

Creative Commons License Agreements in Croatian Law

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Abstract. *Permanent information revolution influences the way authors create and distribute content. Faced with rampant piracy and user antagonism towards digital rights management technologies, copyright protection of digital content faces unique challenges.*

Through self-regulation authors and content industry have developed new types of formular contracts with the goal to conciliate postive legal framework of copyright protection to new patterns of user and author behaviour in the digital domain. Creative Commons license agreements are a widely accepted licensing model with important repercussions for both the users as well as content creators. This article explores their validity within the Croatian legal system.

Keywords. Information revolution, license agreement, copyright, Creative Commons, digital content;

1 Introduction

Copyright and neighbouring rights today face a serious challenge. Information technology breakthroughs have enabled content distribution that is both cheap and widely accessible, fostering easier access to content as well as wide-spread illegal distribution and reproduction of protected works.

In turn, copyright holders and content industry have turned to using information technology to manage rights on works in digital form. However, the current concept of these right management technologies has been found seriously limiting to the end users.

The classic licensing framework enabled by the legal standards of copyright protection is a foundation of the commercial exploitaton of the protected works. However, some authors/rightsholders choose different business models. Some even choose to offer their works free of charge in order to achieve personal recognition, influence and marketing effects. While this model obviously benefits the users of the work, it can also create confusion about the status of a work in

digital form. Determining the legal status of a work in digital form is not a trivial endeavor.

In the recent years, there has been a noticable rising trend regarding the use so called *free licenses*, or more precisely formular licensing agreements, in licensing digital content. These licensing agreements (like the GNU General Public License, Apache license and Creative Commons set of licenses) are used to manage copyright and related rights on digital content in a way adapted to the digital domain.

While many of these license agreements have been developed to manage rights on computer programs, software is not by any means only cathegory of protected work managed by these licenses.

Indeed, Creative Commons (CC) set of licenses can be used to license all kinds of digital content.

2 Creative Commons in General

The terms *Commons* and *Creative Commons* represent certain ideas and values regarding the extent of copyright protection and enforcement of copyright and related rights by the rightsholders. Both the licenses themselves and the Creative Commons non profit organization (established in the United States) strive to promote the culture of "*creativity, innovation and sharing of content*" in the digital domain [1]. The term "*commons*", especially in the context of Creative Commons is usually defined as "*...that which is common, heritage, including ... the works that are a product of human creativity. The basic idea of commons is that everyone is free to use these resources, the natural and cultural heritage of the society as a whole without excluding anyone else*"[2].

These ideas and values are the philosophical basis of *CC licenses*. Any thorough discussion on the effects of Creative Commons should analyse both the legal as well as social and political aspects of these values. While the focus of this paper is the analisis of the legal aspects of these licensing agreements, a short consideration of its mission is still necessary.

Creative Commons can be considered a social movement or a social platform[3]. The goal of Creative Commons is to increase the number of copyrighted works, primarily in the digital form, that

are free to access by the users, in order to "...fulfill the full potential of the Internet - a free access to science, education and culture - to foster a new era of development, growth and productivity".[4]

Creative Commons licensing agreements do not displace the classic, positive legal framework of copyright law regarding the management of rights on the protected work. Instead, these agreements *manage* the rights in a way that allows users more access and more liberal terms of use, a "*some rights reserved*" paradigm instead of the classical "*all rights reserved*". [5].

The goal of CC licenses is to allow a faster and easier licensing of protected works in the digital domain without jeopardizing the author or hampering the user.

On the other hand, the primary concern of the copyright legislature is, at least formally, to protect the author and foster an economic model that will allow authors to live off their work and further influence social development and culture.

Historically, however, the legal framework and regulation of copyright was always influenced by other parties (publishers, content industry in general) sometimes even to the detriment of authors. Business models based on commercial exploitation of copyright need not represent the interests of authors themselves, regardless of the fact that the protected work is the keystone the entire industry is based upon.

