
iPhone  
launched in  
UK

September, 2012

# NEWS

EC clears  
Project Oscar  
joint venture

September, 2012



# M-payments – making it happen

Increasing variety of innovative deals and collaborations:

- online/mobile wallets
- NFC stickers and phone cases
- branded applications
- virtual loyalty cards
- personal card readers
- mobile ticketing
- instant mobile checkout

# Drivers in Key Sectors

## Telecoms

- Increased customer data analytics
- Customer engagement
- Brand loyalty
- Marketing opportunities

## Technology

- Seamless/uninterrupted processing
- Focus on security
- Common standards

## Retail

- Multiple channels
- Deeper customer relationships
- Competitive edge
- Loyalty schemes/data analytics
- Reduced checkout times

## Financial Services

- Multiple channels
- Branding opportunities
- Customer engagement
- Increased customer data analytics
- Interchange fees

# Deal Structures

M-Payments

Independence

Contractual  
Collaborations

Corporate  
JV

Trusted Service  
Manager

# Issues Common to all Structures

- Roles and responsibilities
- Owning customer relationship
- Branding
- Ancillary revenue streams



- Governance
- Revenue share
- Exit
- Regulatory impact

# Structures: 1. Independence



## Pros:

Control

Fewer partnerships?

Commercial 'issues'  
driven by business  
objectives

Build or buy?

Co-operation for handset  
integration?

Control of service and Secure  
Element

Acquisitions accelerate growth

## Cons:

Risk

Reliant on brand  
strength

Cost/investment



# Structures: 2.Contractual Collaboration/Alliance

## Pros:

Opportunity for greater interoperability

Wider customer reach

Costs shared

Leveraging competencies of collaborators



Cross sector or single sector?

Outsourcing, licence agreement, services contract or true collaboration?

## Cons:

'Issues' must be negotiated

Equality of parties or one partner as leader?

# Structures: 3. Corporate JV

## Pros:

Structure & focus  
for new business

Governance flexible

Tag/drag options

Continuity of service  
post-exit

**monitise**<sup>™</sup>

Dedicated vehicle to run  
m-payments business

Opportunity to realise  
investment on exit  
(e.g. sale or IPO)

## Cons:

May require  
competition clearance

Customer relationships  
with JV entity

New data consents  
required?

**MCX** MERCHANT  
CUSTOMER  
EXCHANGE

**ISIS**<sup>™</sup>

# Structures: 4.Trusted Service Manager



Can facilitate smooth interface between multiple players.

## Variety of roles:

- Commercial
- Security
- Technical
- Independent broker
- Combinations of the above

# Leveraging Customer Data



## Risks

- Data privacy compliance measures
- Who is Data Controller?
- Security, security, security
- Legacy data
- Control of personal data = responsibility
- Hosting outside EEA / in cloud?

## Benefits

- Detailed analytics
- Targeted promotions
- Social purchasing
- Cross-selling
- Loyalty schemes



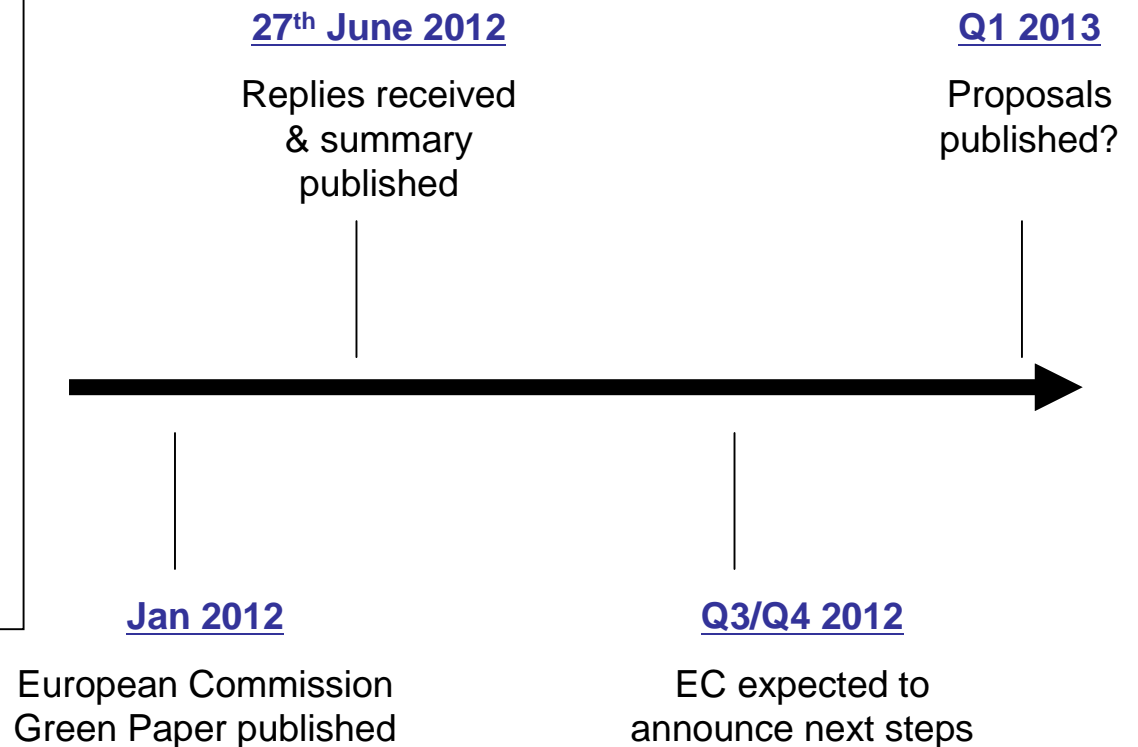
# EU perspectives on m-payments



## Key issues:

- Market fragmentation and access
- Transparent and cost effective pricing
- Interchange fees
- Standardisation
- Interoperability
- Security

