FREE SOFTWARE, CREATIVE COMMONS AND ALTERNATIVE LICENSES: SPANISH PERSPECTIVES

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ABSTRACT

This contribution provides a general overview of the main legal issues raised by license contracts in the field of free and open source software and other alternative license models, like creative commons, from the perspective of Spanish Law. Particular attention is paid to contract law and intellectual property issues. Formation of contract, formal requirements, validity of certain typical clauses and standard terms, warranties and liability are among the contract law issues considered. Possible constraints resulting from copyright law are also addressed. An analysis of Spanish case law on alternative licenses, in particular, creative commons, is also provided.

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I. General information on FOSS and alternative licensing

1. Rules applicable to license contracts in general

Title V of Part I of the Intellectual Property Act (TRLPI)[1] contains the provisions on "Transfer of Rights" for copyright (Articles 42-85). Articles 43 to 57 (Chapter I) of the TRPLI are of particular interest as they establish the general provisions on transfers. Chapter II and Chapter III of Title V regulate publishing contracts (Articles 58 to 73) and stage and musical performance contracts (Articles 74 to 85). It is to be noted that copyright on computer programs is governed by the provisions under Title VII of Part I TRLPI, which includes specific provisions on the transfer of rights for computer programs (Articles 95 to 104 TRLPI) that prevail over the general provisions in Title V.

Article 43 TRLPI lays down the basic provisions on transferability and the scope of transfers:

- The exploitation rights in a work may be transferred by *inter vivos* transaction, the transfer being limited to the right or rights transferred, to the means of exploitation expressly provided for and the time and territorial scope specified (para. 1)

* Report to the 20th World Congress of the International Academy of Comparative Law (Vienna, July 21-25, 2014).

1 Legislation concerning copyright and related rights is contained in a single act, named the Consolidated Law on Intellectual Property [TRLPI]. It regularizes, clarifies, and harmonizes the applicable statutory provisions approved by Royal Legislative Decree 1/1996 of April 12, 1996 (*Boletín Oficial del Estado* no. 97, April 22, 1996) and revised recently by Law 23/2006 of July 7, 2006 (*Boletín Oficial del Estado* no. 162, July 8, 2006). This Act is currently under review. English versions of the Act may be found online at the website of the Spanish Ministry of Justice <*http://mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html* > and (not fully updated) at the WIPO Database of Intellectual Property Legislative Texts <*http://wipo.int*>.

- Failure to mention the duration shall limit the transfer to five years, and failure to mention the territorial scope shall limit it to the country in which it is effected. Where the conditions governing the exploitation of the work are not mentioned specifically and categorically, the transfer shall be limited to such exploitation as is necessarily deduced from the contract itself and is essential to the fulfillment of the purpose of the contract (para. 2).
- Any global transfer of exploitation rights in all the works that the author may create in the future shall be null and void (para 3).
- Any stipulations whereby the author undertakes not to create any work in the future shall be null and void (para 4).
- The transfer of exploitation rights shall not apply to methods of use or means of dissemination that do not exist or are unknown at the time of the transfer (para 5).

Other general provisions deal with the capacity of minors over 16 years of age living independently to transfer exploitation rights (Article 44), form requirements (Article 45), remuneration (Articles 46 and 47), transfer of the rights of an author who is an employee (Article 51), transfer of rights for periodical publications (Article 52), pledging and charging of copyright (Article 53), and the unwaivable nature of the benefits granted to authors in Title V.

The distinction between the transfer of exclusive and non-exclusive rights is established in Articles 48 to 50 TRLPI. Pursuant to Article 48, the transfer of exclusive rights requires an express statement of that character which grants to the transferee, within its assigned scope, the right to exploit the work to the exclusion of any other person, including the transferor himself, and, unless otherwise agreed, the right to grant non–exclusive authorizations to third parties. The exclusive transferee has the independent right to institute proceedings for violations that affect the powers that have been assigned to him. The exclusive transfer places the transferee under the obligation to make all the necessary arrangements for the licensed exploitation to be effective, depending on the nature of the work and the practices prevailing in the professional, industrial or commercial field concerned. According to Article 49, the transferee holding exclusive rights may further transfer his rights to another person with the express consent of the transferor. In the absence of such consent, the transferees shall be jointly responsible to the first transferor for the obligations arising out of the transfer. Article 50 establishes that the non–exclusive transferee has the right to make use of the work according to the terms of the transfer in competition both with other transferees and with the transferor himself. A non-exclusive transferee's rights are non-transferable. Finally, Article 56 deals with the

transfer of rights to the owners of certain physical media, by providing that the person who obtains ownership of the medium in which the work has been incorporated does not have any exploitation right in that work by virtue of that ownership alone.

