

Free and Open Source Software in Russia:

Developer Risks Overview

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Free and Open Source Software are quickly spreading in Russia. Commercial companies and state organizations use in their operations such products as GNU/Linux, Apache, MySQL, OpenOffice, Mozilla FireFox, Mozilla ThunderBird, etc. The pioneers in this activity were GNU/Linux distributors, then appeared Web solutions vendors, and after them this market segment entered companies which develop and/or implement their own or third party open source enterprise software. Today there exist both Russian open source community and several associations formed by vendors and integrators to stimulate future FOSS development. The process is going on not only in private sector but also at the state level. There are official programmes aimed to spread FOSS in governmental and educational organizations to cut budget expenses and prevent software piracy. President Dmitry Medvedev even stated that Russian Federation should widely adopt FOSS to ensure national independence in information technologies.

But despite all of this good news there are actually a number of legal issues with FOSS licensing in Russia which in some circumstances could be very serious. These problems were 'invisible' for some time because IT people usually are not aware about laws, and most Russian jurists still don't know what is free or open source software. However ignorance of the law is no excuse in case of its violation. It means that FOSS enthusiasts should know corresponding legal risks which are related to the specifics of legislation of Russian Federation and particularly the Civil Code. Let's review in brief most important of them.

First of all we should remember that the State language in Russian Federation is Russian. It means that all business documents (including license contracts) shall be formulated in Russian. But all FOSS licenses are formulated in English (and some of them, like GNU GPL, exist only in English) which means that their legality in Russia could be challenged in Court.

Secondly there is the Article 1286 in Russian Civil Code Part IV (see Appendix 4) which introduces two issues related to FOSS licenses:

All license contracts on copyrighted materials shall be concluded in written form (it could be a paper document signed by both parties or two electronic copies of license contract each signed by one party). And Article 1235 of Civil Code (see Appendix 3) makes void any license contract concluded with violation of written form. There is an exception only for 'shrink-wrap' licenses and only for computer programs. It means that GNU FDL, CC and all other licenses for open/free program documentation and books won't work in Russia if they aren't concluded in written form.

If the license contract implies license fee the sum must be directly indicated in contract, or otherwise there shall be stated that license is granted to licensee. This law provision causes problems with GNU GPL and other FOSS licenses which don't contain neither license fee sum nor grant statement.

Actually, situation is even worse. There is the joint Decision of Supreme Court and Supreme Arbitration Court of Russian Federation №5/29 of 03/26/2009 where is written that a 'shrink-wrap' exception is applicable only in cases when licensee is an end-user but not

reseller, distributor or developer. Thus today the legality of almost all FOSS license contracts (which are concluded unilaterally by users in 'electronic' form) is under big question in Russian Federation.

Third the above-mentioned Article 1235 of Civil Code contains special conditions defining the obligatory information that should be specified in license contracts, in particular: the territory of effectiveness of the license contract (by default it is limited to the territory of Russian Federation); the time period of effectiveness of the license contract (by default it is limited to 5 years). As almost no FOSS license contains statements about territory and the period of license contract in Russia all FOSS licenses will be automatically treated as five-year contracts which are in force only on the territory of Russian Federation.

Fourth there is the Article 1233 of Civil Code (see Appendix 2) which particularly state: "Terms... of a license contract that limit the right of a citizen to create results of intellectual activity of a defined type or in a defined area of intellectual activity or to alienate the exclusive rights to such results to other persons are invalid." It means that 'viral' mechanisms of GNU GPL, CC-BY-SA and all free licenses that obligate to distribute all derivative works only under conditions of the same license wont work under Russian legislation. License contracts with such conditions (which conflicts with Article 1233 of Civil Code) will be either invalid or valid but with invalid "viral" condition. Thus free software principle doesn't work in Russia for now.

Besides that there is one pretty good thing in Civil Code of Russian Federation. It's Article 1211 (see Appendix 1). It states that "Where there is no agreement of parties on applicable law, the contract shall be subject to the law of the country with which the contract has the closest relation." In plain English it means that if licensor is not Russian company or citizen the applicable law of a license contract would be the law of licensor (i.e. US law, or Finland law), not Russian law. It is an option for foreign FOSS vendors but their Russian colleagues are in difficult position for now.

