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OPEN SOURCE: THE RUSSIAN EXPERIENCE (LEGISLATION AND PRACTICE)

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OPEN SOURCE: THE RUSSIAN EXPERIENCE (LEGISLATION AND PRACTICE)[†]

The emergence of so-called "free" or "open source" software and the growth of its economic importance in various industries makes questions regarding the legal status of free/open source licenses especially important. In December 2010 new draft amendments to the Russia's Civil Code were published, introducing new concepts in order to reflect the ideas pursued by these types of licenses. This article analyzes existing problems with the legal status of free/open source licenses, whether proposed amendments may solve them, and what risks they may create. Since Russia is among the first countries trying to include provisions on free/open source licenses in its legislation, such analysis may be of interest to foreign lawmakers since the concept of open source is universal all over the world.

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1. Introduction.

The Internet's growth during the past decades has profoundly affected the way software is created and distributed. One of the most significant developments in this area is the emergence of so-called "free" or "open source software" (open source), which is distributed under a special type of license, commonly referred to as a "free" or "open source" license[1]. Usage of this type of license helps to make a computer program widely available for use, as well as allow for the modification and subsequent distribution in both source and object form with a minimum number of constraints. Despite the fact that open source software started to emerge in the early 1980s, only in the last decade has its popularity increased to the extent that enables open source software to compete with traditional commercial proprietary software products. Most of its success is made possible thanks to the Internet, which provided a unique opportunity to create more cost-effective software and an efficient way for programmers to collaborate on software projects, as well as distribute the resulting software among themselves and to customers.

Open source attracted some attention in the Russian legal doctrine, resulting in many interesting publications and discussions relating to the legal status of open source licenses and various legal aspects of their practical use[2]. Needless to say that all these discussions are not only of academic interest. The volume of use for such software around the world, including Russia, is growing due to a number of factors.

1) *Value for end-users*. Many software products licensed under open source licenses are worthy rivals of their commercial counterparts, being not only more functional, but also much cheaper to maintain[3]. One key feature of open source software is the absence of an obligation to pay any fees or royalties for the right to use the software[4]. This enables multiple users to significantly reduce their costs of maintaining IT-infrastructure, as well as to minimize the risks associated with using pirated software in organizations.

2) *Value for vendors and independent software developers*. Many commercial software vendors often use the code distributed under open source licenses to develop its own software. It is much

easier and more efficient than re-inventing the wheel by trying to solve a problem that has already been solved effectively. In this case the vendor needs to ensure that all parts used in the resulting software product are used on a sufficient legal basis, since the presence of code with doubtful legal status may compromise the overall product and decrease its commercial value. Open source software may also be the basis of business models for many IT-companies. For example, some companies created successful business based on providing various services to the users of open source software (implementation, integration, education, support, etc.)[5]. Other companies sell hardware that is tailored for work with open source software, such as Linux, Android, and others.

3) *Value for promoting open standards and open architecture of Internet*. It is a well-known fact that most of the fast-growing Internet infrastructure is based on open source software[6]. In this context, open source plays a significant role in further developing the Internet and its architecture by effectively preventing its control by any single entity[7].

4) *Value for state*. Open source software is beginning to be increasingly used by states. It helps not only to save budgetary money, but also provides easier opportunities to adapt software to the specific needs of public entities while still remaining technologically independent from a single vendor (often a foreign resident)[8]. Russia has a plan for the transition of federal government bodies and federal budgetary institutions to the use of free/open source software for the period of 2011-2015 years[9].

5) *Value for research institutions.* Finally, it is necessary to mention the considerable potential that open source software and free licenses have in the field of scientific research. Dissemination of the results of such activities under conditions ensures reproducibility and, in turn, the possibility of further free usage in research activities plays an important role in the development of scientific cooperation. Classic copyright instruments may sometimes create unnecessary obstacles to the dissemination of scientific knowledge. Open source software's experience represents a successful model that demonstrates that IP licenses could eventually be used to protect against the misuse and misappropriation of basic scientific research[10].

However, despite the significant socio-economic importance of open source software in modern society, its practical use in Russia is associated with some difficulties caused by the uncertain legal status of free/open source licenses. This uncertainty is mostly caused by a lack of understanding of the specifics of relationships that are governed by such licenses and their correlation with traditional proprietary licenses. Such a misunderstanding on the part of public authorities (i.e., the courts and tax authorities) often leads to a failure to acknowledge the legitimacy of these licenses. After conducting an audit of software, police authorities claimed that using open source software constituted infringement, citing an absence of hardcopy licenses and other written documents that normally certify legal use. After clarifications from the Russian Ministry of Economic Development that the use of software under GPL license does not constitute infringement, provided that the user complies with its terms[11], the usage of open source became much safer from a public-law perspective.

However, one letter from the Ministry cannot overcome the formalism of existing Russian legal doctrine, which still resembles the Soviet approach to resolving legal issues ("what is not explicitly permitted under law is contradicting it and therefore prohibited"). Existing peculiarities on the conclusion and performance of obligations arising under open source licenses often provide a basis for conclusions that such licenses do not fit into the existing Russian legal system. Needless to say that such an uncertainty creates additional barriers for the use and distribution of open source software in Russia, not only for end users and developers of commercial software, but also for the scientific community.

In order to remedy the situation, some amendments to existing legislation were proposed in order to advance the free dissemination of creative works and usage of free/open source licenses in Russia. These amendments were prepared by an order of former Russian President Dmitry Medvedev, who devoted much attention to the potential of free/open source licenses[12].

The rest of the article will be dedicated to an analysis of the suggested amendments, what problems they intend to resolve, and what impact they may have on the development of open source in Russia. Taking into account that Russia is one of the first countries to try to deal with

free/open source licenses on a legislative level, its experience may be of interest for other countries that are facing many problems while dealing with such licenses similar to those in Russia.

2. Existing legal problems with free/open source licenses under Russian law.

There are many different legal issues associated with the use of free/open source licenses. They may have various legal impacts on the validity of open source licenses, thus posing different types of risks on interested parties. All legal issues may be summarized in the following list of problems:

Identification of the parties. It is claimed that existing mechanisms for accepting open source licenses can neither ensure that an authorized person grants a license, nor can it ensure the identification of the end-user.

