Legal Review of Two Free Licenses Under the Czech Law

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Abstract

The subject of this legal review is to analyze enforceability and validity of two free licenses, mainly to decide whether documents and software released with a reference to them may be freely distributed in the Czech republic.

The author finds these licenses incompatible both with the Czech copyright law and with general rules of contracts execution.

1. A decisive element in choice of law decision under the Czech law is a citizenship of the author. Therefore, this analysis applies completely only to works created by Czech authors.
2. Because these licenses (as most licenses posted on the Internet) do not satisfy the requirement of the Czech contract law for determination of offeree, these are not offers in the legal sense.
3. Accepting contract is deemed to be effective upon its receipt by an offerror. Therefore, a license posted to the Internet site (either to a document or to a computer program) is usually never executed, because user usually never notifies author about his acceptance.
4. Authors may require a remedy for the unjust enrichment because of use of the work without a contract. However, the measure of such remedy would be highly difficult to evaluate.
5. Notwithstanding their unenforceability as the contracts, the free licenses may constitute a sufficient notice to users, which would protect author from a damage as well as a defects responsibility.
6. The current wording of the licenses conflicts with the Czech legal regulation (especially, when it does not stipulate an remuneration for the author, or—as it is the case of OP/L—it expressly forbids any remuneration whatsoever).

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Unenforceability of the licenses is important, because firstly, there are a kinds of bazaar style development misuse which may misuse such unenforceability, and secondly, the author needs protection against possible claims of damage compensation.

In the final part of the document, some broad ideas how to harmonize free work distribution with the Czech law are given.

Contents

1. Introduction

The goal of this legal review is to find whether free licenses[1] are valid and enforceable[2] under the Czech law. If I find these licenses invalid or unenforceable, I shall try to find some workaround (if available).

I suppose, that not later than after reading the previous two sentences, most of my readers have got some serious doubts about my intention. Why have I written such a long text as follows, reviewing such strange documents as these contracts, when being American of origin and copyright license of nature it shall be almost certainly unenforceable under the Czech law?

It seems to me, that an issue of the free licenses enforceability has not been discussed among legal scholars enough. I am afraid, that discussions concerned with the free licenses are held much more by computer scientists rather than by lawyers.[3] Main subject of such discussions are usually issues of a technical nature, like free libraries linked to non-free programs. However, basic legal issues, like one of licenses enforceability are mostly untouched. My hope is that this paper may help to extend such discussions among lawyers.

Other reason, why I began to write this paper, was to get more deep understanding of the copyright law issues on the Internet. Later on, I found, that such material may be helpful to all those, whom I admire—programmers of the free software. When founding how little these men know about legal protection of their work, I wanted to help them, as well as to notify about pending problems with the free licenses enforceability. Although, this paper is based solely on my knowledge of the Czech copyright law, I am afraid that there are very similar problems in other legal systems, especially the ones in the continental Europe.

The reason why this paper may be considered insignificant is that my reader has a legal background (I hope, there will be many such readers!) and he may not understand a significance of the free movement as a whole. For such readers some explanation of the free software's significance would be helpful. I am not empowered to make economic findings about a possible future of free works (and especially software) in competing with their non-free counterparts, but at least I may say, that even to my non-professional view it seems to be clear, that in some areas free software is clearly very strong competitor to the non-free products even under the most strict economical scrutiny. I guess, that in very near future free software would replace many of its non-free variants even in the Czech republic (this process has already begun) and when there will be obstacles to this movement, it may have impact on the overall progress of the economical development in the Czech republic.[4]

[1] Namely Open Content Principles/License, version 1.0 (see `http://www.opencontent.org/opl.shtml`—hereinafter "OP/L"), and General Public License, version 2 (see `http://www.gnu.org/copyleft/gpl.html`—hereinafter "GNU/GPL").

[2] Concept of "enforceability" is a crucial theme of any legal analysis. Lawyers are not concerned very much with "validity" of the legal documents, because the true meaning of this term is rather unclear and differs heavily depending on the context. Term "unenforceable contract" is defined by [Black's Law Dictionary CZ (1993)] as "a contract, which does not have a legal force or effect in the court". Usually, enforceability means that all promises contained in the contract may enforced by the court.

[3] An example of such discussion is list `debian-legal`; subscribe to this list by sending a message to `debian-legal-request@lists.debian.org` with the mere word "subscribe" as its subject.

[4] There are some examples supporting the opinion, that free software may be very successful in competition with their non-free counterparts mentioned in [IDC (1998)]. For example, according to long-time independent survey

This article is targeted to non-lawyers interested in the legal aspects of free works movement, especially to programmers, who may be mostly interested in the legal protection of their work. Another, and very welcomed, audience of this article should be non-Czech lawyers interested in the discussion about the legal aspects of the free software. As I have mentioned above, I am deeply unsatisfied with the level of pending discussion on this theme, and if this article helps to support such discussion, my effort has not been wasted. Due to such intended audience, substantial part of this article is spent on general explanation of particular provisions of the Czech copyright and contract law with examples in relation to the free licenses.

2. Step-by-step detailed analysis

2.1. The copyright law point of view

2.1.1. Generally on relation between copyright law and free licenses

In order to explain, why the Czech Copyright Act is so many times cited in this text, I have to explain by couple of remarks a position of licenses in the system of Czech law. According to the general rules of the Civil Code[5] (hereinafter "OZ"), all works (and among them free software) are not tangible things, and therefore their legal regime is not regulated by provisions of the Czech civil law. Therefore, it is not possible to sale, lease, etc. work according to general terms of OZ. The Copyright Act contains very special provisions and it uses special terms, which I shall try to explain them in following paragraphs.

In relation to the term "license" used throughout this document, it is important to emphasize for my Czech colleagues, that I do not use it in the strict meaning of this word under the Czech law (especially § 508 and foll. of the Commercial Code[6]–hereinafter "ObZ").

by Netcraft, free WWW server APACHE has achieved more than one half share in WWW servers' market in sharp head-to-head competition with non-free software by companies as Microsoft, Netscape, Sun Microsystems and IBM. Even bigger share of "market" has been traditionally achieved by e-mail server SENDMAIL who holds in many variants (some of them sold commercially) close to eighty percent of the mail servers' market. However, argument can be made, that this huge share is given by its long tradition and it is still losing market share to its non-free competitors like Microsoft Exchange and Lotus Notes. I do not find it too much persuasive, because disproportion of these products' market shares is still very clear and I think, that Sendmail loses mainly in situations when some additional functions are required above the classical e-mail ones (e.g., groupware services). Moreover, no argument can be made against Apache's gain that entered market not sooner than its competitor given by short period of time for which WWW server exists at all. Both of these pieces of software are not covered by GPL, but by less strict one (based on BSD license—see `http://www.debian.org/misc/bsd.license`—which is the most simple consent with use of the work; unfortunately, even such simple agreement fails on the same problem as not being a contract according to Czech law—see section 2.2). The most successful work under GPL is the free operation system LINUX, which has taken just around two years after its maturity more than fifteen percent on the server-side operation systems' market.

