

GETTING THE DEAL THROUGH

Licensing

in 25 jurisdictions worldwide

Contributing editors: Bruno Floriani and Alexander Konigsberg

2009



Published by
GETTING THE DEAL THROUGH
in association with

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Licensing 2009

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Licensing

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
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ISSN 1759-9830

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Printed and distributed by
Encompass Print Solutions.
Tel: 0870 897 3239

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Ukraine

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Overview

- 1 Are there any restrictions on the establishment of a business entity by a foreign licensor or a joint venture involving a foreign licensor and are there any restrictions against a foreign licensor entering into a licence agreement without establishing a subsidiary or branch office?

As regards the admission of foreign investments into the Ukrainian economy in general, and into certain branches and sectors of the economy, Ukrainian law fixes the national regime of treatment for foreign investors, with certain exceptions that have a limiting effect. The foreign-owned share of an information agency shall not exceed 30 per cent. Foreign investors are not allowed to own customs-licensed stores and duty-free shops located on Ukrainian territory.

There is no requirement for a foreign licensor to set up a subsidiary or branch office before entering into a licence agreement.

Kinds of licences

- 2 Identify the different forms of licence arrangements that exist in your jurisdiction.

The Civil Code of Ukraine does not stipulate particular kinds of licence arrangements, but simply refers to a licence to use an intellectual property object, while laws as to protection of industrial properties (like trademarks, inventions or industrial designs) list trademarks or service marks, inventions and industrial design licensing. Copyright law refers to an author giving permission to use a product he or she has created, but not to licensing. Ukrainian law has no clear definition of know-how or technology transfer arrangements or the possibility of licensing them, though such licensing may be performed under general regulations provided by the Civil Code of Ukraine.

The Civil Code of Ukraine names exclusive, non-exclusive and sole licences that may be included as a separate document or as a clause in a licence agreement. The stated list of licences is not exclusive. A single requirement to other kinds of licenses does not contradict the current laws.

An exclusive licence may be issued to a single licensee and excludes the licensor's right to use it in a sphere that is covered by the licence.

A sole licence may be used by a single licensee and the licensor itself, while non-exclusive licences may be issued to different licensees.

Law affecting international licensing

- 3 Does legislation directly govern the creation of an international licensing relationship or require registration of the licence with local authorities? Describe any requirements.

International licensing is regulated by the same norms as national licensing. There is no requirement for obligatory registration of the licence with the local patent office, but the parties may do that voluntarily.

- 4 Are there any pre- or post-grant disclosure or registration requirements with respect to any international licensing rights to be granted in your jurisdiction? Do these requirements still apply if your jurisdiction forms part of a multi-jurisdictional territory in respect of which rights are being granted?

Though Ukraine has no clear pre- or post-grant disclosure requirements with respect to international licensing, we consider it desirable for a foreign licensor to make a pre-grant disclosure. Our position is based on general norms of executing agreements. Article 203 of the Civil Code provides for a general requirement as to free expression of the party's will and its correspondence with its intentions. Article 229 of the Civil Code allows the party to seek to void an agreement in court, if such agreement was concluded under a mistake as to its essential circumstances. A mistake as to the nature of a transaction, parties' rights and liabilities, or such peculiarities and features of a thing that considerably decrease its value or possibility for use according to its purpose is treated as having essential meaning. The article provides that a party that, due to its imprudent actions, contributes to the mistake, shall compensate another party for any losses incurred.

Article 230 of the Civil Code concerns the legal consequences of a transaction executed under deception or fraud. The article states that 'a fraud takes place if a party denies circumstances that might hinder the conclusion of the transaction or if it conceals such circumstances'. The Code states that the party that performed the fraud is liable to compensate the other party for double its losses and moral damage caused by the transaction.

As soon as an international licensor is treated as a seasoned business that shall deal fairly with its licensee, the court may emphasise the licensor's obligation to warn a licensee about any possible risk of licence activities and other matters peculiar to licensing, namely on its obligation to disclose.