Identification of a license's subject matter. It is claimed that sometimes it is difficult to identify a specific work of authorship that is subject to license terms, especially if such terms dictate the use of the same license for works based on the licensed one (so called "reciprocal" open source licenses).

Compliance with requirements to form a contract. It is claimed that the existing mechanism of concluding open source licenses cannot be constituted in written form according to Russian law, thus making such licenses unenforceable.

Compliance with limitations on gratuitous contracts between commercial companies. Russian law contains a restriction on the signing of gratuitous contracts between commercial entities[13]. Since the concept of "gift" is understood very broadly under Russian law[14], granting rights under a license agreement may fall within such a restriction. This blocks the use of open source licenses between Russian commercial entities, making such licenses unenforceable.

Conflict between the moral right to integrity and the right to create derivative work. The problem here is that moral rights in most countries of continental law (including Russia) are

inalienable and cannot be limited by contract. Many open source licenses grant the licensee the right to create derivative works that may conflict with the moral right to integrity, under which changes to the initial work are subject to the consent of the original author[15]. So, even in cases when the licensee has the right to create derivative works, the author still retains the right to control changes based on his moral right to integrity, thus creating additional risks for the licensee. There is no way that moral rights can be waived or limited contractually.

Enforceability of viral provisions of reciprocal licenses. Some open source licenses contain the obligation to use the same license terms for derivative works as for the original one, thereby "infecting" the new pieces of code that are combined with the initial code in the resulting product (so-called "viral" provisions). Such provisions limit the freedom of the author to define the terms of disposal of his or her newly created works and are potentially invalid[16]. Since such viral provisions form the "core" of many open source licenses, the invalidation of such a provision may lead to the invalidation of all licenses.

Since Russia is part of the continental system of law, it does not have a concept of "consideration", which as essential for contract formation under common law. Therefore, discussions relating to the presence or absence of consideration in free/open source licenses, which can be frequently met in the Anglo-American doctrine, are not relevant for Russia[17]. If an agreement between parties is specific enough to constitute what in English law is called a "meeting of the minds" and complies with legal requirements as to the form, then it is enough to constitute an enforceable contract. But, as it may be seen, the list of other problems subject to consideration is quite substantial, even without discussion on the concept of consideration.

3. Description of suggested amendments to the Russian Civil Code that might facilitate ideas of open source licenses.

3.1 Introduction of a waiver of exclusive right to a work of authorship.

Draft of § 1283.1 Waiver of exclusive rights to work

"The copyright owner is entitled to waive his exclusive rights to a work of science, literature, and art in full amount. In this case, such a work is considered to be in the public domain. Such a waiver should be done in a notarized form or in a form of public statement made by the copyright owner. The statement of waiver must contain information necessary to identify the copyright owner and the work in respect of which the exclusive right is waived.

If the above statement is made when there is a valid license granted for such a work, the copyright owner should compensate losses caused to licensee by such a waiver.

Reversal of any property rights to published works put legally in the public domain is not allowed."

One of the misunderstandings frequently shown by those who are not deeply familiar with the open source topic is mixing the ideas of free/open source licenses with that of the public domain[18]. The misunderstanding can be simply stated as "if it is so necessary to ensure the widest possible dissemination of copyrighted work, then just place it in the public domain, thereby forfeiting your exclusive right to it. Is it not the same thing you are trying to achieve by using open source license?"

Russian law does not contain explicit provisions authorizing a copyright owner to waive his exclusive right. General provisions of the Civil Code provide that "the refusal of citizens and legal entities to use their rights does not result in the termination of those rights, except as explicitly indicated by law."[19] Since the law does not explicitly provide for the termination of exclusive rights when there is a refusal, it is generally considered impossible to put the work in

the public domain voluntarily. It may appear in the public domain only upon expiration of the copyright term or as a result of the absence of any heirs to such a copyright.

It is not surprising that the idea of introducing the possibility of such a waiver was among the first solutions of the problem with open source: Why should one use a complicated legal instrument if it is possible to achieve the same goal by simply waiving his or her exclusive right to it?

Indeed, one must agree that a waiver of exclusive rights and free/open source licenses do pursue some similar goals. For example, they help to make the work available to the widest possible audience. The option to make a waiver in an informal way by making a relevant public statement in the Internet helps to reach this goal.

However, there are important distinctions between the public domain and free/open source license that at some moment justified the emergence of this separate concept of license.

An open source license provides the author with a mechanism that is more flexible when adapted to a specific situation and to particular needs. The author may be interested in retaining some kind of control over how the work is further distributed or revised. For example, if he or she wants to ensure that all derivative works are also freely available to others and are not "locked" after some modification by a savvy commercial company[20]. Or he or she may wish to be on the safer side by including some limitation of liability or warranties statements that should be re-translated in any subsequent license agreements involving the initial work[21]. Or perhaps he or she may wish to ensure that all the members of community developing specific software are granted necessary rights to continue such development and granted rights (including on relevant patents) necessary for such continuation[22]. The public domain does not allow one to put any conditions on the use of the works within it, except for some limited obligations to respect the moral rights of the authors.

Of course, some positive effect from the described amendment is expected since, after all, it introduces an additional degree of freedom for copyright owners on how they may dispose

their exclusive right. Practice knows the facts when important copyrighted works were dedicated to the public domain,[23] so such additional options are welcome.

But introduction of the waiver concept does not by any means solve the question relating to the legal status of already existing free/open source licenses, under which pre-existing works are distributed.

Therefore it is worth looking at other proposed amendments, which are going to facilitate the ideas of free/open source licenses in Russia.

3.2 Introduction of the concept of "self-limitation of exclusive right".

The full text of the suggested amendment is as follows:

"Article 1235 (6): The owner of exclusive rights may make a statement granting to any person the right to use his intellectual property under specific conditions and for a period specified by such an owner. Within such a period, any person may use such intellectual property in accordance with the specified conditions.

Unless otherwise indicated in the statement, such a period constitutes five years.

Unless otherwise indicated in the statement, the territory will be the territory of Russian Federation.

The owner of exclusive rights is not entitled to make such a statement if there are valid license agreements granting the same scope of rights for a fee.