## Payments Green Paper



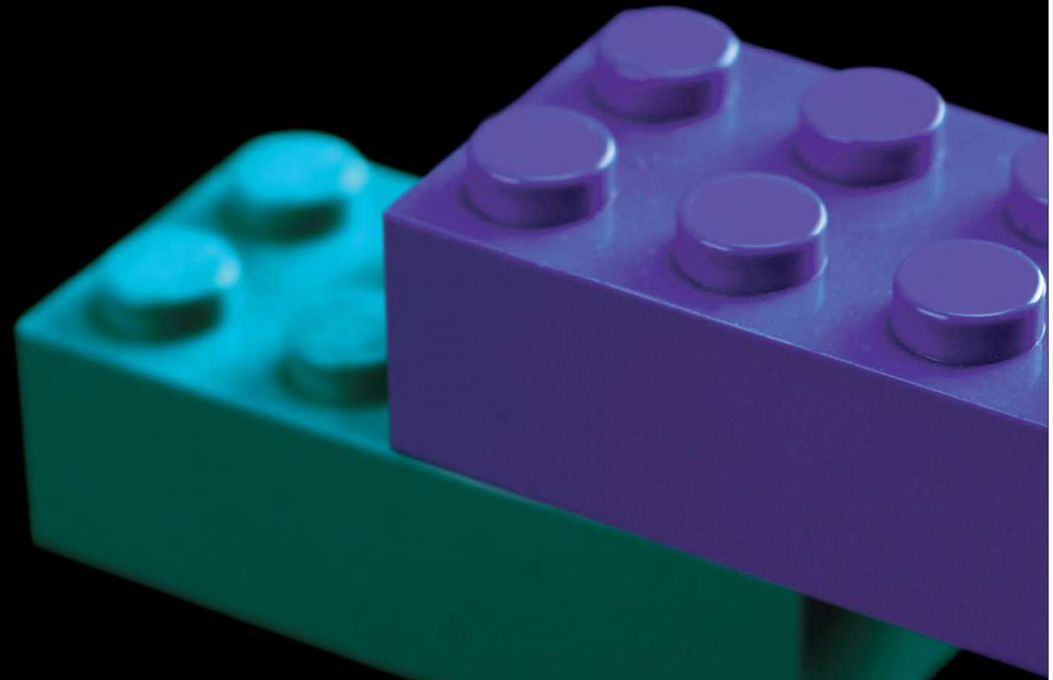


**Joining the mobile payments race...**

# Contracting for Agile



Field Fisher Waterhouse



Last year...



# Agile - A reminder

- Group of software development methodologies
- Requirements and solutions evolve through collaboration
- Agile Manifesto

