

## CREATIVE COMMONS WILL IT DO GOOD IN THE CZECH REPUBLIC?

by

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*The fact that there is no Czech version of Creative Commons licenses, obviously didn't deter Czech internet users from using them. The Czech internet domain currently contains thousands of works licensed under Creative Commons, however a great part of these licenses are used improperly and can be considered invalid. The article describes the impacts of Creative Commons movement on Czech internet community and analyses legal aspects of license contracts concluded via Creative Commons licensing schemes. The article comes to a conclusion that, generally speaking, these licenses can be considered valid however their validity can be questioned under certain circumstances. The article compares legal consequences of licensing work under Creative Commons and placing the work on the webpage without any attempt to create a licensing scheme. This comparison resulted in a conclusion that the differences between both alternatives are relatively small. I hold the opinion that the main contribution of Creative Commons licenses in the Czech legal environment lies in improving the awareness of intellectual property rights among internet users. Better awareness about copyright regulation could then lead internet users to respect the intellectual property rights of other users.*

### **KEYWORDS**

*Creative Commons, licensing, intellectual property, on-line contracts, copyright*

## **INTRODUCTION [1]**

Free culture movement and Creative Commons organization have undisputedly great impact on current trends in intellectual property. Creative Commons licenses, the most famous “product” of their endeavor became extremely popular among many internet users and have gained a great amount of supporters. These user-friendly, computer-generated licensing schemes that enable authors to permit other users to use, share or modify their works are slowly getting known also in the Czech Republic.<sup>1</sup> They are supported mainly in certain internet communities such as bloggers, users of photography servers, music servers etc. Even though the works placed in the Czech domain which are licensed under Creative Commons are clearly outnumbered by works under traditional copyright it can be said that Creative Commons are becoming an inherent part of Czech internet culture. Since the concept of these licenses originates from the legal environment of United States and because there is no version of Creative Commons adapted to suit the Czech legal system, the question arises, whether they are compatible with Czech regulations and can be used without risk. The aim of this article is to analyze legal problems that accompany Creative Commons in the Czech Republic and the impact that Creative Commons makes on the Czech legal environment.

## **LEGAL ASPECTS OF CREATIVE COMMONS LICENSES [2]**

### **CZECH COPYRIGHT REGULATION [2.1]**

The Czech copyright law is governed by the copyright act (statute no. 121/2001), but core principles of copyright arise from Czech constitutional and civil law. Czech copyright law is also in conformity with EU Directives<sup>2</sup> and all relevant international conventions regarding intellectual property. Like in other European countries, Czech copyright law divides authors’ rights into moral rights, that cannot be legally waived or transferred to oth-

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<sup>1</sup> According to Google search engine there is more than 10 000 000 web pages under the .cz domain that are licensed under Creative Commons, from the total amount of 200 000 000 webpages, which means that 5% of web pages in the .cz domain are licensed under CC. It is however a bit questionable whether these numbers are really accurate, and the Czech users who create their pages under other domains also have to be considered. However the accuracy is not really relevant for the purpose of this article. These numbers only serve to illustrate the fact that Creative Commons is established and persistent element of the Czech Internet.

er subjects, and economic rights which can be assigned by licenses. Since the Czech law recognizes license as a legal tool for assigning economic rights of an author, no problems arise with compatibility of Creative Commons' elemental principles.

### **MORAL RIGHTS [2.2]**

As it was mentioned above, the author cannot license or otherwise waive his moral rights. These rights contain the right to decide about making his work public, the right to claim authorship, the right to decide how should be the authorship indicated and authors right for inviolability of the work. An author also has right to supervise whether his work is not used in a manner that depreciates its value *unless ensuing otherwise from the nature of the work or of its utilization, or unless it is not possible to fairly require of the user to allow the author the exercise of the right to author's supervision*. When we look at the terms and conditions of creative commons licenses we will find out that they are not in conflict with any of author's moral rights.

### **A RIGHT TO CLAIM AUTHORSHIP AND TO DECIDE ABOUT MAKING WORK PUBLIC [2.2.1]**

Creative Commons licensing scheme obviously does not affect author's right to decide about making his work public in any way. It only encourages authors to license works which they intend to make or have already made public. The author's right to claim authorship is also not breached. It is even promoted by each version of licensing schemes, because the obligation is to give attribution to the author of the work is a minimum standard of author's rights in every Creative Commons scheme. Creative Commons licensing schemes simply do not provide author with an option to waive his

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<sup>2</sup> Among others: Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission; Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases; Directive 2001/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art; Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society; Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property right; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version);

right to claim authorship. This is very logical, because a licensor in fact claims to be the author of a work by licensing it under Creative Commons. For this reason, any person other than author (except sub-licensors and delegates) who licenses work under Creative Commons breaches the Czech law, because such conduct would be considered as a wrongful claim of the authorship.

