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New Licensing Instruments for Use on the Internet

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Contents:

Traditional Licensing Relations — 1

- Problem setting:
  - Approach to procedures related to negotiation, performance, entering into and termination of license agreements in the sphere of copyright is not suitable for circulation of copyright-protected objects on the Internet.
- Change of paradigm:
  - Parties usually communicate through Internet or other digital means and are not present at the same location for negotiation and execution of the license agreement.
  - Fast-paced growth of the amount of copyright-protected materials, including created by Internet users result in necessity to adopt the new licensing regimes.
  - Major shift of focus from a few large value transactions to high volume low value transactions.

Traditional Licensing Relations — 2

- Problem setting (cont'd):
  - Transformation of copyright in the digital area becomes a policy-driven exercise of balancing between stricter enforcement, on the one hand, and streamlining the legitimate offering of content to vast variety of small and medium-sized users, on the other hand.
  - By design of world wide web a growing number of right holders rely on the benefits of potentially widest possible distribution of works to any potential users rather than enforcing their rights to exclude such users as in traditional copyright paradigm.
- *Digital Opportunity: a Review of Intellectual Property and Growth* by Ian Hargreaves, May 2011
  - "*Intellectual Property is important for growth, <…> the IP framework is falling behind and must adapt*".

Simplification of License Grant — 1

- Necessity to ensure entering into agreements with large volume of end-users first arose in software distribution on the mass market:
  - This led to evolvement of standard adhesion-type license agreements entered into by users in order to be able to use boxed or, later, software products distributed online.
- Shrink-wrap licenses:
  - The approach involving consent of the user to be bound by license agreement via opening of package of the physical media of the program copy.
  - Applicable to the fullest extent only to offline software distribution channels of the physical copies of software.

Simplification of License Grant — 2

- Shrink-wrap licenses were long rejected by US courts as unenforceable, with first positive precedent only in 1996 (*ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)):
  - The court held that Zeidenberg did accept the offer by clicking through. The court noted that he "*had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance*".
- Click-wrap or “click-through” licenses:
  - Consent to be bound by license agreement is provided by clicking or tapping on the “I agree” button often coupled with necessity to affirmatively opt-in on respective checkbox or scroll through the entire document.
  - The US court practice routinely upholds click-wrap licenses

Simplification of License Grant — 3

- Click-wrap licenses (cont'd):
  - *Hotmail Corp. v. Van$ Money Pie*, No. 98-20064, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998): breach of contract claim upheld in relation to *hotmail.com* terms of services violation by sending of spam;
  - *Caspi v. Microsoft Network, L.L.C.,* 323 N.J. Super. 118, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999): court enforced forum selection clause contained in an on-line subscriber agreement of the Microsoft Network (MSN) as it was consented to when the user clicked the "I agree" symbol of the agreement in order to proceed with registration;
  - Click-wrap licenses are recognized in Germany, UK, Canada, Italy, France and other countries.

Simplification of License Grant — 4

- Russian law on shrink-wrap and click-wrap licenses (license agreement requires written form to be valid and enforceable):
  - *Article 1268(5) of the Russian Civil Code* provides possibility to enter into an agreement for software or database licensing in a simplified procedure, where the terms of the agreement are stated on the copy of the program/database, on package or by electronic means, and commencement of use, as defined by its terms, shall constitute consent to be bound and written form is considered to be observed
  - *Articles* 434(3) *and 438(3) of the Russian Civil Code* further provide that where a written proposal to enter into agreement is accepted by implicative actions, such as provision of services or payment, within a timeframe of the offer, the written agreement is deemed to be formed
- *Note*: by default, Russian law provides that click-wrap licenses are gratuitous (it is possible to contract out of this provision);

Simplification of License Grant — 5

- Browse-wrap licenses:
  - Type of simplified license entered into by an online access to certain materials or downloadable content without any express adhesion to the terms and conditions
  - Courts in various jurisdictions are generally reluctant to enforce such licenses absent specific conditions
    - *Ticketmaster v. Tickets.com (*terms and conditions were located at the bottom of the page in “small print”)
    - *Specht v. Netscape* (users of the site were urged to download free software by clicking on a button, and only if a user scrolled down the page to the next screen the hyperlink to the license agreement became visible – as plaintiffs were not put on notice of these terms they were not bound by them)
    - *Register.com, Inc. v. Verio, Inc.* (license enforced under specific circumstances)