# Types of Agile Methodology

**Scrum**

**eXtreme / Pair Programming**

**Lean Software Development**

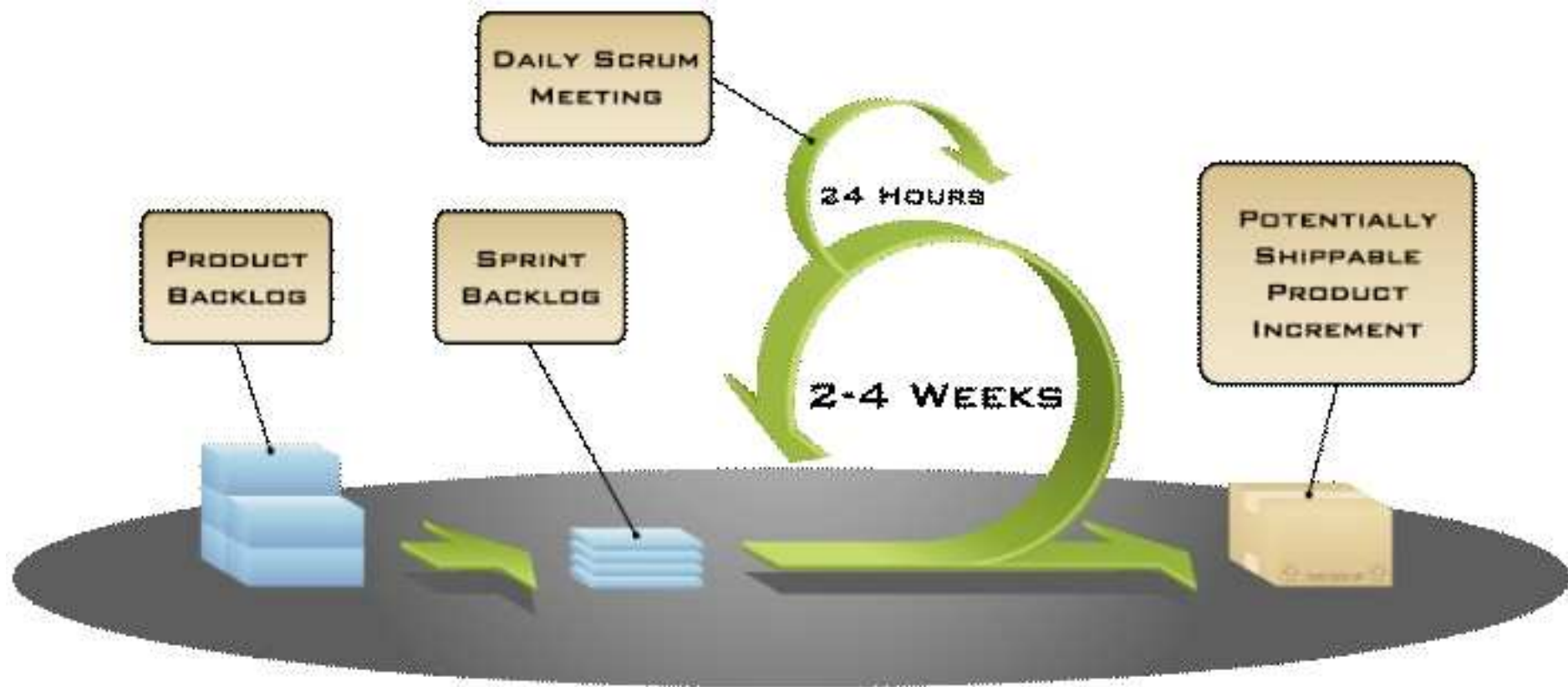
**Feature Driven Development**

**Test Driven Development**

**DSDM** (Dynamic Systems Design Method)

**Iterative Development**

# Example: A Scrum Cycle



COPYRIGHT © 2005, MOUNTAIN GOAT SOFTWARE

# Benefits and Challenges

## Key Benefits

- Fast time to market
- Iterative rather than big bang
- Ability to address changing business requirements
- Early and frequent customer feedback
- Ability to identify and mitigate problems early
- Improved efficiency



## Key Challenges

- Adopting Agile in larger teams
- Contracting Agile on fixed price
- Managing risk with Agile
- Agile requires more skilled and experienced teams
- Big shift from traditional waterfall approach

# Contracting for Agile

- Requirements
- Pricing
- Governance
- Performance
- Acceptance
- Changes
- Termination



# Requirements

- **High level scope** developed at outset
- **Detailed requirements** developed during project
- Availability of **business users**
- No **contractual commitment to produce deliverables**
- Regular check points



# Pricing

- T&M
- Fixed price
- Fixed price per iteration
- Fixed price per user story point
- Target pricing
- Caps/incentive mechanisms?
- Combination?



# Process, Governance and Communication

- **Describe process** rather than the result
- **Communication lines** identified
- **Project teams** to make decisions
- **Approvals** given orally
- Consideration for **multi-location/offshoring**



# Acceptance and warranty

- **Iterative Testing**
- Only **completed** software tested
- Some development may not be used
- **Final sign-off** based on previous acceptances
- **Warranty Period** - pre-defined days of support



# Monitoring Performance

- Burndown Charts and Project Velocity monitor performance
- Service Levels - amount delivered versus amount agreed to be delivered
- Quality measured through defects found after each iteration



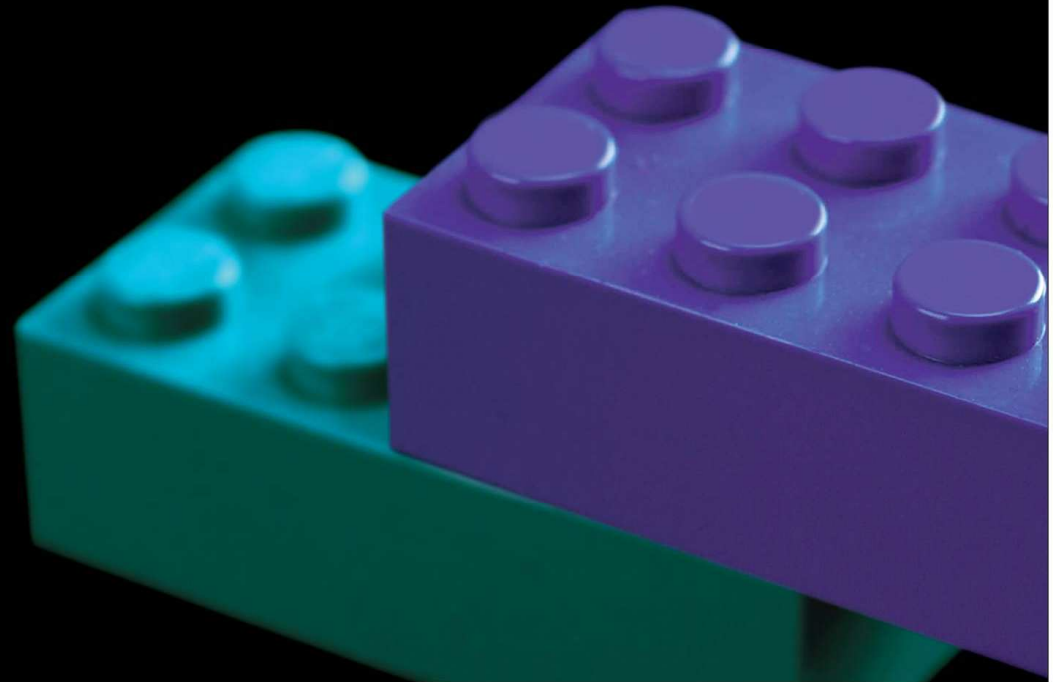
# Termination and Changes

- Termination possible after each iteration
- Changes to requirements for free (with caveats!)
- Formal change procedure for high level requirements






# Big Data – assessing the impact





# What is big data?

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*90% of the data in the world today has been created in the last two years alone* 


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one of the most valuable but under-used assets a company already has: its customer information. 


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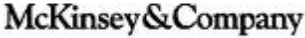
The cumulative benefits of £216 billion over the years 2012-17 is equivalent to a 2.3 per Cent share of ... UK GDP 

# What is big data?

*90% of the data in the world today has been created in the last two years alone* 

one of the most valuable but under-used assets a company already has: its customer information. 