It is, however, a bit questionable whether CC licenses don't limit the right to decide how the authorship should be indicated. For example the "human readable summary" of Attribution 3.0 Unported licence states: "You must attribute the work in the manner specified by the author or licensor ...",<sup>3</sup> but the full license gives rather detailed description of how to give an attribution to the original author in cases of public performance or distribution of the work. Obligations imposed on licensee therein are surely not unreasonable and do not contain any unpleasant surprises, however could be confusing in cases where author gives contrary instructions e.g. on his webpage. Due to such exact rules of giving attribution to the original author, creative commons do not give author much space to decide how his authorship should be indicated, but it is making such decision instead of him. However, this is not contrary to the Czech legislation, because the author in fact makes a decision how his authorship should be indicated by choosing Creative Commons. This principle gives author less space to determine the way of attribution, nevertheless it makes the whole process of creating license simpler. Moreover these provisions guarantee that the author's right of attribution (which corresponds to a right to claim authorship) will remain protected even in those cases where authors are not aware of this right.

#### **A RIGHT FOR INVIOABILITY OF THE WORK [2.2.2]**

By licensing work under Creative Commons author practically loses control over his work. Since he does not know which subjects have licensed his work he practically cannot supervise whether they are using his work in a manner that depreciates its value. This does not, however, mean that the author

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<sup>3</sup> *Creative Commons Attribution 3.0 Unported* [online]. 2007 [cit. 2008-01-20]. Available at WWW: <http://creativecommons.org/licenses/by/3.0/legalcode>.

waives this right. It ensues from the nature of Creative Commons licenses that when the author does not know which subject uses his work he cannot make any supervision of this use. This is because the user has a duty to use a work in accordance with terms of a license, but he has no obligation to report author that he uses the work and give him any details of the use. But when the author finds out that his work is used by an individual subject he still has the right to supervise in reasonable extent whether the user uses the work in accordance with the license. However, licenses which enable licensees to modify (remix, adapt) and distribute the modifications of the work are very dubious under the Czech law. The article 11 of the copyright unambiguously states that the author has the right to grant consent to any alteration of, or other intervention into his work. This right is also considered to be a non-waivable moral right. Moreover, the Czech law deeply respects the principle that no one can waive a right that can arise in the future. Each user who relies on the human readable summary of license and modifies or shares modifications of the work risks that the original author could object that his consent to alterations was not valid, because he could not legally waive his right to give consent to alteration of his work when he couldn't have foreseen how the work would be altered. Even the wording of Creative Commons unported versions is aware of this possible conflict with legislation and states that *Licensor agrees that in those jurisdictions (e.g. Japan), in which any exercise of the right granted in Section 3(b) of this License (the right to make Adaptations) would be deemed to be a distortion, mutilation, modification or other derogatory action prejudicial to the Original Author's honor and reputation, the Licensor will waive or not assert, as appropriate, this Section, to the fullest extent permitted by the applicable national law, to enable You to reasonably exercise Your right under Section 3(b) of this License (right to make Adaptations) but not otherwise.*<sup>4</sup> This provision can be disputed, however, on the same basis as the provision in which licensor gives consent to alterations of the work. If these provisions were proven to be invalid, it would not cause invalidity of the whole contract, but it could still create a situation where user who relies on the "human readable summary" of the work and acts fully in accordance with this summary breaches the Czech copyright law.

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<sup>4</sup> *Creative Commons Attribution 3.0 Unported* [online]. 2007 [cit. 2008-01-20]. Available at WWW: <http://creativecommons.org/licenses/by/3.0/legalcode>.

This problem could be prevented by choosing more liberal jurisdiction, e.g. the jurisdiction of United States.<sup>5</sup>

