The problem with the validity of on-line copyright licenses under Turkish law

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"In addition to the requirement of written form, any transaction or notice aiming at the relinquishment of copyright and thus releasing the work into the public domain further requires the notarization of the written form as a condition of validity."

Under Chapter IV of Law No: 5846 (1) on Intellectual and Artistic Works, the Turkish legal system (2) lays down provisions pertaining both to license contracts and other transactions aiming the transfer of authors' rights in rem.

Turkish copyright law makes a distinction between license contracts that grant a right to use the work in a certain manner and those that aim at the actual transfer of the rights in rem, namely the passing of property, the economic rights of the author. However, such a distinction has a limited effect in terms of scope since contracts for the transfer of economic rights may also be limited in terms of duration, territory or the scope of the rights being transferred. Both types of contract may be drafted to achieve similar legal results.

Unless otherwise provided by law or contract, license contracts are deemed to be non-exclusive (3). Without express written consent, exclusive or non-exclusive license holders may not grant sub-licenses or authorize others to use the work. It is a matter of dispute whether a licensee may bring legal action against third parties violating the economic rights granted by the license. In several judgments, the Turkish Court of Appeals(CoA) has recognized the right of action against third parties for exclusive license holders even though they were not expressly granted such authority in the license contract (4).

"Authors may not transfer economic rights or grant a license on future works before the economic rights come into existence upon the completion of the work."

With regard to incomplete or future works, authors may only enter into contracts in which they undertake to transfer economic rights or to grant a license. Authors may not transfer economic rights or grant a license on future works before the economic rights come into existence upon the completion of the work. In case of the author's failure to fulfil a contractual commitment pertaining to future works, a claimant may only ask for compensation but cannot obtain the license or economic rights through a legal action. Similarly, license contracts which pertain to prospective rights to be granted by future legislation will have no legal effect (5).

Mandatory written form for license contracts

License contracts take effect under the general notions of offer and acceptance as provided by the general principles of contract law (6). As a general rule, no formalities are required for a contract to be valid. However by virtue of Article 52 of the Law No: 5846 on Intellectual and Artistic Works, a contract purporting to transfer authors' rights or to grant a license on those rights is subject to written form as a condition of validity.

Accordingly any contract pertaining to the transfer of copyright shall have no legal effect unless made in writing, to be more precise, unless fixed in a permanent medium in eligible language and signed by the parties.

In case of online contracts, only an electronic signature satisfies the requirement of written form and apart from this, Turkish copyright law provides no alternative legal remedy.

Having said that, a possible remedy may come into play as a judicial intervention in the event that the court declares the assertion of lack of written form to be contrary to the principle of good faith. Under the general principles of private law, the court may choose to ignore this requirement due to the implied covenant of good faith. Although the requirement of written form is regarded as a strict author protective rule, in a judgment from 1999 the Turkish Court of Appeals (CoA) decided that, under limited and exceptional circumstances, the principle of good faith could preclude the author from declaring the license ineffective retrospectively (7). Nevertheless, intervention through the principle of good faith is seen as a final and exceptional remedy which courts apply with utmost caution.

Mandatory notarized form for transactions aiming the relinquishment of copyright

In addition to the requirement of written form, any transaction or notice aiming at the relinquishment of copyright and thus releasing the work into the public domain further requires the notarization of the written form as a condition of validity.

"There is enough reason to be optimistic that Turkish courts will comprehend the true nature of these licenses and not treat them as waivers subject to further notarization."

This additional requirement may be troublesome in cases of free and open source licenses (e.g. GNU-GPL, BSD, Creative Commons). Given the fact that free and open source licenses aim to grant certain economic rights free of charge and for unlimited duration, and with a rather blunt interpretation, they carry the risk of being found akin to a waiver of copyright that makes a work public domain and thus, being subject to notarization. That being said, in fact free and open source licenses are not unilateral acts and furthermore, they do not intend to release the work into the public domain (8). Moreover, taking into account that many public bodies consider the use of works governed by free and open source licenses, there is enough reason to be optimistic that Turkish courts will comprehend the true nature of these licenses and not treat them as waivers subject to further notarization.

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This blog post is a revised summary from the chapter by Emre Bayamlıoğlu, National Report :Turkey in Free Software and Other Alternative License Models: A Comparative Analysis, Axel Metzger (Eds.), March 2015, Springer Science+Business Media. Forthcoming.

(1) Throughout the life of the Turkish Republic numbers given to statutes was reset three times, each marking a milestone in Turkish political history. The last reset was in 1961 and currently there are two statutes each bearing the number 5846, one is the 1951 Law on Intellectual and Artistic Works and the other is the 2009 legislation regarding the ratification of a bilateral agreement with Egypt.

(2) Although Turkey became party to Berne Convention in 1952, it was in 1995 that Turkey fully acceded to 1971 Paris version of the Convention. Today, with regard to the protection of copyright, Turkish law may be said to be in line with the principles laid down in the Berne Convention, TRIPs and the Rome Convention.

(3) Legal scholars dispute as to the legal nature of the rights granted by exclusive licenses. Özge Erbek, "Fikir ve Sanat Eserlerine İlişkin Lisans Sözleşmesinin Hukuki Niteliği", Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, Volume 11, No. 2, p. 1-68.

(4) However this question has not been resolved definitively. For more information see ibid. p.50-51.

(5) Article 51.

(6) Turkish Code of Obligations ("CoO") Law No: 6098

(7) Yargıtay 11. Hukuk Dairesi (Court of Appeals 11th Civil Chamber) 1998/10031 K. 1999/250, 29.01.1999

(8) Creative Commons type CC0-zero- is an exception since it clearly purports to make the work of public domain.