Simplification of License Grant — 6

- Russian practice on browse-wrap licenses:
  - *Ruling of Eighteenth Arbitrazh Appellate Court No. 18АП-366|2011, dated February 21, 2011, Case No. A76-18536/2010*
  - Court indirectly ruled on validity of license agreement for online mapping service 2Gis (also distributed offline via installation software packages on CDs) made available on the website, as well as on copies of the program
  - Whereas the infringer referred to the license agreement available at the website the court as a basis for absence of violation, the court ruled that the agreement does not permit any commercial use of the maps which implied that such browse-wrap license agreement is valid

Free and Open Source Software — 1

- A novel approach to development, distribution and licensing of software emerged in early 1980s with development of GNU project in 1983, establishment of Free Software Foundation in 1985 and creation of first General Public License in 1989 and GNU/Linux operation system in 1992:
  - Concept of free software is based on the notion of freedom of users **to run, copy, distribute, study, change and improve** the software;
  - The approach found its implementation in the concept of **four freedoms**: **(1)** the freedom to run the program for any purpose without limitations; **(2)** the freedom to study how the program works, and implement any changes; **(3)** the freedom to redistribute copies; **(4)** The freedom to distribute copies of the modified versions to others;
  - Freedom means that no obtain special permission of rights holder is necessary

Free and Open Source Software — 2

- Obligations associated with free software:
  - Requirement to disclose source code of the derivative program and permit distribution of the program and its modification on the same terms and conditions;
  - In order to differentiate the concept from traditional copyright system aimed to ensure that right to the software is monopolized and use is possible only upon special permission, the “copyleft” concept has been developed.

“To copyleft a program, we first state that it is copyrighted; then we add distribution terms, which are a legal instrument that gives everyone the rights to use, modify, and redistribute the program's code, or any program derived from it, but only if the distribution terms are unchanged. Thus, the code and the freedoms become legally inseparable.” [http://www.gnu.org/copyleft/copyleft.html]

Free and Open Source Software — 3

- Specifics of free software licenses:
  - “Viral” nature — generally any incorporation of software licensed under free software into another software “infects” it requiring the entire source code to be disclosed and redistribution to be unrestricted (*e.g.*, in case of General Public License).
  - “Free” is related to liberty, not price. In other words, although access to source code and redistribution shall be at no cost to user, it is possible to commercialize free software by provision of support and other services or selling copies of the programs.
  - Free software relies on copyright to ensure the protection of declared freedoms, it is specifically noted that public domain regime would not allow the goal of preserving freedoms to be achieved as there will be no control over the derivative works.

Free and Open Source Software — 4

- Open Source Initiative was founded in 1998 in order to promote pragmatic aspects of collaborative effort in developing software rather than any ideological approach, but currently terms “free software” and “open software” are generally considered to be interchangeable;
- OSI developed and maintains an Open Source Definition (http://opensource.org/osd):
  - (1) Free Redistribution (use as a component and no royalty); (2) Source Code (access to source code and license); (3) Derived Works (modification and right to distribute modified works under same license); (4) Integrity of The Author’s Source Code; (5) No Discrimination Against Persons or Groups; (6) No Discrimination Against Fields of Endeavor; (7) Distribution of License (automatic application of license); (8) License Must Not be Specific to a Product (*e.g.*, either separately or with other products); (9) License Must Not Restrict Other Software; (10) License Must Be Technology-Neutral

Free and Open Source Software — 5

Classification of Free and Open Source Software Licenses:

- Sphere of application:
  (1) strict licenses (fully applicable to derivative and composite works);
  (2) standard licenses (derivative and composite works are under requirement to disclose the source code);
  (3) permissive licenses (licenses are applicable only to original work, derivative and composite works could be distributed under different, including proprietary, licenses)

- Historical viewpoint:
  (1) GNU licenses (various types of GPL license);
  (2) Academic licenses (Berkeley and MIT licenses);
  (3) Licenses of the community of developers (Artistic License and Apache License);
  (4) Corporate license (Netscape public license *etc.*).

- Reciprocal (GPL) and Permissive (BSD, MTI, Apache).

Free and Open Source Software — 6

License Compatibility Issue:

- Possibility for a software code distributed via different licenses to be put into a single derivative or combined work subject to distribution under a new single license.
- The most critical issue is the compatibility with the GPL license (compatible are MIT, BSD, LGPL and non-compatible are Mozilla Public License, Apache License, IBM Public License).
- In order to combine two programs (or substantial parts of them) into a larger work, you need to have permission to use both programs in this way. If the two programs' licenses permit this, they are compatible. If there is no way to satisfy both licenses at once, they are incompatible.
- For some licenses, the way in which the combination is made may affect whether they are compatible—for instance, they may allow linking two modules together, but not allow merging their code into one module.

