

THE LEGAL NATURE OF CREATIVE COMMONS LICENSES AND THE FEATURES OF THEIR USE IN UKRAINE

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ABSTRACT

Description: The purpose of this article is to study the legal nature of Creative Commons (CC) licenses and to explore the particularities of their use in Ukraine.

The Subject of the Study: The subject is the examination of the legal nature of CC licenses and the features of their use in Ukraine.

Methodology: Research methods are chosen based on the object, subject and purpose of the study. The study used general scientific and special methods of legal science. Thus, the analysis and synthesis method as well as the logical method are applied to form a holistic view of the legal nature of free public licenses, in particular CC licenses. The logical-semantic method was used to establish the meaning of the terms “free public license” and “adhesion agreement”. The normative and dogmatic method was used in the analysis of normative-legal acts of Ukraine, which regulate the issue under consideration, and the method of comparison – in the analysis of scientific views on this problem. The systematic analysis method allowed us to consider the types of CC licenses. The legal modeling method helped to formulate the main findings of the study.

The Results of the Study: Based on a study of relevant legislation, it has been found that the problem of copyright infringement on the Internet is one of the most acute and pressing today. The application of contractual forms of use of works on the Internet is one way to protect the authors’ rights. Among them, the protection model called Creative Commons, which is a free public license, deserves special attention.

Practical Implications: As a result of a study, the necessity of introducing CC licenses into the legal field of Ukraine was substantiated, which is currently hampered by national legislation. It was proposed to make the necessary changes to the relevant laws, which currently regulate this issue.

Value/Originality: On the basis of the conducted research, the list of factors that are currently affecting the risk of using free licenses, including CC licenses, in Ukraine was formulated.

Keywords: Public License, Creative Commons, Types of Licenses, Adhesion Contract, Risk of Using, Ukraine.

INTRODUCTION

No one will argue with the fact that the creation of a global network was the greatest scientific achievement of the 20th century. According to the UN (International Telecommunication Union, 2019), 4.1 billion people in the world are connected to the Internet as of 2019, which is the equivalent of 53.6% of the Earth's population. The Global Network is made up of millions of local and global private, public, academic, business and government networks and contains vast amounts of information of a diverse nature.

In recent years, the use of Internet technologies has expanded significantly: they serve both government agencies and organizations to optimize information procedures, and private companies to conduct business operations and simplify business processes. With their help, one can get news, statistics, reviews, access to educational programs and online libraries, make transactions and purchases at any time and from anywhere in the world. It is not surprising, therefore, that the governments of all countries are trying to create the optimum legal framework to ensure, on the one hand, the legal and secure access of citizens to Internet technologies and, on the other, to protect their rights and interests.

In this context, the problem of copyright infringement on the Internet is one of the most acute and urgent, since the simplicity of copying and the intangible nature of copyright objects complicate the process of proving the facts of the infringement of the creator's rights. Besides, currently there is no relevant legislation, which can regulate the spread of a large number of copyright objects on the network and therefore protect them.

The application of contractual forms of use of works on the Internet is one way to protect authors' rights. In our view, a model of protection called Creative Commons, which is a free public license, is worthy of special attention. In this Article we will discuss what Creative commons are and what the features of its use in Ukraine are.

MATERIALS AND METHODS

Research methods are: general methods, operating in all fields of science and at all stages of the research; general scientific methods, i.e. which are suitable for all sciences; partial methods, which are suitable for certain sciences; special methods, which are appropriate for one particular branch of science.

Research methods are chosen based on the object, subject and purpose of the study. The study used general scientific and special methods of legal science. Thus, the analysis and synthesis method as well as the logical method were applied to form a holistic view of the legal nature of free public licenses, in particular CC licenses. The logical-semantic method was used to establish the meaning of the concepts of "*free public license*" and "*adhesion agreement*". The normative-dogmatic method was used in the analysis of the normative-legal acts of Ukraine, which regulate the issue under consideration, and the comparison method-in the analysis of scientific views on this problem. The systematic analysis method allowed us to examine the types of CC licenses. The legal modeling method helped to reveal the key findings of the study.

The empirical materials for this study are international and domestic legal acts, governing the issues of copyright protection. Thus, the following legal acts were applied: Berne Convention

for the Protection of Literary and Artistic Works (1971); WIPO Copyright Treaty (1996); Civil Code of Ukraine (2003); Constitution of Ukraine (1996); Law of Ukraine “*On Copyright and Neighboring Rights*” (1993). Moreover, the scientific works of domestic and foreign scientists, who have considered the problems of protection of the rights to the objects of intellectual property, were used.