The cumulative benefits of £216 billion over the years 2012-17 is equivalent to a 2.3 per Cent share of ... UK GDP 

The use of big data will become a key basis of competition and growth for individual firms. From the standpoint of competitiveness and the potential capture of value, all companies need to take big data seriously. 

# Forecast effects on business

- Improved customer intelligence to better meet demand
- Predictive analytics for replenishment in retail
- Fraud detection through high-performance analytics
- Reduced speed to market and development cost of drugs
- Boosting employee productivity

etc.

# How will big data applications work?

- Acquisition of data
- Integration of data sources
- Better number crunching hardware
- More sophisticated analytics
- Clever real-time short cuts

# Do I hear alarm bells ringing?

Q. Should I be concerned about:

- Where the information is coming from
- Whether we allowed to take it
- IPR, confidentiality and data privacy
- Regulatory issues
- Reputational risk?

A. You can bet your bottom dollar you should be.



# Two worlds colliding



# What risk

- Fines – 2% of worldwide turnover
- Consumer trust
- European employee privacy
- Data regulation: Financial firms, SOX etc



# Big Data: Typical legal issues

- Personal data and consent based approach
- Copyright and proprietary information
- Confidential information
- Other restricted sources
- Context is everything

# Managing big data risk

- Planning for flood
- Professional risk and impact assessment
- International risk
- Getting it right first time

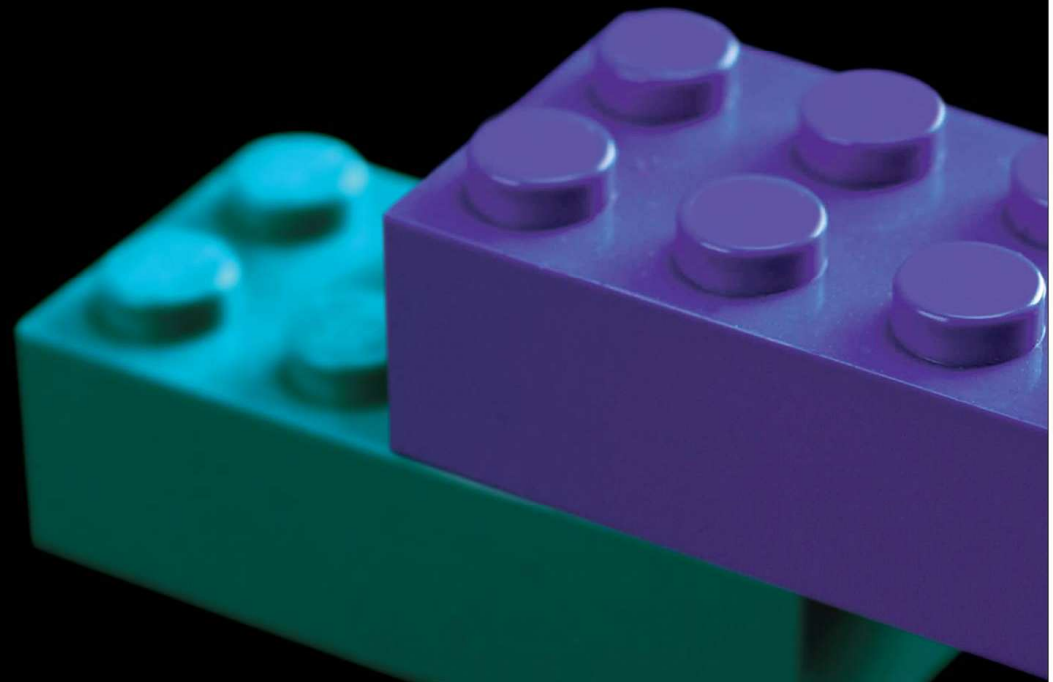


# Back to two worlds

- Reach out
- Find a common language
- Accommodate each other's ideas
- Build long lasting solutions



# EU Cybersecurity Proposals



# Network and Information Security Directive

- Proposal for a Directive published 7 February 2013
- Logical extension of EU regulatory framework beyond “personal data”
- Major impact on organisations that are in scope, including
  - Technical & organisation measures to manage risk and ensure continuity of service
  - Mandatory disclosure of serious security incidents to the authority
  - Possible disclosure of serious security incidents to the public
  - Regulatory audits

# Who is affected?

- **Critical infrastructure**

- Utilities
- Energy
- Transport
- Banking
- Financial markets
- Health sector

- **Market operators**

i.e.

“...provider[s] of information society services which enable the provision of other information society services”

Public administrators

# Market operators include...

- eCommerce platforms
- Internet payment gateways
- Social networks
- Search engines
- Cloud computing services
- App stores
- So...the proposed Cybersecurity Directive will regulate platforms on which other services depend.

# General privacy

by S.Room, FFW

**NOW:**

Law = DP Directive 1995

Who = Data controllers

Effect = Appropriate T&O measures for personal data security

**NEXT:**

Law = Draft DP Regulation 2012

Who = Controllers & processors

Effect = Approp. T&O, breach disclosure, regulatory audit

# Ecoms Privacy

**NOW:**

PEC Directive 2002-09

Telco & ISP

Approp. T&O for service security to protect personal data, breach disclosure, regulatory audit

