Are you Open Source compliant? Understanding OS licensing in preparation for the Internet of Things

Corporate Counsel Commission
IP/TMT Commission

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Questionnaire for National Reporters

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1. **Description of the Workshop**

   It all started with Stallman's slogan saying to "think free as in free speech, not free beer" but year after year, open source softwares have slowly taken over in several fields. Open source licenses, however, can be really challenging for lawyers, not only for the issues related to their compatibility with and enforceability within national legal systems (or lack thereof) but also under a number of other profiles, such as their contaminating effect (often a tiny OS element is capable of attracting into OS a much more complicated software) and the compatibilty among different OS licenses. For this workshop, the IP/IT and the Corporate Counsel Commissions have joined forces to provide to all lawyers (and not only IT lawyers or tech-lovers) some valid instruments to deal with open source licenses. This workshop will also aim at providing to all lawyers - whether or not they are inhouse - the right knowledge to ensure awareness and compliance on this issue that can have, whichever is the industry involved, a disruptive impact if not correctly managed; an awareness that might become even more strategic as the internet of things is developing, extending the use of software - often OS - to the most various devices.

2. **Introduction to and scope of Questionnaire**

   In our AIJA workshop in Prague, we will present ways to ensure compliance with Open Source for clients and companies in various industries, i.e. not only for software developers.

   Since OS challenges the concept of national laws, the workshop is not aimed at dealing with OS compliance issues from the perspective of national laws, but rather from practical issues that arise across the jurisdictions. The reports are intended to set the stage for the workshop.

   The reporters do not have to strictly follow the questionnaire and are explicitly encouraged to think "out-of-the-box" and share their experiences with OS issues. The questions shall be mere guidelines to help structure the ideas.

   We appreciate your effort and enthusiasm very much. Please send your national report per e-mail to the General Reporters (see cover sheet) before 15 February 2014.

3. Questionnaire for national reporters

1. Compatibility:

Are there specific issues in your jurisdiction relating to the structure of OS licensing (e.g. problems relating to the fact that there is no consideration; possibility of binding counterparts to the adoption of license terms towards third parties, conflict with copyright laws, etc.)?

A. General

Software is protected under the law of 30 June 1994 concerning the protection of computer programs (hereinafter the "BSCA"), as well as under the general law of 30 June 1994 on Copyright and neighboring rights. In order for a program to fall under the scope of the law, it must be materialized and original, which requires that it must be an intellectual creation of the author. Hence, if the computer program enjoys protection of the law, it can be developed and licensed under an OS License.

Although case law on the matter is rather rare, the different OS licenses, which are being used, have been subjected to a thorough examination. In Belgium OS licenses are considered as *sui generis* license agreements, which are valid and can generally be fully enforced. However, the licenses are not airtight. The more they are being used, the more discussions come to light. Depending on the capacity or the intention of the contracting parties, different legal questions will need to be addressed.

B. Issues with OS License

1. <u>Acceptance of the OS license</u>

One of the first questions asked is whether an OS license agreement is entered into between parties. Under Belgian law, the user is bound by the terms and conditions, if he has gained knowledge of said terms and conditions, or if it is reasonably possible to take knowledge of the terms and conditions.

Applied on OS Licenses, it means that the license must be made available to the user, who is working with software developed under said license. If the conditions of the license agreement would only be provided by means of a hyperlink (*browse-wrap*), the acceptance will be up for debate. The licensor carries the

burden of proof, and he will have to establish that the hyperlink was functioning properly and that it contained the text of the OS License in question.

 If however, it is required to download the license agreement, or if the user needs to scroll trough the OS license before he receives the code, or if the user has to click on an "I agree" button (*click-wrap),* the consent with the OS license will most probably be accepted.

In this regard, a distinction will be made between non-professional and professional users. The latter will be deemed to be more familiar with the existence of OS Licenses, and as a consequence, the burden of proof on the licensor will be lighter when dealing with professional users. The courts will consider that it is more likely that a professional user is aware of the existence of OS license agreements.

2.   'Copyleft' principle

(i)   General

A certain number of OS licenses, such as the GNU GPL license[1], incorporate the "copyleft" principle.

As an example, article 5 (c) of the GNU GPL license states that:

> *"You must license the entire work, as a whole, under this License to anyone who comes into possession of a copy. This License will therefore apply, along with any applicable section 7 additional terms, to the whole of the work, and all its parts, regardless of how they are packaged. This License gives no permission to license the work in any other way, but it does not invalidate such permission if you have separately received it."*

This implies that the author of the initial code grants the right to adapt the original code, as long as the distribution of the derivative work is also bound by the license. In other words, if a program is developed, with the use of GPL code, the author is required to convey the source code of the modified program as well.