[5] Act No. 41/1964 Coll., Civil Code [orig. "Občanský zákoník"]; see § 118.

[6] Act No. 513/1991 Coll., Commercial Code [orig. "Obchodní zákoník"].

2.1.2. Work protection

Before commencing the detailed analysis of both licenses, it is necessary to explain how is a work protected by the Copyright Act.[7] Author's right protected by AZ could be divided in the following groups:[8]

1. *Right of authorship protection, above all the protection of the work's inviolability, and if the work is exploited by a third person, it must be done in a way not degrading the works value*—the rights contained in this category are so called personality elements of work, which protect assignement of the author's name to her work from the use of the work which damages her good name.

2. *Right to dispose with the work, especially to decide about its presentation to public and to give a permission to others for its use*—this part of author's rights includes a right to decide about the destiny of the work. For free work there is a very important right included under this group, which is a right to permit a third person to create a derivative work. It needs to be noted, that there is no provision of the law barring author from withdraw her consent with work's use. Therefore, an author can decide at any time that a work once distributed as a free work is no longer a free and it shall be distributed only by commercial style of distribution.

3. *Right to authors remuneration*—the author has a statutory right for compensation from all users of his work. It is important to emphasize that this right is not based upon the contract and therefore, even when there is nothing in the contract (between user and author) on the topic of payments to author, the former can still claim his right for such compensation in the usual amount.

Another important statutory provision is the ban of copyright transfer in § 13(2) AZ: "Right of author's protection is non-transferable". This provision is based on the monistic view of a copyright as *a personal-proprietary aggregate*. This complicated term means, that according to the Czech law it is not possible to separate a personal rights to the work (indicated in point no. 1, sometimes called moral rights) from the right to commercially exploit the work (explained as items no. 2 and 3). Such unity has a consequence that it is not possible to separate possession of these two rights one from another, and therefore, it is not possible to transfer either of them as it is not possible to transfer the personal rights.[9]

2.1.3. Derivative work

The crucial phenomenon for computer programs is the issue of derivative works. It is important to emphasize, that the theory of copyright law (European as well as American one) does not

[7] Act No. 35/1965 Coll., Act on a literal, scientific, and artistic works [orig. "Zákon o literárních, vědeckých a uměleckých dílech"], hereinafter "AZ".

[8] See § 12 AZ.

[9] See § 19(1) AZ: "Author is allowed to transfer only right to use her work." I am not an expert on the common law Copyright law, but I think, that this is the main source of differences from the civil law one. Probably, it is due to the classical Roman definition of ownership as compound of right to use, right to dispose, and right to keep, which is not usual, I think, in the common law countries.

recognize a change of work (including computer programs) itself, but rather the changed work is deemed to be a new, derivative, work. Author of derived and one of original work have rights similar to rights of co-authors of a work.[10]

However, the author of the derivative work has to obtain a permission from the author of the original work for the creation of a new work (in the form of a contract, which includes an agreement on original author's compensation, see item no. 3 in list in paragraph no. 2.1.2 above and a more thorough discussion in subsection 2.1.6), in order to be able to create a derivative work or to profit on it. I mean, that while authorship of derivative author is always protected under the copyright law, even she has not get consent of original author to create a new derivative work, such original author has an action for damages compensation (including lost profit) for breach of her copyright.

Moreover, such use of the old work without a permission may be punishable as a criminal offense (according to § 152 Criminal Code—hereinafter "TZ").[11]

2.1.4. Free work and free license

When we described protected of the work, we can continue by looking at the meaning of term "free" as used in phrases "free work" and "free license". The basic meaning of the term free software is introduced in GPL as follows: "When we speak of free software, we are referring to freedom, not price.".[12] Therefore, the issue of money is not the crucial issue for understanding free licenses and there is no legal limit on sale of free works. GPL focuses on these main issues protected under the term "free":

1. *Freedom to distribute copies of free software (and charging for this service)*—any user can freely share free software in binary as well as source form without any further consent of author. This characteristics of free software allows creating of world-wide distribution network of individuals distributing the work without any substantial costs for author (even when it is less important in the time of Internet, when website erection is relatively cheap and accessible for everyone).

2. *That every user receives source code or can get it if he wants it*—in order to enable users to utilize preceding right, authors have to attach source codes to the distribution of executable codes. There is no similar provision of this kind in the OP/L, but because most of Open Content is in HTML format and therefore every copy may be easily edited, it should not make any trouble (however, OP/L does not deal with the problem of Open Content in other formats than HTML, which may cause troubles when dealing with documents which are difficult to edit in their distribution format, as it is case with Postscript and PDF documents).

[10] See [Knap (1996)], p. 42.

[11] Act No. 14/1961 Coll., Criminal Code [orig. "Trestní zákoník"].

[12] This quotation is taken from `http://www.gnu.org/`, which is the main site of the Free Software Foundation, author of the whole concept of "free software". More thorough explanation of the term "free" as used by this article may be found on address `http://www.gnu.org/`. Similar to "free software" although different in its more open attitude to commerce is the phrase "open source software"—for more information see `http://www.opensource.org`; colloquial explanation of the difference between two meanings of the word "free" differs a free software from a free beer.

3. *Freedom to change the software or to use pieces of it in new free programs*—every user is allowed to analyze source code, create derivative work based on it, which can be further distributed.

4. *That every user knows he can do these things*—education of users is critically important for free works as whole movement is based on trust among all its participants and unclear environment would be supportive for deceptive dealings and misuse of free works (or creating works which tries to persuade lay users, that they are free, although they may be exploited for commercial development lately).

For European continental lawyers, it is important to emphasize, that term "free software", as it is used in free licenses, covers substantially different phenomenon than free work as sometimes used in continental law context (e.g., § 35(2) AZ), where it is close to common law term "public domain".

2.1.5. Free work use

When analyzing which exact rights and activities, from the Czech law's point of view, are covered by GPL (and OP/L as well with limitations due to differences between documents and computer programs), there are the following three undertakings of author and subsequently these user's rights:

- consent to elementary use of work, e.g. executing a computer program and reading a document,
- consent to user's creation of derivative works based on author's work,
- consent to distribution of original as well as derivative works.

General term "use" covers all three these issues[13] and as such provisions of § 14(1) AZ govern them: "Use of work, unless allowed by law, is permissible only with an author's consent. Consent to use author grants by a contract." Therefore for every use a contract between author and user is necessary. Consent to elementary use is usually the easiest one to find. Unfortunately, this is not a case with GPL which provides in its Article 0, that "Activities other than copying, distribution and modification are not covered by this License; [...]. The act of running the Program is not restricted [...]." Notwithstanding the fact, that GPL expressly excludes an elementary use of program from its protection, it gives in following sentence very exact consent, which under my opinion perfectly satisfies requirement of the Czech Copyright law for author's consent to use. On the other hand, it is not clear whether so intricate construction of GPL (going against expressly stated will of author!) would be upheld by a rather formal Czech court or whether this part of the license would be stroke down as fatally ambiguous.