- 5 Are there any statutorily- or court-imposed implicit obligations in your jurisdiction that may affect an international licensing relationship, such as good faith or fair dealing obligations or the obligation to act reasonably in the exercise of rights?

The principles of fair dealing and reasonableness are treated as fundamental to Ukrainian civil law. The Code provides that any person in the exercise of his or her rights shall refrain from actions that may violate the rights of other persons.

Authorised institutions or artists' unions may approve typical licence agreements. Any licence agreement may contain provisions not stipulated by the typical licence agreement. Provisions of a licence agreement concluded with the creator of an IP object that worsen his or her position as compared with that stipulated by the law or typical licence agreements, are null and void and to be substituted with those stipulated by the typical agreement or the law.

The Ministry of Education and Science, as the authorised institu-

tion, has approved by Order No. 986 dated 28 December 2004:

- an agreement on share of property rights on IP objects created under an employer instruction;
- an agreement between creator as employee and employer on transfer of a right to receive patent (certificate) to IP object;
- an agreement between employer and inventor on his or her fee;
- a licence agreement to use commercial secrecy; and
- co-authors' agreement on their contributions to IP object creation and fee sharing.

The approved agreements have not been given as typical ones, but are recommended for application. Thus, the question is opened as to whether they will be treated by the court as typical and decisive in disputes between licensors and licensees.

- 6** Does the law in your jurisdiction distinguish between licences and franchises? If so, under what circumstances, if any, could franchise law or principles apply to a licence relationship?

Ukrainian law does not regulate franchises but rather commercial concession agreements, which are treated by practitioners as analogous to franchise ones. The law defines that under a commercial concession agreement, the grantor renders to the grantee a right to use intellectual property law objects like trademarks, industrial samples, inventions, works, commercial secrets and practice and business reputation to produce or sell goods or services. Such legal definition leads to the conclusion that sets of licences or groups of rights that use IP objects are granted under commercial concession agreements. Under such a conclusion, the difference between licence and franchise agreements is in the quantity of rendered licences. If the grantor issues several licences for IP objects, the court may decide that the parties have entered into a franchise agreement. To avoid such possibility, it is necessary to expressly withdraw from the regulations covering commercial concession agreements in the Ukrainian Civil Code. Such withdrawal is allowed by the Civil Code itself in article 6.

Intellectual property issues

- 7** Is your jurisdiction party to the Paris Convention for the Protection of Industrial Property? The Patent Cooperation Treaty (PCT)? The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

Ukraine is a party to all listed agreements.

- 8** Can the licensee be contractually prohibited from contesting the validity of a foreign licensor's intellectual property rights or registrations in your jurisdiction?

No.

- 9** What is the effect of the invalidity or expiry of registration of an intellectual property right on a related licence agreement in your jurisdiction?

The invalidity or expiration of registration of an intellectual property right results in termination of the related licence agreements, as only an owner may dispose an intellectual property right. Such ownership is confirmed with a patent or certificate. As soon as this document is considered as invalid or expired, the licensor has lost its right to issue licences.

- 10** Is an original registration or evidence of use in the jurisdiction of origin, or any other requirements unique to foreigners, necessary prior to the registration of intellectual property in your jurisdiction?

Ukraine has no unique requirements for foreigners, as they are treated equally with nationals.

- 11** Are there particular requirements in your jurisdiction: for the validity of an intellectual property licence; to render an intellectual property licence opposable to a third party; or to take a security interest in intellectual property?

An intellectual property licence shall be made in writing and formed as a separate document or as a clause in a licence agreement. It shall be a sole or exclusive agreement to be opposable to a third party. The owner or licensor, if it is provided for in the licence agreement, may give security interest in intellectual property to his or her creditors. Such security interest must be filed with the Registry of Creditors' Rights and Encumbering for a creditor to have preferential rights over competing creditors.

- 12** Can a foreign owner or licensor of intellectual property institute proceedings against a third party for infringement in your jurisdiction without joining the licensee from your jurisdiction as a party to the proceedings? Can an intellectual property licensee in your jurisdiction institute proceedings against an infringer of the licensed intellectual property without the consent of the owner or licensor?