RESULTS AND DISCUSSION

Article 54 of the Constitution of Ukraine (Law of Ukraine, 1996) states that every citizen has the right to the results of his/her intellectual, creative activities; no one can use or distribute them without his / her consent, except as required by law. Pursuant to Article 9 of the same legal act, the existing international treaties, by which the Ukrainian parliament has agreed to be bound, form the part of the national legislation of Ukraine. If an international treaty, by which the Ukrainian parliament has agreed to be bound, establishes the rules other than those enshrined in the legislation of Ukraine, then the rules of the international treaty shall apply.

Due to the fact that a number of provisions contained in the international treaties are not enshrined in the legislation of Ukraine, it should be borne in mind that Ukraine is a party to a number of international treaties governing these legal relations.

In particular, according to Article 2 (1) of Berne Convention for the Protection of Literary and Artistic Works (World Intellectual Property Organization, 1971) the expression “*literary and artistic works*” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic and musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science).

In accordance with Article 6 of WIPO Copyright Treaty (World Intellectual Property Organization, 1996) the authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership. They shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them) (Art. 8). This definition also includes the distribution of original works through the Internet.

It will be recalled that the author owns personal non-property rights, which cannot be transferred, and personal property rights. According to Article 15 of the Law of Ukraine “*On Copyright and Neighbouring Rights*” (hereinafter-the Law) (Law of Ukraine, 1993) the property rights of the author (or other person having copyright) include:

1. An exclusive right to use the work;
2. An exclusive right to authorize or prohibit the use of the work by the others.

The property rights can be transferred to another person on the basis of the author's contract, after which it becomes the subject of copyright. The author's contract is a general concept that covers virtually all contracts made in the case of transfer of property rights by the author of the copyright object. The types of agreements with regard to the disposition of intellectual property rights are listed in Article 1107 of the Civil Code of Ukraine (Law of Ukraine, 2003). These are:

1. A license to use an intellectual property object;
2. License agreement;
3. An agreement on the creation of the object of intellectual property on request and the use of it;
4. An agreement on the transfer of exclusive intellectual property rights;
5. Other agreements with regard to the disposition of intellectual property rights.

License agreements, which are called online licensing in connection with their use on the Internet, are one of the most common contractual forms of use of works on the Internet. Today, many types of such licenses are used in the world, depending on the subject, object, and scope of licensing. Thus, OpenSource certification standards, general public licenses (GPLs), etc. can be applied to software (Podolieva, 2017).

Public licenses are also in high demand on the Internet. In the Recommendation on the Application of Free Public Licenses for the Use of Copyright and Neighbouring Rights (hereinafter-the Recommendation) (State Intellectual Property Service, 2015), a free public license is treated as publicly available adhesion contract that grants a person who has acceded to such contract, free permission to use the copyright object and / or related rights in certain ways under the terms set by the license.

It is worth noting that Article 634 of the Civil Code of Ukraine provides for the possibility of using adhesion contract in civil legal relations. According to the provisions of the same article, adhesion contract is a contract, the terms of which are established by one of the parties in templates or other standard forms, and which can be concluded only by joining the other party to the proposed contract as a whole. The other party cannot offer his terms of the contract. Free public licenses involve adherence to them by taking certain actions (such as reproduction, modification, distribution of a computer program) that express the person's will to establish legal relations, that is, to join the conditions of a free public license.

Accordingly, it can be stated that free license is a license agreement, the terms of which contain the permission from the copyright holder to the user for a specific list of ways to use his (her) work, which empowers the holder to use it for any purpose, to study it, to create and to disseminate the copies of the work, to change the work, to publish and to distribute such modified derivative works. Such types of use are violation of an exclusive right of the author without a license, since the exclusive right to the work is automatically protected without any formalities; all rights are reserved to the author, and the use of his (her) work is prohibited. The authors have an opportunity to delegate some of their powers within the exclusive property right to the works to an unlimited number of users with the help of free license (Chmyr et al., 2017).

The most popular among public licenses is the Creative Commons license, which is considered universal transaction of object composition. As the representatives of the creative professions (writers, artists, musicians, scientists) search for an opportunity to present their works to as many people as possible, they actively place them on the Global Network. This, however, immediately raises the issue of the limits of the use of such works and the extent to

which they are protected. To address it, Creative Commons licenses create a legal framework for sharing information; enable copyright entities to independently regulate the use of their works, and to protect the latter from unauthorized use.

The number of works distributed under Creative Commons licenses is steadily increasing: in 2006, there were 140 million, in 2014–882 million, and in 2016—more than 1.2 billion. Creative Commons is used by government agencies, public organizations, and private users around the world. Particularly relevant is the use of Creative Commons by public, municipal, or charitable donations, since the public, which finances such organizations directly or through taxes, should be able to freely use material funded by the community. Recently, some charitable foundations, such as the Bill & Melinda Gates Foundation, demanded the publication of research results under free Creative Commons licenses or similar terms research funding to be released under free Creative Commons licenses or similar terms among the requirements for research grant funding (Creative Commons, 2017).