Among the special provisions on computer programs, it is to be noted that under Article 99.2 TRLPI the assignment of the use of a computer program is regarded, in the absence of proof to the contrary, as non–exclusive and non-transferable. Likewise, it is presumed that assignment has taken place only to meet the needs of the user. Additionally, in regards to the exhaustion of rights, it provides that the first sale in the European Union of a copy of a program by the owner of the rights, or with his consent, shall exhaust the right of distribution of that copy, subject to the right of control over the subsequent rental of the program or of a copy thereof.[2] Furthermore, Article 100 TRLPI lays down detailed rules on the limitations to the right of exploitation. In particular, Article 100 establishes that:

- The authorization of the owner shall not be required, in the absence of a contractual provision to the contrary, for reproduction or transformation of a computer program, including the correction of errors, where those acts are necessary for the use of the program according to its intended purpose by the lawful user (para. 1).
- The making of a reserve copy by the person who holds the right to use the program may not be prevented by contract in so far as it is necessary for such use (para. 2).
- The lawful user of the copy of a program shall be entitled to observe, study or verify the operation thereof, without prior authorization from the owner, for the purposes of ascertaining the ideas and principles underlying any element of the program, provided that this is done in the course of any of the operations of loading, display, operation, transmission or storage of the program that he is entitled to perform (para. 3).
- Unless otherwise agreed, the author may not object to the assignee who holds the exploitation rights carrying out or authorizing the carrying out of successive versions of his program, or of programs derived therefrom (para. 4).
- The authorization of the owner of the rights shall not be necessary where the reproduction of the code and the translation of its form is essential to the

2 Establishing that an author of software cannot oppose the resale of his licenses allowing the use of his programs downloaded from the Internet, see the ECJ Judgment of 3 July 2012 in case C-128/11, *UsedSoft GmbH v Oracle International Corp*.

> securing of the necessary information for achieving interoperability of an independently created program with other programs, provided that certain requirements and use limitations are met and that these provisions are not interpreted in a manner that permits their implementation to prejudice unjustifiably the legitimate interests of the owner of the rights or is contrary to the normal exploitation of the computer program. (paras. 5 to 7).

2. Special provisions on FOSS or other alternative licenses

There are no special contract law provisions on FOSS or other alternative licenses. See Section IV *infra* for the discussion on public procurement regulations.

3. Reported case law on FOSS or other alternative licenses

Creative commons licenses have been referred to in a significant number of Spanish judgments, particularly in disputes concerning the payment of levies to collecting societies. In these cases, defendants have sought to invoke creative commons licenses as a defense against collecting societies' claims that they had failed to pay the levies required for public performances of music managed by the relevant collecting society. The defendants have argued that because the music performed in their establishments was licensed by the rightholders under a creative commons model, they were allowed to use it and no payment was due from them to the collecting society. Therefore, these disputes concern the relationship between users of creative common licenses and a third party (collecting society).

The judgments show some significant divergences on key issues relating to the disputes, e.g. the burden of proof concerning the (non) use of musical works belonging to the repertoire of the collecting society. However, it is noteworthy that dozens of second instance judgments rendered by the *Audiencias Provinciales* generally accept that creative common licenses may be effective in order to facilitate the free use of musical works and to exclude such works from the repertoire of the collective society, even if the judgments may differ as to who should bear the burden of proof[3]. In some cases, reference

3 See SAP Madrid (Secc. 28ª) 150/2007, of 5 July 2007, AC 2007, 1768 ; SAP Granada (Secc. 3ª) 409/2008, of 10 October 2008, AC 2008, 2097; SAP La Coruña (Secc. 4ª) 556/2008 of 11 December 2008, JUR 2009, 241020; SAP Madrid (Secc. 28ª) 56/2009 of 13 March 2009, AC 2009, 509; SAP Pontevedra (Secc. 1ª) 329/2009, of 9 July 2009, AC 2009, 1843; SAP Tarragona (Secc. 1ª) núm. 390/2009 of 19 November, JUR 2010, 44100; SAP León (Secc. 1ª) 576/2009, of 26 November 2009, AC 2010, 296; SAP Cáceres (Secc. 1ª) 40/2010, of 5 February 2010, JUR 2010, 112508; SAP La Coruña (Secc. 4ª) 122/2010, of 17 March 2010, JUR 2010, 196063; y SAP Madrid (Secc. 28ª) 76/2010, of 22 March 2010, JUR 2010, 206687.

is also made to other alternative licenses in the same context, as was the case in a judgment made by the Audiencia Provincial de León of 22 July 2009[4], which mentions the GPL or General Public License as an example of an additional alternative license. Notwithstanding, these judgments have traditionally lacked an in-depth analysis of the content of creative commons licenses and no detailed assessment has been made of the particular licenses used in each case[5]. More recently, some judgments have considered that creative commons licenses do not cover the rights of performers and producers of phonograms. In such cases, the courts have ordered the payment of levies to the relevant collecting society to compensate performers and producers of phonograms for making available the performances fixed in phonograms, regardless of the alleged existence of a creative commons license.[6]

4. Jurisdiction-specific standard licenses for FOSS or other content

Since 2004 there has been a Spanish-specific version of the creative commons license[7]. This jurisdiction-specific license is intended to adapt the generic international license to Spanish law[8]. The interaction between creative commons licenses and Spanish law may pose conflicts in several areas: specifically, the inability to waive certain moral rights and benefits granted to authors, and the prohibition under Spanish law on the transfer of exploitation rights covering methods of use or means of dissemination that do not exist or are unknown at the time of the transfer.