The licensee may join the proceeding as a third party without any independent claims. The licensee may initiate proceedings in Ukraine against an infringer of the licensed intellectual property only if authorised to do so by the owner or licensor.

- 13** Can a trademark or service mark licensee in your jurisdiction sub-license use of the mark to a third party? If so, does the right to sub-license exist statutorily or must it be granted contractually? If it exists statutorily, can the licensee validly waive its right to sub-license?

The licensee may sub-license use of the mark to a third party if such right is given to it contractually.

- 14** Can an unregistered trademark be licensed in your jurisdiction?

An unregistered trademark may be licensed in Ukraine only if it is well known.

- 15** Is your jurisdiction a 'first to file' or 'first to invent' jurisdiction? Can a foreign licensor license the use of an invention subject to a patent application but in respect of which the patent has not been issued in your jurisdiction?

Ukraine is a 'first to file' jurisdiction. A foreign or Ukrainian licensor may license the use of an invention only after the patent has been issued.

- 16** Can the following be protected by patents in your jurisdiction: software; business processes or methods; living organisms?

Yes.

- 17** Is there specific legislation in your jurisdiction that governs trade secrets or know-how? If so, is there a legal definition of trade secrets or know-how?

The Law On Investment Activities in Ukraine defines know-how as an aggregation of technical, technological, commercial and other knowledge formed in the technical documentation, skills and production experience necessary to organise a production process, but not patented.

The Civil Code of Ukraine defines a commercial secret as information that is secret in the sense that it is, as a whole or as a specific form, and in the aggregate of its components, unknown, and is not easily accessed by the persons who usually deal with this type of information, and due to this it has a commercial value and was a subject of measures, adequate for the existing circumstances, to preserve its secrecy, undertaken by a person who legally controls this

information. Information of a technical, organisational, commercial, industrial or other nature can be a commercial secret, except for that which cannot be attributed to a commercial secret pursuant to the law.

18 Does the law allow a licensor to restrict disclosure or use of trade secrets and know-how by the licensee or third parties in your jurisdiction, both during the term and after the expiration of the term or termination of a licence agreement?

The Civil Code allows a licensor to restrict disclosure or use of trade secrets and know-how by the licensee or third parties. Though the Code does not state the time limits of such restrictions, due to freedom of the contract proclaimed by the Code, we consider that such restrictions may apply both during the term and after the expiration of the term or termination of a licence agreement.

19 What constitutes copyright in your jurisdiction and how can it be protected?

The following works may be copyrighted in Ukraine:

- literary written works of fiction, publicity, scientific, technical or of another nature (books, articles, etc);
- speaking engagements, lectures, speech, propagation or other oral creation;
- software;
- databases;
- musical works with and without text;
- dramatic and musical works, pantomimes, choreography created for scenic shows and works settings;
- audio-visual works;
- works of art, architecture, urban construction and parks;
- still pictures and other works created similar to photography;
- common works including ornamental weaving, ceramics, carving, works produced by forging metal, jewellery, works in artistic glass, etc;
- graphics, maps, plans, drawings, sketches, plastic works concerned with geography, geology, topography, techniques, architecture and other spheres of activity;
- dramatic treatments of works stated in the first point above, and dramatisations of folklore and other traditional stories;
- derivative works;
- collection of works, collections of folklore, encyclopaedias and anthologies, collections of general data and other complex works provided they are the results of creative work under content and coordination without violating the copyright of works that are part of the collections;
- translations for looping, sound recording and subtitling in Ukrainian and other languages of foreign audio-visual works; and
- other works.

Unless otherwise proved, a person stated on an original or sample of the work is treated as its author (presumption of authorship).