In the modern times, the legal theory of copyright observes several layers or aspects of protection. Some, like *De Werra*, see three levels - the traditional legal framework based on early multilateral conventions such as the Berne Convention and modernized by WTO and WIPO Treaties being the first[6].

The second layer would be the technical protection measures whose purpose is to protect the content from unauthorized access and unauthorized use and distribution. Finally, *De Werra* recognizes the third layer of protection - the legal provisions forbidding the circumvention of the technical protection measures. It remains to be discussed whether implementing measures excluding perpetrators of unauthorized access to protected works from further access to digital content, such as the measures foreseen by the French authorities in the HADOPI law or the measures foreseen by the Croatian lawmaker in the Article 75 of the Croatian Penal Code represent a new, fourth level of protection[7].

Legal framework of copyright and neighbouring rights grants authors and other rightsholders certain subjective rights of absolute character (*erga omnes*) that can be concentrated in the person of the author or rightsholder, or they can be an object of contract where the rightsholder allows another subject to access, use or commercially exploit his work in exchange for an adequate compensation.

The objective of Creative Commons is to increase the availability of protected works on the Internet, as

well as to license protected works in a manner that grants users some or a great deal of rights contained in the positive legal framework of copyright.

This is facilitated by formular licensing agreements that authors can easily apply to their work. The Creative Commons set of licenses consists of six different license agreements mutually differentiated by the scope of rights relinquished by the authors to the users.

Since the purpose of this paper is to examine the possibility of using Creative Commons licenses as a valid legal contract in copyright management in Croatian legal system, there needs to be a few clarifications on copyright management in Croatia in general.

The Croatian Copyright and Related Rights Act (CRRA) in *Article 42*. regulates that copyright shall not be transferable, except by inheritance and transfer for the benefit of coheirs in the case of dissolution of community of heirs. This especially applies to the moral rights of the author (right of first disclosure, right of recognition of authorship, right of respect for the work and honour or reputation of the author, right of revocation) [8].

Of course, this does not mean that the authors and rightsholders cannot grant some of the rights to others - especially the economic rights of the author.

Article 44. of the CRRA regulates the disposition of copyright by granting a right of exploitation. The Article provides that author may grant to another person a right of exploitation of a copyright work or may entrust him the exercise of copyright by a contract, by giving the authorization for use, or by other legal transaction.

Article 47. of the CRRA regulates the transfer of right of exploitation. The right of exploitation may be transferred without the author's authorization from one person to another within transfer of the entire business or the part thereof constituting the entirety. Where the right of exploitation can be transferred without the author's authorization the person acquiring the right of exploitation shall have joint and several liability for fulfilling the obligation which the person transferring such right has in respect of the author.

Article 48. of the CRRA regulates the act of granting further rights of exploitation. The holder of the exclusive right of exploitation may, on the basis of his right, grant to another person further right of exploitation only with the written authorization of the author.

Article 50. of the CRRA provides that the author may not renounce his copyright.

The provisions of the CRRA cited above clearly state that, in Croatian legal framework, copyright cannot be transferred from an author to another person and simultaneously cease to exist for the author. Therefore, in order to facilitate economic exploitation of the work on behalf of another person instead of transferring the right itself, the author can grant

another person the right of exploitation or may entrust him the exercise of copyright (by a contract, by giving authorization for use or by some other legal transaction). It is these provisions that represent the basis of analysis of Creative Commons license agreements in the context of the Croatian copyright law, and the basis of our conclusion regarding the validity of copyright disposition.

3 The legal qualification of the Creative Commons licenses

One of the unique attributes of Creative Commons licenses is that they are available in three different forms, adapted to who (or what) may be accessing them.

These forms include:

1) A standard, legal document form ("*legal code*", as defined by the terminology of the Creative Commons website);

2) A simplified CC license agreement ("*Commons Deed*" or "*human readable code*") which aims to explain the main concepts, rights and limitations stemming from the particular licensing agreement to an average person by use of simple, easily understandable terminology.