Among the amendments made to the generic international license, it is noteworthy that the Spanish version of the licenses establishes that the rights granted may be exercised in all media and formats known at the time of the license (to align it with Article 43 TRLPI) and no reference is made to use in future media or formats. In line with other European versions of the licenses[9], a special reference has been added to the applicability of the national provisions implementing the EU Database Directive. In particular, it is stated that where the licensor is the owner of the sui generis database rights under the national law, the licensor waives these rights. Furthermore, the references to the

4 SAP León (Secc. 1ª) núm. 405/2009, 22 July 2009, JUR 2009, 361980.

5 See P.A. De Miguel Asensio, *Derecho privado de Internet*, 4th ed., Navarra, Thomson Reuters Civitas, 2011, pp. 662-667.

6 SAP Madrid (Secc. 28ª) 45/2011 of 18 February 2011, AC 2011\932; SAP Madrid (Secc. 28ª) 9/2011, of 21 January 2011, AC 2011\368; SAP Madrid (Sección 28ª), 312/2011, of 28 October, AC 2011\2272.

7 http://es.creativecommons.org/blog/licencias/.

8 R. Xalabarder Plantada, "Las licencias Creative Commons: ¿una alternativa al copyright?", *uocpapers*, 2006, pp. 4-11.

9 C. Maracke, "Creative Commons International: The International License Porting Project – Origins, Experiences, and Challenges", 1 (2010) *JIPITEC* 4, p.10.

prevalence of mandatory provisions of the applicable law over the license terms, particularly on certain issues, such as unwaivable moral rights, warranties and limitations on liability, leaves open other possible adaptations of the license to Spanish law.

II. Contract law

1. Mere use of a program without a license

FOSS and alternative licenses are presented as license contracts and it is widely accepted that they can be characterized as contracts[10]. Nevertheless, in situations where a contract has not been duly concluded between the licensor and licensee, the existence of a unilateral, limited authorization of rights that can be waived under the law may become relevant to establishing that when the user acts within the terms of the waiver there is no copyright infringement[11]. Although the case-law referring to creative common licenses seems to adhere to the view that they are contracts, this issue has not been expressly settled by case-law, nor has it been addressed by legislation.

2. FOSS and alternative licenses as contracts

a) Offer and acceptance

Under the general principles of Spanish contract law, the consent of the contracting parties is one of the essential requirements for the validity of contracts (Article 1261.1º Spanish Civil Code). Pursuant to Article 1254 of the Civil Code, the contract exists from the time where one or several persons consent to bind themselves vis-à-vis another or others to give something or to provide a service. According to Article 1258 of the Civil Code, contracts are perfected by mere consent, and subsequently bind the parties, not just to the performance of the matters expressly agreed therein, but also to all consequences which, according to their nature, are in accordance with good faith, custom and the law. The basic provision on consent formation is to be found in the first paragraph of Article 1262 of the Civil Code. This provision states that consent is manifested by the coincidence between offer and acceptance along with the "*causa*" (consideration) which

10 See J.P. Aparicio Vaquero, *Licencias de uso no personalizadas de programas de ordenador*, Granada, Comares, 2004, pp. 87 and 90; A. López-Tarruella Martínez, *Contratos internacionales de software*, Valencia, Titant lo blanch, 2006, pp. 69-95; R. Xalabarder Plantada, "Redes sociales y propiedad intelectual", Navarra, Thomson Reuters Civitas, 2010, p. 348.

11 See M. Bain, "Spain", *The International Free and Open Source Software Law Book*, <*http://ifosslawbook.org/spain/*>, at p. 7.

constitutes the contract. This basic framework applies to IP license contracts, including software licenses[12].

In the context of FOSS and other alternative licenses, it seems that a special assessment of offer and acceptance is required in order to determine whether there has been a manifestation of consent. Works are typically made available on a website accompanied by a mere notice stating that the work is provided under a certain license. Furthermore, no requirement is imposed on the licensee to accept the terms of the license, whether by clicking on an "accept" button or by any other means. Nevertheless, it seems reasonable to argue that by using the work offered on a webpage, a user manifests their consent with respect to the authorization of the rightholder. However, works are made available under these licenses without the user having had an opportunity to review the terms, as required by the law on standard contract terms, and thus without having accepted the terms and conditions of the license. Hence, the user may argue that he is not bound by those terms and conditions. Since the possibility to use the work has to be founded on the authorization given by the rightholder or on the law itself, an alternative could be that in circumstances where the work is made available on the Internet by the rightholder, a limited authorization to use it may be inferred from IP legislation. In this scenario, the user could be entitled to make certain uses of the work but to a much lesser extent than under creative commons or other alternative licenses.

The rights granted to the user under a FOSS, creative commons or other alternative license typically go beyond the uses allowed by the applicable copyright law; for instance, such licenses may grant the right to create derivative works and are typically construed as not restricting any rights of the user arising from limitations on exclusive rights under copyright law. Therefore, from a practical perspective, it is noteworthy that in many situations users will usually not benefit from challenging the existence of the license and the acceptance of its terms.[13]

However, in the absence of a license contract, the acts of a user that constitute copyright infringement must be established with respect to the relevant copyright law. Although the circumstances in which a work is made available may influence the outcome under copyright law, the will of the licensor may not always be determinative in this respect. Therefore, provisions such as Section 9 GNU GPL Version 3[14] have to be

12 See J.P. Aparicio Vaquero, *Licencias de uso no personalizadas de programas de ordenador*, Granada, Comares, 2004, p. 178.