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[1] Article 5 of the GNU General Public License, Version 3, 29 June 2007.

This can create discussions in case the definition of a modified work as recorded in the license agreement is wider than the legal concept. It is possible that a certain GPL code is used to create a new code, but that the GPL code does not enjoy copyright protection due to the lack of originality.

From a point of view of the law, the author is not violating anyone's copyright and is therefore not required to make the source code available. However, under the terms of the OS License, the author of the derivative work might be obligated to convey the source code if he decides to distribute its work.

The GNU GPL license has coped with this issue in the following way:

 The term "to modify" is defined as: *"To "modify" a work means to copy from or adapt all or part of the work in a fashion requiring copyright permission, other than the making of an exact copy. The resulting work is called a "modified version" of the earlier work or a work "based on" the earlier work."*

This definition assumes that the original work is copyright protected, since it refers to the permission required from to author to adapt the work. As a result, it can be stated that the contractual terms have the meaning of the legal concepts. In accordance to Belgian law, a modified work is regarded as a work with a certain degree of originality, which results from a prior existing work, of which particular original elements are being copied.

However, since the interpretation of these legal concepts can differ from one country to another, it is advisable to choose applicable law.

(ii)   Sanctions

The doctrine reveals that there is a discussion concerning the appropriate sanctions if an author refuses to convey the source code of the adapted work.

Most OS licenses contain a termination clause, based on which the license will be terminated if the modified work is being propagated in violation with the license conditions, the license is terminated automatically. However, a termination of the license agreement does not necessarily compel the author to convey the source code of his adapted work.

As a result, two tendencies can be observed as to whether the author can be forced to hand over the source code. The answer depends on the approach of the problem.

From a copyright angle, it can be argued that an OS license (implementing a copyleft condition) does not actually contain an obligation to convey the own source code. Most OS license give the permission to distribute adapted works provided that it will be licensed under the same OS license, which implies the release of the source code. Distribution in violation with these terms will be perceived as a copyright infringement, rather than a breach of contract. Consequently, the author can be ordered to cease and desist the distribution of the work, but will not be forced to hand over the source code.

On the other hand, a contractual approach is possible as well. If the obligation to convey the source code is being interpreted as a contractual obligation, it is possible to order the forced execution thereof and thus order the author to hand over the source code.

In practice, it can be observed that the copyright approach is preferable, since a contractual claim could in some case be considered as an abuse of right.

3.   Pre-contractual obligations

In every contractual relationship, pre-contractual obligations are imposed on the parties. This principle does not change when entering into an OSS License agreement.

The information duty on the OS developer in the pre-contractual phase is probably the most important one. Evidently, the duty to inform the other party of the characteristics of the product depends on capacity of the other party. The obligation to inform will considered to be more extensive when dealing with consumers, than with professional users.

A violation of the information duty can lead to pre-contractual liability.

4.   Exoneration

Traditionally, the OS License agreement will contain a no warranty clause, which explicitly states that the software is delivered "as is". However, depending on the targeted public, the OS developer cannot exonerate himself entirely.

According to Belgian law, exoneration clauses are valid, and can be quite broad. It is however impossible to exclude liability for deceit or intentional fault. Nonetheless, it is possible to exclude liability for the intentional fault of subcontractors.

Furthermore, it is also impossible to exclude liability in such a manner that the agreement becomes useless. As a result, the typical exoneration, which can be found in the standard OS Licenses, will be problematic. After all, with the full exoneration, the OS developer avoids any financial risk when he distributes the software.

The no warranty clause in the GNU GPL license is drafted as follows:

> *"Because the program is licensed free of charge, there is no warranty for the program, to the extent permitted by applicable law. Except when otherwise stated in writing the copyright holders and/or other parties provide the program "as is" without warranty of any kind, either expressed or implied but not limited to, the implied warranties of merchantability and fitness for a particular purpose. The entire risk as to the quality and performance of the program is with you. Should the program to prove defective, you assume the cost of all necessary servicing, repair of correction.*

> *In No event unless required by applicable law or agreed to in writing will any copyright holder, or any other party who may modify and/or redistribute 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."*

Although it looks as a complete exoneration for any possible responsibility, it contains the words *"to the extent permitted by applicable law"*. Given that no further degree of liability has been set out, it will be up to the courts to determine whether the OS Software developer can be held liable for malfunctioning of the software. After all, the fact that the program is licensed *"free of charge"*, does not mean that the OS Software developer cannot benefit economically from the distribution of its developed software. This particular clause is not ideal since it gives quite some discretion to the courts, when examining possible liability.