The Copyright Act in § 22-28 stipulates the mandatory requirements of specific contracts giving consent to individual types of use. Unfortunately, these standard forms of contract were

[13] See [Telec (1997a)], p. 175.

not prepared (in 1965, when the Copyright Act has been drafted) having on mind a possibility of computer program being distributed work and Internet distribution medium.

All these forms of contract are based on Contract on distribution of work according to § 22 AZ. Subject of this contract is that "Author gives consent to work distribution [by user] in consideration of royalties…" (par. 1). The mandatory requirements of the contract are

> … method and area of work distribution, time, when such distribution should occur, agreement on author's compensation, help to be provided by author, term of the contract, and distributor's undertaking, that distribution shall be done at his costs.

Copyright Act does not provide for explicit contract giving consent to user's creation of derivative work based on author's work, and the provision of Copyright Act governing such contract would be § 28 AZ, which provides for all contracts not specifically stipulated in previous paragraphs of the Copyright Act.[14] Such contracts not-regulated otherwise have very broadly defined requirements: "on contracts on other use of work, provision of § 22(3) and § 23 AZ shall be used accordingly." The word "accordingly" is very important. It means, that requirements of the mentioned paragraphs must not be satisfied completely (and analyzed licenses these requirements actually do not satisfy), but only in the measure as required by the substance of the contract.

Therefore, in order to consider whether free licenses satisfy requirements of § 28 AZ (or § 22(3) & § 23 AZ respectively), we must investigate the substance of both general distribution contract and analyzed free licenses.

On one hand, main idea of the distribution contract according to § 22 AZ is that author gives permission to distributor to distribute his work, but the distributor is not only allowed, but he is bound to distribute author's work in accordance with the contract (in the agreed time, amount, geographical area etc.). However, there is no such commitment on the side of free work user (and/or distributor), which can use free work, distribute it if he wishes to do so, or not, he can make his own work derived on the free work (or not if he chooses so), and finally he can (but he must not) distribute such derived work anywhere he wants in any manner and without any limits geographical or other. Actually, the free works' user is actually not bound to do anything. Only in the moment, when he creates derivative work or when he commences distribution of the work, there are some limitations on the manner in which he can provide such distribution.

When this fundamental difference between two contracts and forms provided by AZ is taken into account, I assume, that we can conclude, that some requirements as stipulated by the § 22(3) AZ have no sense for free licenses at all. This is true especially for method of work distribution, time, when such distribution shall be commenced, and certainly, distributor undertaking, that distribution shall be done at his costs. However, such fundamental difference with the contemplated distribution contracts may be used as an argument against the very idea of free licenses, because these may not be found to satisfy main characteristics of distribution contracts. I do not found this argument to be persuasive, because of general principle of contractual freedom which is the most fundamental principle of law on contracts in every civilized law culture. When parties wishes to conclude an contract which does not hurt any of them, which is not against a

[14] More on this paragraph, see [Knap (1996)], p. 111, or [Telec (1997a)], p. 301.

law or a public order (but which is perceived by the § 27 AZ), I would assume that solely such difference could not be the reason for striking these contracts down.

Concerning the time and area of work's distribution. There is an issue unresolved by the current Czech literature, which is the question where is the place of work's distribution when it is distributed via Internet (or any other public network), or when actually is work distributed. Is it in the moment when the work is sent by the author to a publicly accessible Internet server or when it is actually downloaded by the final user? Or using an above-mentioned analogy, is distribution of work by the Internet similar to distribution of books, which are copied by the publisher in definite number of copies, and *these copies* are subsequently distributed among final users?[15]

When using a definition of copy as found in legal theory,[16] which states basically, that copy is an a fixation of work to the material substance, I do not believe, that I could agree with "the book analogy" mentioned above. It seems to me, that Internet distribution is not distribution of fixed number of previously prepared copies, but rather allowing final users to make their own copy by themselves. It is difficult to decide where exactly is the place of distribution (location of Internet server, or location of user's computer?), but it seems to me clear, that Internet server's owner is not distributor of copies, but rather it is similar to board where free work is posted, available to anybody for making her copy. In such analogical situation, the place of distribution would be location of copy-machine used. Without saying final decision on the issue of Internet's work distribution, the only important point in this context is that, this confusion makes an idea of time or area determination in an agreement for distribution even less clear.

2.1.6. Free Work author's compensation

To conclude, the reasoning supporting the legality of free licenses as distribution contracts is quite weak and the result of the court decision on this issue should be decided on the specific facts of the case. Even worse is the situation as concerned with mandatory author's compensation, which shall be discussed in following paragraphs.

In order to analyze fully issue of author's compensation, we have to recall provision of § 13(1) AZ, which states that "author is entitled to author's compensation for every use of her work, unless royalty-free use is allowed by § 15 AZ." Impact of this provision is much stronger, when considered alongside statutory given bar of author's statutory rights reduction in § 14(2) AZ, which states, that "author's right given by law cannot be reduced or eliminated by the agreement of parties." It means, that any contractual provision shrinking or totally eliminating author's right given by the law shall be void and unenforceable (therefore, court would not use it because of official duty, without any party's pleading it). Given this bar, contract which does not states author's compensation should be reformed by the court and provision of contract which eliminates author's compensation up front as it does OP/L's provision of article 1: "You may not charge a fee for the OC itself" shall not be enforced by the courts at all.

The reason why this provision of law was enacted is not clear from the sole free licenses point view. However, the goal of legislator was reasonable, as he tried to avoid employees stripping of her rights in employment contract, taking into consideration unequal bargaining position of an

[15] This schema is used in [Telec (1997b)], p. 181.
[16] See for example [Knap (1996)], p. 57.

author and (supposedly) mighty employer or publisher. The most important right which might be employee stripped off are the very rights of author's compensation and therefore their waiver is most likely not to be enforced. Moreover, waiver of future right to compensation (which is dependent on future *use* of work rather than on *consent* with such use) shall be probably found in violation of the general provision on waiver in § 574 OZ which states, that "agreement, where a person waives his right, which will originate in future, is void and unenforceable."