Such a statement can be done on the official website of the Federal Authority on Intellectual Property. If relevant intellectual property is subject to registration, information about such a statement should be included in the relevant state register.

Within the validity period of such an application, it cannot be withdrawn or changed. The provisions of this paragraph shall not apply to the intellectual property for which the Code establishes special procedures for granting an open license (Articles 1368 and 1429)."

As it may be seen from the text of the proposed amendment, the idea is to create some kind of centralized depository of "free" works, where any interested party may either place his or her work or where he or she may find something interesting for subsequent use. As discussions with the authors of this amendment showed, such a solution reflects their view that "free licenses inevitably conflict with our country's legal system, which can be remedied only by making very substantial changes in the law"[24].

All this raises a number of questions. Are free licenses really so unique that they cannot be squeezed into the existing Russian law without substantial revision? Will not the proposed amendments cause problems much more serious than those that currently exist and act as obstacles for the use of free/open source licenses in Russia, according to the drafter's view? Finally, will the proposed mechanism really promote the use and development of open source software in Russia? Let's try to find some answers.

First, the concept of self-limitation of exclusive rights means that it is not a bi-lateral contract, but a unilateral act. Thus, relevant relations automatically acquire non-contractual status. A number of consequences follow from such a qualification.

When we designate a certain act as being unilateral, we limit ourselves in the application of contract law provisions. At the same time, the concise regulation of such one-sided deals will inevitably require supplementing it with something. For example, some contractual remedies, such as specific performance, may be of value for enforcing the term to provide the source code for modifications made (copyright law does not have relevant provisions). Besides this, existing default rules that are applicable to license agreements may be useful, too. The mere fact that some of the were copied and pasted into the draft of the proposed amendments[25] just confirms that any unilateral voluntary act related to the disposal of exclusive rights cannot be completely isolated from a legal regime of licenses perceived as a bi-lateral contract.

Qualification of a certain act as unilateral also has its consequences from the point of view of private international law. The presence of a foreign element in open source relations creates the basis for choosing the applicable law for a relevant license agreement. Russian law

allows significant autonomy of will in this matter, authorizing the parties to choose any foreign law they consider appropriate (even one that has no connection with the contract at stake)[26]. Taking into account the fact that open source movement exists in the Internet, such freedom to choose an applicable law to licensing relationships helps to provide certainty and predictability for relationships. Especially if the chosen governing law is open source-friendly. Qualifying relevant relationships as a unilateral deal prevents the application of contractual statute, which would limit the autonomy of will of the parties that are subjecting the relationship to the statute of intellectual property, which is imperative by its nature.

Another important concern arising from introducing this special public resource/register is protection of third parties who relied on the data provided in it.

The issue of identifying individuals is a well-known problem of the Internet. Considering the fact that copyright appears upon creation of a work without any need to register, anyone may claim that he or she is the author of a work and make a statement of self-limitation of rights. Based on such a statement placed in a resource that belongs to a state authority, all other users may start to use the product if they act in good faith. But what is to be done when the true copyright owner appears and wants to protect his rights? Whose rights should prevail: those who relied on information and acted in good faith, or the rights of copyright owner? In Russia, as in many other countries,[27] there is no such defense against copyright infringement as acting in good faith without knowingly violating someone's right[28]. From a strict legal point of view, any such unauthorized user is infringing copyright regardless of the fact that he used the information available on some kind of public resource.

So we have a situation when someone who said "A", through the creation of such a centralized depository of public works, should say "B" as well and develop the concept of acquiring non-exclusive rights in good faith. But it is not being contemplated in amendments to the Russian Civil Code. And the possibility of such a mechanism deserves a separate detailed study.

Second, it is evident that the proposed decision reflects the typical Russian desire to "find its own way" and is not based on a deep analysis of foreign practice of using free/open source licenses.

Russian intellectual property legislation is not so unique and for the most part reflects existing provisions of international agreements in the IP sphere, which Russia is a party to[29]. According to the Constitution of the Russian Federation, such an international agreement forms a part of the Russian legal system[30]. At the same time, other countries with close legislative provisions have already faced many similar problems with open source licenses. And foreign courts managed to solve them successfully within the existing legal framework, which was adopted at a time when no one even heard about software, let alone free/open source licenses. Of course, such a result required some degree of flexibility and creativeness in the application of such a law to a new type of relationship, but courts usually have such a level of discretion.

One of the first countries where the validity of the open source license (in this case GPL) was "tested" was Germany, a country whose legal system for various reasons is one of the closest to the Russian system[31].

While under judgment, the defendant was forbidden to distribute, reproduce, or make publicly available software Netfilter/Iptables due to a breach of license conditions of GPL ver. 2. The court noted that it has "no doubt that conditions of the GPL license, being the standard terms of the contract (allgemeine geshäftsbedingungen), have become a part of the contractual relationship of the parties in accordance with § 305 (2) BGB[32]". Another German court reaffirmed that a GPL license is compatible with German law. The fact that these GPL conditions were easily accessible on the Internet allowed the court to conclude that they have become part of the contract. As a result, the plaintiff was awarded for compensation of costs incurred as a result of examination of the defendant's code in order to find a violation of license conditions[33].

The French court also did not have substantial doubts about the validity of GPL license within the context of French law. The Paris Court of Appeal found company Edu4 liable for

breaching the terms of the license relating to distribution of the software in object code, since no possibility to obtain the source code was provided[34].

In the US the main precedent relating to the legal status of open source licenses is the decision in Jasobsen v. Katzer[35]. As was established by the court, the defendant used the software code developed by the plaintiff and licensed under Artistic License as a part of his own commercial product with a violation of license terms. Specifically, he did not indicate the plaintiff as the author of the used portion of code, did not make a link to the website of the author, and did not describe the changes he made in the original code. The court acknowledged that by doing so the defendant both breached license terms and infringed the plaintiff's copyright.

The above cases provide a bright illustration of the fact that, if needed, free/open source licenses may be squeezed into the existing law, which was adopted long before the emergence of the phenomenon of open source. One of the reasons is the fact that an open source license is not some kind of unique legal concept; it is just a type of a license agreement. The difference between a "classic" proprietary license agreement and an open source license is in emphasizing different aspects of exclusive rights: in the first case the "negative" one is emphasized (the right of a licensor to "exclude" others), while in the second case a "positive" one is emphasized (the right to grant rights to use the work within defined limits). Based on this, the terms of relevant license agreements differ accordingly, but the essence of the relationship remains the same.