13 M. Bain, "Spain", *The International Free and Open Source Software Law Book*, <*http://ifosslawbook.org/spain/*>, at pp. 8-9.

14 "*You are not required to accept this License in order to receive or run a copy of the Program. Ancillary propagation of a covered work occurring solely as a consequence of using peer-to-peer transmission to receive a copy likewise does not require acceptance. However, nothing other than this License grants you permission to propagate or modify any covered work. These actions infringe copyright*

considered in light of this limitation, particularly to the extent that they affect persons who are not a party to the license contract.

b) Consideration requirement

Under general Spanish contract law, the consideration requirement is called *causa*. Pursuant to Article 1261 of the Civil Code, the *causa* of the obligation established is one of the three essential requirements for the validity of contracts, in addition to the consent of the contracting parties and the object or subject matter of the agreement. According to the first paragraph of Article 1262 of the Civil Code, consent is manifested by the concurrence between the offer and the acceptance over the subject matter and the consideration (*causa*), which together constitute the contract. The consideration requirement is further regulated in Articles 1274 to 1277 of the Civil Code. Even if the consideration is not expressed in the contract, it is presumed to exist and to be lawful, unless the debtor proves otherwise (Art. 1277). Contracts without consideration or with illegal consideration have no effect whatsoever. The consideration is unlawful when it is against the law or good morals (art. 1275). A statement of false consideration nullifies the contract, unless it is proved that the contract was based on another true and lawful cause (Art. 1276). In contracts for valuable consideration, the supply or promise of a thing or service by the other party is deemed to constitute the *causa* with respect to each contracting party; likewise in remunerative contracts, it is the service or benefit which is remunerated, and in contracts for pure beneficence, the mere liberality of the benefactor constitutes the *causa* (Art. 1274). The Supreme Court has stressed the view that the consideration (causa) is basically the aim intended in a given contract[15].

Among the general provisions on the transfer of authors' rights, Article 46 TRLPI establishes that the transfer granted by the author for valuable consideration shall entitle him to a proportional share in the proceeds of exploitation, the amount thereof being agreed upon with the transferee. Nevertheless, it allows the payment of a lump sum to the author in certain cases, although an action for the review of inequitable remuneration is laid down in Article 47 TRLPI. Transfer contracts for pure beneficence without payment or monetary consideration are not excluded and are therefore acceptable[16].

if you do not accept this License. Therefore, by modifying or propagating a covered work, you indicate your acceptance of this License to do so".

15 See, e.g., L. Díez-Picazo and A. Gullón, *Sistema de Derecho Civil*, 4th ed., 1986, Madrid, p. 72.

16 See M.C. Gete-Alonso y Calera, "Artículo 43", R. Bercovitz Rodríguez Cano (coord.), *Comentarios a la Ley de propiedad intelectual*, 3rd ed., 2007, Madrid, Tecnos, p. 767; and R. Xalabarder Plantada, "Las licencias Creative Commons: ¿una alternativa al copyright?", *uocpapers*, 2006, p. 9.

3. Formal requirements

Freedom of form prevails under the general principles of Spanish contract law. Pursuant to Article 1278 of the Civil Code, contracts are binding "whatever the form under which they have been entered into", provided that they meet the essential requirements for their validity, previously mentioned (see II.2.b, *supra*). Article 23.1 of the E-commerce and information society services Act (LSSICE)[17] expressly allows for contracts to be concluded by electronic means and provides that such contracts produce full legal effects where they meet the essential requirements for their validity.

In regard to the exploitation of authors' rights, Article 45 TRLPI establishes that any transfer shall be evidenced in writing[18]. This article does not alter the application of the basic principle of freedom of form to contracts on copyright. It does not establish written form as an essential requirement for the validity of contracts on the transfer of copyright. It only establishes a requirement for evidentiary purposes as a rule on form *ad probationem*. Article 45 further provides that if, after having been formally called upon to do so, the transferee fails to meet this requirement, the author may choose to terminate the contract. Therefore, no doubt exists that contracts transferring copyright can be valid even if not concluded in written form. Form requirements are regarded as *ad validitatem* or as an essential requirement for the validity of a contract only where the law exceptionally provides. This is the case for publishing contracts, since Article 61 TRLPI establishes that publishing contracts that are not made in writing shall be null and void.

In conclusion, freedom of form prevails with regard to the conclusion of license contracts.

4. Alternative licenses as standard terms and conditions

Alternative licenses typically fall within the scope of the Spanish legislation on standard terms and conditions. Two bodies of law are of particular significance in this context; the Act on standard terms and conditions (Ley 7/1998 de Condiciones Generales de la Contratación or 'LCGC') and the Title on general conditions and unfair terms of the Law for the protection of consumers and users (Ley General de Defensa de los Consumidores y Usuarios 'TRLGDCU').

