

Some remarks on open source licenses

Disclaimer

This presentation does not represent legal advice:

- Specific cases can not be discussed, please ask general questions.
- This is an academic topic and the legal background against which to interpret the licenses may be totally different in your part of the world.
- Your speaker is a qualified German lawyer and does not wish to dispense legal advice where he is not licensed (Switzerland!).

A general introduction

Software is subject to four types of legal protections:

- Copyrights
- Patents
- Trademarks
- Designs

Please note: At the moment, there is no „Intellectual Property“ as such per se. This may change once we know what is going to be contained in the Anti-Counterfeiting Trade Agreement (ACTA).

Copyright

A copyright on software in general awards:

- A right to prohibit copying of the software.
- A right to modify the software.
- A right to distribute the original or copies of the software.
- A right to make available the software for use.

A copyright on software comes into existence with the creation of the software. The work needs to be original but there is a very low threshold for originality.

Patents

Patents are awarded for technical inventions. The execution of software may fall under (European) patent law:

- European patent law provides for method claims, i.e. claims for the protection of a technical procedure.
- Method claims may be infringed by software if the execution of the software provides for a technical result.
- Example: Software that controls a plant and executes a patented method.

Trademarks and designs

Trademarks are registered names for the use by a market participant:

- Trademarks may be words, depictions (2D and 3D) and sounds.
- Trademark protection may be claimed for goods and services. For software, you usually use class 9 of the Nice Classification.

Design rights protect the design of screens, user interfaces and user experiences. They can be registered and unregistered.

Licenses

Licenses are grants of rights. With a license, a licensee obtains from the licensor the right to make use of one of the licensor's rights.

Licenses are:

- Contracts in themselves. Licenses need to be offered and accepted.
- Usually are obtained through another contract (e.g. a purchase).
- Regulate what you may or may not do with the right in question.

Open Source Software

- What is open source software?
- How does it relate to free software or „software libre“?
- The Open Source Definition (OSD)

What is open source software

- It is a generalized term for software under an open source license.
- The test for determining whether software is open source is whether certain rights are given to the licensee. It is not relevant whether a license is called „open source“ or not.
- „Open source“ is not only about access to the source code. Simplified and expanded later, open source rights regard rights to use, modify and distribute software as well as access to the source code.

Free software or software libre

- Free software or software libre is a political or philosophical concept.
- It is concerned with the rights of a software's user and places less importance on being „free as in beer“ than on being „free as in freedom“.
- The right to access to source code and to be allowed to modify source code are priorities and are seen as „inalienable“.

The Open Source Definition

- The Open Source Definition is maintained by the Open Source Initiative (OSI).
- It is available under *<http://www.opensource.org/osd.html>*.
- The definition is considered *de facto* as the list of criteria that have to be met by a license in order to be considered an open source license.

Elements of the Open Source Definition

1. Free Redistribution:

„The license shall not restrict any party from selling or giving away the software as a component of an aggregate software distribution containing programs from several different sources. The license shall not require a royalty or other fee for such sale.“

Elements of the Open Source Definition

2. Source Code:

„The program must include source code, and must allow distribution in source code as well as compiled form. Where some form of a product is not distributed with source code, there must be a well-publicized means of obtaining the source code for no more than a reasonable reproduction cost preferably, downloading via the Internet without charge. The source code must be the preferred form in which a programmer would modify the program. Deliberately obfuscated source code is not allowed. Intermediate forms such as the output of a preprocessor or translator are not allowed.“

Elements of the Open Source Definition

3. Derived Works:

„The license must allow modifications and derived works, and must allow them to be distributed under the same terms as the license of the original software.“

Elements of the Open Source Definition

4. Integrity of The Author's Source Code:

„The license may restrict source-code from being distributed in modified form only if the license allows the distribution of "patch files" with the source code for the purpose of modifying the program at build time. The license must explicitly permit distribution of software built from modified source code. The license may require derived works to carry a different name or version number from the original software.“

Elements of the Open Source Definition

5. No Discrimination Against Persons or Groups:

„The license must not discriminate against any person or group of persons.“

6. No Discrimination Against Fields of Endeavour:

The license must not restrict anyone from making use of the program in a specific field of endeavour. For example, it may not restrict the program from being used in a business, or from being used for genetic research.

