INTERNATIONAL ASSOCIATION
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Are you Open Source compliant? Understanding OS licensing in preparation for the Internet of Things

Corporate Counsel Commission
IP/TMT Commission

Prague, 2014 – Workshop A

National Report of Poland

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15 February 2014

1. Compatibility: Are there specific issues in your jurisdiction relating to the structure of OS licensing (e.g. problems relating to the fact that there is no consideration; possibility of binding counterparts to the adoption of license terms towards third parties, conflict with copyright laws, etc.)?

The vast majority of existing open source licences qualify as licence agreements under the Polish copyright law, so there is no conflict with the local copyright laws.

Following to Polish copyright law, the crucial elements (*essentialia negotti*) in order to qualify an agreement as a license agreement are under the Act of 4 February 1994 on Copyright and Related Rights ("Copyright law"):

a) authorizing the other party to use a certain work (i.e. computer program)
b) scope of the authorization by specifying the fields of exploitation on which the authorization is granted.

Following to Article 65 of the Copyright Law there is a presumption in favour of a license agreement, if there is not a clear provision on transfer of copyright laws and according to Article 67 Section 2 that a non-exclusive license has been agreed.

Also provisions so typically used in OS licences stating that the license automatically expires upon the infringement of its terms, are considered as fully admissible under Polish law[1].

1.1 Consideration

Any other elements to be agreed upon are possible but not necessary, in particular consideration does not constitute a required element for a license agreement to be valid under the Polish Law.

Generally, under the Copyright Law there exists a presumption under Article 43 Sector 1 that the licensor obtains remuneration if there is no explicit provision that the license was granted for free. Thus, in an OS license under Polish law there should be an explicit provision excluding remuneration.

The Copyright Law provides a special right for the author to demand a court of a due increase of his/her remuneration, in the event of a gross discrepancy between the remuneration of the author and the benefits of the licensee (Article 44). The

[1] Piotr Wasilewski, Open Content Zagadnienia prawne, Warszawa 2008, p. 52

commentators agree, however, that the above regulation does not apply in case of an open source (open common) licencing, since it would be contrary to the obvious aim of that type of licences[2].

1.2 Termination rights

Certain controversy exist with respect to the possibility of termination of OS licenses. The question arises weather an OS license can be terminated with notice under the statutory notice periods as provided in Article 68 Section 1 of Copyright Law, as applicable to licenses executed for an indefinite period of time. Generally a license agreement can be terminated with a one year termination notice effective on the end of the calendar year, unless the terms of the licence explicitly provide that it was executed for an indefinite period of time.

An opinion against such termination rights with respect to "free" licenses due to its particularity was expressed by commentators[3]. The above Articles 68 can be modified by the parties, i.e. the parties of the agreement may validly exclude the possibility of its termination. Majority of OS licenses contain, however, no such regulations or the term of the license is described ambiguously, e.g.: "*This license will remain in force for as long as the copyright which is attached to the work of art*". The commentators present the view that the OS licenses should be interpreted in the context of free software movement, whereby granting the parties, in particular the licensor, termination rights would impair the idea of "giving" or "opening" the computer program to the benefit of the Internet community. Execution of termination right with respect to a OS license is, therefore, considered by the above commentators as ineffective.

Another view has been also presented[4]. The commentator points out that there is no reason to make an exception for the OS licences and exclude the applicability of Article 68 Section 1 of Copyright Law providing for termination rights. There is a general rule in Polish civil law expressed in Article 365[1] of the Civil Code that any agreement can be terminated. Consequently, a company exploring an OS software, and also a company developing such software is exposed to the risk that

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[2] J. Barta i R. Markiewicz, Oprogramowanie open source w świetle prawa. Między własnością a wolnością, Zakamycze 2005, s. 161

[3] J. Barta, R. Markiewicz, Oprogramowanie open source w świetle prawa. Między własnością a wolnością, Zakamycze 2005, s. 113; Piotr Wasilewski, Open Content Zagadnienia prawne, Warszawa 2008, p. 52

[4] Mikołaj Sowiński, Prawne aspekty oprogramowania open source, MoP No 5/2009, p. 272-277

one of the licensors (authors of the source codes used by the distributor of the particular software), will terminate the OS licence.