Therefore, as foreign experience shows, there is no principle needed in order to create some kind of mechanism parallel to open source licensing, or to make major revisions of law, only because of the fact that existing legal provisions lack some specific clauses on these licenses. Courts may breathe new life into "old-school" statutory provisions by way of their broad interpretation.

Now it may be useful to return to the existing issues with free/open source licenses that are outlined above and ascertain whether these issues are as critical as drafters claim or whether they are quite manageable.

The problem of identifying the parties to the contract is partially solved by the fact that all open licenses encourage providing information about the author, who will usually be the owner of exclusive rights. Such information may be included in the source code, supporting documentation, or a computer program's audiovisual displays. Such license terms are aimed to ensure that users are aware of the identity of the author of the code[36]. Even if information on the author is not indicated somewhere in the code, the right to publish the work anonymously is not abolished and is applicable for computer programs as well. After all, the author is the master of his rights and ultimately decides how to use them.

It is easy enough to identify a licensee, especially when a dispute arises. As a general rule, a licensee will be any person who uses a computer program that is distributed under an open source license. With the exception of a very limited number of situations where law authorizes free usage of the work, most ways of how the work may be used require the consent of the owner of the rights, thus requiring the user to have the status of licensee and indicate the acceptance of the terms for the respective license. So, open source users have little to gain by denying the existence of a contract unless they are willing to be accused of copyright infringement.

Besides this, Russian law, like many other jurisdictions, considers many contracts that are concluded in everyday life in the absence of an express identification of parties to be legally enforceable. As an example, one may specify a contract of purchase and sale of goods using coin-operated machines, service contracts entered into by purchasing tickets, contracts of carriage by public transport, and others. After all, a lack of clarity on the identity of the party to the contract is a matter of fact to be resolved within the litigation process, which does not itself challenge the validity of the relevant agreement as such. But even in cases of litigation, the identification of parties to open source licenses is not a serious issue, according to Lawrence Rosen, who states that "litigation about contract formation issues probably won't arise in commercially relevant situations"[37].

Similar considerations may provide for the problem of identification as a subject matter of an open source license. Like a click-wrap or shrink-wrap license, an open source license accompanies specific computer programs, being either attached to its source code or an object code. Whether the relevant license provisions apply to derivative works is a matter of interpreting existing copyright law, which is not unique to open source licenses only. And again, it is a matter of facts for each individual case, which cannot in and of itself be enough to claim an open source license to be invalid.

The problem of compliance for an open source license with existing requirements is to form a contract that can also be solved within the existing framework of the current legislation, which is flexible enough, meaning that there is no need to introduce some additional amendments to address this issue.

The general provisions of Russian contract law allow for a contract to be formed not only in the form of a single document signed by both parties or by an exchange of documents, but also by acceptance of a written offer via conduct. In the context of open source licenses, we have the author's written offer to use his or her work under an open source license (e.g., by placing it on specialized Internet sites such as SourceForge.net) that is addressed to everyone. Placing a notice in the source code, documentation, or audiovisual displays of a computer program on the applicable type of open source license (BSD, MIT, GPL, etc.) incorporates essential terms of offer via reference. Beginning to use software constitutes an implied acceptance of such an offer and, as a consequence, the conclusion of the license agreement. Under Russian law, the written form is considered observed in such a case. Besides, Article 1286 (3) contains specific provisions for shrink-wrap and click-wrap licenses by explicitly authorizing such types of license agreements. Therefore, there are no valid reasons to claim that open licenses lack required legal form. Although formation of open source license has some specifics (interpretation of the offer, incorporation of contractual terms, etc.), there is nothing so extraordinary in it that cannot be resolved without amending the existing law.

As for possible implications of the existing restrictions on gifts between commercial organizations, it is possible to overcome this problem by interpreting existing legislation in a way that makes these restrictions not applicable to license agreements. Since in the open source sphere there is no potential detriment to the interests of creditors resulting from the presence of such agreements that justified the inclusion of such restriction some time ago,[38] there is no need to apply it. Such an approach may be justified by reference to a different essence or substance of the license agreement as compared to a gift agreement. Since many free/open source licenses have obligations that the licensee must comply with, it also may be a basis for concluding that it is not a gift contract.

It is noteworthy that proposed amendments to the Civil Code contain specific provisions prohibiting only exclusive licenses and assignments of exclusive rights between commercial entities, thus *a contrario* authorizing the conclusion of non-exclusive licenses without any restrictions.

As we can see, many of the so-called "problems" with open source are not really so fatal that they cannot be resolved without substantial amendments to the existing law. The only visible exception to it are "patent" provisions of various open source licenses, under which the licensee receiving rights according to such licenses grant other users rights to patents that may be infringed by using licensed software. Such provisions were included in open source licenses as a response to threats posed by software patents that may cover some functionality of open source software. Under these provisions, the copyright license automatically terminates when the relevant claim is brought against open source software users, thus making the claimant a copyright infringer[39]. While the efficiency of such provisions is yet to be tested in courts, it is possible to say that under Russian law such provisions will be hardly enforceable due to the mandatory requirement that all patent license agreements are subject to registration in the Russian Patent Office. Without such registration they are void. It is quite different from US approach, where patent license agreements are not subject to registration and are not covered by

US federal law: once the patent is granted, it becomes an ordinary asset and any licenses would be covered by state laws.

So, relevant provisions of open source licenses granting patent licenses will be unenforceable if related to Russian patents[40]. And this really can be changed with substantial changes to Russian patent law, which are not yet being contemplated.

Now it is worth taking a closer look on how rights flow in various open source projects and whether this may be a problem. Open source software is distinguished from most other commercial software because its development frequently takes place collaboratively among many individual developers, working alone or for different companies, without contracts or other formal arrangements between them[41]. The open source community may number in the hundreds and even thousands of members, each of which may act as a licensor and a licensee simultaneously. Each member not only uses what others created, but also contributes his own share in the final result ("contribution"). Such a contribution may relate to added functionality, fixing a mistake, or other improvements to the code.