17 Ley 34/2002 de servicios de la sociedad de la información y comercio electrónico (*Boletín Oficial del Estado* no 166, July 12th, 2002).

18 See J.A. Torres Lana, "Artículo 45", R. Bercovitz Rodríguez Cano (coord.), *Comentarios a la Ley de propiedad intelectual*, 3rd ed., 2007, Madrid, Tecnos, pp. 790-797; and J.M. Rodríguez Tapia, "Artículo 45", J.M. Rodríguez Tapia (dir.), *Comentarios a la Ley de propiedad intelectual*, 2nd ed., 2009, Navarra, Thomson Reuters Civitas, pp. 412-413.

Pursuant to Article 1 of the LCGC, provisions that were supplied by one of the parties to the contract and were not individually negotiated, but were nevertheless incorporated into the contract, are to be regarded as standard terms governed by the LCGC. In contrast with the TRLGDCU, which is intended to protect consumers, the provisions of the LCGC apply both to business contracts and to consumer contracts. With respect to FOSS, creative commons and other alternative licenses, the provisions of the LCGC on the incorporation of standard terms deserve particular attention. Pursuant to Articles 5 and 7 of the LCGC, standard terms supplied by one party are to be excluded from the contract if the other party did not have a real opportunity to have full knowledge of the terms at the time of conclusion of the contract, or to the extent that the terms are not clear. Accordingly, such terms may not be invoked against the other party. Furthermore, according to Article 27.4 of the LSSICE concerning contracts concluded by electronic means, the party supplying any terms has to make them available to the other before initiating the contracting process. This must be done in a manner that enables the other party to keep a durable record of the terms[19].

With respect to consumer contracts, Article 3 of the TRLGDCU establishes that for the purposes of the legislation, consumers and users are natural or legal persons acting in a sphere that falls outside entrepreneurial or professional activity. Unfair terms in consumer contracts are legally null and void and have to be considered as ineffective (Art. 83 TRLGDCU). Spanish legislation on unfair terms responds to the implementation of Directive 93/13 in Spanish law and is currently under review to be adapted to Directive 2011/83/EU of 25 October 2011 on consumer rights[20]. According to Article 82 of the TRLGDCU, standard terms which, counter to the requirements of good faith, may cause a substantial imbalance in the rights and obligations of the parties resulting from the contract to the detriment of the consumer or user, are to be regarded as unfair terms. The unfairness of a term has to be assessed with regard to the nature of the goods or services to which the contract relates and must consider all concurrent circumstances at the time of conclusion of the contract. 'Unfair terms' refer to those which do the following: bind the contract to the entrepreneur's will; limit the rights of consumers and users; establish a lack of reciprocity in the contract; impose disproportionate guarantees on consumers and users; are disproportionate in relation to the conclusion and execution of the contract; or contravene the rules on jurisdiction and applicable law.

19 On electronic contracts and incorporation of standard terms, see M.E. Clemento Meoro y S. Cavanillas Múgica, *Responsabilidad civil y contratos en Internet*, Granada, Comares, 2003, pp. 162-170; and P.A. De Miguel Asensio, *Derecho privado de Internet*, 4th ed, Navarra, Thomson Reuters Civitas, 2011, pp. 845-855.

20 OJ 2011 L 304/64.

5. FOSS licenses drafted in English only

Under Spanish law there is no general requirement that a contract should be drafted in Spanish or any other official language in Spain. Notwithstanding this, where licenses are only drafted in English, or the licensor provides the other party with only an English version of the license, it will be necessary to assess the circumstances of the case in order to establish if the terms of the license may be invoked against the other party and if the latter is bound by them. In particular, where the contents of a website providing the relevant works are in Spanish, a reference to license terms drafted in English could lead to a situation in which the other party may claim that he was not aware of such terms, since he did not have a real opportunity to have full knowledge of the terms at the time of conclusion of the contract. Under such circumstances, the user could claim that he is not bound by the license terms (Art. 7 LCGC). That would be particularly applicable in the case of consumer contracts.

6. Special rules of interpretation for license contracts

The idea that the scope and extent of contracts for the transfer of copyright have to be restrictively interpreted may be found in the Preamble to the TRLPI. It is also derived from the content of Articles 43 (1) and (2), 48, 57 and 76[21] of the TRLPI. As far as software licensing is concerned, the same rule of interpretation can be derived from the last paragraph of Article 99 TRLPI. Pursuant to this provision, the assignment of the use of a computer program is regarded, in the absence of proof to the contrary, as non–exclusive and non-transferable. It is likewise presumed that assignment has taken place only to meet the needs of the user.

7. Promulgation of revised versions of FOSS and other alternative licenses

The typical clauses which allow the entity promulgating the license to publish revised versions of the license are arguably valid. In the cases where the licensee may choose whether he would like to make use of the rights granted under the new version of the license or whether he prefers to retain the terms of the older license version. Note that such a clause gives a choice to the licensee and that the discussion under ection II.2.a) and II.4, *supra,* may also be relevant in this context to determine whether the licensee is bound by the new terms.