3) Computer code (*CC Rights Expression Language*) linked to a specific work licensed by a chosen CC license, which is used for technical description of content ("machine readable code").

With regard to the goals of this paper, the full text CC license agreements are the fundamental and the most important aspect of the CC licensing system. In legal context, it is these documents that define the rights and obligations of parties regarding the use of a certain work. The Commons Deed and the computer code are only of secondary importance since they only explain or technically link to the content licensed by the full text legal code - the chosen CC license.

Another question that needs to be addressed concerns the legal qualification of CC licenses in the context of a somewhat confusing distinction between the terms "license" and "license agreement" in the framework of positive law.

While managing the rights on the protected work, rightsholder can dispose through various legal acts that nonetheless include a license - an assent to use a certain concrete subjective right concerning an object protected by laws regulating intellectual property in general.[9] If a legal act that contains this assent is a contract, then act of giving license represents a performance by a contractual party (i.e. in exchange for a monetary compensation). However, the license to use a protected work should also be possible to give even as a one-sided declaration of will (*see Gliha*). Concerning this, the Article 44. of the CRRRA stipulates that author may grant to another person a right of exploitation of a copyright work or may entrust him the exercise of copyright by a contract, by

giving the authorization for use, or by other legal transaction. Even if a CC license is not considered a proper license agreement (which we believe it is), this still means that it is a legitimate way to manage rights on a protected work.

The Commons Deed, on the other hand, may represent a liability of the CC licensing system. The *Deed* is a simple set of information representing a short summary of a chosen CC license, written in an accessible language understandable to legal laymen. While it has no formal legal value, it is an important element of the CC system as a guideline for rightsholders and users regarding the terms of the chosen license as well as a means of popularisation of use of the CC licenses. However, the necessary simplification of the licenses to be more understandable to the general public may lead to inadvertent violation of the license terms by the users or misunderstanding between the rightsholder and the public concerning the legal regime of the protected work.

Finally, the CC Rights Expression Language (CC-REL) is a tool used to mark digital content as CC licensed content. There is some ambiguity regarding the legal status of CC-REL. As a means of a machine readable interface between the protected work and the license agreement, CC-REL is necessary to enable effective distribution of protected works through different internet services ensuring the users are aware of the legal status of the protected work. CC-REL allows users to, while accessing a repository of works such as a photo-sharing site or a music repository, choose content based on a rights status criteria.

4 Definition of terms

There are six main types of Creative Commons license agreements, varying in the scope of rights relinquished by the rightsholder to the user. These types are :

1. Attribution license (*CC BY*)
2. Attribution-NoDerivs license (*CC BY-ND*)
3. Attribution-NonCommercial license (*CC BY-NC*)
4. Attribution-ShareAlike license (*CC BY-SA*)
5. Attribution-NonCommercial-NoDerivs (*CC BY-NC-ND*)
6. Attribution-NonCommercial-ShareAlike license (*CC BY-NC-SA*)

All these licenses have certain common elements, follow a similar structure and make use of commonly defined terms (i.e. "*Attribution*", "*NoDerivs*", "*NonCommercial*", "*ShareAlike*"). The licenses differ with regard to using one or more of the said terms.

As formular agreements, CC licenses are meant to be used by an indeterminate number of rightsholders from various legal systems. Management of rights

represented by the terms used may differ in meaning and scope from one legal system to another. This is why the creators of the licenses state (*Article 8.e* of the legal code common to all CC licenses) that these terms are defined in accord with the definitions used in the Berne Convention for the Protection of Literary and Artistic Works (1886.), Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961.), Universal Copyright Convention (1952.) and the WIPO Internet Treaties (1996).[10] Naturally, CC licenses can not ignore the normative framework laid down by the positive national law as well as relevant international treaties.

