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Creative Commons Licenses within the Czech Legal System

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I. Introduction to Free Licenses and Creative Commons

The copyright protection is triggered when the outcome of creative activity is expressed in any objectively perceivable form.¹ In that moment exclusive moral and economic rights to the work arise. Should anyone wish to use the work within the meaning of Copyright Act² he or she needs permission from the author. The permission takes form of a license contract. Nowadays the scheme is considered too rigid in the environment of Internet and wide practice of file sharing.

The answer to the problem may be an introduction of so called free licensing schemes. It is rather important to mention that the word “free” is used in the same context as the expression “free speech”, as opposed to the meaning in the expression “free beer”.³ The idea behind these schemes is to add flexibility to the standard copyright by allowing the author to release the work with an offer to enter into the license contract that addresses an indeterminate circle of persons.⁴

Licensing scheme of Creative Commons is a response to overly restrictive and prohibitive copyright laws that do not offer convenient instruments to share and disseminate information among internet users. They offer a simple, user-friendly tool to allow others to distribute or build upon one's work without the necessity of drafting legal documents or making formal steps to conclude a license contract. Even person without any legal education or knowledge of law can use the Creative Commons website to his or her work under professionally drafted license contract.

¹Sec. 9 para 1 of Act. No. 121/2000 Coll. on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act), as amended.

²Sec. 12 of Act.No. 121/2000 Coll.

³GNU OperatingSystem:The Free Software Definition[30-11-2010]. Accessible at<http://www.gnu.org/philosophy/free-sw.html>.

⁴Sec. 46 para 5 of Act.No. 121/2000 Coll.

This user-friendliness has, however, its hidden perils. The licensing procedure itself is perhaps too easy and may create an illusion that nothing can go wrong. But licensing is not as simple as it may appear from the first visit of Creative Commons' website. The most frequent mistake a user can make when using a license under the Creative Commons is to license a work for which he has no legal entitlement to license. Surprisingly, even the author of the work does not always have the right to license his or her work under the Creative Commons. For example, if he or she creates work under contract or as an employee, the right to license may belong to the customer or employer. On the other hand, a company might not be always entitled to license works produced by its employees. The problems might get even more complicated when a work has more than one author, or when there is a derivative work (such as translation or music remix) involved.

II. No One Can Transfer a Greater Right Than He Himself Has

Putting a work under Creative Commons license without a legal entitlement to do so can have negative consequences for the licensor (i.e. the person who grants a license) but also for the licensee – a user who uses the work licensed under Creative Commons. When dealing with licensing we have to bear in mind a universal legal principle that no one can transfer a greater right than he himself has.⁵ If the licensor does not have a right to award a license, the permission to use the work cannot be granted to a licensee. Hence in this case, the licensee violates the copyright even if he or she uses the work in accordance with the terms of the Creative Commons license contract he saw attached to it.

Therefore answering the question who can share the individual work is a necessary first step to every procedure of licensing. The basic rule of copyright is that the right to grant permission to use a copyrighted work belongs to the author. This rule is modified when the author enters into the legal relationship with other person or entity, such as employment, works contract or license contract.

II.1 License Contract

When a license contract is present we can distinguish four possible models that would determine who would be entitled to put a work under CC terms:

1. The author grants the licensee an exclusive license with a right to sub-license
2. The author grants the licensee an exclusive license without a right to sub-license
3. The author grants the licensee a non-exclusive license with a right to sub-license
4. The author grants the licensee a non-exclusive license without a right to sub-license

⁵*Nemo plus juris ad alium transferre potest quam ipse habet.*

The exclusive license means that the licensee becomes the only subject entitled to use the work. If the author grants an exclusive license, he loses the right to grant any more licenses, including licenses under Creative Commons, for the duration of the license agreement. Shall he wish e.g. to give library a permission to display the work on-line under Creative Commons, he would need a permission from the licensee or wait until the duration of the license has expired. In cases where the license is non-exclusive i.e. giving the author right to grant a license to multiple subjects, the author is free to share his work under CC (or give someone else consent to make the work available under CC).