It is questionable, whether such provision's unenforceability causes unenforceability of the contract as whole or court would insert a implied provisions of the law instead. This issue is dealt with by § 41 OZ, which provides in the relevant part, that if the reason of unenforceability is caused by the part of the legal transaction, only this part shall be deemed to be unenforceable, unless from the character or content of the legal transaction or circumstances of its execution it infers that the part is inseparable from the whole. Therefore, the resolution of the issue is just question of fact of each particular case and it cannot be resolved generally. However, I think, that authors compensation provision should be usually separable from the rest of free license, and therefore it might be cut from the license and author should be given compensation in the usual amount (measured by the courts expert).[17]

The provision of law on waiver in § 574 OZ makes other troubles to free works as well. Because it stipulates the requirement of writing for any valid waiver under the Czech law, we have to decide, whether there is agreement in writing when free licenses are executed (supposing that it is possible according to other rules execute free licenses at all). According to § 40(4) OZ "form of writing is preserved when legal action is executed by telegraph, telex or by other electronic devices, which preserves content of the action and identity of person, who caused it." Therefore, for e-mails to be deemed to be form of writing, they have to preserve its content and identity of author. However, a decision of court on this issue cannot be presumed, because it is the question of facts, which have to be decided by free consideration of court (there are no juries in most of the continental Europe). Such freedom for court may be on one hand in favor of free licenses, as there is no statutory express bar of their acceptance as writing and there is no need of special legal regulation for e-mails to be accepted as an evidence, but on other hand current e-mails usually does not satisfy these conditions, as neither content or authorship is securely preserved by current e-mails.[18]

In the above mentioned provision of § 13(1) AZ, the § 15 AZ is mentioned as possible way for using work free-of-charge. However, this provision could not save free licenses. It is just general leeway for the fair use of work for purposes of education, charitable use, research etc. There is no way how to get under this provision while using free software for other, including commercial, purposes.

2.1.7. Unjust enrichment & other author's rights of defense

The legal doctrine of unjust enrichment is a general doctrine of the Czech civil law with purpose of remedying the situation where one person has been enriched from the property of other. The legal provisions dealing with this doctrine are included in § 451-459 OZ. The main rule is given

[17] For explanation of this conclusion see paragraph 2.1.7.

[18] The issue is too complex for this article. For better explanation of the whole secured e-mails' issue see [Froomkin (1996)].

in § 451(1) OZ which states, that "Any person who, to detriment of somebody else, is unjustly enriched must return what he has acquired." The following paragraph states more precisely, that such enrichment may be also enrichment acquired "by performance of an act based on an invalid act in law".

Therefore, when an user of free work has received any property value (including right to use free work) on the basis of invalid free license (invalid as whole or in the part concerning waiver of authors compensation for such work), he has to return enrichment to author (if the author of free work cannot be identified, the unjust enrichment has to be given to the government, according to § 456 OZ). The remedy would be based on authors compensation with usual interest and on return of the work itself.[19] The issue of what exact amount is "usual author's compensation" would be determined by an independent expert called for by the court.

AZ presumes a possibility of author's rights violation. He gives for such situation to the author right (in § 32 AZ) to commence a litigation, where he would ask "*especially* for forbidding his rights violation, consequences of violation remedied, and he would be awarded appropriate satisfaction. If the consequence of author's right violation is the substantial damage of non-proprietary character, the satisfaction may be awarded in money." (emphasis mine) However, such right does not tries to eliminate author's right to unjust enrichment and damage compensation.

2.1.8. Relation between free licenses and the other IP rights

GPL tries to protect free software against other intellectual property rights misuse—it means mainly misuse of patents—(in Czech legal theory, these other IP rights are usually called collectively as "industrial rights"). The main principle is simple: when a user is not allowed to change a free software due to limitations given by these rights, he is not allowed to distribute any version (original or derived work) at all. Therefore, one can be sure, that any free software legally distributed under GPL could be freely changed without any limitations imposed by industrial rights.

The basic statute regulating the industrial rights is the Inventions, Industry Models, and Bettering Proposals Act[20] (hereinafter "ZVPvZn"). There is a general exclusion from patentability for "computer programs" in § 3(2)(a) ZVPvZn. However, although true meaning of this paragraph is rather obscure, it means certainly that the application for patent on a computer program itself or its part shall be rejected by the office. The Patent Office clearly stated that he would be willing to accept patent application on the larger technology, where a computer program would be part of a more compounded technologies,[21] which accepted a patent application on a complicated roentgen technology, where a computer program was used in controlling roentgen lamps for the best shining while securing lamps from their overburdening.[22]

The issue of patentability of computer algorithm under the Czech law is not clear as well. Especially, there is no literature on the matter at all. Moreover, there is no express rule in the

[19] Return of the work may be ordered when the license would be found invalid as a whole, e.g. because of some substantial conflict with § 14(1) AZ.

[20] Act no. 527/1990 Coll. [zákon o vynálezech, průmyslových vzorech a zlepšovacích návrzích].

[21] For similar decision, although not binding by any means on the Czech Patent Office, see [EPO (1994)].

[22] This holding seems to me similar as an interpretation of case DIAMON v. DEIHR as given in [Epperly (1991)].

statute governing patentability of computer algorithms other than not totally clear statement, that "inventions, scientific theories, and mathematical methods" are excluded from patentability. Such provision of law relates directly to the very core of the patents—which is that *technical problems solution* should be protected by the patent law, rather than technical steps not relating to the specific solution of technical problem.[23] The same core idea is expressed in § 3(c) ZVPvZn, where another class of non-patentable applications are "plans, rules, and methods of mental activity". Therefore, it is not absolutely clear whether patents constitutes real threat to free works, but such analysis should be done in separate substantial analysis on this sole matter. Without such analysis, I only guess, that according to the provision of § 3(2)(a) it should not be possible to patent any computer program at all, but rather it may be possible to patent complex original algorithm which satisfies requirement for invention as of their originality.

For example, it may be possible that Donald Knuth, author of typesetting program TEX, (if not himself opposing whole idea of software patents) could be awarded with a patent on paragraph breaking algorithm. However, this question is very complex and deeply related to technical analysis of facts. Moreover, there has not been any judicial decision on the issue, so the issue is very unclear.

2.2. Free licenses from the contractual point of view

2.2.1. Generally to the relation between free licenses and general contractual theory

As we have seen in par. 2.1.5 above, it is necessary for every user to conclude a contract with author, when the user wishes to use a work. According to § 52 AZ, "for issues not resolved in [AZ], particular provisions of the Civil Code shall be used". Therefore in order to analyze the legal position of the licenses as contracts, we have to refer to § 43-51 OZ, which contains general rules of contract creation under the Czech law. The main principle of contract is the same as anywhere in the world: there must be an *offerror* presenting offer to other person, *offeree*, which must such offer accept and thus create new contract. There is no consideration required in the Czech law.

2.2.2. Offer

Offer is defined in OZ as "expression of will intended to closing of contract, which is *targeted to one or more specific persons…*" (§ 43a(1) OZ) The function of emphasized text is to make distinction between true offers of the contracts and not binding advertising and similar documents, which would be sometimes difficult to distinguish otherwise, notwithstanding that their author did not intended them to give to their recipient any power to accept them and create contract. Definiteness of recipient is generally accepted (not only in the Czech law) as the best available characteristics for real offers.

However, such definition is crucial to the free licenses (as well as any other license merely attached to a material released on the Internet). There is probably no way how to find any definite addressee to such documents and therefore these are not offers in the meaning of law and they do not give a power to offeree to create new contract.

[23] More thorough explanation of the problem can be found in [Ježek (1996)].

