VALIDITY ISSUES OF OPEN SOURCE LICENSES IN EUROPEAN UNION THE EU'S SOLUTION

by

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New available software's and new ways to disseminate it equals new legal issues. This article is meant to point out a few possible problems regarding Open Source/Free Software (OS/FS) and to introduce European Union Public License (EUPL).

KEYWORDS

Copyright, open source software, software license, copyright license

INTRODUCTION [1]

In the era of e-society, where no deed goes unregistered on the internet (the 'net'), there is an increasing need for transparency and legal predictability within the e-environment. E-users, being either the real end user or the developer, need to be aware of the legal consequences of their actions. This is especially true in relation to the acceptance of software licenses and when an individual becomes the licensee. However, it is not always clear who is the licensor and how to become the licensee within the context of Open Source/Free Software. In this paper Open Source licenses' validity issues shall be briefly presented. It is very important part of modern software development - an area of constant growth and increasing legal uncertainty.

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Importantly, from a legal point of view, the ideological argument between Open Source movement and Free Software movement has no impact on the judicial analysis, and as such, will not be discussed within the context of this paper. Accordingly, for the purposes of this paper, the term Open Source/Free Software (OS/FS) will be employed. The OS/FS movement has increased primarily due to the specific licensing system.[1] The most known (but not common to all OS/FS licenses) feature of the OS/FS licensing system is the reciprocity provision. It allows the licensor to control licensing scheme on further dissemination of his/her works, with or without modifications, by adding a rule that the original license is also a license of a copied or amended work. The licensor asks for reciprocity: I have shared with you, so you will share with me (and others). Reciprocity clauses have encouraged cooperation and the sharing of ideas within groups of people, which are commonly referred to as a 'community' (or 'communities'). This increased movement has simultaneously reduced the cost of ownership and usage of software, while allowing users to further customize applications on a 'as needs' basis.

The difference between the OS/FS and proprietary software (closed source software or CSS) lies in the license. CSS licenses have far more limitations which includes, for example that the program is distributed only in the form of an object code, what dismiss possibility to repair errors. In contrast OS/FS licenses essentially grant everybody the same rights as the original author. The granting of these rights to community members not only operates as a catalyst for participation, but also acts as a major incentive for community member to share their knowledge, to co-operate with other members and to co-develop software. Bearing this equality approach in mind, it may also be argued that OS/FS stimulates innovation. For example, by allowing licensee to copy, modify and distribute software, the process of exchanging ideas, data and new software occurs at a faster rate, which in turn develops new knowledge.

The primary purpose of this paper is to articulate the key legal issues regarding enforcement of OS/FS licenses within European Union (EU). In do-

[1] L. Rosen, Open source licensing, software freedom and Intellectual Property Law, Prentice Hall PTR, 2005, p.3

ing so, the paper also briefly examines the European Union Public License (EUPL) as the European Commission's (EC) response to these issues.

OS/FS licenses can be categorized into two main groups: academic licenses and reciprocal licenses.[2] Academic licenses allow every development from the original code to be distributed under any license. New software can be licensed under the same type of license, another open source license or as a proprietary license. A Berkeley Software Distribution (BSD) license is an example of an academic license. Reciprocal licenses (also called 'copyleft' licenses) provide the individual with the rights of an academic license, i.e. they also grant the individual the right to use, modify and disseminate the software for an unlimited range of purposes. There is however one strong condition attached to this form of license - the distribution of modified or unmodified version of a work should be done under the same type of license as the original software. The most common reciprocal license is General Public License (GPL).

OS/FS LICENSES ORIGINATED IN UNITED STATES – ISSUES OF USE [2]

Studies to date[3] have shown that existing licenses have not, as yet, corresponded with the specific requirements of European Institutions. These requirements include: specification of applicable law and competent court, limitation of liability, warranty disclaimer, terminology regarding copyright fitting European legal practices, equal legal value in the multiple languages.

Each of these requirements will be briefly considered in turn.

Applicable law.[4] In instances where the license has not explicitly referred to the rules of the applicable law, the contract will be governed 'by the law of the country with which the contract is most closely connected.[5] In the European copyright traditions the license will be considered to be a contract. With respect to OS/FS licenses it might be assumed, therefore, that the party most closely connected with the contract will be the licensors of the

[2] L. Rosen, Open source licensing, software freedom and Intellectual Property Law, Prentice Hall PTR, 2005, p.69

[3] At the level of EU: Advice report on Open Source Licensing of software developed by The European Commission, 16.12.2004, Unisys, Crid at http://ec.europa.eu/idabc/servlets/Doc?id=19296

[4] The only license that decides upfront that the applicable law is the law of state of California is MPL.

software as they carry the obligation to provide the license to use the software (characteristic obligation – see footnote 3). Due to the potential for international cooperation, different arrangements for contributed works and not always clear sublicensing scheme, determining who the licensor is, will not always, however, be a straightforward task.