Creative Commons — 1

- In order to streamline most efficient use of the internet with the aim of wide dissemination of works a non-profit Creative Commons organization was established in 2001;
- In December 2002 a first set of copyright licenses (Creative Commons 1.0) was released in order to provide possibility for authors to permit public to use their works using free standardized legal tools:
  - Creative Commons non-exclusive license provides a possibility to permit various types of use with change of the approach from “All Rights Reserved” to “Some Rights Reserved”;
  - Creative Commons could be applied to educational resources, music, photographs, databases, government and public sector information, but is not recommended for computer software and hardware.

Creative Commons — 2

Rights provided by Creative Commons are non-exclusive and involve six main types:

- Attribution (BY)
- Attribution Share Alike (BY-SA)
- Attribution No Derivatives (BY-ND)
- Attribution Non-commercial (BY-NC)
- Attribution Non-commercial Share Alike (BY-NC-SA)
- Attribution Non-commercial No Derivatives (BY-NC-ND)

CC Zero (CC0) mark provides possibility for an author to give up copyright and related rights, to the fullest extent permitted by applicable law. If a waiver is not valid for any reason, CC0 acts as a license from the affirmer granting the public an unconditional, irrevocable, non-exclusive, royalty-free license to use the work for any purpose.

Creative Commons — 3

- Creative Commons licenses are irrevocable and for the entire term of the respective exclusive rights.
- Conceptually, the Creative Commons licenses are aimed to ensure:
  - Easy access and comprehensive format for right holders and licensees;
  - Accessibility of the licenses which is enhanced with “three-layered” design containing Legal Code, Commons Deed (“human-readable” version) and Machine Readable version (CC Rights Expression Language).
- License porting issue (adaptation of the CC license to various jurisdictions) — the procedure has been ceased with the adoption of Creative Commons 4.0:
  - Creative Commons currently recommends using the International version of 4.0 license unless there are specific grounds to turn to ported version (which are available only for previous versions)

Creative Commons — 4

- Creative Commons 4.0 was released on November 25, 2013:
  - Creation of most internationally enforceable set of CC licenses;
  - Rights outside of copyrights are covered (*sui generis* database rights);
  - Attribution requirements clarified;
  - Possibility to request removal of attribution not only in the event of adaptation, but in case of verbatim reproductions;
  - 30-day window to correct license violations is provided.
- Enforceability:
  - Creative Commons lists 9 cases where CC licenses were considered valid (Belgium, USA, the Netherlands, Germany, Spain, Israel);

Russian Law on Open Licenses — 1

- Changes to Part IV of the Russian Civil Code aimed at incorporation of open licenses into Russian legal framework:
  - In force as of October 1, 2014 (open licenses) and as of January 1, 2015 (public statement to permit free use of the copyrighted work);
- Public Grant of Right to Use via Statement:
  - Article 1233(5) of the Russian Civil Code provides a possibility to make public statement providing permission to any persons to use scientific, literary or artistic work, outlining the grounds of such use and setting forth the term
  - Grant of right may only be free of charge;
  - Unless identified, term of rights grant is 5 years and the territory is Russian Federation;

Russian Law on Open Licenses — 2

- Public Grant of Right to Use via Statement (cont'd):
  - The statement is irrevocable and unchangeable during its term;
  - Non-permissible in the event there is an exclusive license agreement in place;
  - In case of non-exclusive license it shall terminate;
- Conclusion:
  - Additional way to exercise intellectual property right with unclear scope and implementation prospects (with respect to the requirement of notice to be published on the website of certain state body, no procedure has been adopted as of yet);

Russian Law on Open Licenses — 3

Open Licenses:

- Article 1286.1 of the Russia Civil Code generally sets forth that open license is a simplified means to enter into adhesion-type license agreement, where its terms are made available to the general public prior to use of such work;
- Applicable only to copyright-protected works;
- It is provided that the license shall contain indication on the specific actions that licensee shall take in order for the agreement to be formed and written form requirement considered to be complied with (otherwise there appears to be a risk of agreement being considered unconcluded);
- Licensor is entering into direct relations with users of derivative works;
- By default, license is free of charge;

Russian Law on Open Licenses — 4

- Open Licenses (cont'd):
  - Unless specified, term of the open license for software is for duration of copyright, for other works — five years;
  - Unilateral termination (partial or full) for rights holder is permissible under separate notice of termination (*i.e.,* no automatic termination takes place is case of breach).
- Integrity Right is adapted (Article 1266(3)):
  - Author is entitled to permit future changes, abridgment and additions to the work, illustration and clarification unless author's design is distorted and integrity is violated.

