INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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

Corporate Counsel Commission
IP/TMT Commission

Prague, 2014 – Workshop A

National Report of Spain

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14.02.2014

1. Compatibility

The OS licences require different conditions when taking advantage of a software, especially regarding its redistribution. Those differences can lead to legal incompatibility between them. This is not a problem when integrating and using components in an internal way (not distributing them to third parties), but it can prevent the components from being redistributed under non-compatible licences integrated in a same product.

It is understood that two or more licences are compatible when a program code can be integrated in other code under a different licence, always that the resulting work redistribution does not infringe the licence of the first code.

-If all the application components are received and distributed under the same licence, then there is no incompatibility.

- In other programs, the integration of components under permissive licences should not be a problem, since normally they accept any redistribution system.

- The conflict arises when distributing components under two or more copyleft licences.

The compatibility or incompatibility between licences will depend on the way the different components are integrated and on whether this integration constitutes, from a legal perspective, a transformation or not thereof.

With regard to the issue of copyleft, it is not true that the OS licences oblige the user to freely release any type of modification in the software. The licences include certain obligations such as maintaining the author's notes and indicating the occasional modifications, as well as giving access to the source code of the programs only in case it is redistributed to third parties, and even being that the case, only to the distribution addressee. Therefore, the internal diffusion within a same organization of an OS can never oblige third parties to release the source code of the software.

2. Enforceability

The use of free licences does not imply to renounce the rights by the owner. An OS licence is a non-exclusive cession of some of the owner's rights under certain conditions. It is not a sale, nor a cession, in an actual and exclusively way, of the copyright to a third party, neither a renouncement to bring legal actions in case a third party should infringe any of the conditions of the OS distribution.

As the licences are not exclusive, the licensor maintains his rights of the work. He maintains his own right to publicly reproduce, transform, distribute and communicate the software. He/ can also authorise a third party to retake advantage of it under other licence, and in case the licensee does not respect the conditions of the licence, the owner/ licensor could terminate the licence or urge the licensee to fulfil his/her obligations.

The software licence, as any other type of agreement, requires the evident acceptation of a valid offer. A person accepting the conditions of use of software becomes a legitimate user and acquires the right to use it.

Therefore, an OS licence, for being an agreement, is not only enforceable in direct way, but also in an indirect way, since there are proceedings in Spanish law giving protection to software (such as unfair competition), the computer programs can be protected through copyright (the literal code of the program and its documentation), through patents (the functionalities and processes that fulfil the requirements), though the trademark law (exclusive and excluding right to use a trademark in regard with a software), and also through trade secret.

3. Case Law

In Spain, there have been only some judgments with respect to "creative commons" licences. So far, apart from those ones, there has been no mention to OS licences.

The are several situations that could lead to a conflict situation, such as the infringement of a licence conditions, divergences regarding the interpretation and the application of a licence conditions or conflicts as regards to software ownership.

In practice, the usual process to fulfil the OS licences obligations are extra-judicial. Normally, the fact that the owner of the rights of software sends a communication (a formal requirement) to the person that infringes the licence conditions will be enough to make the infringing party take some proper steps to address the situation. In any case, it is always possible to bring an appeal before the Court.

4. Compliance: Recommendation /Clauses

As the licences are agreements unilaterally drawn up, the law establishes a preventative requirement to ensure that the user has had the opportunity to access to the contractual conditions and that he/she has accepted. It is the Spanish law purpose to protect the party that has not drawn up the conditions and to make impossible the validity of those clauses likely to be considered abusive.

Many OS are downloaded from internet, and even its integration in the software not always has or requires the express acceptation of the licence, and it does not indicate the licence to be applied. This process would be considered as insufficient in Spain. In Spain it is still a non-solved situation. It is suggested In order to avoid those conflicts to establish a transparent and informative procedure consisting in indicating the applicable licence in the agreement between the owner and the user. It is also recommendable that a user's final software includes the presentation and acceptation of the licence in its download and running process.

In principle, no problems regarding the validity of its terms as a software licence should arise once the agreement of open sources licences is established.

The Spanish law is controlling that the licences having been unilaterally drawn up and containing abusive clauses do not bind, totally or partially, the weakest party of the contract.

5. OS in non IT-related industries

I don't think there is an awareness about the diffusion of OS in non-IT industries from a user's perspective in the sense licence agreements are being accepted, with or without abusive clauses, sometimes even without the users' notice. Spanish laws protect consumers against these abusive clauses, and give certain legal guaranties to those who acquire those services.

These guaranties are those in conformity with the product (the smooth running of the software) and the obligation to cure the occulted defects.

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