**NEXT:**

No change

No change

No change

# Cyber

**NOW:**

Better Regulation Directive 2009

Telco & ISP

Approp. T&O for network & services security, breach disclosure

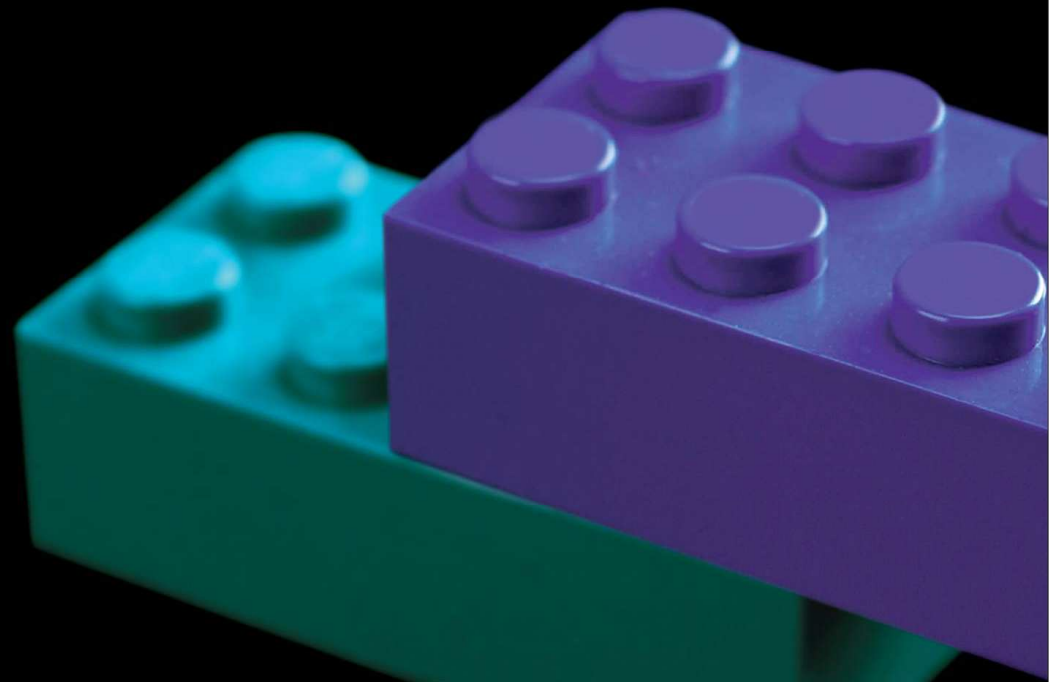
**NEXT:**

Draft Cybersecurity Directive 2013

Market Operators, Utilities, Transport, Finance, Public Bodies

Approp. T&O measures for NIS, breach disclosure, regulatory audit

# EU Patents New Unitary Patent and Unified Patents Court.



# What is in store?

- Most dramatic change in EU patents landscape for 30 years
- EU unitary patent package will deliver:
  - Single unitary patent across 25 participating Member States (excluding Spain and Italy)
  - Unified patent court
- Effective 1 January 2014 or, if later, on the date the Unified Patent Court Agreement takes effect.

# Current system

- National patents
- European patents granted centrally by the European Patent Office (EPO). Applicant designates the relevant territories
- Patent granted by the EPO are not “unitary”:
  - Bundle of national patents
  - Law of the relevant Member State applies
  - No single jurisdiction for patent disputes
  - Single dispute may give rise to multiple litigations, with different national laws applying in each case

# New unitary patent

- Administered by the European Patent Office in parallel with “classic” European patents
- One-stop shop
- Applicant chooses whether to apply for Unitary protection or “classic” European patent in designated territories (or both!)
- Unitary patent: a single patent that applies across all participating Member States, instead of a bundle of national monopoly rights.
- Official languages: English, French and German.
- (National patents will continue to be available.)

# Unified Patent Court

- Single court applying the same law, uniformly
- Benefits:
  - Avoid problem of multiple court cases in different member states on the same issues
  - Avoid contradictory court rulings on the same issues.
- Locations:
  - Court of First Instance (Paris Central Division - physics and materials; London: chemistry/pharmaceuticals; and Munich - mechanical engineering cases)
  - Court of Appeal in Luxembourg

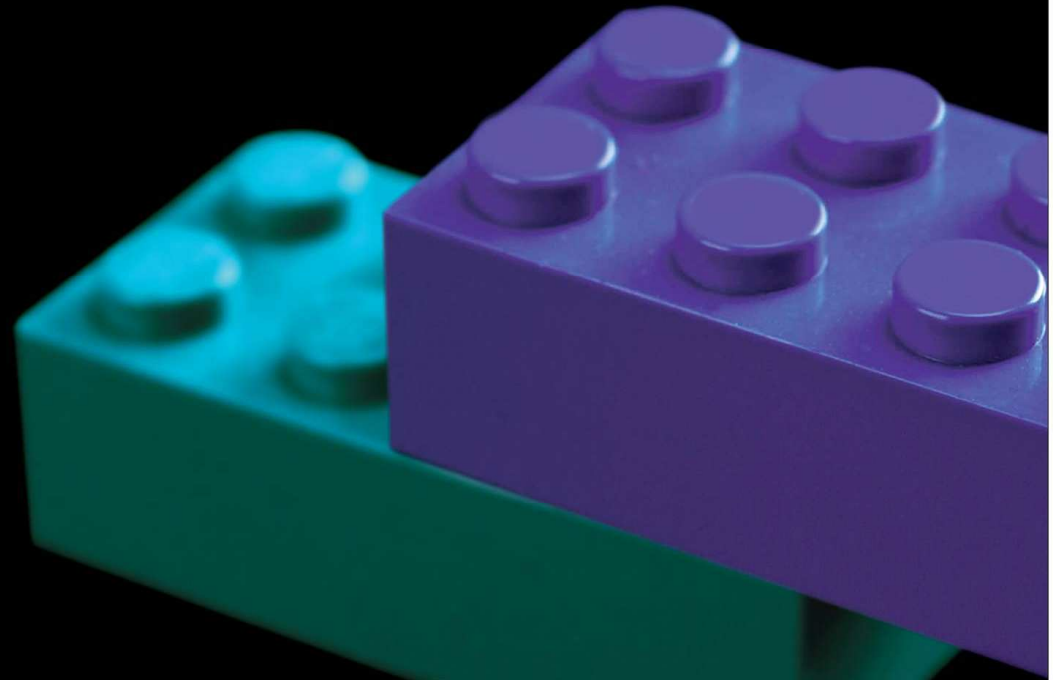
# Pros

- Patentee friendly system
- Reduced administration costs for patentees (filing fees, renewal fees, translation costs)