Digital Copyright Exchange — 1

- A series of Reports has been commissioned in the UK in order to develop approach as to whether any changes are necessary in the current legal IP framework in order to adapt it to digital era:
  - *Digital Opportunity: a Review of Intellectual Property and Growth* by Ian Hargreaves, May 2011
  - *The Government Response to the Hargreaves Review of Intellectual Property and Growth*, August 2011;
  - *Rights and Wrongs: Is copyright licensing fit for purpose for the digital age?* The First Report of the Digital Copyright Exchange Feasibility Study (Phase 1), March 2012
  - *Copyright Works: Streamlining copyright licensing for the digital age*. An independent report by Richard Hooper CBE and Dr Ros Lynch, July 2012
  - July 2013 — Copyright Hub went online

Digital Copyright Exchange — 2

Recommendations by Ian Hargreaves included the following:

- *In order to boost UK firms' access to transparent, contestable and global digital markets, the UK should **establish a cross sectoral Digital Copyright Exchange** with a range of incentives and disincentives to be used to encourage rights holders and other to take part;*
- *A framework for cross-border copyright licensing shall be established;*
- *A problem of orphan works requires resolution partially through use of Extended Collective License scheme.*

Digital Copyright Exchange — 3

- Phase 1 and Phase 2 reports by Richard Hooper confirmed that:
  - *Copyright licensing involving creators, rights owners, rights managers, rights users and consumers across the different media types and the different industry segments is not fit for purpose of the digital age.*
  - *Reasons: (1) expensive; (2) difficult to use; (3) difficult to access; (4) insufficiently transparent; (5) siloed within individual media types (at a time when more and more digital content is mixed media and cross-media); (6) victim to misalignment of incentives between creators, rights owners, rights managers, rights users and end users; (7) insufficiently international in focus and scope.*
- Digital copyright exchange is an automated e-commerce website or network or websites which allows licensors to set out the rights the wish to license and allows licensees to acquire those rights from the licensors.

Digital Copyright Exchange — 4

- Phase 1 and Phase 2 reports by Richard Hooper (cont'd):
  - *The **main recommendation of our report is the creation of a not-for-profit, industry-led Copyright Hub** based in the UK that links interoperably and scalably to the growing national and international network of private and public sector digital copyright exchanges, rights registries and other copyright-related databases, using agreed **cross-sectoral and cross-border data building blocks and standards, based on voluntary, opt-in, non-exclusive and pro-competitive principles**.*
  - *The Copyright Hub's particular focus will not be on the low volume of customized high monetary licensing transactions coming from the top of the market (for example Universal Music Group's Licensing of Spotify) but on **the very high volume of automatable, low monetary value transactions** coming mostly from the long tail of smaller users.*

Digital Copyright Exchange — 5

- Data building blocks:
  - *International standard identifiers (publishing and music industries) shall be used to identify the work;*
  - *Where no such identifiers exist (cross-media content and image industry) there is a need to agree approach*
  - *Recognize that stripping of metadata on commercial scale can constitute a criminal offence and civil infringement*;
- Reducing complexity and expense of licensing;
- Educational institutions (creating ‘one stop shop’ for licensing through intermediary);
- Music industry licensing (expanding blanket and direct licensing and reducing number of licensors where possible).

Digital Copyright Exchange — 6

- Orphan works and mass digitization in relation to libraries, archives and museums:
  - *Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works;*
  - *Simplification of due diligence to be done in automated way by linking and search libraries (e.g., ARROW and ARROW Plus projects).*
- Repertoire Imbalance between physical and digital world (audiovisual industry).

Digital Copyright Exchange — 7

- Possible incentives to participate in the DCE (proposed by Ian Hargreaves):
  - *Providing that remedies are greater for infringement of rights to works available through licensing exchange;*
  - *Right to creators withdraw from publisher/record contracts where they are not marketing a creator's works through the exchange;*
  - *Putting publicly owned copyright material on the DCE at day one;*
  - *Requiring that an orphan works search requires checking of the licensing exchange as part of a diligent search.*

Thank you for your attention!

Questions?