There is probably no certain way around this provision of the law. Only some very debatable interpretation may be created. Such interpretation is based on supposed *intention* of the lawmaker. When assuming the intention to differentiate true offer from mere promotional materials, I suppose that it may be concluded, that when both free licenses are unambiguously targeted to contract execution, the provision of § 43a(1) OZ should not be relevant.[24] However, opposition to this interpretation (as well as to any intent-based interpretation of statutes) is very simple: if lawmaker had such intention, why he would not write it into text of statute? Therefore, if statute says, that offer has to be addressed to specific persons, it cannot be held, that it may be addressed to general audience as well.

2.2.3. Public promise

We should at least briefly describe the possibility of public promise defined in § 850 OZ. Such is defined in literature as a public declaration, that promises a benefit to a person satisfying conditions of the promise.[25] The legislator did not create this institute for the purposes of the generally-wide offered contracts, although its literal reading seems to support such notion, but for small-scale promises (typical example is the search for missing home pet or help with looking for criminal). The main difference from situation of all free licenses (or in this situation not only free—all Internet-wide offers) is that the performance is supposed to be *one-time performance*.[26] Such is certainly not offer of unlimited distribution of free work over the Internet.

2.2.4. Offer acceptance

Even though we would overcome the problem of offer without definite addressee in the free licenses (by any means, for example, by the Czech parliament having mercy on free movement and amending the Civil Code :-), there is still open another problem, which is an acceptance of such offer. According to § 43c(1) OZ, "timely notice of the offer addressee, or *other action, which could indicate accord with the offer* is acceptance of the offer".

The standard procedure of an offer acceptance includes notification from offeree to offerror about assent to the offer. It means, that for free licenses to be accepted by this standard method, all users would have to send to the author some notice expressing their acceptance with an offer provided to him in the form of free license. However, such method in the quantities typical to Internet would require thousands of e-mails for each version of the software (remember, there is no such thing as *changed* work, but only new pieces of work derived on the old one!). Moreover, some changes would have to be included in the free licenses (which is not possible without consent of theirs authors, who have authors rights on their text as well), because under current licenses users do not know, that there is such need of express assent to the free license (moreover, in many countries of the world, such assent is really not needed). Another question may arise, whether it is possible with sending one e-mail to more co-authors accept contract as well (again, remember, that Linux has hundreds core developers!).

[24] Moreover, such interpretation is part of § 14(2) CISG—see below.

[25] See [Zoulík (1992)], p. 329.

[26] Whole doctrine of public promise seems to me similar to American doctrine of "unilateral contract" as defined in § 45 of [Restatement of Contracts 2nd (1992)].

Therefore, there must be other way to make legally binding contract by accepting an offer. There already is such way and the provision of the law establishing such possibility is emphasized in the last quotation from Civil Code above. This kind of contract acceptance (called "acceptance by a deed") is in the practice concluded by offeree's sending actual performance asked for by the offerror rather than mere sending of acceptance notice. For example, merchant in hazelnuts responds to order by sending particular shipment of nuts in ordered quality etc. rather than by promise to ship nuts in future, which is real meaning of acceptance. When applied to free work distributed over the Internet, this kind of acceptance would be satisfied by user's mere use of the work, or by her creation of the work derived from the original free work. Moreover, from the procedural point of view, creation of derived work based on the original one is better, because by such user releases to public hard evidence about his use of original work.

However, such kind of acceptance does lead to yet another pitfall. The last issue in non-synchronized formation of contract is the question of finding the moment when the contract was actually executed. The Civil Code in § 43c(2) states, that "timely acceptance of the contract is effective in the moment, when expression of assent with the content of the offer is receipt by the offerror." So, there is another problem for Internet-based contracts. In the abovementioned case of hazelnuts, the problem is usually non-existent, because offerror is informed about offeree's acceptance of the contract by receiving a shipment of ordered nuts. However, authors of Internet distributed works in most cases never receive any information about users acceptance of the free work (again, consider situation of poor Linus Torvalds, when he would have to be informed about every user of Linux). However, without such notification the contract has never been executed according to the Czech law.

On the other hand when a conflict between user and author arise and contract is needed, author *per definitionem* knows, that his work was used and therefore contract has been accepted by the deed (user couldn't create derivative work, sell the work etc. without prior using the original author's work). When there are no troubles with the user (and therefore author will never identify her), there is no need of contract to be ever executed. This idea is usually sufficient but it does not take into consideration situations when the contract is needed for author's *defense* rather than for *binding* of free work user.[27]

2.2.5. Assignment of author's rights

The difficulties with Internet-disseminated contracts is known to many other people than myself, of course. Free Software Foundation, authors of whole concept of free software and nowadays main "free software house", requests authors of patches to the programs originally authored by FSF's programmers to assign their rights as legal co-authors.[28]

2.2.6. Conclusion on the free licenses validity as contracts

From the previous paragraphs we can draw only one conclusion: free licenses are not offers in the meaning of the Czech law, and therefore they have no power to enable offeree to create contract by their acceptance. Moreover, users accepts free licenses by mere use of free work only

[27] For more thorough explanation of impact of free licenses unenforceability see section 3.2.

[28] Honza Jiroušek has called my attention to this practice of FSF. Thanks.

in very limited number of cases. It can be said, that in most cases users of free work created by Czech authors shall use them without any legal title and especially without the contract presumed by § 14 AZ.

One small sad note in the end of this contract law analysis: the general contract law in the Czech republic has been harmonized (more in the Commercial Code than in the Civil Code) with [CISG (1991)]. CISG provides in § 14(2) as follows: "Offer, which is not addressed to one or more identified persons, is deemed to be mere solicitation for offers, *unless offerror clearly indicates otherwise*." However, the emphasized text has not been incorporated in the Civil Code (similar, more complicated provisions, are contained in the Commercial Code, § 276, which is not available[29] for most of free licenses), because lawmaker probably did not contemplate mere possibility of non-commercial public offer (they certainly did not thought about Internet :-)

2.3. Liability

2.3.1. Generally on author's responsibility

Due to its openess, free work is usually never finished. Even, when original author of the work lefts further development, anybody is able to grab last version of the work and continue its maintenance (actually, users are usually encouraged to do so). This continuance is also supported by current users of the software, because it guarantees to them support of theirs always changing needs unparalleled in commercial software market.[30] Unfortunately, such welcomed still-going development has one serious drawback. There are usually some errors or ommissions in the latest version of programs (collectivelly called "bugs" in programmer's slang). [31]

Even though, there are often less bugs in free programs than in non-free ones, because hundreds of programmers reads their source code. On the other hand, impact of bugs on free programs could be much bigger than in the case of non-free ones.[32] Firstly, fate of free programms is based on relation between author and its users. A mistreatment of user by author can lead (and leads) to either users switching to "competing" project, or (if there is none) to its establishment. Again, I do not know about any litigation concerning compensation for damages caused by free software, but possible impact of ordered damage compensation could virtually eliminate any free software developer—considering their usual small capital and possible huge damages caused by malfunction in computer programs.