21 See S. Cavanillas Múgica, "Artículo 48", R- Bercovitz Rodríguez Cano (coord.), Comentarios a la Ley de propiedad intelectual, 3rd ed., 2007, Madrid, Tecnos, p. 818.

8. Disclaimers of warranty and liability

First, it may be worth noting that such clauses are only effective between the licensor and licensee, and to the extent that a contract has been validly concluded and the relevant clauses have been properly incorporated into the contract.

A basic distinction has to be made between those contracts concluded by a legal or natural person acting in a sphere that falls outside entrepreneurial or professional activity and those contracts concluded between businesses. The first category of contracts is subject to the special act for the protection of consumers (TRLGDCU) and, in particular, to its provisions on unfair terms. As already noted, unfair terms shall be legally null and void and considered ineffective.

According to Article 86 of the TRLGDCU, in all cases unfair terms shall include those which limit or deprive consumers and users of the rights recognized in dispositive or mandatory provisions, and in particular those stipulations which may provide for:

- The inappropriate exclusion or limitation on the legal rights of consumers and users due to the total or partial non-compliance or the defective performance of the entrepreneur. In particular, terms amending the laws on contract compliance in respect of goods or services placed at the disposal of the consumer or user, to the detriment thereof, limiting the consumer or user's right to compensation for damages caused by lack of uniformity.
- The exclusion or limitation of the entrepreneur's liability in contractual performance, for damages, or for death or injuries caused to the consumer or user due to an action or omission of the entrepreneur.
- The imposition of any waiver or limitation on the rights of consumers or users.

This list is merely indicative and non-exhaustive, since all standard terms which, counter to the requirements of good faith, may cause a substantial imbalance of the rights and obligations of the parties resulting from the contract to the detriment of the consumer and user, shall be regarded as unfair. For provisions other than those listed in Article 86 of the TRLGDCU, the determination of the unfairness of a term is to be made, pursuant to Article 82.3 TRLGDCU, by considering the nature of the good or services and all concurrent circumstances at the time of conclusion of the contract. In this context, the lack of monetary consideration may be relevant.

By contrast, in business-to-business agreements, parties have broad autonomy to regulate the extent of warranties and limitations of liability. In principle, for agreements granting free licenses, parties may exclude warranties of merchantability and fitness for a particular purpose, and they may also limit liability for damages, although with certain exceptions[22]. In particular, pursuant to Article 1.102 of the Civil Code, liability arising from willful misconduct is enforceable and any waiver of the action to enforce it is considered null and void. According to Article 1.103 of the Civil Code, liability arising from negligence is equally enforceable in the performance of all kinds of obligations, but may be moderated by the courts on a case-by-case basis.

Therefore, particularly in the light of the scope of consumer protection, it seems necessary to limit warranty disclaimers and limitations of liability, by introducing expressions such as "… to the extent permitted by applicable law" or "… unless required by applicable law", in order to avoid a declaration of nullity of the standard terms.

9. Automatic termination of licenses

Treating non-compliance by one of the parties as a ground for termination seems compatible with the general provisions of Spanish contract law. Pursuant to Article 1124 of the Civil Code, the power to terminate obligations is deemed to be implied in reciprocal obligations, where one of the parties should not perform his obligation. The aggrieved party may choose to demand performance or to terminate the obligation, with compensation of damages and payment of interest in both cases. He may also request termination, even after having chosen specific performance, where the latter should be impossible. The court shall order the requested termination, unless there are justified grounds that authorize the court to set a term[23].

The distinction between business-to-business contracts and contracts concluded by a legal or natural person acting in a sphere that falls outside entrepreneurial or professional activity is also to be mentioned with regard to termination clauses. In regards to the latter, the specific provisions on consumer protection (TRLGDCU) provide special safeguards, as certain terms are deemed unfair and hence void in consumer transactions. In particular, such unfair terms include those which authorize the entrepreneur to terminate a fixed term contract in advance, when the same power is not recognized for the consumer or user. Also included are terms that authorize the entrepreneur to terminate

22 J.P. Aparicio Vaquero, *Licencias de uso no personalizadas de programas de ordenador*, Granada, Comares, 2004, p. 391.

23 See, e.g., L. Díez-Picazo and A. Gullón, *Sistema de Derecho Civil*, 4th ed., 1986, Madrid, pp. 332-333.

indefinite term contracts within a disproportionately brief period, or without providing notice sufficiently in advance. However, these provisions do not affect terms that may envisage the termination of the contract due to non-compliance or for serious reasons beyond the control of the parties, which may alter the circumstances that gave rise to the signing of the contract (Art. 85.4 TRLGDCU).

III. Copyright law

1. Mere use of a program without a license

Typical FOSS licenses grant a non-exclusive license to copy and distribute the covered program with or without modifications. By contrast, the mere use of the program is typically excluded or not explicitly mentioned. To establish if it would be possible to use a program without the conclusion of a license contract, it may be appropriate to consider that a unilateral authorization by the rightholder to use the program could also allow use by third parties without the infringement of IP rights. Moreover, the owner of a legally distributed copy of a program can arguably use the software without conclusion of a license (Art. 100 TRLPI).

