

Copyright licensing in the UAE and the Pitfall of Ambiguous language

Mariam Sabet - Senior Associate - Intellectual Property / Competition
m.sabet@tamimi.com - Dubai International Financial Centre

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Yet nowadays, we see more and more vagueness and ambiguity in contract terms. Whether due to the rush of lucrative business where time is of the essence to secure a deal, or lack of attentiveness, uncertainty in contract drafting creates a linguistic nightmare when searching for the initial intention of the parties. If a party finds it has been given extended rights based on the ambiguity of the license terms, they will insist that this was the parties intention all along. With the rapid influx of cross border licensing occurring, few words are universally understood to have a single meaning and that can lead to a once promising collaboration being frustrated.

The solution is to avoid ambiguous drafting by using clear and concise terms, especially when preparing the 'Operating Language' of the license.

This article will discuss the Operative Language of a license in general, and the common errors that are typically found.

The Operative Language

Careful consideration must be taken when negotiating and drafting the Operative Language in a license agreement. The Operating Language is the "grant" clause, which is the most important clause in a license agreement.

The grant clause should typically contain 6 elements:

1. Nature of grant (language should be clear that it is a license and not an assignment)
2. Nature of exclusivity (a (non) exclusive (or sole) license under certain IP rights)
3. Bundle of rights (to make, have made, use, offer to sell, sell, or import Licensed Products; depends on the subject matter of the license))
4. Territory
5. Duration
6. Consideration

In such clauses one tends to find modifier terms such as "indivisible", "irrevocable" and "non-transferable". This is inadvisable. Some of these terms should not be recited in a license and some do not belong in the grant clause. It is important to understand the repercussions of adding such terms, and they can often be the source of disputes.

For instance the term "indivisible" could rule out the use of the license by affiliates or subsidiaries. The term "non-transferable" would not grant any right to assign or sublicense.

Other terms such as "irrevocable" do not belong in the grant clause, but belong in the clause on termination.

The parties need to understand that terms like these often tend to add ambiguity. If they need to be there

the parties need to understand what they mean exactly and the restrictions or rights that come with them.

In licensing of intellectual property rights, particularly copyright, the bundles of rights are extensive and vary with the evolution of technology. One must be diligent in licensing those rights and ensure that the correct terms of the license are well defined, clear and far from any ambiguity.

Bundle of rights in copyright licensing

Bundles of rights under a copyright are the exclusive rights of authors and their successors regarding the exploitation of their copyright.

In the UAE these rights are set out in the UAE Federal Law No. 7 of 2002 for Copyright ('the Copyright Law') particularly at article 7 which stipulates that:

'Article 7 : The author alone and his successors after him, or the holder of the right of the author, may license, in any way, the exploitation of the work, especially by means of reproduction including electronic downloading and storing, or acting by any method, or broadcasting, or re-broadcasting, or public performance or transmission, or translation, or alteration , or amendment, or rental, or lending, or publishing in any way, including giving access to the work by means of a computer or information and communication networks, or by other means'

Trying to grant or obtain a license to exploit any of those rights is no easy task. For example, one must know what would a reproduction license entail, exclude and also imply.

The Operating Language is therefore critical in clarifying any ambiguities. Article 9 of the Copyright Law demands that any disposition of the rights of copyright must be in writing and must detail the purpose, duration and territory to which the assignment applies. It does not however require an explicit statement as to which rights in the bundle of rights are being granted, whether a reproduction, or distribution, or adaptation license.

By way of example, one of the rights in the bundle of rights is the reproduction right, which is perhaps the most fundamental right granted by the Copyright Law. The reproduction right is the right to reproduce a copyrighted work in copies or in whatever other medium. Reproduction is defined in the Copyright law as:

"making one or more copies of a work, or a sound recording, or a broadcast program, or any performance, in any manner or form, including permanent or temporary electronic downloading or storage, regardless of the method or device used in the reproduction".

A common assumption is that a license to reproduce a work includes a right to distribute it. However there is no mention of distribution in the definition of 'reproduction' above. A license to reproduce is distinct right from a license to distribute. They are not synonymous terms and cannot be used interchangeably. As such, a holder of a reproduction license does not necessarily have a distribution right and would be considered in violation if he sells the work without an explicit license. The same applies for a distribution license - a reproduction right is not implied, and it is considered a violation if he copies the work.

The best approach is to explicitly state in writing the specific rights being licensed, as any rights not explicitly licensed or assigned shall be deemed to be retained by the Licensor. For instance , simply stating that licensor grants the licensee a reproduction license would not be clear enough because it does not state the number of copies permitted, the purpose of the license (e.g. whether education or for profit) and the medium of reproduction.

In light of the above, it is imperative that in a licensing agreement the parties carefully review the language used so as to ensure that the parties intent is truly reflected. Otherwise a dispute may arise and Courts may be called upon to interpret the license, which is often to the detriment of one of the parties to the agreement.