An autonomous termination right which is recognised as applicable to the OS licences is Article 56 Section 1 of the Copyright Law. Following to the Article, the author may renounce or terminate the contract because of his/her own fundamental interests. First of all, it should be noted that this exceptional right may be exercised by an author only[5] and, thus, it applies exclusively to the OS licences executed with the author of the software and not to the further licensees. Its aim is to protect the personal rights of the author, i.e. the link existing between the author and his/her work. Therefore, generally, only if the interests of the author are threatened in the circumstances of the particular case, e.g. further exploration of an outdated software would harm author's reputation, etc. the author may renounce or terminate the contract.

1.3 The "copyleft" clause

The Copyright Law recognises also the so called "copyleft" clause. It is, therefore, possible under Polish law to bind counterparts to the adoption of the same license terms towards third parties to any software developed on the basis of the original software, in order to guarantee that the same terms apply to the original and to the modified versions thereof. The terms and conditions of OS licenses usually fulfil the necessary requirement and provide for the author's consent for the dissemination of derivative works (derivative copyright) or such consent can be construed form its terms and conditions.

2. Enforceability: Is OS licensing fully enforceable in your jurisdiction? If yes, is that feasible directly (contractually) or indirectly (through general principles of law, applicable copyright law, "moral suasion"/commercial reputation or otherwise?)

Since the OS licenses are recognised by the Polish law, they enjoy also full enforceability, contractually and through the applicable copyright law. In fact, as explained in Section 3 below, there has been no case law in the Polish jurisdiction with respect to OS licences so far. Therefore, we cannot serve us any practical

[5] J. Barta i R. Markiewicz, M. Czajkowska-Dąbrowska, Z. Ćwiąkalski, E. Traple, Prawo autorskie i prawa pokrewne. Komentarz, Lex 2011, komentarz do art. 56.

examples coming from the Polish courts, in particular confirming its enforceability.

Moreover, the directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights was implemented by the Act of 9 May 2007 on amendment of the Act on Copyright Law and Related Rights and also other Acts (Official Journal, no 99, pos. 662). The above Act has unified all civil measures applicable in case of intellectual property infringements.

3. Case law: Is there any case law in your jurisdiction on breach of OS license terms or, more broadly, on OS issues in general?

Unfortunately, the OS licences has not been a subject of the jurisprudence of the Polish courts so far.

Few years ago in 2010 there was the first OS precedence in Poland with respect to a possible GPL licence infringement by one of the biggest Polish press distributors - Kolporter. Kolporter developed and introduced onto the market an e-book reader eClicto based on a software developed under the OS Linux software license, GPL. The terms and conditions of the GPL licence require, that the source code to any modification should be made available to any third party. However, Kolporter refused to share the source code, which provoked a strong reaction of the Internet community. In a press release Koporter confirmed its readiness to make the source code available if an independent external legal opinion that Kolporter has requested confirms such legal obligation. Kolporter argued that its in-house lawyers were of the opinion that on GPL license infringement takes place, whereby underlining that the case is a precedence in Polish law and that the terms and conditions of the GPL license are very complex and unclear[6]. Unfortunately, there was no follow up of the case.

[6] entire text of the press release was published on: http://www.nowemedia.org.pl/joomla/index.php/orzecz/item/673-pierwsze-w-polsce-naruszenie-licencji-gpl

4. **Compliance: Do you have any recommendation (to clients/your company) to ensure OS compliance? Are you addressing the OS issue (or have you witnessed the same being addressed) in the subcontracting of software development and/or in the licensing of software that includes OS components? re specific clauses being adopted in the relevant contracts? Can you provide examples of such clauses? If no contractual clauses are being included in the contracts, what are the measures adopted to ensure compliance?**

   Within our IT practice group we prepare and revise agreements on software development and also software licenses. Nevertheless, so far we have dealt with practical OS cases.

5. **OS in non IT-related industries: With specific reference to OS used in non-IT industries (e.g. "internet of things" or other products that contain electronic parts with OS components): Do you believe there is, broadly speaking, awareness of the diffusion of OS in traditional, non-IT industries? Is that an issue, from a legal perspective? If not, why?**

   In my opinion there is still not much awareness of the OS licences and their typical terms and conditions in non-IT industries, although they are used and explored in their businesses, as the example of Kolporter, described under Section 3 above demonstrates. Exploring OS licenses by entrepreneurs in their business activities exposes them to new risks, for which they are still not sufficiently prepared.

6. **Do you have any practical OSS cases that you would like to share?**

   We are still waiting for our fist OSS case.