It is really difficult to ascertain the status of such contributors from the point of view of classic copyright law. There are two main options: Either they are co-authors of a joint work, or they are the authors of derivative works – which itself is a separate object of copyright. Correct qualification of the existing relations between open source contributors is important for understanding the scope of discretion, which a contributor has for disposal of his result. If he is a co-author of the resulting program, then under Russian law he may conclude license agreements only with the consent of other co-authors[42]. If he is an author of a derivative work that is based on previous works created by other contributors, then he is the ultimate decision-maker on the questions related to disposal of his work, provided, however, that he does not violate the rights of the original copyright holders[43].

However, these questions are in most cases not relevant for open source projects because they are structured around having only one license that governs all relations between contributors and serves as the universal law between them, governing not only their status but

also the status of the created code. Therefore, in practice it really makes little difference whether a contributor is a co-author of a joint work or an author of derivative work – the limits of his discretion towards his created result are defined by the open source license, not by him. And its terms are mandatory for him since without its acceptance he could not even become a user, let alone a contributor. It is also important to understand the implications of terminating a user's or a contributor's open source license due to its being breached. For example, should a subsequent user's license that is obtained from such a breached user be terminated, or should other users lose their right to use modifications created by a violating user? From a strict legal perspective, terminating the license of one user leads to the termination of those licenses granted by him to subsequent users. But it is evident that such an approach does not consider the specifics of relationships existing in the open source community and can be simply unfair. However, some open source projects and corresponding licenses try to adapt rigid copyright rules to the specifics of the collaborative nature of open source.

When someone wants to make a contribution to an existing open source project, he should first accept the terms of the relevant open source license agreement. Without it, he cannot create modifications to it. So, such a contributor inevitably becomes a licensee. The most popular open source licenses relating to popular open source projects contain provisions governing the status of contributions and the rights to them that are provided to other users and contributors[44]. So all other members of the open source project that are simultaneously licensees of the relevant license automatically receive relevant rights to the modifications created by any other member (contributor) as soon as such a modification is published. It means that they can include such modifications in their own code and distribute them further. The subsequent termination of a contributor's license for breach does not challenge the rights already received under the applicable open source license by other contributors or users. Another substantial role apart from the license itself is played by the project coordinator, which is usually represented by a non-commercial entity. This entity not only defines the "rules of the game" (terms of open source license) and controls compliance within them, but also sometimes concentrates necessary

rights on contributions,[45] thereby creating a "back-up" plan for situations when for some reason the relevant rights cannot be obtained directly from a contributor. In these cases, rights may be obtained by users and contributors from the coordinator itself, who received the given rights from the authors of the relevant contributions. Uniform license terms ensured by a project coordinator then create necessary conditions for a dynamic and free flow of rights among all the members of the projects: from contributors to users and other contributors directly and/or via the project coordinator. Although such a mechanism is rather original and not typical for classic commercial licensing, it still has a basis in copyright law and there is no need to introduce major changes to it. So, there is no justified reason to create any specific legal mechanism similar to open source licenses, motivating it by the impossibility of existing law to embrace such licenses.

In summation, it is possible to say that the discussed draft of the amendment is a good example of a situation wherein an attempt to resolve some issues proves to create more problems than solutions, especially taking into account the fact that solutions may be found much easier. It also does not anyhow shed light on the legal status of existing open source licenses: It is not clear how they should be treated if such a parallel mechanism of self-limitation of rights is introduced in Russian law. The mere fact that such an exotic solution was suggested may be used as an argument that it is the only possible way that an author in Russia may disseminate his works to the largest audience possible while retaining copyright and some degree of control over the work and its use.

It is not surprising that other amendments were suggested at some time. In addition to the concept of a waiver of non-exclusive rights and self-limitation of exclusive rights, it has also been suggested to include the concept of "open license" in Russian law.

3.3. Inclusion of an "Open license" concept in Russian law.

The Russian Association of Electronic Communications, the Skolkovo Foundation, Wikimedia Russia, and the Association of Internet Publishers all proposed this suggestion. All these companies were concerned about the legal status of free licenses not only regarding

software, but also in other spheres of copyright, where the most important type of license is Creative Commons.

The text of the amendment appears as follows:

"Article 1286 (6). *The license agreement under which the Licensor grants the Licensee a simple (non-exclusive) license to use works of science, literature, or computer programs may be concluded under a simplified procedure (open license).*

All terms and conditions of such a license agreement should be available to the public, in particular, by displaying on a computer screen, and are placed such that the licensee had the opportunity to review them before using the relevant work, if the license is not otherwise specified.

The terms of such a license agreement may be defined by customs. The licensor may indicate what acts shall constitute acceptance of the terms of a license agreement. In this case, the written form of agreement is considered to be observed.

In particular, the beginning of the use of a computer program or a database user, as defined by these conditions and acceptance by the conclusion of a license agreement."

These amendments serve the purpose of legitimizing free/open source licenses in Russia by giving state authorities a direct "signal" that they are just a type of license agreement along with shrink-wrap licenses, which are also mentioned in this article.

It also intends to make the notion of open license universal and applicable both to software and to other objects of copyright (works of literature, science, and art). But, as a consequence of this generalization, there is no clear definition of what an open license is. Paragraph 7 of the draft of article 1286 of the Civil Code simply points out that "the subject of an open license is the right to use the appropriate product within the limits specified in the agreement." But it is a well-known fact that the right to use the object within the established limits is characteristic of any license agreement.

Unfortunately, the features of the definition of open source or free software provided by the Open source Initiative or Free Software Foundation were not reflected anyhow

in the proposed amendments possibly due to the fact that the concept of "open license" both in software and outside have substantial differences. Since there is no source code, the access to which plays a key role in modification of the computer program and which caused the whole open source movement to appear, open licenses in the sphere of literature and other classic copyright objects are different. As a result, the Creative Commons license was not intended to apply to computer software[46].

The main consequence of having no legal definition for an open license in the proposed draft of the amendments is that it leads to significant uncertainties regarding the applicability of a special regime of such licenses. How can efforts to legalize open licenses in the Russian legal system be successful if Russian law lacks clear understanding of what an open license is?