Having protected his or her copyright, the author may:

- claim recognition and restoration of his or her rights, including prohibition of carrying out actions that violate the copyright or related rights, or create threat of their violation;
- initiate proceedings to restore violated rights or ensure termination of actions that violate the copyright or related rights, or create the threat of their violation;
- claim moral compensation and reimbursement of expenses and compensation, including lost profit or vindication of profits received by a violator in court;
- claim termination of preparation actions before violation of cop-

yright and related rights, including stopping customs clearance formalities if there is a suspicion that counterfeited samples of works, phonograms, videograms or means of circumvention of technical defence may be imported or exported;

- take part in the inspection of industrial premises, stores, technological processes and commercial transactions connected with production of samples of works, phonograms, videograms as to which there is a suspicion of violation or threat of violation of copyrights and related rights;
- claim publication of a notice of violations of his or her copyright and related rights and judgments as to that in the mass media; and
- demand information as to third parties that participated in the production and distribution of counterfeited samples of copyrighted and related rights objects as well as on means of circumvention of protection remedies and on channels of distribution from persons violating copyright and related rights.

20 Is a provision requiring the contractual assignment of copyright by the licensee to the licensor for any artwork, software improvements and other works advisable in your jurisdiction?

No.

Software licensing

21 Does the law in your jurisdiction recognise the validity of 'perpetual' software licences?

No.

22 Are there any legal requirements to be complied with prior to granting software licences? In particular, are there import or export restrictions on software?

There are no legal requirements to be complied with prior to granting, whether for import or export, software licences.

23 Who owns improvements and modifications to the licensed software? May a software licensee obtain bug fixes, upgrades and new releases from the licensor in the absence of a contractual provision to that effect?

The question of ownership of improvements and modifications to the licensed software shall be decided in the licence agreement. The licensee may not obtain bug fixes, upgrades and new releases from the licensor in the absence of a contractual provision to that effect.

24 May a software licensor include a process or routine to disable automatically or cause unauthorised access to disable, erase or otherwise adversely affect the licensed software?

Yes.

25 Have courts in your jurisdiction recognised that software is not inherently error-free in determining the liability of licensors in connection with the performance of the licensed software?

There have been no judgments on this issue in Ukraine, so we do not know the courts' attitude towards the problem.

26 Have courts in your jurisdiction restricted in any manner the enforceability or applicability of the terms and conditions of public licences for open-source software (ie, GNU and other public licence agreements)?

No.

Royalties and other payments, currency conversion and taxes

27 Does law govern the nature, amount or manner or frequency of payments of royalties or other fees or costs (including interest on late payments) in an international licensing relationship, or require regulatory approval of the royalty rate or other fees or costs (including interest on late payments) payable by a licensee in your jurisdiction?

The law does not govern the nature, amount, manner or frequency of payments of royalties or other fees or costs (including interest on late payments) in an international licensing relationship, and does not require regulatory approval of the royalty rate or other fees or costs (including interest on late payments) payable by a licensee in Ukraine. All these items are to be regulated in the licence agreement.

28 Are there any restrictions on transfer and remittance of currency in your jurisdiction? Are there any associated regulatory reporting requirements?

If licensee pays more than €100,000 to the licensor within a year, it needs to obtain a positive conclusion of the price committee as to the correspondence of paid amounts to market prices.

29 In what circumstances may a foreign licensor be taxed on its income in your jurisdiction?

As soon as royalties are treated as foreign licensor income received on the territory of Ukraine, they shall be taxed at the rate of 15 per cent if lower tax rates are not prescribed by bilateral treaties on avoidance of double taxation. Ukraine has concluded more than 150 bilateral treaties. To use the advantages of the treaty, a licensor shall submit annually to the licensee a certificate of its residency. For the US it is Form 6066. The tax is paid for the amount of payments made to a foreign licensor by a Ukrainian licensee.

Competition law issues

30 Are practices that potentially restrict trade prohibited or otherwise regulated in your jurisdiction?

Practices that potentially restrict trade are prohibited in Ukraine. These include resale price or other terms of purchase or sale maintenance; limits on production, sale or technical and technological development or investment; tied selling; territorial, market sector, national or major account or other customer restrictions; refusal to deal or supply; and auction distortion.

31 Are there any legal restrictions in respect of the following provisions in licence agreements: duration, exclusivity, grant-back provisions and non-competition restrictions?