2. Interpretation of broad and unspecific license grants

Article 43 paragraph 1 of the TRLPI clearly states that the transfer of exploitation rights in a work by *inter vivos* transaction is limited to the right or rights transferred. The same basic idea may be derived from Articles 48 and 50 of the TRLPI, concerning exclusive and non-exclusive assignments. In regard to the transfer of rights, these provisions have to be read in connection with Article 2 TRLPI, which makes reference to the economic character of the rights in intellectual property, and also with the provisions that set out the several exploitation rights: i.e. the reproduction right (Article 18 TRLPI); distribution right (Article 19); the right of communication to the public (Article 20); the right of transformation (Article 21); and the right to make selections (Article 22). It is important to note that these rights are independent (Article 23) and hence may be exploited or transferred independently. In relation to computer programs, these provisions have to be supplemented with Article 99 of the TRLPI.

Therefore, according to the first paragraph of Article 43, the transfer is limited to the economic rights identified for transfer within the contract, but it is to be noted that in paragraph 2 a certain degree of flexibility is introduced. To the extent that the conditions governing the exploitation of the work are not explicitly stated in the contract, Article 43

(2) TRLPI acknowledges that the transfer shall be limited to such exploitation as is necessarily deduced from the contract, and is essential to the fulfilment of the purpose thereof. Hence, not only will the explicit will of the parties expressed in the text of the contract be determinative; the tacit will of the parties that may be inferred from the terms of the contract or the circumstances of the case may also be relevant[24].

3. Modes of using a work unknown at the time of the license grant

Manners of using a work that are unknown at the time of the license grant are not covered by the license. According to Article 43 (5) TRLPI: the transfer of exploitation rights shall not apply to methods of use or means of dissemination that do not exist or are unknown at the time of the transfer.

4. Direct license or sub-license

The wording of the legal provisions in this respect is unclear. In particular, Article 50 TRLPI states that the rights of the non-exclusive assignee shall be non-assignable except where the assignment occurs as a result of the winding-up, or a change in the ownership, of the corporate assignee. Notwithstanding this, it is generally accepted that it is possible for a licensee to sublicense the rights, provided that the right holder has authorized him to do so[25].

As far as computer programs are concerned, in the case of a collective work, unless otherwise agreed, the individual or legal person who publishes and makes it available under his name shall have the status of author, according to Article 97(2) TRLPI. It has been argued that when someone collates different FOSS works into a package he may qualify as an editor for these purposes. The editor would be in a position to grant further licenses to users provided that he has acquired upstream licenses[26].

24 See M.C. Gete-Alonso y Calera, "Artículo 43", R. Bercovitz Rodríguez Cano (coord.), *Comentarios a la Ley de propiedad intelectual*, 3rd ed., 2007, Madrid, Tecnos, p. 773.

25 See S. Cavanillas Múgica, "Artículo 50, R. Bercovitz Rodríguez Cano (coord.), *Comentarios a la Ley de propiedad intelectual*, 3rd ed., 2007, Madrid, Tecnos, p. 835; and J.M. Rodríguez Tapia, "Artículo 45", J.M. Rodríguez Tapia (dir.), *Comentarios a la Ley de propiedad intelectual*, 2nd ed., 2009, Navarra, Thomson Reuters Civitas, p. 50.

26 M. Bain, "Spain", *The International Free and Open Source Software Law Book*, <*http://ifosslawbook.org/spain/*>, at p. 8.

5. Revocation or rescission rights in copyright legislation

The moral rights granted to authors that cannot be waived or assigned include, among others: the right to decide whether his work is to be made available to the public, and, if so, in what form; the right to demand respect for the integrity of the work and to object to any distortion, modification or alteration to it or any act that may be prejudicial to the author's legitimate interests or reputation; and the right to withdraw the work from circulation due to changes in his intellectual or ethical convictions, after paying damages to the holders of the exploitation rights (Article 14 TRLPI).[27] Therefore, the withdrawal right prevails over the transfer of exploitation rights, but with certain limitations[28]. In regards to the withdrawal right, it is noteworthy that it has to be based on changes in his intellectual or ethical convictions and it can only be exercised against the holders of the exploitation rights. Furthermore, if the author later decides to resume exploitation of his work, he is obliged to give preference, when offering the relevant rights, to the previous holder thereof and shall offer terms reasonably similar to the original terms.

Once a work of joint authorship, i.e. a work that is the unitary result of the collaboration of two or more authors (art 7 TRLPI), has been made available to the public, none of the co-authors may unreasonably withhold their consent to its exploitation in the manner in which it has been disclosed. Furthermore, in relation to computer programs, it is to be noted that, in the case of a collective work, unless otherwise agreed, the individual or legal person who publishes or makes it available under his name shall have the status of author (Article 97.2 TRLPI).

The prevailing view is that FOSS or alternative license terms stating that the author of a work (including derivative works) cannot oppose the use of the work by certain people or for certain purposes which may affect his reputation, may conflict with moral rights established in Article 14[29].

6. Author's statutory right for equitable remuneration

Authors have a statutory right for equitable remuneration under Spanish copyright law.