Returning to the conclusion that the content of license terms makes a free license different from the usual "classical" license, the definition of an open license should be formulated by reference to these specific terms. If we are talking about free/open source licenses, then its specifics may be summarized as follows. *An open source license is an agreement that permits licensees to copy, modify, and distribute the program without payment of fees or royalties both in an object and a source code that is generally available.*

Besides, it is necessary to remember that the recognition of open source licenses depends highly on its recognition by the Open Source Initiative. License, based on principles, different from those which are generally accepted by open source community will hardly be accepted by such a community in practice, regardless of the degree the government support of such license in a particular country. So, a question whether a license may be regarded as an "open source" one, should be based on the established practice and opinion of the open source community.

Given the differences between open source software licenses and open licenses in spheres outside software, if one wants to include respective concepts in legislation, it would make sense to have two definitions of relevant open licenses: one for software, and another for other copyright objects. Otherwise attempts to squeeze both types of open licenses into one definition

may lead to the omission of important features for such licenses and, as a result, and the license might lose its definitive nature.

The proposed legal regime includes:

- *Additional provisions relating to the formation of an open license*. For example, license conditions should be available prior to its acceptance. This requirement is likely to be borrowed from US case law dealing with the validity of shrink-wrap and click-wrap licenses[47]. This is not bad in and of itself, provided that this provision will be accompanied by the flexibility that has been demonstrated by US courts. Not all open source software contains the license text appearing during installation or usage. The very text of the license can be presented in a separate file in the program folder, or can be made via a reference resource on the Internet, where those interested may familiarize themselves with it. Ideally, all such situations must meet the above requirements of availability for license terms.

- *Content of open licenses*. Contrary to what is provided by the statement of self-limitation of exclusive rights, regulation for open licenses is more appropriate for the Internet realm. In the absence of specific provisions in the relevant license, its term by default will be limited to the whole duration of copyright and the territory will extend worldwide.

Draft provisions also explicitly authorize one to take into account any established customs in the sphere of open licenses for regulation of their terms and conditions. It is an important provision taking into account that organizations, such as the Open Source Initiative, the Free Software Foundation, and Creative Commons, define the policy of relevant open source movements that is reflected in licenses and publish interpretations of their terms and conditions, which are formally not mandatory, but nevertheless are very authoritative. When a statute explicitly directs one to take them into account, it helps to ensure the harmonized application of relevant provisions throughout the world, and eventually lead to a higher predictability of relevant decisions.

However, it is difficult to agree with the draft provision that an open license is free of license fees unless otherwise indicated in the license itself. If the first part of this provision is

consistent with reality, then the second one (the possibility of open licenses with fees) runs contradictory to the very nature of open source and free licenses. It is fundamental that such licenses should not require a royalty or other fee for the rights provided[48]. This does not mean, however, that no chargeable complementary services can be provided, or that it is impossible to charge for distributed copies [49]. But it is evident that open source licenses should contain no monetary consideration. It is understandable that the drafters of this provision wanted to encompass as many possible situations as possible, regardless of how fantastic they can be. But in the absence of a clear definition of what an open license is, any such "flexibility" may create substantial difficulty in understanding whether a particular license is "open" or not. After all, if there is a license fee for rights granted, then it is a simple commercial proprietary license with all relevant consequences.

4. Conclusion.

Free/Open source licenses present quite a challenge to courts not only in Russia, but in other countries as well. Many countries managed to answer this challenge by staying within the limits of existing legislation while using broad and creative interpretations. The formalism of the Russian legal environment, which is very suspicious to new legal concepts, and the desire to finish possible debates on the legal status of such licenses, both brought to life attempts to formalize them in legislation. Several amendments were prepared in order to reflect the ideas that are pursued by open source licenses and introduce the following concepts in Russian law: 1) a waiver of exclusive rights, allowing to place work in the public domain; 2) self-limitation of exclusive rights; and, 3) open licenses. While the waiver of exclusive rights might help to share the work with the public to the maximum extent possible, it cannot substitute open source licenses. Self-limitation of exclusive rights is the most controversial concept. Intended to overcome some existing problems with fitting open source licenses into existing Russian law, it creates more problems than it solves. The implementation in practice of this mechanism will not

only require significant costs for establishing and maintaining the appropriate infrastructure, but also creates substantial risks for its potential users, who will not receive any legal protection for reliance on the data provided on a relevant web-site. Besides, creating a mechanism parallel to free/open source licenses does not only fail to resolve the issues with the legal status of free/open source licenses, but it also casts an additional shadow over it. The concept of "open license", which should serve as a universal one, covering both software and classic objects of copyright, contains several flaws that may complicate its use. The absence of a clear definition of open licenses and the implied possibility of existence of paid open licenses will create difficulties with the application of special legal regimes that are established for such licenses to particular agreements. However, if these problems are resolved, the inclusion of special provisions on open licenses in legislation will surely help to bring to an end multiple debates regarding their status. As a result, risks associated with their use will be minimized. Taking into account the fact that court decisions are very much dependent on specific circumstances of a particular case and the overall peculiarities of open source disputes, it will take a long time to achieve similar results with case law. Legislative intervention may therefore be justified on these grounds as well.

It is interesting in this regard to outline recommendations that were prepared by the Skolkovo Industry Advisory Board[50] in a report on how to make Russian legislation more innovation friendly. With regard to free/open source licenses, the report suggested the following.

- Introduce the concept of free/open source license to the legislation, with the indication of its qualifying features, thereby distinguishing it as a separate type of a license agreement. Also, it is helpful to have a separate definition for a free license in relation to software. The legal regime of free licenses should take into account the specificities of their signing, content, and termination – including, undoubtedly, the absence of any license fees for such a license.
- To encourage the distribution of research that is conducted with the involvement of budget funds under the conditions of free licenses.
- To exclude the proposed amendments in paragraph 6 of Article 1233 of the Civil Code of Russia which are aimed at introducing of the concept of "self-limitation" of exclusive rights

to Russian law. In fact, these amendments create a mechanism that is parallel to free/open source licenses and has no analogues abroad. It entails risks to participants in civil relations since it creates the basis for fraudulent acts against objects of intellectual rights of others.