Competent jurisdiction. In some instance it may be extremely difficult to establish which court will have the competent authority to hear disputes relating to breaches of license agreements. If, for instance, the defendant in the litigation is a resident of an EU Member State, competent jurisdiction will be decided upon the Regulation 44/2001.[6] Article 2, point 1 of this regulation holds provision that a residents of an EU Member State shall, whatever their nationality, be sued in the courts of that Member State.[7] There may however still be a problem of correctly identifying all the parties to the license agreement. In the OS/FS community the data about all licensors (original one and contributors) and all licensees (first one and others receiving the work upon implied sublicense, e.g. BSD) is not always easily accessible.

Copyright terminology. To date the majority of OS/FS licenses have been written originated in the US. This is significant due to the differences that exist between US copyright law and European legal practices. The term 'distribution' illustrates this point. Within the European legal framework, for instance, the distribution right is always regarding tangible (physical) copy of the computer program. Within the US new trends[8] are allowing to classi-

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[5] Art.4 of the Rome convention at http://www.rome-convention.org/instruments/i_conv_orig_en.htm. Close connected - it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

[6] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters http://eurlex.europa.eu/LexUriServ/site/en/consleg/2001/R/02001R0044-20050104-en.pdf

[7] Ibidem, art.5 special jurisdiction: A person domiciled in a Member State may, in another Member State, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question.

[8] See: in the US legislation: S.167: The Family Entertainment and Copyright Act of 2005: C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution

fy dissemination over the net also as a way to distribute. The traditional approach to the exclusive 'distribution right' involves handing an existing copy over to somebody else and does not seem to consider dissemination over the internet as a form of distribution.[9] In European copyright these kinds of acts would be classified as a reproduction or performance.[10] The BSD license grants only the redistribution, usage and modification right, and in this case, the EU courts would find it difficult to allow under these conditions the dissemination of the program through the net. Common practice could be used as a reference point, but it will still be up to the court. In the present state of art, BSD used in Europe does not permit dissemination of the program over the 'net'.

License's language. Most OS/FS licenses are written in English and there are no official translations available or possible (e.g. GPL is copyrightable itself). For certainty it is desirable that both parties, the licensor and the licensee, understand the entire content of the license. The question must therefore be asked whether knowledge of English throughout the EU is adequate to enable the parties to fully understand the legal provision contained within the text of the licenses? Moreover, is it to be expected that each user of OS/FS will carefully read the terms and conditions of the license and have the OS/FS license translated if and when required? In relation to B2B licenses, the German Courts have stated that 'there are no problems at all with the text being in English, since English is the common technical language in the computer industry.[11] Would this apply also to consumer relationships (B2C)? The argument can be made that if the consumer had the capacity to download and operate the computer program in English, it may be implied that they were also able to understand the provisions of the license. This argument is obviously not valid for software displayed in other language, but still accompanied by GPL. The legal consequences of entering an obligation without full knowledge of the terms and conditions within the contract shall be decided upon court's ruling. EU courts have not, to date, had the many opportunities to rule on this matter and it ap-

[9] ibidem

[10] "…the act of making these works available on the network constituted reproduction. But at least second decision said that it also constituted performance. In fact, the act of placing a copyright work on the network does seem to be subject to both rights in French law"- André Françon, News from France, Revue Internationale du droit d'auteur, 1999, 181, p.232

[11] District Court of Munich I, Judgement of 19/05/2004- file reference 21 0 6123/04

pears that the issue is unlikely to appear in courts again in the near future. Accordingly, there is little case law to draw upon in regards to the OS/FS licenses within EU. It is quite possible that the decision of the German court would influence also B2C relations, however consumer protection laws throughout the EU offer far reaching protection to the consumer as a weaker party.[12] Article 4(2) of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts states for instance that:

> *"Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.*[13]

Limitation of liability and warranty disclaimer. Most OS/FS licenses contain a clause where the licensor may limit their liability. For instance, Article 16 of the GPLv.3 states that:

> *"In no event unless required by applicable law or agreed to in writing will any copyright holder, or any other party who modifies and/or conveys the program as permitted above, be liable to you for damages, including any general, special, incidental or consequential damages arising out of the use or inability to use the program (including but not limited to loss of data or data being rendered inaccurate or losses sustained by you or third parties or a failure of the program to operate with any other programs), even if such holder or other party has been advised of the possibility of such damages."*[14]

Acquirers of OS/FS have to take into consideration that when they are presented with the product 'as is', i.e. at the current state of development, the quality and performance of the program is not assured. Article 15 of the GPL3 states that:

> *"There is no warranty for the program, to the extent permitted by applicable law. Except when otherwise stated in writing the copyright holder and/or*

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[12] Preamble of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail; http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML

[13] Directive 93/13/EEC of 5 April 1993 at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML

[14] Art.16 GPL 3.0 at http://www.gnu.org/licenses/gpl-3.0.txt

other parties provide the program "as is" without warranty of any kind, either expressed or implied, including, but not limited to, the implied warranties of merchantability and fitness for a particular purpose. The entire risk as to quality and performance of the program is with you. Should the program prove defective, you assume the cost of all necessary servicing, repair or correction."[15]

Uncertainty still exists about the validity of those provisions. Visser has suggested that the fact that these 'as is' provisions exist does not limit the person from claiming that the licensor is liable in the case of, for example, fraud (deliberate behaviour) or serious misconduct.[16] The B2C Relationships Directives 1999/44/EC[17] and 93/13/EEC[18] additionally regulate the rights and obligations of the contracting parties. The two Directives focus on trying to strike a balance between the rights of the contracting parties, simultaneously trying to protect consumers, who have traditionally been the weaker party of the contracting parties.

Nevertheless each license must be analyzed on a case by case basis. While the circumstances of each case will vary, within the context of the B2B relationships, these clauses have been held to be valid[19] as a consequence of the freedom of contracts doctrine. 'As is' clauses also exist within the context of proprietary software licenses, so there is no reason to hold this against OS/FS initiatives.

While the last few decades of OS/FS license use has proved their raison d'être and the disputes have almost never reached the courts, the EU have still focused on developing a local solution to the problem.

As a consequence of the legal uncertainties of the OS/FS licenses mentioned above, the EU decided to initiate works on its very own OS/FS license.

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15 Art.15 GPL 3.0 at http://www.gnu.org/licenses/gpl-3.0.txt

16 E.N.M. Visser, GNU GPL-all rights reserved, Computerrecht, 2004, p. 35

17 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0044:EN:HTML

18 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML

19 E.P.M. Thole, W. Seinen, Open Source-softwarelicenties:een civielrechtelijke analyse, Computerrecht 2004, p.221 and L.Guibault, O.van Daalen, Unraveling the Myth around Open Source Licenses, T.M.C.Asser Press, 2006, p.80.

EUROPEAN UNION PUBLIC LICENSE (EUPL) [3]

As a result of a number of recent studies on the possible legal issues relating to the use of US licenses[20] on EU developed programs, the EC was left with three choices to select a way to license software developed by EU institutions and organizations. These choices may be summarized as follows:

1. To chose a license and apply it "as is" to the developed software. A key disadvantage of this option is that all considered licenses were in English.
2. To contact the authors of one OS/FS license in order to convince the party to modify/translate/adapt the license for the EU's purposes. A disadvantage of this option was related to the lack of certainty over future modifications. For instance, would the author consent to modifying the OS/FS license for a second or third time? Even if this could be guaranteed, this option may have giving rise to potential problems associated with language, and the possible lack of cooperation when working with all European languages, as the EU would be required to create an equal value of the license when produced in courts.
3. To create a specific OS/FS license for the European Commission. This option involved a high degree of risk, in that the potential OS/FS may not be accepted by the OS/FS 'community'.

After much consultation and deliberation the Commission selected the third option and, as a consequence, a new EU initiative was introduced. The EUPL is the first Open Source license elaborated by the EC. The first draft was published in June 2005, and has since been subject of debate within a number of public forums, as well as consultation with the "community". As a consequence of this process, the majority of provisions - ten of the fifteen articles – were amended. The final version of the EUPL, V 1.0, was approved by Decision C(2006) 7108 9 January 2007, at which time the EUPL was validated in three languages: English, German and French.

The overarching objective of the EUPL, as stated in its Preamble, was to: 'promote Interoperable Delivery of European eGovernment Service to public Administrations, Business and Citizens,' thus advancing the distribution and use of the developed software throughout the European Institutions.