The law directly states that provisions potentially restricting trade are allowed if such restrictions are connected with the use of IP objects. The law provides that the duration of the licence agreement shall correspond to the duration of the certificate or patent for the IP object. There is no restriction as to exclusivity, including restrictions on the customers that the licensee may solicit or serve, though a similar restriction exists as to franchises.

There is no regulation as to grant-back provisions, and correspondingly all issues of assignability to the licensor of ownership of improvements or developments made by the licensee to licensed intellectual property shall be agreed in the licence agreement. Granting the licensor a licence to use and sub-license the use of any improvements or developments made by the licensee shall also be agreed in the licence agreement. The law is silent as to the legality of anti-competition restrictions in licence agreements, while such restrictions are directly allowed for franchises.

Update and trends

The most significant changes and amendments to the IP law occurred in 2003. The most important event for Ukraine in 2008 was joining the World Trade Organisation. This did not result in the amendment of the licensing law as it is quite developed and corresponds to the international standards in the field. Due to this, licensing agreements are widely used in Ukraine both by Ukrainians and foreigners.

Indemnification, disclaimers of liability, damages and limitation of damages

32 Are indemnification provisions enforceable? Is insurance coverage for the protection of a foreign licensor available in support of an indemnification provision?

Indemnification provisions are not enforceable in Ukraine. Insurance coverage for the protection of a foreign licensor is not available in support of an indemnification provision.

33 Can the parties contractually agree to waive or limit certain types of damages? Are disclaimers of liability generally enforceable? What are the exceptions, if any?

The parties can contractually agree to waive or limit certain types of damages, based on article 6 of the Civil Code. All disclaimers of liability, excluding liability for health and life of natural persons as well as damage to property of third parties, are generally enforceable.

Termination

34 Does the law impose conditions on, or otherwise limit, the right to terminate or not to renew an international licensing relationship; or require the payment of an indemnity or other form of compensation upon termination or non-renewal?

The law has no provisions as to termination or renewal of the licence agreement or payment of indemnity or other form of compensation upon termination or non-renewal, while such provisions do exist for franchises.

Bankruptcy

35 What is the impact of the bankruptcy of the licensee on the international licence relationship in your jurisdiction and can the licensor structure its international licence agreement to terminate it prior to the bankruptcy and remove the licensee's rights?

Bankruptcy resulting in liquidation of the licensee causes the licence agreement's early termination. There is no prohibition on the licensor restructuring its international licence agreement for termination prior to the bankruptcy and removing the licensee's rights.

36 If the licensee has granted sub-licences in your jurisdiction, what is the impact of the licensee's bankruptcy on their rights?

A licensee's bankruptcy that results in its liquidation leads to early termination of a granted sub-licence.

Dispute resolution

37 Are there any restrictions on an international licensing arrangement being governed by the laws of another jurisdiction chosen by the parties?

No.

38 Can the parties contractually agree to arbitration of their disputes instead of resorting to the courts of your jurisdiction? If so, must the arbitration proceedings be conducted in your jurisdiction or can they be held in another?

The parties can contractually agree to arbitration of their disputes instead of resorting to the Ukrainian courts. There is no requirement to have arbitration proceedings in Ukraine and they can be held anywhere subject to the parties' agreement.

39 Would a court judgment or arbitral award from another jurisdiction be enforceable in your jurisdiction? Is your jurisdiction party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Any judgment obtained in foreign courts may be recognised or accepted for execution by the courts of Ukraine without re-trial on the merits only in cases stipulated by international treaties. Such treaties were concluded with ex-USSR countries only.

Foreign arbitral awards will be recognised and accepted for execution by the courts of Ukraine. This is because Ukraine has been a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1960.

40 Is injunctive relief available in your jurisdiction? May it be waived contractually? May the parties waive their entitlement to claim specific categories of damages in an arbitration clause?

Injunctive relief is available in Ukraine and it may not be waived contractually. The parties may waive their entitlement to claim specific categories of damages in an arbitration clause.

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