It is not surprise that because of these reasons (and ordinary decency, of course) author usually tries very hard to eliminate any damage to its users. For example, most bigger free software projects follows standard introduced by Linux, that in any given moment there are two versions of program, one for developers (usually numbered by odd numbers) and other for

[29] For discussion of particular statutes to be used see section 2.4.

[30] Core of typesetting program TEX used for preparing this article is being developed without interruption for more than twenty years.

[31] Older version of TEX is an exception from this rule, because development of it has been terminated by the author nine years ago, and since that time, he accepts only corrections of a few bugs, which remained—there has been less than ten of them till now; however, even without original author support further development continues on supporting programs, while other group of programmers rewrites TEX into new system Ω inserting support of functions never targeted by original author and certainly including some fresh new bugs.

[32] To the best of my knowledge, there has not been any litigation related to free licences in the whole world.

usuall users (numbered by even numbers, where are no new changes included other than fixes for remaining bugs).

There are two possible legal tools used for protecting from impact of defective work—reponsibility for defects and other for damages. Although, these are similiar in their names, and they are used in similiar situations, these two tools are very different in their nature. While former is intended to force author (or any supplier when used in context of contract for sale) to correct her performance,[33] the latter is intended to compensate her user for damage, which has already occurred by use of defective performance. Sometimes, even result of these tools may be very similar, but still it is important to keep separated analysis of these two issues and drafting of particular part of contracts.

2.3.2. Responsibility for defects

The defects responsibility regulation is rooted in § 499 OZ, which stipulates that "who provides another with a thing for a fee is responsible that the thing in the moment of delivery has a characteristics expressly required or usual, that it may be used according to characteristics of the use mentioned in the contract, or according to agreement of the parties, and that the thing is not legally defective."

This provision of the law has some serious consequences. The most important of them is that because according to the § 118 OZ rights or other non-free entities are not things in the legal meaning of the word, providing another with a work is not providing him with a thing and whole concept of defects responsibility does not affect free work at all, unless parties expressly agrees in their contract otherwise.[34] However, without such agreement, "defects" of the work are not deemed to be defects in the legal sense at all.

Moreover, whole notion of a defect is foreign to the Copyright Act—considering, that it was originally drafted for dealing with articstic and scientific works, which cannot be ever defective in the standard meaning of the word, it is not big surprise. Only small (and in context of free works totally insignificant) exception could be found in work created by the order (§ 27 AZ), which is in its effect similar to provision of § 502(2) OZ, where parties may agree among themselves on characteristics to be satisfied by the product, so that such product is deemed to be perfect.

Other big obstacle for notion of defects apply on free work is that the whole idea of defects in § 499 OZ is attached to providing of thing *for a fee*. However, no free work is distributed for fee under general statutory rules (I suppose, that when a work is sold for profit a contract dealing with all these issues in much more coherent way should be drafted and executed in ordinary way). Moreover, free content released under OP/L is expressly forbidden to be provided for *any* fee.

Even in the case when free works would be recognized as a thing (or when the Copyright Act would be amended, so that a work could contain defects even from the legal point of view[35])

[33] This statement is correct in civil law based legal systems; in common law systems, such intention to get correct performance is rather exception—called *specific performance*—and it is used only when there is not possible to remedy for damages occurred.

[34] See § 502(2) OZ.

[35] There is still a question, how could be a defect defined for the computer programms, when there is nothing like

and the work would be provided for a fee, there is still a way how to eliminate the responsibility for defects. According to § 501 OZ, "when a thing is provided as is, [author] cannot be held liable for any defects other than non-compliance of delivered thing with characteristics expressly required or agreed". Therefore, when GPL declares that "the programs are provided 'AS IS' without warranty of any kind", such reservation means from the legal point of view, that provider openly declares unreliability of her product, and therefore an user cannot argue, that she relied on the product to its own detriment, unless thing did not satisfy characteristics expressly promised by the author.

The medium taking such notice does not have to be a contract, but it could be contained in any documentation, a manual, an attached information file, etc. However, it is important to emphasize once again, that all this stuff on the responsibility for defects is an issue only for *things sold for a fee*.

Other note, which should be mentioned, is that this analysis is relevant only for cases of general defects responsibility, and it does not cover situation of some special kinds of sale, where OZ contains special provisions which are more strict. However, no such provisions apply for Internet-based distribution of free work (beware on a customer sales provisions in §§ 619-627 OZ for a possible future over-counter sale of free software).

In order to make clear, what is the actual subject of a defects responsibility, we should consider some more usual sale of work—over-counter sale of book. Such transaction comprises de facto from two separate transactions: firstly, right to use (by reading) is provided, and secondly customer buys the collection of papers covered by some level of ink under the very ordinary sale contract (by this latter contract he receives materialized work of publisher, compositor, printer, distributor and seller). Because in the latter contract, thing in the legal sense of the word is provided for a fee, regular rules for defects liability can be applied (and moreover, special rules for sale in store applies as well, but these are outside the scope of this analysis) and buyer can apply for remedy of book wrongly printed, bound etc. However, there is no statutory right for compensation of defects in the content of work (which is easy to understand—tell me, what does it means "defective novel"? Novel can be nice or nasty, written in colloquial language or in baroque style, but how it can be defective?).

When this example is used on the free work providing via the Internet, it may be concluded, that such providing is compound of the gift contract and contract for giving right to use free work in the same sense as the previous example could be deemed to be compound of the sale contract and contract for giving right to use the book. And, as it was explained before, it is not possible to apply statutory defect responsibility for any contract which is not for a fee which certainly includes gift contract. Therefore, it may be possible to use only supporting rule of § 629 OZ which states in relevant part, that giver must "notify recipient on a defects of the gift" and as the only remedy for breaching this duty, law gives to the recipient right to require the return of the gift.

"usual characteristics" of computer programs and they are so complicated, there is no way, how could contract defined their characteristics enough sufficiently. Probably, the best way is to define the defect as a difference between the computer program and an accompanied documentation. Difficulty with this idea is, of course, that documentation is provided by the author of the computer program as well, so he may modified the documentation in order to "cover" any remaining problems in the program.

2.3.3. Damage responsibility

It would be most unfortunate situation, when author of free work, which provided his work for free to public, would be in danger of being punished for his giving away because of some hidden defect causing damage to user. However, it often happens, that there are some remaining defects in a computer program, free or non-free, because of omission in debugging or due to failure in coordination among co-authors of the work. Therefore, all licenses (including both one analyzed in this article) try to eliminate impact of such defects on author by some kind of disclosure, that authors refuse to be kept responsible for any damages caused to them.