Creative Commons (CC) is a non-profit organization founded in 2001 in the United States. The public licenses developed by it allow the use and creation of derivative works in keeping with the copyright. CC licenses work only in respect of copyrighted works, related rights and sui generis database rights only when a separate use would be prohibited by copyright in the case of non-use of CC licenses. The licenses can be applied to any works: educational resources, music, photos, databases, state and public information, and other works. It is not recommended to apply a CC license to the computer software and equipment, logo or trademark. Licenses may not be applied to works in the public domain (Creative Commons Ukraine, 2015).

Creative Commons offers the consumers six types of licenses that differ in the amount of the user rights granted. CC licenses are the list of standard license agreements that permit the use of a work specified in the text of the license in an unspecified manner without the obligatory payment to the right holder, and without any restrictions on the territory. The general characteristics of CC licenses can be defined as follows:

1. These agreements do not require the conclusion of a written agreement between the right holder and the user of the work, as well as any registration. The introduction of a work under cc license is regarded as a conclusive act expressing the licensee's will to enter into this agreement and his (her) consent to the terms of such license;
2. CC licenses are unchanged model contracts that cannot be modified by a licensee and published on creativecommons.org;
3. Cc licenses are intended to create legal relationship regarding copyright and neighboring rights between the copyright holder and a wide range of individuals. In this way, they can be classified as non-exclusive licenses, which do not preclude the licensor from using his (her) intellectual property rights and granting the licenses to other persons for the use of this object in a certain area (Zhylinkova, 2011).

The mechanism for using open licenses is the same for all Creative Commons licenses and requires some mandatory attributes, such as the author's name (as well as the names of co-authors, etc.); the legal status of the work; licenses under which the material is used; disclaimer on the terms of use; source references.

Failure to comply with all of these conditions, or any of them, may constitute copyright infringement and the right holder can initiate disputes against a malicious user for the illegal use of the object of intellectual property (Creative Commons, 2019).

All licenses require users to indicate the attribution of the work (BY) when the material is used or distributed. One can choose an Attribution CC BY license that requires attribution as the

sole condition for continued use of the work. The other five licenses combine attribution (BY) with one or more elements (four in all): Attribution Non-Commercial, which prohibits the commercial use of the work; Attribution No Derivatives, which prohibits the creation of derivative works; Attribution Non-Commercial Share Alike, which requires derivative works to be licensed under the same license as the original one.

CC licenses have been widely used in Ukraine in recent years, although they have not yet been introduced into its legal field. The fact is that the use of free public licenses does not comply with Ukrainian law. As it was already mentioned, the Law of Ukraine “*On Copyright and Neighboring Rights*” provides for the right of the author or other person, who owes the copyright, to grant other people permission to use the work in any one or all known ways on the basis of author agreement, which is concluded exclusively in writing. The same is enshrined in Part 2, Art. 1107 of the Civil Code of Ukraine, according to which the contract on disposal of property rights of intellectual property, is void in case of non-compliance with its written form.

The legislation of Ukraine also stipulates other essential conditions of the agreement on the disposal of intellectual property rights without agreeing of which it cannot be considered concluded. Such conditions are the term of the contract, the manner in which the work is used, the territory to which the transferred right extends, the amount and procedure for payment of royalties, as well as other conditions on which the consent of one of the parties must be given.

Based on the above, a short list of factors that affect the risk of using a free license in Ukraine from the point of view of copyright infringement litigation is as follows:

1. In order for an agreement to be concluded, both parties should be identified. Most likely, the Ukrainian court will doubt whether they are identified in the agreement on the use of the cc license, since the court used to see not only the name and surname of the natural person or the name of the legal entity, but also their address, residence, identification code, passport information or taxpayer status information.
2. In order for the license agreement to be concluded, it is necessary to identify the copyright object, to which the license is granted. Naturally, the title of the work, sometimes a brief description and file information (format, volume, etc.) Is the work id, which is available on the site? It is good if the site, where the work was uploaded by the person under a free license, will be available at the time of the dispute. The court will then be able to examine the content of the site directly in court and, if necessary, appoint a forensic examination to establish the identity of the plaintiff's work and the work freely obtained by the defendant. However, it is likely that the site-the source of the work-or a separate page may no longer be accessible (for example, non-payment of domain name, delegation or non-payment of hosting services), or the person, who had hosted the file, deleted it on his (her) own and then the object would not be identified.
3. In order for the license agreement to be valid, it must be concluded in writing;
4. In order for the agreement to have the status of a license agreement, it is necessary to define it's the price, i.e. the cost of the license. As a rule, public licenses are free of charge (Tomarov & Romashchenko, 2017).