With this in mind, it is obvious that when analysing the definitions used, and comparing them with the provisions of Croatian law, it is imperative to use a teleological and comparative method, rather than a strict grammatical interpretation. By doing so, it becomes clear that the terms and definitions used in the CC licenses do, in fact, possess an equivalent in Croatian Copyright law.

To substantiate this argument, we will analyse the a few selected terms such as "*adaptation*", "*collection*", "*distribute*", "*author*", "*work*", "*publicly perform*" and "*reproduce*".

The term "*adaptation*" is defined in the Article 1.a of a CC license agreement as a: "...*work based upon the Work, or upon the Work and other pre-existing works, such as a translation, adaptation, derivative work, arrangement of music or other alterations of a literary or artistic work, or phonogram or performance and includes cinematographic adaptations or any other form in which the Work may be recast, transformed, or adapted including in any form recognizably derived from the original.*". Substantially this definition is inline with the term "*Alteration*" defined in the Article 31. of the CRRA: "*The right of alteration shall mean the exclusive right to translate, adapt, musically arrange or otherwise modify a work.*"

The term "*collection*" is defined in the Article 1.b of a CC license agreement as a: "... *a collection of literary or artistic works, such as encyclopedias and anthologies, or performances, phonograms or broadcasts, or other works or subject matter...*". This definition is also inline with the term "*collection*" as defined in the Article 7. of the CRRA.

The term "*distribute*" is defined in the Article 1.c of a CC license agreement as a: "... *means to make available to the public the original and copies of the Work or Adaptation, as appropriate, through sale or other transfer of ownership.*" The Croatian CRRA defines distribution of protected content as a distribution right: "*right of distribution (right to put into circulation)*", an exclusive economic right of the author. The exclusivity of this right and its economic effects are provided for in the provisions of the Article 18. and 20. of the CCRA: "*The author shall have the exclusive right to do with his copyright work and the*

benefits deriving from it whatever he likes, and to exclude any other person from it, unless otherwise provided for by the law. This right shall include in particular: a) right of reproduction; b) right of distribution (right to put into circulation); c) right of communication of the work to the public; d) right of alteration;" The right of distribution, along with the reproduction right, represent the basis of the modern economic aspect of copyright. The CC license definition of the distribution right, in our opinion, is inline with the provisions of Croatian positive law: "*The right of distribution shall be the exclusive right to put into circulation the original or copies of the work by sale or otherwise, and to offer them to the public for such purpose.*"

The term "*original author*" is defined in the Article 1.d of a CC license agreement as: "... *in the case of a literary or artistic work, the individual, individuals, entity or entities who created the Work or if no individual or entity can be identified, the publisher; and in addition (i) in the case of a performance the actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret or otherwise perform literary or artistic works or expressions of folklore; (ii) in the case of a phonogram the producer being the person or legal entity who first fixes the sounds of a performance or other sounds; and, (iii) in the case of broadcasts, the organization that transmits the broadcast.*" This definition is also inline with the provisions of Croatian law as defined in the Articles 9. through 12. of the CRRA.

The term "*work*" is defined in the Article 1.e of a CC license as: "*literary and/or artistic work offered under the terms of this License including without limitation any production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression including digital form, such as a book, pamphlet and other writing ...etc.*"

The term "*publicly perform*" is defined in the Article 1.h of a CC license as: "...*public recitations of the Work and to communicate to the public those public recitations, by any means or process, including by wire or wireless means or public digital performances.*"

The term "*reproduce*" is defined in the Article 1.i of a CC license as: "...*to make copies of the Work by any means including without limitation by sound or visual recordings and the right of fixation and reproducing fixations of the Work, including storage of a protected performance or phonogram in digital form or other electronic medium.*" The Croatian CRRA defines reproduction of protected content via reproduction right, as stipulated by the provisions of the Article 18. and 19. of the CRRA: "*The right of reproduction shall be the exclusive right of making one or more copies of copyright works, in whole or in part, directly or indirectly, temporarily or permanently, by any means and in any form. The right of reproduction includes fixation which shall mean*

the fixing of copyright works in the material or other corresponding medium." The CRRA defines the reproduction right in a technology neutral manner: "A copyright work is fixed and reproduced in particular by graphic procedures, photocopying and other photographic procedures with the same effect, by sound or visual recording, by building or carrying out works of architecture, by storage of the work in electronic form, and by fixing of the work transmitted by computer's net on a material medium."