## **CC AND ECONOMY RIGHTS [2.3]**

### **VALIDITY OF LICENSE CONTRACTS [2.3.1]**

Like moral rights, also economy rights cannot be transferred to other persons under the Czech law; however the author can grant an authorization to exercise the right to use the work. This authorization can be done by means of a license agreement, which is a special type of a civil law contract. License contracts are governed by section 6, of Czech copyright act and by some general provisions of Civil code in areas which are not covered by provisions of copyright acts. Before 1<sup>st</sup> of January 2007 there were no provisions governing the conclusion of a contract so only general provisions from the Civil code could be applied. This caused many problems arising from the traditional concept of offer and acceptance in Czech civil law. According to this traditional concept, the contract is perfected in the moment when the acceptance of offeree is delivered to the offeror. However this is not the case of Creative Commons license contracts, which presume that the acceptance shall be made by simple use of the work. According to the preamble of all Creative Commons license contracts the user accepts and agrees to be bound by the contracts just by exercising any rights to the work. The user is not obliged to notify author that he has exercised any economic right, so his acceptance is not delivered. Since the acceptance has never been delivered the contract has never been perfected (concluded). As a result of this non-perfection of a contract, the user had no right to use a work which he had already used. This means that all users that acted in accordance with Creative Commons contracts before 1<sup>st</sup> of January 2007 were violating authors' rights in cases where the Czech law applied. Fortunately, the amendment to the Czech Copyright act no. 216/2006 has removed this problem by enacting that the acceptance of a license contract can be made without notifying offeror by acting in a way which is presumed in the offer, especially by performing the contract or by accepting performance. This provision suits perfectly to all Creative Commons licensing schemes so the problem with per-

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<sup>5</sup> The choice of jurisdiction other than Czech Republic would be valid only in contracts with the international element.

fection no longer exists and there is no doubt that the contract is concluded at the moment when user uses the work in a way described in a license.

The validity of Creative Commons contract can be also questioned in the light of article 37 of the Civil code which states that the legal act must be done in a free way, seriously, definitely and intelligibly; otherwise, it shall be invalid. Even though the process of licensing a work is made as user friendly as possible, it is often misunderstood and used improperly and parties can raise objections that the whole licensing scheme was unintelligible. Nevertheless the party in eventual dispute would have to explain why did it decided to license its work under contract that it didn't understood and it would have to prove that it entered the contract in error or under false pretenses. This would be extremely difficult because even though CC licenses may be misunderstood by some users unfamiliar with copyright law, they are not officially promoted or presented by any statements that are contradictory to the content of generated license contract. Another objection could be raised against the validity of the contract due to the indefiniteness of offer, which is made to indefinite subjects. This problem is however solved by a special provision contained in the article 46 paragraph 5 of the Copyright act which states that the offer to conclude a license contract can be made also to an indefinite group of subjects. To summarize, Creative Commons licenses can be legally concluded, however their validity can be questioned in some exceptional circumstances.

### **ECONOMY RIGHTS [2.3.2]**

Czech Copyright act states that the licensor can grant licensee any economic right that arises from the work. The law gives a demonstrative list of economy rights that belong to author, however author's economic rights are not limited to this list. As a result, the author can grant other subjects permission to use the work also in a way which is not described in the copyright act. The scope of license is only limited by the provision that the author may not grant authorization to exercise the right to use the work in a manner which has not been known at the time of the conclusion of the agreement<sup>6</sup>. Creative Commons licenses grant licensee two economic rights:

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<sup>6</sup> Law No. 121/2000 Coll. of 7 April 2000 on Copyright, Rights Related to Copyright and on the Amendment of Certain Laws (Copyright Act) – article 46 (2)

the right to make copies of a work and the right to distribute the work. Both rights are described in the Copyright act and licenses which grant these two rights are standard in the Czech legal environment and are not in conflict with any provision of Czech law, irrespective of whether these rights are granted for commercial or non-commercial purposes.

### **THE IMPACT OF CREATIVE COMMONS ON CZECH LEGAL ENVIRONMENT [3] WILL IT DO GOOD? [3.1]**

According to L. Lessig lawyers rarely test their power, or the power they promote, against the simple pragmatic question: 'Will it do good?'.<sup>7</sup> Please allow me to turn this question against the Creative Commons movement and test it against the same pragmatic question. Will Creative Commons do good in the Czech legal environment? In the previous part I described some possible legal problems that could in some cases question the validity of terms and conditions. In this part I will not focus on legal problems and will analyze positive and negative effects of these licenses in practical life of Czech internet users instead.