Elements of the Open Source Definition

7. Distribution of License:

„The rights attached to the program must apply to all to whom the program is redistributed without the need for execution of an additional license by those parties.“

Elements of the Open Source Definition

8. License Must Not Be Specific to a Product:

„The rights attached to the program must not depend on the program's being part of a particular software distribution. If the program is extracted from that distribution and used or distributed within the terms of the program's license, all parties to whom the program is redistributed should have the same rights as those that are granted in conjunction with the original software distribution.“

Elements of the Open Source Definition

9. License Must Not Restrict Other Software

„The license must not place restrictions on other software that is distributed along with the licensed software. For example, the license must not insist that all other programs distributed on the same medium must be open-source software.“

10. License Must Be Technology-Neutral

„No provision of the license may be predicated on any individual technology or style of interface.“

The GNU General Public License v.2

The GPL v.2 is probably the most prominent open source license, e.g. the Linux kernel is under GPL v.2. It is notable for being:

- A copyleft license.
- It follows a purpose (it is partly a manifesto) for software libre.
- The licensees have the right to distribute, use or modify the software and have access to the source code.

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GPL v.2, mechanisms (I)

- The GPL v.2 is a license between the creator of a software and the software's recipient, s. 6 of the GPL v.2.
- It does not require acceptance on the part of the licensee but relies on the fact that otherwise the acts of copying, modifying or distributing of the software are forbidden under statutory law, s. 5 of the GPL v.2.
- It is not amendable by the licensee, s. 4 of the GPL v.2. Please note that s. 4 of the GPL v.2 should not be construed as to forbid the creator of the software to license it under different conditions.

GPL v.2, mechanisms (II)

- The GPL v.2 is a copyleft license, s. 2. You may modify the software but the modified software would still be subject to the GPL v.2 conditions. Parts that are created and are identifiable and sufficiently separate to be independent works of their own can be made subject to different conditions but a modified whole would still be under the conditions of the GPL v.2.
- Modifications need to be made in a discernible way, may not modify the conditions of the license and display mechanisms for the license conditions may not be modified, s. 2.

GPL v.2, mechanisms (III)

- Distribution of the software and any modifications thereto is permissible, s. 3:
 - S. 3 actually relates to executable code or object code. It does not impose conditions on the distribution of source code.
 - If object code is distributed, it must be either accompanied by source code or an offer to make the source code available on a cost basis or (for non-commercial offers) a reference where to find the source code of the software if only an offer was received.
 - Executable code that is source code in itself usually falls under the exception in the last sentence meaning that you already provided the source code and have not to provide anything else.

GPL v.2, mechanisms (IV)

- If there are circumstances contrary to the terms of the GPL v.2, the contradiction is solved by not granting the rights according to the GPL v.2, s. 7. The territorial scope may be limited for this reason, s. 8.
- The GPL v.2 intends to limit the licensor's liabilities towards the licensees, s. 11, 12. There are discussions whether this limitation is enforceable so it may be wise to discuss this issue with a lawyer in your home jurisdiction.
- Software originally under the GPL v.2 may fall under later versions of the GPL if specified, or – if no version was determined – any version of the GPL. It is however the licensees choice in both cases, s. 10.

GPL v.2, Preamble

While for most licenses it may be notable to discuss the preamble at the end, this is different for the GPL v.2:

- The GPL v.2's preamble does not discuss historical detail but refers to the intentions behind the GPL v.2.
- The preamble therefore offers guidance on how to determine the meaning behind the words in the different provisions.
- It is helpful to test ones opinion of a provision in the later text of the license against the stated intentions. If the opinion does not hold up to the intentions, usually the opinion needs to reassessed.
- The preamble therefore may serve as a last check with regard to the license contents.