To conclude, we find that the terms used in the Article 1 of CC licenses are defined in a way which is in line with the provisions of the Croatian CRRA. These definitions should not represent an obstacle to interpretation and application of CC licenses in Croatian legal system. Recent European case law, which will be analyzed later in the paper, is also inline with this conclusion.

5 Types of CC licenses

As mentioned earlier, there are six basic types of CC license agreements. These contracts are differentiated through the use of standardized clauses, namely: "Attribution", "NoDerivs", "NonCommercial" and "ShareAlike".

Ranging from CC-BY to CC BY-ND-NC, CC licenses allow authors and users to choose the license that fits their needs and purposes.

5.1 CC BY license

CC BY license agreement is considered the most liberal of all CC license agreements. The BY clause is related to the requirement the users have to fulfill in order to use the licensed work - namely, to clearly state the original author of the work.

As long as this requirement is upheld, the users are granted the use of a wide range of rights by the author/licensor of the work. These rights include a right to reproduce the work, a right to incorporate the work into one or more collections and to reproduce the work as incorporated in the collections, to create and reproduce adaptations, to distribute the work, to publicly perform the work, to distribute and publicly perform adaptations etc.

Users of the CC BY licensed work are free to reproduce the work, distribute the work freely or commercially, to modify and adapt the work and to put adapted works into commercial or non-commercial use as they see fit. CC BY license is one of the most popular CC license agreements allowing authors to widely disseminate their work and reach the broadest audience possible.

5.2 CC BY-NC

CC BY-NC is the license which allows users to freely use the work, limited by the requirement that the use

should be strictly non-commercial and that they identify the author of the original, licensed work.

This license agreement allows users to freely access and use the original work. Users can reproduce and distribute the work as long as it is not on a for-profit, commercial basis. The license agreement also allows users to modify and adapt the work. The users are free to distribute their adapted works both commercially and non-commercially - with the requirement to identify the author of the original work their work was adapted from.

5.3 CC BY-NC-SA

The third license agreement further limits the scope of users rights regarding the use of the work. Just like the previous license agreement, the BY-NC SA agreement forbids the commercial exploitation of the original work while allowing its modification and adaptation. This license, however, asks the user - author of the adaptation of the original work, to allow others access to his work under the same condition as the author of the original work (*Share-alike* clause). In other words, the author of a derivative work adapted from the work originally available under the terms and conditions of the BY-NC-SA license agreement is obliged to use the same terms and conditions while licensing his derivative work. In this regard, the BY-NC-SA agreement strongly resembles the provisions of the GNU GPL license agreement, a very popular formular license agreement widely used in the field of software development[11].

5.4. CC BY-NC-ND

This license agreement forbids both the creation of derivative works based on the licensed work as well as commercial distribution, reproduction, public performance or any other use of the work on a for-profit basis.

5.5 CC BY-ND

This contract forbids the creation of derivative works while allowing users to commercially exploit the original work. Under this license, users can freely reproduce the work, distribute it commercially and non-commercially, perform it publicly as well as include it into commercial or non-commercial collections of works.

However, they may not create derivative works based on the original work licensed under this CC license agreement.

5.6 CC BY-SA

This contract allows commercial exploitation of the original work - users are allowed to reproduce, distribute, include the work into a collection of works etc.

The users are also allowed to create derivative works, however, those are required to be licensed under the same terms and conditions as those used in licensing the original work they were derived from. In other words, users creating derivative works based on an original work licensed by the BY-SA license agreement are obligated to use the same BY-SA license agreement for these works as well.