[20] Advice report on Open Source Licensing of software developed by The European Commission, 2004

For this purpose, distribution must be authorized by an Open Source license that is fully accepted by competent legal services.[21] However, the Commission hopes for wider spread of the EUPL. For instance, the Commission hopes that the EUPL may be used by any software owner and it could become a legal interoperability instrument across the EU and its various languages.

Success of the EUPL will be measured by reference to one of its key objectives: the adoption of the EUPL as a common licensing instrument, which would thereby allow the EC and the national administrations to mutualise or share knowledge and software. If this can be achieved, the EC would view this as a positive outcome. If, however, the test of success was measured by reference to a secondary objective - reaching the developers community - the result may be somewhat disappointing.[22]

Given the embryonic stage of use of the EUPL, it is impossible at this point to determine if the EUPL is a success. It is likely that a few more years will need to pass before the "success" of the EUPL may be properly evaluated.

The question of compatibility with other OS/FS licenses was similarly raised when the EUPL was in the editorial faze. It was especially urgent issue for users of the EUPL other than public administrations bodies, interested in not only using the software, but also tailoring it with the use of other licensed computer applications. This problem was addressed in a separate provision called 'Compatibility clause' which states:

> *"If the Licensee distributes and/or communicates derivative works or copies thereof based upon both the original work and another work licensed under a compatible license, this distribution and/or communication can be done under the terms of this compatible license. For the sake of this clause, "compatible licence" refers to the licences listed in the appendix attached to the licence. Should the licensee's obligations under the compatible licence conflict with his/her obligations under this licence, the obligations of the compatible licence shall prevail".*

[21] Mathieu Paapst, EUPL, presentation from the OS conference in Amsterdam, June 2007

[22] See strong promotion of GPL 'Two different copyleft licenses are usually "incompatible", which means it is illegal to merge the code using one license with the code using the other license; therefore it is good for the community if people use a single copyleft license (GPL)' R.T. Nimmer, Legal issues in Open Source and Free Software distribution, Practising Law Institute, 2006, Westlaw results:885PLI/PAT33

According to the EUPL's Appendix, currently compatible are: GPL v.2, OSL v.2.1, v.3.0, CPL v. 1.0, Eclipse Public License v.1.0 and Cecill v.2.0. The selection criterion was: recognition of the license by either the FSF or the OSI, reciprocity regarding the source code, and that the license must be of practical use (wide spread). It was clearly the Commission's intention to encourage the community to work with the EUPL licensed codes – to stimulate the community to take up the EUPL licensed software, improve it by integrating a GPL component, and subsequently license the improved or derived work under the GPL.

CONCLUSIONS [4]

In the current state of art the emphasis should be placed on the fact that OS/FS licenses are contracts and, as such, they need to be evaluated with the context of the freedom of contracts doctrine.

Secondly license agreements have to comply with the principle of reasonableness and fairness and cannot be contrary to common decency, just as any other agreement.

A third point is that there is very little case law regarding OS/FS licenses within the EU. A Germany court has already ruled and established contractual relationship between GPL licensor and licensee. An important part of the OS/FS initiative activities is self-regulation and that is one of the reasons why OS/FS disputes are rare and almost never are reaching the court.

Each time OS/FS licenses are investigated, one conclusion can be drawn: only the case per case analysis is possible. That however is not compromising general idea of sharing, which is encouraged also by Council of Europe.[23]

Looking forward it is unlikely that the EUPL will become as popular as other (US generated) OS/FS licenses. A possible lack of success of the EUPL should not however dishearten the OS/FS movement. OS/FS licenses should be promoted as whole spectrum of licenses, even though some of them are

[23] The Council of Ministers, the Council of Europe's highest decision-making body, calls on its' members to ensure a diversity of software models by mixing Open Source, free and proprietary software. In a statement the council last week adopted recommendations on measures to increase the public service value of the Internet. The councils' members "should develop strategies which promote sustainable economic growth via competitive market structures in order to stimulate investment into critical Internet resources and ICTs." Ensuring a diversity of software including Open Source should be part of these strategies, http://ec.europa.eu/idabc/en/document/7274/469

less clear than other, the economic outcome outweighs those possible, still not confirmed, uncertainties. Economic gain is very important for all of us: better quality, higher reliability of the program, lower cost and increased choice.

There are many uncertain things in life. Some level of risk is almost always attached, and OS/FS licenses are not any different. But still future looks bright for OS/FS initiatives as they get more and more international and intergovernmental attention and promotion.