In general there are some serious issues related to FOSS development and distribution in Russian Federation but most of them still stay theoretical. Foreign FOSS vendors and distributors are immune to the specifics of Russian Civil Code but local vendors and distributors are at risk.

One option is to wait for positive (for FOSS) changes in Russian legislation. The conception of Russian IPR legislation development is already approved by Prime Minister Vladimir Putin. Another option is the development of Russia-specific variants of FOSS licenses and their use at the territory of Russian Federation. There is a positive experience of such approach in France. Third way is the combination of listed options.

Appendix 1.

Civil Code of Russian Federation

Article 1211. The Law Governing a Contract in the Case of Lack of Parties' Agreement on Applicable Law

1. Where there is no agreement of parties on applicable law, the contract shall be subject to the law of the country with which the contract has the closest relation.

2. The law of the country with which a contract has the closest relation shall be deemed the law of the country where the party responsible for the performance under the contract of crucial significance for the content of the contract has its place of residence or main place of business, except as otherwise ensuing from the law, the terms or substance of the contract or the group of circumstances of the case in question.

3. A party responsible for the performance under a contract of crucial significance for the content of the contract shall be a party which, in particular, is the following, except as

otherwise ensuing from law, the terms or substance of the contract or the group of circumstances of the case in question:

- 1) a seller - in a sales contract;
- 2) a donor - in a donation contract;
- 3) a lessor/landlord - in a lease;
- 4) a lender - in a contract of gratuitous use;
- 5) a contractor - in a contract;
- 6) a carrier - in a carriage contract;
- 7) a forwarding agent - in a forwarding contract;
- 8) a lender (a creditor) - in a loan (credit) contract;
- 9) a financial agent - in a case in action assignment financing contract;
- 10) a bank - in a bank deposit contract and bank account contract;
- 11) a custodian - in a custody contract;
- 12) an insurer - in an insurance policy;
- 13) an agent - in a contract of agency;
- 14) a commission agent - in a contract of commission agency;
- 15) an agent - in a contract of agency service;
- 16) a franchisor - in a contract of franchise;
- 17) a mortgagor - in a mortgage contract;
- 18) a surety - in a suretyship contract;
- 19) a licensor - in a licence contract.

4. The law of the country with which the contract has the closest relation shall be as follows, except as otherwise ensuing from law, the terms or substance of the contract or the complex of circumstances of the case:

1) for a contract of independent building contractor work and a contract of independent design and prospecting contractor work - the law of the country where on the whole the results stipulated by the contract are created;

2) for a contract of general partnership - the law of the country where on the whole the activity of the partnership is pursued;

3) for a contract concluded by auction, tender or commodity market - the law of the country where the auction, tender is held or the commodity market is situated.

5. A contract that has features of various types of contract shall be subject to the law of the country with which this contract as a whole has the closest relation, except as otherwise ensuing from law, the terms or substance of the contract or the group of circumstances of the case in question.

6. If internationally accepted trading terms are used in a contract it shall be deemed, unless there are directions to the contrary in the contract, that the parties have agreed on their application to their relations of business transaction usage designated by relevant trading terms.

Appendix 2.

Civil Code of Russian Federation

Article 1233. Disposition of the Exclusive Right

1. The rightholder may dispose of an exclusive right to a result of intellectual activity or to a means of individualization belonging to him in any manner not contrary to statute and the nature of such exclusive right, including by its alienation by contract to another person (contract for the alienation of an exclusive right) or the granting to another person of the right to use the corresponding result of intellectual activity or means of individualization within the limits established by the contract (license contract).

Conclusion of a license contract shall not entail thereby the transfer of the exclusive right to the licensee.

2. The general provisions on obligations (Articles 307-419) and on contract (Articles 420-453) shall be applied to contracts for the disposition of the exclusive right to a result of intellectual activity or to a means of individualization, including to contracts for the alienation of the exclusive right and to license (or sublicense) contracts, unless otherwise provided by the rules of the present Division or follows from the content or nature of the exclusive right.