The question remains, whether a licensee who has the right to sub-license the work can put this work under Creative Commons even without express consent of the author. The answer to this question would depend heavily on the terms of the license agreement, but most likely, will be negative. The duration of license agreement is usually limited in time. The licensee cannot make licensing agreements that would last longer than the original license. Because CC licenses do not have a tool that would limit the duration of license, the licensee would probably not be able to use his right to sub-license.

Hence in situations 1 and 2 the author loses the right to put his work under the Creative Commons license for the duration of the license agreement with the licensee. The licensee can put this work under the Creative Commons only if he has the right to grant further licenses and if the duration of license would match the duration of copyright protection of the work (i.e. 70 years after the death of the author). In most cases, the existence of exclusive license makes it impossible to license a work under the Creative Commons. If the author puts the license under Creative Commons he can be sued by the licensee. In this situation, the author has to wait until the expiration of the license contract or negotiate the change of contract terms with the licensee.

In the situations 3 and 4 the author has the right to make more license agreements so he can freely share his work under the Creative Commons. The licensee can share the work under the Creative Commons only if he has express permission from the author or if he has right to give sub-licenses within the extent of terms and conditions of Creative Commons.

II.2 Employee Works and Works Contract

When we deal with works of the employees of certain entity like school, company or government institution, it is necessary to answer the question, whether the work involved was

really created to fulfill an obligation arising from employment of the author.⁶ If it was, then the provisions regulating employee's work will apply. In the Czech Republic, such works are regulated in the Article 58 of the Czech Copyright Act. The provisions of this article are not really in favor of sharing the work via Creative Commons. The employer is entitled to use the work and even make license agreements with third parties. Hence the employer is entitled to share the work under Creative Commons. Unless expressly stipulated in the contract, the author himself does not have a right to license his work to third parties so he cannot share his work under Creative Commons without express permission of the employer. If the employer ceases to exist, the rights from this work move to the author. This means that in this case, the author can share the work under the CC license.

If a work is created as a performance of the agreement between the author and the third party, like wedding photograph or article for the magazine, it is necessary to examine the provisions of the given contract. If the provisions do not set forth who is entitled to share the work, the paragraph 61 of the Copyright act applies. This article states that *it shall be deemed that the author has granted a license for the purpose following from the contract. Unless otherwise provided in this Act, the customer may only use the work beyond such a purpose on the basis of a license agreement.*⁷ If the contract does not expressly stipulate something else, the author does not lose the right to share the work under the Creative Commons.

II.3 Irrevocability

The problem of licensing a work using one of the Creative Commons licenses is not limited to the fact that it is rather easy to infringe either intentionally or by mistake someone's copyright. Another issue lies in one of the very important features of free licensing which is its actual irrevocability. Once a work has been published using a free licensing scheme it is almost impossible to prevent its further republishing by other persons. Therefore it is important to find a working tool that would prevent an uninformed person from using the Creative Commons license in such a way that would constitute a copyright infringement. Such a tool must deal with the fact that Creative Commons doesn't tackle the issue of current legal status of a work properly since they are mostly dealing with the act of publishing a work under a Creative Commons license. The tool or technique we are talking about should concentrate on the process of evaluating current legal status of a work and deal with third parties' rights before the work is published using the scheme. In the following section we

⁶Sec. 58 para 1 of Act. No. 121/2000 Coll. states that „in fulfilling his duties arising from the employment or civil service contract with the employer or from an employment relationship between a cooperative and its member.”

⁷Sec. 61 of Act. No. 121/2000 Coll.

discuss possible approaches to the issue focusing on their actual implementation, their advantages and disadvantages.

III. Three Approaches to Free Licensing

There are three recognizable approaches to free licensing: the enthusiastic “gung ho approach” used by creativecommons.org⁸ and a large number of bloggers, more cautious “informed user approach” and “institutional approach”.

III.1 Gung ho Approach

Should you want to publish a work using one of the Creative Commons licensing schemes all you need to do is visit the Czech version of Creative Commons website⁹ and use the “Publish a work under a Creative Commons License” link. You are immediately redirected to the form you can use to generate the license. The information that is required to be provided is whether you intend to allow a commercial use of your work and a creation of derivative works. You are also required to indicate the jurisdiction that will govern the license agreement. Additionally you can also describe the type of the work, provide its title, a name of the author and URLs for indicating the authorship, the existence of a work from which the one being licensed has been derived and to the more detailed description of other possibilities of using the work.