The Guidelines state that when determining such terms of the agreement as term, territory, and remuneration with regard to free public licenses, one should take into account the provisions of Article 1109 of the Civil Code (in the absence of the indication of the territory, to which the right to use the object of intellectual property apply, the validity of the license extends to the territory of Ukraine); of Article 1110 of the Civil Code (in the absence of the indication of the term of the agreement it is considered concluded for the remaining period before the expiration of the term of the exclusive property right for the object of the intellectual property defined in the contract, but not more than for five years. If one party fails to notify the other one about the cancellation of the contract in writing six months before expiry of the period of five years, the contract is considered to be extended for an indefinite period of time); Part 4, Article

12 of the Civil Code (a person may transfer his (her) property right to another person under a paid or unpaid contract, except in cases established by law).

Free public licenses can be considered as a public statement in form and content, in which the holder of copyright and/or neighboring rights defines the conditions for the permitted use of the objects in question. Such contracts are non-exclusive, royalty-free license with an unlimited period and territory (State Intellectual Property Service, 2015).

However, it should be recalled that the Recommendations are not binding and informational.

There were attempts to fix this situation several times by submitting to the Verkhovna Rada of Ukraine the relevant draft laws aimed at ensuring the possibility of using open public licenses, in particular CC licenses, in Ukraine. However, these attempts have failed: the bills have either been rejected or are still under consideration by the relevant committee. Thus, on August 15, 2002, the Draft Law “*On the Use of Free Software in State Institutions and the Public Sector of the Economy*” was submitted to the Verkhovna Rada of Ukraine. On December 1, 2005, the Draft Law “*On the Use of Open and Free Forms of Intellectual Property, Open Data Formats and Open (Free) Software in Public Institutions and the Public Sector of the Economy*” (Draft Law of Ukraine, 2005) was submitted to replace the previous act. These bills were aimed to introduce a number of concepts and terms into the legislative field of Ukraine, without which the modern legislation in the area of copyright in general, and in the field of production and use of software in particular, can be neither holistic nor effective. The bills were designed to ensure the possibility of using free forms of intellectual property (without prohibiting other its other types), creating conditions for the development of a full-fledged competitive environment in the area of high information technology, which is now virtually monopolized. Unfortunately, this bill is still being worked out in the committee.

The second attempt took place in the summer of 2009, when the Draft Law “*On the Use of Open Source Software in Public Authorities and Local Self-Government Agencies*” was submitted to the Verkhovna Rada. The Draft Law was aimed to introduce the terminology of various objects and subjects of the information sphere in accordance with world practice and to determine the priority directions of Ukraine’s information policy on the use of open and proprietary computer programs in public authorities, local governments and state educational institutions, as well as to ensure the prevention of monopolies in the supply of software products and comprehensive information solutions. In February 2010, the bill was rejected and withdrawn.

However, we hope that these adverse circumstances will soon be changed for the better. Several working groups are developing changes that allow the use of public licenses without reservation. Thus, it is proposed to enshrine in Article 1107 of the Civil Code the provision, according to which the contract for the disposal of intellectual property rights can be concluded not only in writing, but in some cases orally or in another form.

It is proposed that a copy of a work is a copy made not only in material but also in electronic form is laid down in the Law of Ukraine “*On Copyright and Neighbouring Rights*”. It is also proposed that such a substantial condition, enshrined in Article 33 of the Law, as the amount and the procedure for payment of royalties should not apply to cases of free public license agreement. There is also a proposition to supplement the Law with the Articles 33¹ and 44¹, which would regulate the institution of public license agreement (Yurliha, 2015). We hope that such changes will be adopted in the near future.

CONCLUSION

The emergence of the Internet has not only become the mankind's biggest technological breakthrough—it has completely changed the order of access to copyright objects. Nowadays every author who is interested in familiarizing as many people as possible with his (her) work should just upload it on the site. Naturally, the issue arises regarding the limits of the use of such works, their protection, and the transfer of rights to them in whole or in part.

Free public licenses have been developed to accomplish this task. The most common among them are Creative Commons licenses, developed in 2002 by an American non-profit organization. The simplicity, legality and convenience of their use have led to the proliferation of CC licensing practices in 74 countries. CC licenses are also used in Ukraine; however, they have not yet been introduced into its legal field, because they do not comply with Ukrainian law.

Several attempts have been made in Ukraine to resolve this issue by submitting the relevant bills to the Verkhovna Rada of Ukraine which, unfortunately, had been rejected or are still under consideration by the relevant committee. This problem has also attracted the attention of many scholars and practitioners, as evidenced by a number of scientific publications with the proposals on how to resolve it, since most of them support the idea of using free public licenses. However, the lack of legal regulation of this institution, as well as the inability to comply with the written form of license agreement stipulated by the Civil Code of Ukraine and the Law, currently hinder its implementation. We hope that these issues will be resolved at the legislative level in the near future.

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