Before the existence of Creative Commons and even nowadays, the majority of internet users create their websites, write their logs, share their works and photos by simple uploading without defining the terms and conditions of the use of their work. Under the Czech law, the user can freely download such work, enjoy it, make a copy or even modify it but everything can be done solely for private purposes. The user cannot distribute work, its copies or modifications without the consent of the author. On the other hand, the user can create a link to the work or recommend it to his acquaintances, so he can distribute the work indirectly. Plenty of works are uploaded in a way that can be interpreted as an implied consent to use a work in a certain way e.g. to make copies (e.g. records of local groups and artists) or to distribute it among other users (e.g. chain letters). The differences between licensing work under the most liberal license of Creative Commons can be compared in a following table:

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<sup>7</sup> LESSIG, Lawrence. *Free Culture*, 2004, page 312,



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Criterion	Licensing work under Creative Commons	Uploading work without any license
User friendliness	Licensing is very easy and takes less than one minute	Doesn't take any extra time
Free access of users	Users have access to the work for free	Users have access to the work for free
Copying	Users can make any kind of copy	Users can make any kind of copy but only for private purposes
Share and distribution	Users can share and distribute the work	Users cannot distribute the work unless it is clear from the context that the consent is implied
Attribution	Users are obliged and also reminded to give attribution	Users are obliged but not reminded to give attribution
Modification of work	Users are allowed to modify the work	Users are allowed to modify the work
Distribution of modified works	It is questionable whether users can distribute modified works	Users are not allowed to distribute modified works
Commercial use	The work can be used commercially	The work cannot be used commercially unless it is clear from the context that the consent is implied (very rare)
Good faith of users	Users are properly instructed about their rights and obligations	Users usually do not get any information about their rights and obligations
Rights of the author	The author waives majority of his rights	The author keeps all his rights

When we compare both alternatives, we will find out that the differences between both alternatives are relatively small. Both alternatives make copyrighted work legally accessible to the public, what is in my opinion the most important feature for authors who want to place their work on the internet. Creative Commons encourage users to distribute the work among other users, while “no-license solution” preserves all authors’ rights to the work. The main contribution of Creative Commons phenomenon does not lie in the opportunity to share artistic works by the internet. In my opinion, the main contribution of Creative commons movement lies in the simplicity of how users can express their will, accessibility of such tool to the public, positive influence on the legal culture and support of good faith of users.

#### **SIMPLICITY [3.1.1]**

Works had been legally shared and exchanged via internet many years before the existence of creative commons movement and a large amount of works is still legally available on the internet without being put under Creative commons licensing schemes. The real contribution of creative commons movement lies in the simplicity of how individuals can reserve their rights and set terms and conditions of use of their works. Because the procedure of creating a licensing conditions can be managed by everybody who is able to upload a picture or file on his website, the author can be sure that he expressed his will to share his work in a legally relevant way (Without Creative Commons licenses the author would have neither skills nor willingness to create any terms and conditions). On the other hand, the user is fully aware of how he is allowed to use the work in good faith.

#### **ACCESSIBILITY TO WIDE PUBLIC [3.1.2]**

One of the main reasons why authors upload their works on the internet without clarifying how users can use, distribute or modify these works is undoubtedly the unwillingness to spend time with legal aspects of copyright. The willingness to deal with legal aspects of publishing the work online declines together with the market value of the work. Creative Commons licensing schemes could become an ideal tool for amateur authors who are reluctant to spend much time on creating their own licensing

scheme but could be willing to spend a minute to decide which rights they really want to reserve if the procedure of licensing is enough simple and user friendly.

## **POSITIVE INFLUENCE ON THE LEGAL**

### **CULTURE AND RIGHTS OF COPYRIGHT HOLDERS [3.1.3]**

Creative commons have a real impact on the legal awareness of the society. Recently there has been an increasing interest in creative commons movement which is accompanied by focus of the media which makes creative commons phenomenon more and more known. A focus on the creative commons movement means also focus on the copyright regulation. Since the low familiarity with copyright laws is undoubtedly a significant reason why the rights of copyright holders are so frequently breached in the Czech Republic, anything that can bring attention to the copyright regulation can also help reducing “piracy” and other forms of copyright breach. Boom of Creative commons licenses makes authors aware that each of their creation is protected by law and it is up to them to decide how their work can be used. Thanks to the user friendly environment of Creative Commons license generator, authors (and users as well) can get a good image of their own rights, which can lead them to be aware of other authors’ rights and thus respect these rights more.

### **GOOD FAITH OF THE USER [3.1.4]**

Despite the fact that the licensing schemes could or still can cause situations, where users who rely solely on a human readable summary of a license will find themselves breaching copyright regulation, Creative Commons can still be considered as a rapid step forward in a bona fide use of copyrighted content. Firstly it removes doubt whether the author really gave an implied consent to use a work in a certain way by making it available on the internet. Secondly it gives users rather clear borderlines which designate how they can use the work. Thirdly it identifies who the author of licensed work is, or at least claims to be, so that users can contact author if they wish to extend the copyright license instead of using the work in a wrongful way. This surely isn’t any new element in copyright world, because traditional copyright sign © has a same function. However placing a

copyright mark on a website can deter users from using the work even in a way which is permitted by law. Many users tend to understand works without copyright sign as works on which no copyright protection applies and on the other hand are afraid to use works with copyright sign even in ways which are completely legal. Creative Commons help authors to identify themselves as authors without distracting some users.