- The practical implementation of the mechanism inherent in paragraph 6 of Article 1233 of the Civil Code of Russia will require significant costs for establishing and maintaining the appropriate infrastructure, and they can hardly be justified, taking into account its potential inefficiency. Besides, creating a mechanism parallel to free/open source licenses does not only fail to resolve issues with the legal status of free/open source licenses, but also casts an additional shadow over it.

These suggestions reflect the view of high-tech industry. While one may agree or disagree with them, they are a good starting point for elaborating legislative provisions on free/open source licenses. And, while such provisions might not foster development of open source themselves, they may help to minimize possible legal barriers for the development of such in countries – such as Russia – that have a rather formalistic approach to legal enforcement.

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The views expressed here are the views of the author, and do not necessarily represent the views of IBM or HSE on relevant matters.

[1] There is considerable debate regarding the different definitions and variations of what is generally understood as open source software, particularly because there is a divergence of opinion between different camps in whether one should use the terms “open source” or “free software”. See: Stallman R. Why “Free Software”' is better than “Open source”,1998. http://www.gnu.org/philosophy/free-software-for-freedom.html. The term “free software” is advocated by the Free Software Foundation (www.fsf.org) and its founder, Richard Stallman. The term “open source” is created and promoted by the Open source Initiative, which elaborated the definition of open source and certifies licenses compliant with such a definition (www.opensource.org). Without going into too many details relating to the existing differences between these camps, it is possible to state that the term “open source” is more business-friendly and makes more emphasis on a development methodology; the term “free software” is more of ideological nature. For the free software movement, free software is an ethical imperative being thus not a means but an end in itself. However, from strict legal perspective it is possible to disregard these ideological differences since all free software licenses are acknowledged to satisfy the existing requirements to open source licenses and most problems and solutions immanent to open source licenses are also applicable to free licenses as well. Therefore for the purposes of this article the terms “free licenses” and “open source licenses” are used interchangeably unless otherwise indicated.

[2] Free software in organization. Collected materials. The Center for IT-research and expertise, The Academy of National Economy under the Government of the Russian Federation. Moscow.: INFO-FOSS.RU, 2008; V.A. Slyschenkov, A.E. Levin. Issues of Open source software licensing // Pravovie voprosy svyazi. N 1. 2009; V.A. Slyschenkov, A.E. Levin. Specifics of Open source software Licensing // Journal Rossiiskogo prava. N 10. 2009; I.A. Zenin, K.M. Meshkova. Free License in the Internet // Informazionnoe pravo. N 4. 2011; etc.

[3] Detailed description of possible advantages of open source on small businesses may be found in recent research: Economic Impact of Open source on Small Business: A Case Study. O’Reilly. July 2012. http://thebridge.oss-institute.org/whitepapers/economic-impact-open source.pdf

[4] This feature of open source software is specifically emphasized in the widely accepted definition of open source, which includes free redistribution: “The license shall not require a royalty or other fee for such sale”. http://opensource.org/osd

[5] For an extensive overview of business models based on open source software, see: Report on Commercial Adoption of Open source prepared by the 451 Group.2008: https://451research. om

[6] For example, one may recall the frequently used abbreviate “LAMP” reflecting the most popular package of open source software used in servers (Linux, Apache, MySQL, PHP/Perl). See: Mikko Välimäki. The rise of open source licensing. Helsinki. 2005. P. 17. Another example includes BIND software, which forms the core of Internet domain name system management. See: http://www.isc.org/software/bind/whatis

[7] The risks associated with a possible transformation of the Internet into a controlled network are persuasively described in a famous book by Jonathan Zittrain «The Future of the Internet and How to Stop It. Yale University Press. 2009». See also: Lessig Lawrence. Architechting Innovation // 49 Drake L. Rev. 2001. P. 403.

[8] For more details see: Evans D., Reddy B. Government Preferences for Promoting Open source Software // Michigan Telecommunications and Technology Law Review. Vol. 9. 2003. P. 379

[9] Decree of the Government of Russian Federation of 17.12.2010 N 2299-p

[10] Guadamuz, Andrés, Open Science: Open source Licenses in Scientific Research. North Carolina Journal of Law and Technology, Vol. 7, No. 2, pp. 321-366, 2006. Available at SSRN: http://ssrn.com/abstract=886906

[11] Letter of the Ministry of Economic Development of Russian Federation of May, 5th, 2009. N Д05-2235

[12] http://www.cnews.ru/news/top/index.shtml?2012/04/18/486180

[13] Article 575 (4) of Civil Code of Russian Federation. This restriction was included in Russian legislation in the middle of the 1990s in order to protect the rights of creditors by minimizing abuses with assets of the debtor.

[14] According to Article 572 (1) Under a contract of gift one party transfers or has the duty to transfer without compensation to the other party a thing in ownership or a property right (or claim) against himself or against a third person, or frees or has the duty to free him from a property obligation to himself or to a third person.

[15] In Russia relevant provision sounds as follows: "Making of changes, abridgements or additions to a work or the provision of a work in its use with illustrations, a foreword, commentaries, or any explanations shall be not allowed without consent of the author. Perversion, distortion, or other change in the work impugning the honor of the author and an attempt at such actions shall give the author the right to demand protection of his honor, dignity or business reputations" (Article 1266 of Civil Code of Russian Federation). In accordance with Article 1228 (2) moral rights are inalienable and non-transferable. A renunciation of these rights is void.

[16] According to Article 1233 (4) of Civil Code of Russian Federation, "Terms of a contract for the alienation of an exclusive right or of a license contract that limit the right of a person to create intellectual property of a defined type or in a defined area of intellectual activity or to alienate exclusive rights to such intellectual property to other persons are invalid."

[17] See generally: Rosen L. Open source Licensing: Software Freedom and Intellectual Property Law. Prentice Hall. 2005. P. 61-66; Lindberg V. Intellectual Property and Open source. A Practical Guide to Protecting Code. O'Reilly. 2008. P. 135-143.

[18] See Generally: Heather J. Meeker. The Open Source Alternative. Understanding the Risks and Leveraging Opportunities. John Wiley & Sons. 2008. P. 24; Robert W. Gomulkiewicz, Debugging Open Source Software Licensing, 64 U. PITT. L. REV. (2002). P. 79.