## BUT

- A patent will stand **or fall** across all 25 participating Member States.
- Litigating patents will become easier. More exposure to litigation
- New system may benefit “patent trolls”

# 'You bought it, you own it': Online Licensing and Distribution in Europe after Usedsoft v Oracle



# UsedSoft V Oracle: introduction

Bloomberg.com | Businessweek.com | Bloomberg TV | Premium

U.S. EUROPE ASIA

STOXX 50	2,479.93	+26.67	1.05%
FTSE 100	5,801.72	+59.65	1.04%
DAX	7,294.88	+78.73	1.09%

CLICK HERE FOR THE FULL STORY

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U.S. Jobs Outlook Weak as Companies Seek Cost Cuts

Skype Founder to Startups: Show Me the Money

Analysts Cut Profit Outlook 52% as Valuations Hit High

## Second-Hand Software Sales Set to Soar on Oracle Ruling

By Cornelius Rahn - Sep 16, 2012 11:40 PM GMT+0100

7 COMMENTS

As chief of computer systems for Berliner Volksbank, Joerg Bauske has long been dismayed at the amount he spends on software. Now he says he's found an easy way to cut costs dramatically: Buying used programs.

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Europe Stocks Rise, Euro Gains on Spain Banks; Commodities Drop

Global IPOs Slump to Second-Lowest Level Since Crisis

Kraft Mac and Cheese Reheated in New Company

Intel Software Snaq Said to Hamper Windows

# UsedSoft V Oracle: the facts

ft.com > companies >

## Tech Hub

Home UK World Companies Markets Global Economy Lex Comment

Energy Financials Health Industrials Luxury 360 Media Retail & Consumer Tech

July 3, 2012 5:53 pm

### EU court decision deals blow to Oracle

By Duncan Robinson

The European Court of Justice dealt a major blow to [Oracle](#) on Tuesday, ruling that the software maker cannot block the resale of its software online.

The decision has the potential to create a multimillion dollar market for second-hand enterprise software licenses. It could also have broader ramifications for other digital products such as film, music and ebooks, lawyers say.

# UsedSoft V Oracle: the facts



- Oracle develops and distributes computer programs functioning as 'client-server software'. Customers purchasing the software over the web download a copy of the program directly onto their computer from Oracle's website. The user licence includes the right to store a copy of the program permanently on a server and to allow up to 25 users to access it by downloading it to the main memory of their work-station computers.
- The licence agreement gives the customer a non-transferable right of use for an unlimited period, exclusively for his internal business purposes.
- On the basis of a maintenance agreement, updated versions of the software (updates) and programs for correcting faults (patches) can also be downloaded from Oracle's website.

# *UsedSoft V Oracle: the facts*

- usedSoft\* • UsedSoft resells software licences.
- Once a customer has bought the licence from UsedSoft, they download the software directly from the software company's website.
  - Oracle obtained an injunction from the Munich Regional Court restraining UsedSoft from reselling Oracle software.
  - UsedSoft appealed to the German Federal Court which referred a number of questions on the interpretation of the Software Directive to the CJEU.

# ECJ decision

- ECJ found in favour of UsedSoft:
  - Downloads where the licensee obtains a perpetual licence for a one-off fee = “first sale”
  - Right of distribution in software is exhausted on first sale, so second acquirer can re-sell.
  - Licence provisions that prohibit “transfers” are ineffective where the distribution right has been exhausted.
  - “Second acquirers” from UsedSoft had therefore acquired the software lawfully. They were able to rely on a right under the EC Software Directive that allows “lawful acquirers” to reproduce the software to use it for its intended purpose
  - First acquirer must delete/erase his copy
  - Splitting/dividing licences for resale is prohibited.

# Implications of UsedSoft decision (1)

- Licensors may try to change their licence model
  - A move away from perpetual licences and towards a subscription based model?
- A move to the cloud
  - Attractive because cloud arrangements unlikely to constitute a “first sale”
  - Therefore exhaustion principle does not apply
- Applies to existing perpetual licences
  - Little that licensors can do to avoid licensees having the benefit of the ECJ decision