### **NEGATIVES [3.1.5]**

Unfortunately, there are also some negative impacts of Creative Commons. Some problems arise from the fact that there is no adaptation of Creative Commons to the Czech jurisdiction, e.g. the problems with the consent to adapt work or with validity of a contract mentioned above, but most problems arise from the misunderstanding of the whole concept of these licensing schemes. My personal experience is that many users who have discovered Creative Commons licenses have licensed the whole page, or if not the whole page, the (cc) sign is always visible regardless of what content is currently displayed to the user. The problem arises when administrators of these websites upload works of other authors to which they don't have rights. In this case the owner of the webpage breaches the law twice, firstly by sharing a work without license, secondly by requesting attribution (which is minimum standard of every Creative Commons license) which could be qualified as claiming authorship of other's work. The user who is relying on terms and conditions of license is also in a bad position, because he uses and maybe distributes work to which he, in fact, has no rights. Another example of how Creative Commons can be misunderstood is the existence of portals which gather works under public domain and license them under Creative Commons<sup>8</sup>. Also a myth of "If I want to make something available on the internet for free, I have to put it under Creative Commons" still persists among some users. These users license their works without realizing that they would be able to keep more of their rights if they simply uploaded their works. It has to be mentioned, however, that users should be

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<sup>8</sup> The most blatant example of this conduct is a Slovak portal [zlatyfond.sme.sk](http://zlatyfond.sme.sk) which gathers works of classical authors and made them available under the Creative Commons licenses. Later, the terms of licenses were revised to a version which licensed only the rights of a person who digitalized the work.

blamed for causing these problems much more than Creative Commons licensing schemes.

A significant problem lies in a fact that many users fail to see that the use of licensed works does not have only intellectual property aspects. As an example of this, even though it is not from Czech environment, we can use a legal complaint on the telecommunication company Virgin which used a photograph licensed under Creative Commons for commercial purposes. Even though the author allowed the use of work for commercial purposes, the Virgin company was sued by parents of the child depicted on the photograph on the basis of invasion of privacy<sup>9</sup>. Fortunately, no such case has appeared in the Czech republic, but users should still be aware that the copyright act is not the only regulation that could be relevant for the use of such work.

The purpose of this part was to demonstrate that even though Creative Commons are good tool for a certain group of users, it can have no relevance or be even counter-productive for other users. So the question “will it do good?” can be answered positively, but not too enthusiastically.

### **IS IT NEEDED? [3.2]**

After we have answered the “will it do good” question, let me ask another question, which is often asked by opponents (but not only by them) of this movement. The question is: Is it needed? Fortunately, we do not have to find an answer to this question when talking about Creative Commons. This question surely has to be answered when talking about legal regulation that will affect group of people regardless of their will, but in a licensing scheme which is completely voluntary, it is up to every author and user to answer this question, and to decide to use it or not. Therefore I hold the opinion that the criticism based on arguments that these licensing schemes are not needed should be rejected, because I don't see anything wrong about giving people some extra options to choose from.

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<sup>9</sup> See The Register. *Creative Commons sued for deception* [online]. 2007 [quot. 2008-01-15]. Available at WWW: [http://www.theregister.co.uk/2007/09/24/creative\\_commons\\_deception/page2.html](http://www.theregister.co.uk/2007/09/24/creative_commons_deception/page2.html); Creative Commons. *Lawsuit Against Virgin Mobile and Creative Commons – FAQ* [online]. 2007 [quot. 2008-01-15]. Available at WWW: <http://creativecommons.org/weblog/entry/7680>

## **CONCLUSION [4]**

Despite the fact that there is no Czech version of Creative Commons licenses, they are becoming popular among the users. The absence of version adapted to local jurisdiction could cause some problems, especially in the process of concluding the license contract and in the area of author's moral rights. However, after recent amendments of relevant Czech legislation, these problems can appear only accidentally. Much bigger threat looms in an improper use of Creative Commons licenses which is frequently caused by poor knowledge of the copyright regulation or by simple misunderstanding of the Creative Commons concept. However, it is obvious that Czech internet community benefits from the existence of this licensing tool and that Creative Commons have good influence on the development of Czech legal environment.