27 See I. Garrote Fernández Díez, *El Derecho de autor en Internet (Los tratados de la OMPI de 1996 y la incorporación al Derecho Español de la Directiva 2001/29/CE)*, 2th ed., Granada, Comnares, 2003, pp. 158-169.

28 P. Martínez Espín, "Artículo 43", R. Bercovitz Rodríguez Cano (coord.), *Comentarios a la Ley de propiedad intelectual*, 3rd ed., 2007, Madrid, Tecnos, pp. 231-233.

29 R. Xalabarder Plantada, "Las licencias Creative Commons: ¿una alternativa al copyright?", *uocpapers*, 2006, p. 8; M. Bain, "Spain", *The International Free and Open Source Software Law Book*, <*http://ifosslawbook.org/spain/*>, p. 7.

It is generally admitted that granting gratuitous licenses is compatible with benefitting from statutory rights for equitable remuneration. Such statutory rights may be not waived and are subject to mandatory collection by collecting societies[30].

7. Participation in the distribution of revenues by collecting societies

It is possible in principle to grant licenses in accordance with an alternative licensing model and to participate at the same time in the distribution of revenues by collecting societies, although significant divergences may be found among the practices of the several Spanish collective societies[31].

8. Right to modify and moral rights

See section III.5, above.

9. Remedies in case of termination of the licensee's rights

If a contract had been effectively concluded and one of the parties did not perform his obligations, the aggrieved party may choose between demanding performance or termination of the obligation, with compensation of damages and payment of interest in both cases. He may also request termination, even after having chosen specific performance, where the latter should be impossible. The court shall order the requested termination, unless there are justified grounds that authorize the setting of a term (Art. 1124 of the Civil Code).

The rightholder may bring an action for copyright infringement. The actions and procedures at his disposal are, to a great extent, based on Directive 2004/48/EC of 29 April 2004 regarding the enforcement of intellectual property rights[32]. The remedies available include injunctions and urgent precautionary measures (Article 138 TRLPI), the restraining or cessation of the unlawful act (Article 139), and damages (Article 140).

Pursuant to Article 140 paragraph 2, damages shall be set, at the aggrieved party's choice, according to any of the following criteria:

a) The negative economic consequences, including the *lucrum cessans* suffered by the aggrieved party and the profits that the infringer may have obtained from his unlawful use. Moral prejudice shall afford entitlement to indemnification even

30 See e.g. R. Xalabarder Plantada,"Redes sociales y propiedad intelectual", *Derecho y redes sociales*, Navarra, Thomson Reuters Civitas, 2010, p.350.

31 See A. Vera Palencia, "Guía Creative Commons" <*http://www.sideleft.com/guia-creative-commons/*>.

32 OJ L 157, 30.4.2004, pp. 45–86.

where there is no evidence of economic prejudice. The amount of the indemnification shall be determined according to the circumstances of the infringement, the seriousness of the harm done and the extent of unlawful dissemination of the work.

b) The money the aggrieved party would have received, if the infringing party had requested a license to use the copyright in question.

It is to be noted that it is the aggrieved party who makes the choice between the two options.

IV. Other aspects: Public procurement

Although there is significant awareness of the potential benefits of using open source software in public administration, the legal framework generally remains rather vague[33]. The 2007 Act guaranteeing electronic access by citizens to public services[34] has some broad provisions favouring the use open source software. In particular, Article 4 establishes technological neutrality as a basic principle that includes a mandate to use public standards. Article 45 and 46 contain provisions on the re-use and sharing of systems and applications by public administration with a specific reference to open source[35]. Of particular significance is a set of recommendations dealing with the use of free and open source software by the administration, drafted in 2005 as part of the framework for the Ministry for Public Administration[36]. Furthermore, in 2006 a public entity was established with the goal of promoting the adoption of open source technologies.[37] Finally, at the regional and local level, some provisions have been adopted to favour the implementation of open source software in regional and local administrations, particularly in the field of education[38].

33 F.A. Huertas Méndez, "El software libre como elemento de desarrollo de la Administración electrónica", IDP Número 8 (2009), pp. 36-47.

34 Ley 11/2007 de 22 de junio, de Acceso Electrónico de los Ciudadanos a los Servicios Públicos (*Boletín Oficial del Estado nq 150, 23th July, 2007*).

35 C. González Calderón y O. Ferrán Riera, "El software libre y las administraciones públicas. Una visión actualizada", *IDP. Revista de Internet, Derecho y Política*. N.º 8. 2009, pp. 25-35.

36 Propuesta de Recomendaciones a la Administración General del Estado sobre la Utilización de Software Libre y de Fuentes Abiertas, junio 2005 <http://www.csi.map.es/csi/pg5s44.htm>.

37 Centro Nacional de Referencia de Aplicación de las Tecnologías de la Información y la Comunicación basadas en Fuentes Abiertas (CENATIC). See, its document CENATIC, "Software de fuentes abiertas en la Administración electrónica Análisis del impacto de la LAESCP en la Administración Pública", available at <http://www.cenatic.es/>

38 See, e.g., Decreto 72/2003 de la Junta de Andalucía.