Another issue concerns the conform delivery of products. Under Belgian law, the delivery of a product implies that it is fit for the purpose for which it would ordinarily be used. This does not mean that it needs to be out of excellent quality. It means that the software must meet the legitimate expectations of the acquirer, which are based on its characteristics and its representation. In this regard, the way how the software is being represented is of great importance. If the OSS developer gives the impression that he is selling a well functioning product, he will have to meet the representation and can be held liable in case the result shows otherwise. If however, the OSS developer warns its public clearly and unmistakably that he is distributing a semi-finished product, it will be more difficult to hold him liable for malfunctions.

5. Protection of consumers

When OS software is offered to consumers, the law of 6 April 2010 concerning market practices and consumer protection needs to be taken into account. In article 74, the legislator has provided a list of contractual clauses, which are deemed to be void in agreements with consumers.

Furthermore, the law of 25 April 1991 on product liability needs to be taken into account. Pursuant article 10 of this law, product liability cannot be excluded by any form of agreement. It is possible that OS software is installed in consumer products (phones, cars, dishwashers), and that it would cause damages.

6. Moral rights

Article 4 of the BSCA confers the author with a moral right of integrity. The law refers to article 6*bis* 1, of the Bern Convention, which states that: *"Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any*

distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation".

The GNU GPL provides however that the author cannot oppose to any further adaption of its work.

In Belgium, it remains a discussion whether it is possible or not for an author to waive his moral rights entirely. Such waiver must be done explicitly, which is often not the case in the license agreements. Moreover, a general waiver of future exercise of the moral rights is deemed void. Although this might remain a theoretical question, the scenario exists that a certain source code is used for other goals, than what the original author had in mind. Given that the Belgian Law on Software is mandatory law, it is likely that the author can oppose to modification of the software, which violates his integrity.

7.   Free licenses

Generally, OS licenses are offered for free. It is however debatable if the licensor is always authorized to do so. When an OS license is entered into online, it could fall under the scope of the Law of 17 March 2003 on E-Commerce.[2]

Article 2 of said law defines a service as: *"any information service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".*

After all, offering a product online under a license agreement can be considered as a service in the sense of the law. Therefore, it needs to be examined whether OS licenses can escape the remuneration requirement set forth by the law. The same remark can be made when applying the Law on Copyright. Article 3 of the Law on Copyright stipulates that remuneration needs to be determined concerning every form of exploitation.

Given that the term "remuneration" has not been defined, it does not entail that the author has to be rewarded financially. If the license agreement provides that

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[2]   Implementation of the E-Commerce Directive (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

the license is being granted "for free", technically the mandatory conditions of the Law have been met. "for free" can be considered as a remuneration, and will not be detrimental to the validity of the OS license.

2.   Enforceability:

Is OS licensing fully enforceable in your jurisdiction?

If yes, is that feasible directly (contractually) or indirectly (through general principles of law, applicable copyright law, "moral suasion"/commercial reputation or otherwise?)

Yes, OS licensing can, as any other licensing of software, fully be enforced in Belgium. The enforceability of the license results in the first place from the license agreement itself. Article 1134 Civil Code stipulates that agreements that are lawfully entered into between parties, must be kept (*Pacta sunt Servanda).*

A question, that arises, is whether the licenses are validly entered into. Especially on the Internet, issues come to mind concerning the acceptance of the license conditions.. This issue has been covered under section 1.1.

Concerning the extent of the liability clauses, we refer to section 1.4.

Evidently OS software does not imply that it does not enjoy copyright protection. If a third party would infringe the copyright of an OS developer, the latter can, based on the BSCA, demand a cease and desist of the infringement and claim damages.

3.   Case law:

Is there any case law in your jurisdiction on breach of OS license terms or, more broadly, on OS issues in general?

In Belgium, case law regarding the subject is rare.

On 25 October 2010, the court of first instance at Nivelles has ruled on the applicability of open source licenses. The question at hand concerned the enforceability of the creative commons license, which was challenged in court.