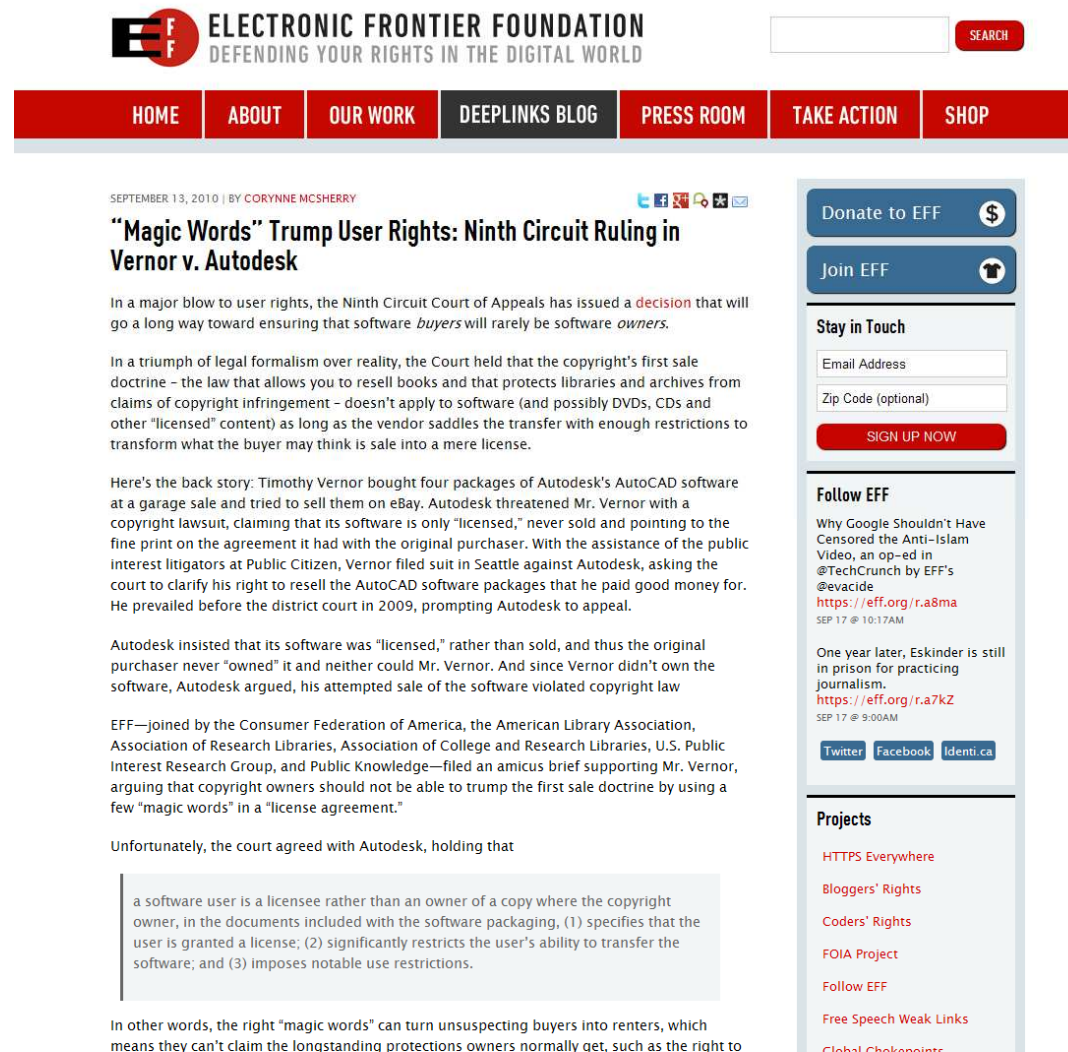
## Implications of UsedSoft decision (2)

- Warranty, indemnity and other contractual obligations of the licensor not transferred
  - Nothing to bind second acquirer to the terms of the original software licence
  - Nothing to require the licensor to transfer warranty etc obligations to second acquirer
  - In practice?
- Software maintenance agreements not transferred to second acquirer
  - Exhaustion principle doesn't apply to service contracts
  - Patches and upgrades
  - Unlikely to be a tactical lever for licensors
- Commercial opportunities for licensees
  - “Used” software market likely to expand

## Implications of UsedSoft decision (3)

- If contractual prohibitions on resale are no longer effective, can DRM technology (eg limited-activation product keys) or the distribution of software in a "closed environment" (such as Apple's App Store, the Playstation Network or via the Kindle) lawfully achieve the same result?
- Impact for other audio-visual media?

# The CJEU decision – not the same as the US



The screenshot shows the Electronic Frontier Foundation (EFF) website. At the top is the EFF logo with the tagline "DEFENDING YOUR RIGHTS IN THE DIGITAL WORLD" and a search bar. Below is a red navigation bar with links: HOME, ABOUT, OUR WORK, DEEPLINKS BLOG, PRESS ROOM, TAKE ACTION, and SHOP. The main content area features an article titled "Magic Words" Trump User Rights: Ninth Circuit Ruling in Vernor v. Autodesk, dated September 13, 2010, by Corynne McSherry. The article text discusses the Ninth Circuit Court of Appeals' decision in Vernor v. Autodesk, which held that the first sale doctrine does not apply to software licenses. A quote from the court is highlighted in a light blue box: "a software user is a licensee rather than an owner of a copy where the copyright owner, in the documents included with the software packaging, (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions." To the right of the article is a sidebar with several sections: "Donate to EFF" with a dollar sign icon, "Join EFF" with a person icon, "Stay in Touch" with a form for email address and zip code, and a "SIGN UP NOW" button. Below that is a "Follow EFF" section with a tweet from EFF about Google censoring anti-Islam video. At the bottom of the sidebar is a "Projects" section with links to various initiatives like "HTTPS Everywhere" and "Bloggers' Rights".

SEPTMBER 13, 2010 | BY CORYNNE MCSHERRY

## "Magic Words" Trump User Rights: Ninth Circuit Ruling in Vernor v. Autodesk

In a major blow to user rights, the Ninth Circuit Court of Appeals has issued a [decision](#) that will go a long way toward ensuring that software *buyers* will rarely be software *owners*.

In a triumph of legal formalism over reality, the Court held that the copyright's first sale doctrine – the law that allows you to resell books and that protects libraries and archives from claims of copyright infringement – doesn't apply to software (and possibly DVDs, CDs and other "licensed" content) as long as the vendor saddles the transfer with enough restrictions to transform what the buyer may think is sale into a mere license.