6 CC license agreements in European legal practice and judicature

A decade has passed since the CC licenses first became available as a licensing solution for the digital conundrum. Today, there is a vast amount of licensed works in digital form available under the terms of CC license agreements.

This short yet eventful history of application of CC licenses includes the question of contract validity. Do authors and users recognize the validity of CC licenses, and more importantly, what do courts say? Here, we can detect a number of issues involved.

Primarily, concerning the applicable law, the international system of intellectual property in general, and copyright in particular, while harmonized to a high degree, is not completely identical in each and every possible jurisdiction. There are subtle nuances and conceptual differences present that stem from the history of copyright and its parallel development as an institute of common law[12] as well as an institute of European continental jurisprudence[13]. The question whether a national court will acknowledge the disposition of the author through the CC licencing agreement is therefore valid and needs to be considered.

Furthermore, does "fair use" reference, a common law copyright limitation doctrine, translate adequately into continental legal systems? Statutory limitations of copyright indeed are a legal standard in continental copyright systems, but their implementation also varies from country to country. This is also important when considering the potential use of formular licensing agreements such as CC licenses in an attempt to evade existing statutory limitations of copyright.

Comparative European judicature notes several recent cases where courts had the chance to analyze and discuss the application of CC licenses.

Currently, the case of *Curry vs. Weekend Magazine* brought before a Dutch court in 2006. is the earliest known case where CC licenses were discussed by a European national court. The plaintiff, American tv- host and blogger *Adam Curry* sued a Dutch tabloid magazine *Weekend* for unauthorized use of photographs obtained from Curry's public *Flickr* account[14]. The photographs were published under a CC BY NC license, a non commercial license that

stipulates the obligation of the user of the work to identify the author. The magazine published the photos in the print edition, without naming the author. Following the interpretation of the applicable license agreement the Dutch court ordered the defendant (the magazine publisher) to cease and refrain from further use of the photographs upholding the provisions of the CC license agreement[15].

The second case was brought before a Spanish court in 2008. A copyright collecting society (*Sociedad General de Autores y Editores*) was involved in a dispute with a cafe owner regarding the monthly copyright remuneration fee due for the public performance of music managed by the collecting society. During the court proceedings, the cafe owner supplied evidence that the music publicly performed on the premises of his establishment was limited to CC licensed content, therefore the Spanish collection society had no legal grounds to ask for the remuneration fee since the authors of the music used have not chosen to delegate the exploitation of their rights to a collective society (in this case, the SGAE). The Spanish court demonstrated that: " ... authors can choose how to manage their rights for their own benefit and anyone can benefit from that choice...expect that collecting societies will understand that something has to change to face this new reality".[16]

In both of these cases, as well as additional cases like *Gerlach vs. DVU* [17], *Lichôdmapwa v. Lasbl Festival de Theatre de Spa* [18], and even a case before an Israeli Rabbinical Tribunal [19] the courts considered the rightholder's disposition of rights through chosen CC license as a valid means of managing copyright on the protected work. There have so far been no recorded cases where the judicial body would reach an opposite conclusion.

7 Conclusion

Creative Commons licence agreements, in essence, are convenient formular license agreements which allow authors and other rightholders to manage their rights within the scope of copyright as recognized by positive law.

The six licence agreements reviewed are meant to fine tune the scope of rights reserved or delegated to users, and to simplify the licensing process for both parties. Authors and other rightholders are entitled by the provisions of positive law to choose how to manage their rights, as well as relinquish their use to users if they choose to.

Our analysis concerning the definition of terms used in the texts of the CC licence agreements, their compatibility with Croatian positive law as well as review of available comparative case law have so far unequivocally shown that CC licenses are valid copyright licenses and represent a valid instrument to

express the will of the author/rightsholder regarding the access and use of the protected works.

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