The GNU General Public License v.3

The GPL v.3 is a new version of the GPL according to s. 10 of the GPL v.2. It shares the major traits of the GPL v.2:

- It is a copyleft license.
- It follows a purpose (it is partly a manifesto) for software libre.
- The licensees have the right to distribute, use or modify the software and have access to the source code.

GPL v.3, Changes (I)

- The GPL v.3 contains a provision to avoid GPL'ed DRM systems to be effective technical barriers in the sense of the European Copyright directive (2001/29/EG), s. 3.
- It provides for a requirement regarding installation information, i.e. it avoids being circumvented by trusted binary system, s. 6.
- The GPL v.3 is now amendable by the licensor to a limited extent (s. 7):
 - Disclosure requirements regarding authorship and legal terms;
 - Declaratory statements regarding rights not imparted;
 - Limitation of liability provisions and indemnification clauses
- Infringement does not automatically terminate all rights under the license (s. 8).

GPL v.3, Changes (II)

- Patents of persons who wrote or modified software are now licensed to recipients to the extent necessary for the enjoyment of the rights under the GPL v.3.
- If a licensee of a patent distributes software falling under the license, the licensee has the options to:
 - Arrange for a license for all recipients of the software consistent with the GPL v.3
 - Remove from itself the benefits of the license (thus being in the same boat as the recipients of the software)
 - Cause the patented technology to be generally available.
- If a patent license is granted while software falling under the GPL v.3 is distributed by the licensor, the patent license is granted to every recipient of the software.
- Software falling under the GPL v.3 may not be distributed by a party to a licensing agreement in contravention of the GPL v.3.

GPL v.3, Changes (III)

- The GPL v.3 now offers more flexibility in the ways to allow recipients access to the source code, s.6.
- The GPL v.3 does not require system libraries and software the recipient is usually expected to have to be distributed.
- GPL v.3 software is now clarified to be workable on systems with non free system libraries.

The GNU Lesser General Public License

- The GNU Lesser General Public License is a GPL that allows to link against libraries from non-GPL'ed software.
- Programs that merely link to libraries under the LGPL are not subject to copyleft.
- However, modifications of the libraries under the LGPL usually are.
- Applications and libraries carry notification obligations.

The BSD licenses

- Historically three different licenses.
- Common traits:
 - Disclaimer of warranty and liability.
 - Copyright notice to be maintained in copies.
 - Otherwise no restrictions on redistribution for any purpose.
- Differences:
 - The original BSD license required an acknowledgement of the organizational authorship of the software.
 - The revised BSD license restricts the use of the name of contributors as a sign of endorsement of derived software.
 - The simplified BSD license omits the endorsement clause.

The BSD licenses - consequences

- Software under BSD licenses may be easily adopted and incorporated in products, also by commercial entities.
- The maintenance of the BSD license provisions is crucial in the products.
- BSD licenses do not contain patent provisions.
- BSD licenses are non-copyleft licenses.

The Mozilla Public License

- The MPL is a weak copyleft license.
- It contains provisions regarding a patent license grant.
- In general, software under the MPL remains under the MPL but may be combined with proprietary code.

Typical business strategies for open source software

- The service model
 - Selling services in connection with the open source software.
 - Usually reliant on specific knowledge outside of the purely software related domain.
- The integration model
 - Selling integration of open source software with existing systems.
 - Usually reliant on IT-related knowledge as a systems integrator.
- The specific advancement model
 - Selling improvements to open source software not available as open source.

Doing business with open source

The risks:

- Open source software licenses usually try to disclaim warranties and liabilities to the maximum extent. However, regularly also do proprietary software licenses.
- Especially the GPL v.2 was strict with regard to non-compliance, revoking the license in full. This has been greatly improved in the GPL v.3. Many proprietary licenses provide also for revocation in case of violation of the license.

Doing business with open source

The benefits:

- Less dependence on a vendor as the source code of a software is available.
- The software can be adapted to the specific needs of an organization.
- Open source fosters in house innovation.
- In case of legal encumbrances, the source code is available as evidence.
- Furthermore, knowledge of an eventual infringement may contribute to an unclean hands defence.