The basis of the Czech damage responsibility legal regulation is given in the §§ 415-450 OZ. Substantially different legal regulation of damage responsibility for commercial cases can be found in the Commercial Code, but because of the length of this article, I shall limit my analysis to the Civil Code damage responsibility only. The very basic rule for damage responsibility which we can analyze in next paragraphs is given in the § 420 OZ, which states in the relevant part, that: "everyone is responsible for damage, which he caused by breaching his legal duty". There are three keywords in this sentence: "damage", "caused", and "legal duty". If victim (e.g., user) requires damage compensation, he has to prove, that all these three events already occurred (if damage has not happened under some special circumstances—see below). If he succeeds and proves all these events, there is only one excuse for offender available. If he proves, that the damage was not caused by his breach of legal duty, he can eliminate or at least lower his responsibility.[36]

The simplest way how to explain a process, is to go through it step-by-step:

1. The first step is to prove, that offender *breached his legal duty*. The term "legal duty" in this context means either duty imposed on offender by a contract, by some special provision of law, or, if no such duty can be found, there is catch-all provision of § 415 OZ, which provides, that "everyone shall act in such a manner, that no damage to health, property, nature, or environment occurs."

   Therefore, in order to evaluate author's liability we have to consider, whether there is any legal duty imposed on her to provide the work without any defects. There is no such duty created by the free licenses themselves and these licenses do not impose on author any other duty as well. Because providing of a work is not contract for sale (defined for the tangible things only) even the general responsibility for defects cannot be imposed on the author.[37] The only remaining duty imposed on the author is the general duty of prevention in § 415 OZ.

   It is not possible to say, what would be decision of the court on the issue whether or not the offender breached this general prevention duty, because such decision would have to be based on the facts of the particular case. Maybe, that in analyzing the issue, court could use by analogy rules for evaluating defects responsibility (which means, probably, that court would decide on the basis of § 501 OZ, where author warned the user that the work is provided "AS-IS").

[36] § 420(3) OZ—for more thorough explanation see [Knapp (1998)], p. 335.

[37] Despite my warning on page 16, that issues of damage and liability for defects cannot be mixed together, both issues are so intertwined, that when considering one, it is often necessary to take other into account.

Therefore, I think, that the author may be held liable only in the measure, where he expressly promises, that the work shall have a particular characteristics, or that it shall support some defined functionality. However, even such construction, may be used only when the work would be provided for a fee,[38] when inability of user to use some particular function caused to him a damage, offender knew (or should have known) about a possibility of such damage, and he did not make a steps to prevent it. I think, that author should not to be held liable for damage caused by a defect not found during correctly done process of debugging.

2. When the breach of legal duty is evidenced, user would have to prove, that a *damage* occurred. It is not as simple as it seems to be, because a legal term "damage" is defined much narrower than in ordinary use. Under the Czech law, a damage is "property diminishing (loss) which could be objectively measured (evaluated) by the general equivalent (i.e., money)". Therefore, loss which cannot be measured by money (e.g., loss of good name, or beauty) could not be *usually* considered as a damage.

3. The last event which has to be evidenced is *a causal nexus*, i.e. uninterrupted link of causes and consequences between the breach of legal duty and the damage.[39]

   It is understood that such link is found, "when the damage according to character of circumstances, or according to usual (natural) proceeding of events is adequate consequence of illegal action or cause of damages". Even such definition means, that there may be more causes of a damage occurrence, all of them foreseeable (i.e., adequate consequences of breaching the legal duty). However, such requirement of foreseeability is objective one—it is not important whether offender know or should know about a possible damage, but whether such damage was "foreseeable from the reasonable person's point of view in the same place and moment as the offender.".

When user proves breach of legal duty by author, occurrence of damage and link of causes and consequences between the two, the only possible defense for author remains—he can prove, that damage was not caused by him. Such possibility is based on the provision of § 420(3) OZ, which states that "who proves, that damage was not caused by him, is justified from responsibility". Contrary from previous requirements burdening damages person, proof of requirement of § 420(3) OZ is subjective term. It means, that offender tries to prove, that no intention or negligence caused damage.[40] Therefore, when he proves, that damage was caused by other circumstance, which he did not and should not expect,[41] court may lower amount of damage compensation or release offender from any responsibility altogether. Example of such circumstance is natural disaster action of third person.

[38] I targeted this analysis mainly on software distribution provided free of charge because I guess, that a commercial distributor of software should be able to employ a lawyer to provide a legal analysis tailored to her particular situation.

[39] For deeper exaplnation of term *causal nexus* see [Knapp (1998)], p. 353; this textbook is source of all my quotations in this section, unless indicated otherwise.

[40] Both terms "intention" and "negligence" are not specified in a private law theory, but private lawyers use theory of criminal law, where the terms are crucial for determining responsibility of criminal.

[41] Which is the most relaxed limit of unconscious negligence, according to § 5 TZ.

Damage compensation usually consists from compensation for the real damage and lost profit due to existence of the damage (according to § 442 OZ). While the real damage is relatively clearly defined as a diminishing of victim's own property, the lost profit is much less clearly defined. There is no statutory definition of the term, so that only understanding may be given by the literature, which is however rather vague on this topic. The legal literature[42] defines the lost profit as "everything, which left victim person". The lost profit must be objectively predictable to occur without doing any steps on the side of victim. And once again, the victim must prove, that there is clear link between loosing of the profit and offender's breaching her legal duties.

Therefore, if we want to conclude this rather complicated introduction to damage responsibility under the Czech law, we could summarize our findings in this way:

- When there is a suspicion, that damage was caused by breach of author's duty imposed on him by the law, user must prove in the court that author already *breached his legal duty*, that she suffered *damage in the legal sense of the word*, and that there is *a connection between the two*. The litigation would be probably based on general duty of prevention (as stipulated in § 415 OZ) and general provision of damage responsibility (§ 420 OZ).[43]

- The most important issue is to decide whether or not author of free work *breached her legal duty*. It seems to me, that generally speaking when author used all usual care used for similar work (in terms of complexity and its declared maturity) released under similar circumstances, damaged should probably not be able to prove breach of general prevention duty as found in § 415 OZ.

2.4. Applicable law

Until now I silently presumed, that all legal relations among author and users of her work are governed by the Czech law. However, it does not have to be always so. Therefore, I shall give you some notes concerning a decision when the governing law shall be the Czech one and when not. These notes are prepared from the Czech court's point of view—conclusions would be probably very different when foreign court decides,[44] especially because all courts tends to pull to its own jurisdiction as many cases as possible.

Start of our analysis is in § 50 and § 53 AZ. Former states the basic principle, that "provisions of this statute are applicable to every work of the Czech citizens, without consideration of the place of the work's origin or first publishing". Further in the section, there are some exceptions given (work of immigrants, or foreigners published or presented for the first time in the Czech republic). However, the basic rules states, that the most important border for decision of applicable law, is the author's citizenship.

The latter section mentioned above (§ 53 AZ), provides for general statutes as ruling issues of copyright relations not provided for in AZ. Therefore, all general issues, like contract

[42] See for example [Zoulík (1992)], p. 146.

[43] Unless there is some type of special responsibility, which is the case in many business related situations.