[19] Article 9 (2) of Civil Code of Russia.

[20] This is one of the main motives of creating a GPL license, which is one of the most widely used and popular license in free/open source software community. See: http://www.gnu.org/copyleft/copyleft.en.html

[21] Relevant provisions are contained in almost all free/open source licenses.

[22] See f.e. Mozilla Public License ver. 2.0 (http://www.mozilla.org/MPL/2.0/index.txt), Apache License ver. 2.0 (http://www.apache.org/licenses/LICENSE-2.0)

[23] For example, the core of what forms now World Wide Web software was placed in public domain. See: CERN European Organization for Nuclear Research, Statement Concerning CERN W3 Software Release into Public Domain, April 30, 2003, http://tenyears-www.web.cern.ch/ tenyears-www

[24] Such discussions occurred within the Round Table dedicated to Free/Open source and Creative Commons licenses, which was conducted May 19, 2011, at the Chamber of Commerce of the Russian Federation. Materials in Russian language are available at: http://www.privlaw.ru/rshchp.php

[25] For example, the default 5-year term of license validity license is also included as a default rule for validity of statement of self-limitation; the same is true for territory, which is by default limited to the Russian Federation only.

[26] See Article 1210 of Civil Code of Russian Federation, Article 1211 (3)(19). In the absence of such a choice of law, the law of the country of the licensor will be applicable as a general rule.

[27] However, in Russia, the good faith conduct of a copyright infringer may serve as a basis for decreasing the amount of damages awarded.

[28] For example, see US case Microsoft Corp. v. Harmony Computers & Electronics, Inc. 846 F. Supp. 208, 31 U.S.P.Q.2d 1135 (7 Feb. 1994).

[29] For example, Russia is party to the Berne Convention for the Protection of Literary and Artistic Works of 1886 (since 1994); the Universal Copyright Convention of 1952 (as a successor of USSR which adhered to it in 1973); WIPO Copyright Treaty of 1996 (since 2009); the Agreement of Trade-Related Aspects of Intellectual Property of 1994 (since August, 2012).

[30] Article 15 (4) of Constitution of Russian Federation

[31] A.L. Makovskiy. About Codification of civil law (1922-2006). Moscow: Statut. 2010.

[32] Urteil Landgericht München vom 19.05.2004, Az. 21 O 6123/04.

[33] Urteil Landgericht Frankfurt vom 06.09.2006, Az. 2–6 O 224/06.

[34] Cour d'Appel de Paris. 16 September 2009 http://fsffrance.org/news/arret-ca-paris-16.09.2009.pdf.

[35] 535 F. 3d 1373, 1378-79 (Fed. Cir. 2008)

[36] Jacobsen v. Katzer 535 F. 3d 1373, 1378-79 (Fed. Cir. 2008)

[37] Rosen L. Open source Licensing: Software Freedom and Intellectual Property Law. Prentice Hall. 2005. P. 66.

[38] See. A.L. Makovskiy. Civil Code of Russian Federation. Part 2. Text. Commentaries. Index. Moscow. 1996. P. 312.

[39] E.g. Article 5.2 of Mozilla Public License v. 2.0; Article 11 of GPL v. 3.0.

[40] Slyschenkov, A.E. Levin. Specifics of Open source software Licensing // Journal Rossiiskogo prava. N 10. But still entering into such agreements, even by local Russian entity, may have legal impact on patent portfolios of transnational companies.

[41] Rosen L. Open source Licensing: Software Freedom and Intellectual Property Law. Prentice Hall. 2005. P. 43.

[42] See Article 1229 (3) of Russian Civil Code. Russian approach is different from the one existing in the United States. Under US copyright law, unless co-authors agree otherwise, each of the joint authors may separately license a joint work—and all of its parts—without the consent of any of the other joint authors.

[43] Article 1260 (3) of Russian Civil Code.

[44] For example, see Article 5 of Apache license v. 2.0: Unless You explicitly state otherwise, any Contribution intentionally submitted for inclusion in the work by you to the licensor shall be under the terms and conditions of this license, without any additional terms or conditions. Article 3.1 Mozilla Public License v. 2.0: All distribution of covered software in source-code form, including any modifications that you create or to which you contribute, must be under the terms of this License. As Lawrence Rosen summarizes, "For most projects, receiving contributions under an appropriate open source license from the contributor provides more than enough authority to do what they need to incorporate the contribution into the project's software." Rosen L. Op. Cit. P. 46.

[45] For example, see Apache Individual Contributor License Agreement v. 2.0 http://www.apache.org/licenses/icla.txt

[46] http://wiki.creativecommons.org/FAQ#Can_I_use_a_Creative_Commons_license_for_software.3F

[47] ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640, 644 (W.D. Wis. 1996); i.LAN Systems, Inc. v. NetScout Service Level Corp., 183 F. Supp. 2d 328 (D. Mass. 2002)

[48] See point 1 of the open source definition at http://opensource.org/osd

[49] As Richard Stallman notes: "To understand the concept [of free software], you should think of "free" as in "free speech" not as in "free beer"… "Free software" does not mean "non-commercial". A free program must be available for commercial use, commercial development, and commercial distribution. Commercial development of free software is no longer unusual; such free commercial software is very important. You may have paid money to get copies of free software, or you may have obtained copies at no charge. But regardless of how you got your copies, you always have the freedom to copy and change the software, even to sell copies." http://www.gnu.org/philosophy/free-sw.en.html

[50] The Skolkovo Industrial Advisory Board is an advisory body under the President of the Skolkovo Foundation that is formed by representatives of the largest international and Russian corporations that have made the decision to locate its R&D centers at the Skolkovo Innovation Center. As of October 2012, the Board includes 23 companies (including Intel, Cisco, EADS, Microsoft, IBM, Ericsson, Siemens, and others). The Board's objective is defined as proactively contributing to the effectiveness of Skolkovo's project developments by providing competent and strategic suggestions regarding innovation-related legislation and the policy environment in Russia. http://www.aebrus.ru/application/views/FCKEditor/files/FCKEDITOR/file/Skolkovo%20presentation.pdf