Here's the back story: Timothy Vernor bought four packages of Autodesk's AutoCAD software at a garage sale and tried to sell them on eBay. Autodesk threatened Mr. Vernor with a copyright lawsuit, claiming that its software is only "licensed," never sold and pointing to the fine print on the agreement it had with the original purchaser. With the assistance of the public interest litigators at Public Citizen, Vernor filed suit in Seattle against Autodesk, asking the court to clarify his right to resell the AutoCAD software packages that he paid good money for. He prevailed before the district court in 2009, prompting Autodesk to appeal.

Autodesk insisted that its software was "licensed," rather than sold, and thus the original purchaser never "owned" it and neither could Mr. Vernor. And since Vernor didn't own the software, Autodesk argued, his attempted sale of the software violated copyright law

EFF—joined by the Consumer Federation of America, the American Library Association, Association of Research Libraries, Association of College and Research Libraries, U.S. Public Interest Research Group, and Public Knowledge—filed an amicus brief supporting Mr. Vernor, arguing that copyright owners should not be able to trump the first sale doctrine by using a few "magic words" in a "license agreement."

Unfortunately, the court agreed with Autodesk, holding that

a software user is a licensee rather than an owner of a copy where the copyright owner, in the documents included with the software packaging, (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions.

In other words, the right "magic words" can turn unsuspecting buyers into renters, which means they can't claim the longstanding protections owners normally get, such as the right to

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Why Google Shouldn't Have Censored the Anti-Islam Video, an op-ed in TechCrunch by EFF's @evacide  
<https://eff.org/r.a8ma>  
SEP 17 @ 10:17AM

One year later, Eskinder is still in prison for practicing journalism.  
<https://eff.org/r.a7kZ>  
SEP 17 @ 9:00AM

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Projects

[HTTPS Everywhere](#)

[Bloggers' Rights](#)

[Coders' Rights](#)

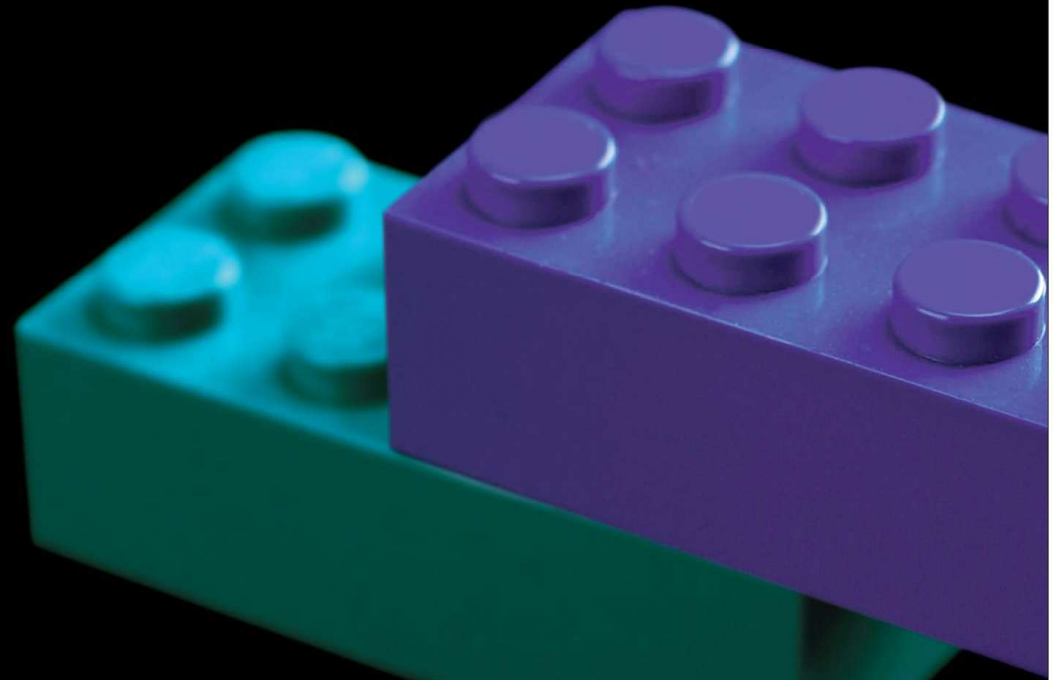
[FOIA Project](#)

[Follow EFF](#)

[Free Speech Weak Links](#)

[Global Challenges](#)

# New EU Data Protection Framework



# This is the moment we've been waiting for...!



- Data Protection Directive 1995
  - In search of harmonisation
  - Making technological neutrality work
- Strategy for modernising EU data protection (Nov. 2010)
- Proposed EU Data Protection Regulation (January 2012)
- What now???
  - Understanding the process and proposed content
  - Influencing the outcome and preparing for compliance

# The Commission's top priority

From this...



To this...



*“A single set of rules on data protection valid across the EU”*

# Understanding the content (II)

## Increased responsibility and accountability

- Stronger and wider rights
  - Information and access
  - Right to be forgotten, to erasure and to object
- Data protection by design and by default
- Documentation and cooperation
- Security and notification of breaches
- Data protection impact assessments and DPOs

# Extraterritorial reach and international cooperation

- Applicability of the law based on EU residency
  - Offering of goods or services and monitoring of behaviour
- Competence of the DPA of the “main establishment” in the European Union (Art. 51)
- Mutual assistance between DPAs (Art. 55)
- Right to lodge a complaint with local authority (Art. 73)

# Preparing for compliance



- Identify your lead authority
- Accountability European-style
  - Have a privacy team
  - Work on your policies
- Prepare to implement 'DP by design' + Privacy Impact Assessments
- Consider how to legitimise international data transfers

# Your contacts



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e: [nick.holland@ffw.com](mailto:nick.holland@ffw.com)