6 artists have created an album and have placed it on the Internet, under the creative commons license 2.5, which authorized the public use provided that the conditions of the license were respected. These conditions were:

- indication of the origin of the work

- no commercial use

- no creation of derivate works

The defendant, an organizer of festivals, has used the music of the plaintiffs in order to promote the new festival season of 2008, without the consent of the plaintiffs.

The plaintiffs sought a judgment, condemning the defendants to pay damages, given that none of the three license conditions have been met. The defendants on the other hand, tried to uphold that they have acted in good faith, and that it was not aware of the existence of the license.

However, the court has ruled explicitly that the creative commons license is valid and applicable. Moreover, the court stated that given that the defendant can be considered as a professional, it has a duty to inform itself properly concerning the specific conditions of the license. Hence, the good faith defense was rejected and damages were awarded to the plaintiffs. This judgment shows that OS License agreements can, as any other license agreement, be enforced.

4.   Compliance:

Do you have any recommendation (to clients/your company) to ensure OS compliance?

Are you addressing the OS issue (or have you witnessed the same being addressed) in the subcontracting of software development and/or in the licensing of software that includes OS components?

Are specific clauses being adopted in the relevant contracts? Can you provide examples of such clauses?

If no contractual clauses are being included in the contracts, what are the measures adopted to ensure compliance?

4.1   The foremost important issue is that the OS License needs to be accepted by all contracting parties, who enter into the agreement. Under Belgian law, this means that it must at least be reasonably possible for the contracting parties to

gain knowledge of the license. It is however strongly advisable, that the OS License under which the software is being developed, will be attached to the agreement.

4.2   Another issue concerns employment contracts. Article 4 of the BSCA provides that in case software is developed by an employee, the employer becomes automatically the holder of the copyrights, which are vested in the software. Since the employer has not always a perfect view on the source codes, which are being used by its employees, it is advisable that the employment contract would contain provisions in this regard. For instance, if an employee would use a copyleft OS license when developing derivate software, the employer can be obligated to divulge the source code if it starts to distribute the software.

4.3   Regarding exoneration clauses, it is advisable to work with different type of contracts, depending on the capacity of the other party. When dealing with professionals, stronger warranties can come into play.

5.   OS in non IT-related industries:

With specific reference to OS used in non-IT industries (e.g. "internet of things" or other products that contain electronic parts with OS components): Do you believe there is, broadly speaking, awareness of the diffusion of OS in traditional, non-IT industries? Is that an issue, from a legal perspective? If not, why?

It is clear that use OS software has become common in the development of all sorts of products and systems. This does not mean that there is a general awareness. Although OS License agreements are not perfect and leave room for discussion, there does not exist case law to show that OS License agreements are perceived as problematic. The questions in this regard are raised in the doctrine, and remain theoretical.

The Fedict, the Belgian federal public service for information and communication technology has issued guidelines, stating that OS systems should be the first choice, when implementing new systems. This has not always proven to be a great success; nevertheless, the government does not refrain from the use of OS software. For example, the justice department has tried in 2005 to implement one computerized system, which would replace all other systems and would serve as a general operating system. It was called the "Phenix computer system", and would

consist out of OS software. Although, it turned out to be a complete failure, the Fedict, the federal public service for information and communication technology, stands by its guidelines, whereby it advises that government authorities should avoid to depend on the proprietary software.

The government even advises schools to use OS software. Evidently the disadvantages are pointed out, such as the lack in support, but the emphasize lays clearly on the advantages. In this regard, the government states that the philosophy of OS software follows the values of the Belgian education system.

Since the Belgian ID card is provided with a chip, different applications have been developed to read the chip, and to use its information. It has been observed that the use of OS software in this regard has proven to be successful.

The EID-Applet is an open source development. It is a browser component, which enables tot use of the Belgian eID card within web applications. The source code is licensed under the GNU lesser GPL License, which implies that derivative work can under certain conditions be used in closed software.

A Belgian OS success story is the Drupal Community. Drupal is developed in 2001 by Dries Buytaert and was originally intended to serve as a bulletin board. However, it grew into a popular platform, which is widely used today. Websites as www.whitehouse.gov or www.economist.com are built on Drupal. Drupal is developed and distributed under the GNU GPL license. When downloading the Drupal version 7.26, the license agreement is downloaded as well. Hence, it is not really a click-wrap or browse-wrap acceptance, but given that it is provided together with the program, it is safe to say that the program can only be employed under the terms of the license agreement.

6.   Do you have any practical OSS cases that you would like to share?