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

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National Report of France

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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.)?

There are many issues concerning the compatibility of OS licensing with French law, which are yet to be resolved. We summarize below the main ones:

1.1 Conflict with copyright laws

French law provides that the transfer of copyrights is subject to each of the assigned rights being separately mentioned in the transfer agreement and the exploitation of the assigned rights being defined as to its scope and purpose, territory and duration. The definition of such rights is of public order.

As most of the OS licenses do not provide for the above details, they would in theory not validly transfer copyrights under French law.

In addition, French law provides that an author cannot waive its moral rights. Although such rights are limited regarding software, this could also be an issue for the validity of the assignment of rights provided under OS licenses.

1.2 Validity of exclusions of warranties and liabilities

The exclusions of warranties and liabilities which are often included in OS licenses can have a limited effect under French law. Some of the OS licenses have already taken such issues into account by providing that their limitations of liability are subject to applicable laws.

In B to B relationships, limitations of liabilities are notably not valid in case of (i) personal injury, (ii) fraud, (iii) gross misconduct, (iv) breach of an essential obligation, if the limitation of liability has the effect of cancelling or depriving of all substance such essential obligation, (v) tort liability, (vi) specific obligations provided by French public policy, (vii) breach of competition rules: French law provides in particular that no party shall subject or try to subject a co-contracting party to obligations creating a significant unbalance in the rights and obligations of the parties.

French law also limits the validity of limitations of warranties against third party actions linked to title to property rights.

In B to C relationships, limitations of warranty or liability are usually not valid.

1.3 Use of French language

The use of French language is mandatory for contracts entered into with consumers or public entities. As most of the OS licenses are in English, they may not be valid towards them.

1.4 Rules relating to the validity of the consent to the license

Since most of the time, the OS licenses are entered into online, this raises the usual issues relating to online and electronic contracts.

1.5 OS licenses compatible with French copyright law

OS licenses compatible with French copyright law have even been prepared by several French public organizations (CEA – CNRS – INRIA) called CeCILL. The CeCILL license (www.cecill.info) is a strict and contaminating license such as the GNU/GPL license, but authorizes that the software be reused without any other constraint than the citation of the license.

Even for this license, however, issues arise in relation to the limitations of warranties and liabilities stipulated therein.

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?)

In spite of the issues raised in section 1, OS licenses have been enforced by French courts. However, at this stage, the validity of OS licenses has not been specifically raised by the parties before French courts in the litigations for which we have decisions.

According to some authors[3], this is because no one has any interest in challenging the validity of the license. The user of the software cannot use, copy, modify and distribute the software without the license. If the user challenges the license, this means that he has no particular rights in this respect. As for the author, he usually is in favour of OS and will not change his position or he wishes to develop an economic activity around an OS software and any challenge of the validity of the license would jeopardize the position of his product on the market.

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?

3.1 Validity of assignments of copyrights on a software containing OSS or to be used with OSS

Court of Appeal of Paris, 14 October 2008, Educaffixx / CNRS

The Court decided the cancellation of an assignment of copyrights on software which had to be used with an OSS. The Court of first instance recognized in its decision the validity and enforceability of the GNU GPL license. The Court of first instance and the Court of Appeal however decided that both parties were

liable for the cancellation of the copyrights' assignment since the purchaser of the software had been informed by the developer that such software contained OSS prior to the assignment of copyrights.

TGI Chambéry, 15 November 2007, Espace et Réseaux Numériques / Conseil Général de Savoie et Université de Savoie

In this case, the Court considered that even if the presence of OSS in the components of the product does not prohibit its commercial use, such presence is not compatible with an exclusivity of use, from a technical and commercial viewpoint, whereas such exclusivity was granted by the provider of the product under the contract signed with the purchaser. The Court retained that even if the purchaser of the product knew that OSS was included in the product, it did not know that such OSS was subject to a contaminating license which prohibited an exclusive use of the product.

3.2 Breach of OS license terms

Court of Appeal of Paris, 16 September 2009, SA Edu4C / Association AFPA

The Court decided the cancellation of a license agreement since the service provider did not comply with the terms of the GNU GPL license by removing the copyrights statements and deleting the license text.