3. A contract in which it is not directly indicated that an exclusive right to a result of intellectual activity or to a means of individualization is transferred in full scope shall be considered to be a license contract, with the exception of a contract concluded with respect to the right of use of a result of intellectual activity specially created or to be created for inclusion in a complex object (second subparagraph of Paragraph 1 of Article 1240).

4. Terms of a contract for the alienation of an exclusive right or of a license contract that limit the right of a citizen to create results of intellectual activity of a defined type or in a defined area of intellectual activity or to alienate the exclusive rights to such results to other persons are invalid.

5. In case of conclusion of a contract for the pledge of an exclusive right to a result of intellectual activity or to a means of individualization, the pledgor shall have the right during the time period of effectiveness of this contract to use such result of intellectual activity or such means of individualization and to dispose of the exclusive right to such result or such means without the consent of the pledgee, unless the contract provides otherwise.

Appendix 3.

Civil Code of Russian Federation

Article 1235. License Contract

1. Under a license contract, one party, the holder of an exclusive right to a result of intellectual activity or to a means of individualization (the licensor), grants or becomes obligated to grant to the other party (the licensee) the right of use of such result or such means within the limits provided by the contract.

The licensee may use the result of intellectual activity or means of individualization only within the limits of those rights and by those means that are provided by the license contract. A right of use of the result of intellectual activity or means of individualization not indicated expressly in a license contract shall not be considered to have been granted to the licensee.

2. A license contract shall be concluded in written form, unless otherwise provided by the present Code.

A license contract shall be subject to state registration in cases provided by paragraph 2 of Article 1232 of the present Code.

Nonobservance of the written form or of a requirement on state registration shall entail the invalidity of the license contract.

3. In a license contract the territory shall be indicated upon which use is permitted of the result of intellectual activity or means of individualization. If the territory on which use of such result or such means is permitted is not indicated in the contract, the licensee shall have the right to exercise its use on the whole territory of the Russian Federation.

4. The time period for which a license contract is concluded may not exceed the time period of effectiveness of the exclusive right to the result of intellectual activity or to the means of individualization.

In the case when the time period of effectiveness of the license contract is not defined in the license contract, the contract shall be considered to be concluded for five years, unless provided otherwise by the present Code.

In case of termination of the exclusive right, the license contract shall be terminated.

5. Under a license contract the licensee shall be obligated to pay the licensor the compensation provided by the contract unless the contract provides otherwise.

In case of the absence in a remunerated license contract of a term on the measure of compensation or the procedure for determining it, the contract shall be considered not to have been concluded. In this case the rules for determination of the price provided by Paragraph 3 of Article 424 of the present Code shall not be applied.

6. A license contract must provide:

1) the subject of the contract by indicating the result of intellectual activity or means of individualization the right of the use of which is granted under the contract, with an indication, in appropriate cases, of the number and date of the issuance of a document confirming the exclusive right to such result or to such means (patent or certificate);

2) ways of use of the result of intellectual activity or means of individualization.

7. The transfer of the exclusive right to a result of intellectual activity or to a means of individualization to a new right-holder is not a basis for change or dissolution of a license contract concluded by the previous rightholder.

Appendix 4.

Civil Code of Russian Federation

Article 1286. License Contract for the Granting of the Right of Use of a Work

1. Under a license contract one party – the author or other rightholder (the licensor) grants or becomes obligated to grant to the other party (the licensee) the right of use of this work within the limits established by the contract.

2. A license contract shall be concluded in written form. A contract on granting the right of use of a work in a periodical press publication may be concluded in oral form.

3. The conclusion of license contracts on granting the right of use of a computer program or database is allowed by the conclusion by each user with the respective rightholder of a contract of adhesion, the terms of which are stated on a copy of such program or database obtained or on the packaging of such a copy. The beginning of use of such program or database by the user as this beginning is defined by these terms shall signify the user's consent to the conclusion of the contract.

4. In a compensated license contract the amount of compensation for the use of the work or the procedure for calculating this compensation must be indicated.

In such a contract payment to the licensor of compensation may be provided in the form of fixed one-time or periodic payments, percentage transfers from income (or receipts) or in another form.

The Government of the Russian Federation shall have the right to establish minimum rates of author's compensation for separate types of use of works.