It can be clearly seen that even not properly informed author can very easily publish a work under the license while he doesn't have all the necessary permissions from other right holders. Should any person want to infringe a copyright intentionally he or she won't encounter even a single obstacle. Therefore licensing a work using this method should be considered as quite risky and extreme level of care should be applied regarding the current legal status of the work.

III.2 Informed Author Approach

The informed author approach aims at providing an author who wants to publish a work using a Creative Commons license with the important information regarding the aspects he or she should consider before actually publishing the work. The intention of the approach is clearly to prevent poorly informed author from publishing a work without all the necessary permissions.

⁸CreativeCommons [31-11-2010]. Accessible at <http://creativecommons.org/>.

⁹CreativeCommons [31-11-2010]. Accessible at <http://creativecommons.cz/>.

Wikimedia Commons¹⁰ is a clear example of the informed author approach. It also uses Creative Commons licensing scheme, but pays much more attention to evaluate the current legal status of the work. Publishing a work at Wikimedia Commons website can be initiated by pressing the “Upload file” button. By clicking the button, the evaluation process is started with an inquiry regarding the form of the work. An author is then asked whether a work is entirely his or her own, someone else’s, a derivative work, etc. Depending on the choice the author is given information regarding the possibilities of licensing the work under Creative Commons.

If the author indicates that a work is entirely his own he would receive a notice that it is possible to license it under the Creative Commons license. In addition a list of works that belong to the same category is provided as well as the warning advising author to consider the possibility whether the work does contain other copyrighted works since such a work cannot be licensed under the Creative Commons scheme.

In case the author indicates that he actually doesn’t know who the author is nor what license should apply he is informed that the work cannot be published at Wikimedia Commons and short description of why is it important to be aware of the current legal status of the work is provided.

The described process is quite reliable in cases in which the author wants to publish the work using Creative Commons license without considering all the relevant aspects regarding the rights of other persons to the work. It is however still ineffective in situations of not providing the system with correct information about the authorship of the work. This can once again be done either intentionally or by mistake.

It is quite important to note that licensing the work using this approach is less pleasant than using simple Creative Commons website. It takes more time to read through the information about the various licensing regimes applicable to the work. However, the “informed author” approach is a sensible way to eliminate the majority of mistakes that can turn free licensing into illegal conduct.

III.3 Institutional Approach

The third possible approach to free licensing is a transfer of the responsibility for licensing the work from the author to the institution which is operating a repository. The main advantage of the approach is that the institution usually deals with the issue of current legal status of the

¹⁰Wikimedia Commons [31-11-2010]. Accessible at http://commons.wikimedia.org/wiki/Main_Page.

work. Unless cheated by the person that wants to publish the work, it can effectively prevent a licensing of ineligible works under the Creative Commons licenses.

As a real-life example of the approach we can mention the theses.cz project run by Faculty of Informatics, Masaryk University, although it does not directly involve Creative Commons. The key feature we would like to highlight is that the institution running the repository sets the licensing policy and introduces measures to ensure that no copyright infringement occurs. The institutions also tend to react more promptly on the possible notification of copyright infringement.

Despite the fact that this approach cannot guarantee that publishing a work under a Creative Commons license does not interfere with rights of other person's copyrights it is probably the safest way that is available for publishing works within the free licensing system since peer reviewing is rather hard to implement within the system, although not impossible.

IV. Conclusions

Free licensing schemes can be considered as a very usable add-on to a traditional copyright. It is however important to bear in mind that careless approach and underestimation of certain provisions of copyright law can easily lead to a copyright infringement. Before sharing a work under the Creative Commons, the aspects of joint authorship, employment issues and existence of other license agreements have to be dealt with. We have demonstrated that instead of overenthusiastic sharing it is advisable to license works by means of more elaborate procedures like Wikimedia Commons or via specialized institutions.