Action against Free in relation to the publication of source codes

An action was brought by developers against the French telecom operator Free to obtain the publication of the source codes used by Free for its Freebox. A confidential settlement agreement was signed in 2011 between Free and the developers, and Free later made its source codes available to the public.

3.3 Use of OS in public procurement contracts

Conseil d'Etat (Council of State), 30 September 2011

The French Council of State judged that a public tender offer requesting for the installation, adaptation and maintenance of an OSS is not discriminatory.

The administrative court of Paris (TA Paris, 26 June 2013, Nexedi, Linagora / GIP Renater) equally judged that the reference to a proprietary software in a tender offer, therefore excluding the use of OSS was not discriminatory.

Under both cases, the public authority was requesting installation services for a software solution that it had already acquired (or was freely available as an OSS in the first case).

4. Compliance:

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

Anticipate the risk of OSS contamination: an improper handling or use of certain OSS code may require to make available owned copyrighted materials to all users under the terms of the OSS license, create compatibility issues prohibiting the distribution of the product or liability issues.

For this purpose, clients should:

- internally define a clear policy regarding the use of OSS: in particular, do they accept to make their developments available under OS licenses? Which part of such developments? How do their handle maintenance of products containing OSS?
- define the OS licenses compatible with their policy,
- inform their employees and subcontractors of the risks linked to the integration of OSS in the products developed or used by the company,
- involve the legal department to define the risks relating to the integration of any OSS in the products developed or used by the company, and verify whether the OSS licenses are compatible with other licenses used by the company and with the policy defined above,
- use a third party to audit code sources when acquired from a third party (eventually from a subcontractor) to verify whether it contains OSS. When acquiring a company for which software is an important part of the value, the source codes of such company should also be audited.

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?

Yes.

OS issues are addressed in the subcontracting of software development to impose an obligation upon developers to create original code and transfer rights on developments. The subcontracting agreement should in such a case provide that no OSS be included in the development provided by subcontractors, without the prior written consent from the customer. If OSS is to be included in the development, the subcontractor must notably undertake not to use any OS licenses which would not be compatible with the rights granted under the agreement by the subcontractor to the customer or under conditions which would prohibit the simultaneous use and/or distribution of items subject to different licenses.

In the licensing of software that includes OS components, the agreement should specify which parts of software are subject to specific OS terms and conditions and in particular exclude any liability as regards such OS components. The license

should precisely indicate the terms and conditions of the OS license, in particular if such OS license has a contaminating character.

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

Specific clauses are drafted in order to comply with specific OS licenses.

For clients from IT industry, most of the time, contractual provisions ensure software developers or integrators neither provide any warranty on open sources components nor transfer any rights on open source materials.

For clients from other sectors, which benefit from a transfer of rights on developments, contractual provisions mainly ensure that OS components are dealt with or that no OS component is supplied.

For instance in circumstances with no identified OS component: « The Supplier represents and warrants that no development of any kind does not include any open source software which may result in a breach of any obligation under the Contract such has the exclusive right of use granted under the Contract »

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

Tracking of OS components and the use of OS components database may ensure compliance even though non contractual provisions are being included in the contract.

Most of the times when no contractual clauses are being included in the contracts, Software developers or clients do not care about open-source compliance and potential liability that may result from it. However, follow above recommendations to ensure compliance is highly recommended.

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?

Awareness of the diffusion of OS in traditional, non-IT industries really depends on the sector.

In some non-strategic industries, it is underestimated even though awareness of legal consequences of unanticipated integration of OS components is making progress.

On the contrary, in strategic industries, such as the sector of defense or aeronautical industry, OS is carefully considered mainly as commitments with clients and potential liability in terms of IP and security.

OS remains an issue as non-IT industries are integrating more and more software components in their products and may create significant issues when used in the production or sales process (in particular in relation to the maintenance of the solutions).

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

We have encountered practical issues in relation to OSS when drafting license agreements or assignments of IP rights by employees or subcontractors, to ensure that the OS risk is contained, e.g. to provide that no OSS be used without the prior consent of the employers/customer or to duly inform the customer of the use of OSS and the contractual consequences related to such use.

Bibliography

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(4) Agence pour la Protection des Programmes, *Responsabilité et licences libres*.

(5) Caroline Le Goffic, *Licences libres et copyleft : la contractualisation du droit d'auteur*.