[44] I guess, that even after only these two sentences, you can get a feeling, that this is very complex matter where we are right now. And you would be very true—conflict of laws is probably the most obscure and complicated part of the legal thinking. Therefore, be aware, that following explanation is *very* simplified.

effectiveness, responsibility for defects and damages, right and obligations arising from unjust enrichment, etc., are governed by the general provisions of other statutes—especially the Civic Code. It has to be noted, that when requirements of the Commercial Code[45] are satisfied, ObZ has preference and OZ shall be used only subsequently in the issues not governed neither by AZ nor ObZ. Most important requirement is that both parties, author as well as user, are entrepreneurs and that the relation arisen during their enterprise activities (e.g., sale of free software or provision of other free works for free).

Therefore, to summarize this subsection—this analysis is not concerned with works of foreigners. Situation for other authors is much better, as many foreign (especially, American) legal systems are much more kind to free works.

3. Conclusions to be drawn

3.1. Recapitulation of given analysis

I concluded in the previous text these conclusions:

1. Free licenses are not valid offers according to the Czech law, and therefore these are not capable of giving to its addressee power to accept and create contract binding on both parties. Therefore, current users of free works created by the Czech authors (who did not accept license by some other means than mere use of the work) are using such works illegally.

2. Czech authors may require compensation for unjust enrichment for such illegal use. However, measure of such compensation is highly difficult to evaluate.

3. Current wording of the analyzed licenses conflicts with the Czech legal regulation (especially, when it does not stipulate enumeration for author, or—as it is the case of OP/L—it expressly forbids any enumeration whatsoever).

4. Czech authors should probably not be held responsible for any damage or defects, when using usual care in the elimination of such defects.

5. Current legal system is highly confused concerning its attitude towards both computers and free works. When these two confusion combine the result is at least half-guessing on the real state of law.

3.2. Consequences of free licenses invalidity

While discussing consequences of free licenses invalidity on newsgroup on Usenet, I have heard this argument from an American lawyer:

> [The] point [...] is that if the GPL is not considered applicable, than what you are left with is the restrictions allowed in the copyright law. These do not allow you to distribute derived works without permission.

[45] Specifically § 261 ObZ.

> In other words the copyright holder promises not to sue you if you obey the requirements of the GPL, but if it becomes necessary to sue you, the copyright holder will base the suit on your violation of one or more provisions of copyright law. If the GPL comes up in the suit, it will only be to prove you didn't comply with one of the GPL allowed exceptions or because you brought it up in your defense.
>
> You might not be forced by the court to release, but you might agree to do so to avoid even worse penalties. Presumably the copyright holder is more interested in seeing you release your code under the GPL than seeing you fined, jailed, and permanently restricted from distributing your own code[46].

As I understand these paragraphs, author's thought is that it does not matter, that GPL is unenforceable (and I am not sure, whether he is right in such preposition), because anyone breaching its provisions could be held responsible under the general provisions of statutory copyright law. I do not agree with this thought and I shall explain my reasons in the following paragraphs.

The first of all, a willfull use of unenforceable license does not seem to me to be honest and it certainly did not support a trust between the author and her users. This argument may seem not to be important, but in the free-work world such argument should not be taken lightly, because in my opinion the trust to author (or lack of thereof) is one of the most important reasons, why people switches from non-free software to the free one. We were as users so many times deceived by a software producers, that we are very touchy to be left totally in the mercy of author.

The most importatnt reason why I think that enforceability of free licenses is relevant is based on the fact (probably overseen in cited post to newsgroup) that licenses are usefull for benefit of more than one party. Certainly, that the most visible result of free licenses acceptation is user's right to use the work, but it is not only result of a license. As it was shown in section 2.3. the fact that user has seen and took in his mind notice of author stating, that the work is provided "AS IS" and author does not want to be kept liable for a bug found by user may be important in the decision on the defects responsibility. Even less the author wants to be served by the petition for decision on compensation of damages caused by work to her users.

Another rather complicated issue may be called "misuse of bazaar". Author sends to Internet free early version of its software as in the case of any other free software. After some time of further development, bug-fixing etc., he would "found", that there is no enforceable license. After elimination of whole Internet presence of the software, he could rewrite all improvements of the users to its old non-free version. I am not sure, whether such method may be economically viable, however it is certainly worthy of consideration.

In the case of big companies, it may be in some countries even necessary to consider tax consequences of giving of the gift or requirement to put some contingency in the book for the case of unjust enrichment compensation.

3.3. How to get out of it?

When I have came to so ugly conclusions in previous paragraphs, I should draft some ideas what should do a regular programmer (or author in case of OP/L) to avoid a conflict with the

[46] See [Isaac (1998)].

Czech law. However, I had to emphasize as well, that I do not know about any totally fool-proof solution to the described problems. I can offer only some ideas, which would be eventually cultivated in some vital solutions in future.

1. X WINDOW LICENSE—This solution is really far from being fool-proof. The main issue, concerning enforceability of the license, is still the same—X license is not any better offer than GPL is. However, although X license contains everything what is necessary (consent with use of work as well as declaration that work is provided "AS IS"), it is so simple that the probability of its acceptance by the Czech court is little higher. However, because X license is very close to true license (I mean, GPL), this probability is only very little higher.

2. CZECH GENERAL PUBLIC LICENSE—I have invented this term for the special version of the contract containing consent with work's use and all other requirements on the free license (waiver of responsibility etc.) but custom-tailored to the conditions of the Czech law. There are two limitations on this idea: first, I am not sure, that mass used contract for giving a consent with use of work is under the current Czech law possible at all. One possible solution would be to provide every user with some kind of tool to accept the license (HTML form e-mailed to author with some kind of all-users' database on author's side), or what is sometimes called "card-ware"—every user is required to send a card to author. Usually, the reason for this was to get nice postcards from all the world, but such postcard could be in the same time used as an evidence of user's acceptance. Another problem is that, I do not see any way how to make any free license specific to be addressed to "specific person" as required by the Civil Code.

   Other problem is, that according to GPL, a work derived on the free work has to be released under GPL as well. It would be necessary to amend GPL, for example so that it would allow release of derived work under any license previously expressly approved by FSF (authors and current maintainers of GPL) and approval published on official FSF webpage.

3. LOBBYING FOR THE COPYRIGHT ACT AMENDMENT—There is currently pending bill amending the Copyright Act in the Czech parliament, so that it may be possible to replace requirement of contract containing consent with use of work by not formalized consent with the same.

   Another very simple possibility may be to include in the law new phenomenon of the "free work" (so as to eliminate possibility of its misuse by evil author's employer). Such free work would have to be free for everybody, not only for some group of person (therefore, when work is free, author can give it freely to anybody), free work has to be barred from being able to be protected by the non-disclosure agreements or from statutory protection of the commercial secret, and lastly, ideas included in the free work cannot be protected by patents.

   Unfortunately, I do not see any pressure group powerful enough to promote such parliament action.

Therefore, there is still plenty of work waiting for willing programmers as well as lawyers to be done.

SOLI DEO GLORIA

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