

Legal issues of Open Source Software

Krzysztof Siewicz

Leiden University

Leiden, The Netherlands; Warsaw, Poland

BACKGROUND OF THE RESEARCH PROPOSAL

From the legal standpoint, Open Source amounts to distributing rights and obligations in software license agreements in such a way, that they would (1) both grant users control over the program and (2) facilitate the sharing of improvements. The Open Source idea aims at reversing the process usually referred to as proprietary licensing and equaling the rights of the users with these of the authors. To some extent, it attempts to destroy monopolies created by copyright laws and to prevent them to arise again. There is much in the discussion on the legal issues of Open Source. The first voices came from the programmers who started the movement. The debate between people such as Stallman[1] and Perens[2] is on a priority question, viz. whether the main values to be protected are freedom and friendly cooperation of the users or whether the economic value of better programs should be given primary attention. Different views on these issues have resulted mainly in drafting software licenses in different ways. Therefore, interests of users, programmers and commercial companies are spelled out differently in every Open Source license.[3]

Legal scholars and practitioners (e.g., Moglen, Benkler, Lessig, Gomulkiewicz)[4] are not so much concerned about the values that are protected, but rather discuss validity and enforceability of various Open Source licenses or their clauses. Still, Benkler and Lessig focus on more theoretical issues and provide arguments from areas like constitutional law (freedom of speech, etc.) or law and economics (innovations desiring legal protection). According to Moglen, Open Source programs are in general quite well protected by law and all the parties may rely on such licenses as GNU GPL, even though the courts have never tested any of them. Authors like Gomulkiewicz accurately analyze clauses of the most popular Open Source licenses (GNU GPL, BSD) and seriously doubt about their perfect compliance with the law. There are significantly fewer publications from European countries. In Germany, the authors (Metzger, Jaeger, Spindler)[5] discuss the possible effects of German law on Open Source licenses, which were drafted having with the US Copyright Law in mind. Metzger and Jaeger analyze the most popular standard Open Source license - GNU GPL and reach the conclusion that under German law it is not effective when it tries, for example, to dispose the author of the claim for integrity or to grant users rights over the yet unknown means of utilization. Spindler focuses mainly on the question of Open Source software vendors liability, which according to him cannot be totally contracted away in licenses. However, Spindler himself admits that the debate has not made sufficient progress to formulate final conclusions.

MOTIVATION FOR THE RESEARCH

In our opinion, so far the worldwide expansion of Open

Source has not received the full attention necessary to arrive at definitive conclusions. Even the numerous American authors who write on the subject, do not formulate conclusions reaching out of their jurisdiction. German voices are definitely not sufficient in number and there is much to add in the discussion. For instance, it should be considered, what impact on the further development of Open Source programs the differences between many legal systems might have. Copyright law is not the only area of concern. There is still an unresolved issue of the extent to which patent protection should be given to programs.[6] In the field of Open Source this triggers additional questions about its future in case of extended patentability. These questions were long ago raised by Stallman and are addressed by Moglen, Lessig and the others. Now it is quite a good time to add them to this research, especially having in mind the proposal of EU Software Patents Directive, with its recent twists and turns. Moreover, it seems that some promising points can be made after investigating the law of contracts. For instance (Johnson[7]) *inter alia* stated, that the conclusion of a shrink-wrap license (of which Open Source licenses are the example) does not necessarily follow the traditional pattern of offer and acceptance. It is difficult to point the parties to such a contract. In common law jurisdictions the question of privity arises, as such license may try to influence third parties rights and obligations. Finally, we would like to remark that, warranty and liability exclusion clauses used in Open Source licenses tend to be quite wide and may sometimes infringe *iuris cogentis*. There should be some attention given to conformity with consumer protection or product liability laws[8]. The problem statement of this research is as follows: To what extent is it possible to formulate a legal framework that protects Open Source phenomenon? The research will attempt to cover both an impressive number of issues already raised in the discussion and to identify sources of risks or concern not revealed yet. After drawing a sufficiently detailed picture of the current legal situation it may be even possible to propose a particular solution that would help reduce the risks. It seems also possible to estimate, for instance, legal destiny of some Open Source license agreements or their particular clauses. However, these results should not be expected to be definite, because the Open Source phenomenon is still novel and in the process of continuous development. Apart from some detailed conclusions it is also expected to indicate overall effects that the differences between various legal systems might have on Open Source development. One more working hypothesis is that these effects are reciprocal - Open Source is an innovative approach, especially towards the usual understanding of the role of intellectual property laws and influences the role this law plays in the society. It is reasonable to anticipate some remarks *de lege ferenda*.

THE RESEARCH METHODOLOGY

In the ideal case we should analyze every jurisdiction and every legal system involved. However, this is clearly impossible. Therefore the research will rather focus on those legal systems, where some discussion has already taken place, such as in the US and the European countries. The final number of legal systems covered by the thesis is subject to further research; undoubtedly however, the EU legislation will have to be taken under into consideration too. Because of the special importance for the author, an attempt to analyze the Polish legal system will be made. Research will encompass primary and secondary sources of law. It will touch intellectual property law, contract law, consumer protection law, private international law and constitutional law. It will be also necessary to ponder on the issues triggered by Open Source Movement on the more general level of jurisprudence (theory of law). For example, the evolution of model licenses should be given some attention by comparing this process to the emergence of so called world law (legal norms accepted worldwide, regardless of the host jurisdiction). Logical legal reasoning and appropriate rules of interpretation will be used when analyzing the law of particular jurisdiction. Because of the American origin of Open Source licenses a comparative method will be used when considering European legal systems. In addition to studying law as it is, there seems to be a good opportunity to examine how it is applied - there is a pending suit brought by Caldera Systems International (SCO Group) against International Business Machines, touching issues crucial for the Open Source[9]. During the research it is quite likely for additional relevant court disputes to arise, as the leaders of the Open Source Movement call for a more strict approach towards individuals infringing model licenses. Additionally, some studies of the technical, economic and social background for Open Source Movement will be conducted. Software production is a specific process, only to a limited extent resembling the making of more traditional intellectual property. Moreover, a computer program when viewed from an economic standpoint, possesses certain features which makes it a very special good. Consequently, the market for software is also a specific one and the Open Source Movement makes it even more visible. As for the social background, it must be indicated that the movement, especially the "hackers' community" developed sophisticated moral norms and customs. All these non-legal factors will be taken under into consideration to the extent possible for the researcher with a predominantly legal background.

REFERENCES

- [1] Richard M. Stallman is the author of the term Free Software, defined in his *GNU Manifesto* and many other publications. Some of them were published in: *Free Software, Free Society: Selected Essays of Richard M. Stallman* (Free Software Foundation, Boston, 2002). See also <http://www.fsf.org>.
- [2] Bruce Perens is one of the originators of Open Source Initiative and the author of Open Source Definition. See e.g. Bruce Perens, *Open Source Definition*, in: *Open Sources: Voices from the Open Source Revolution*, (Chris DiBona, Sam Ockman, and Mark Stone eds., Beijing and Sebastopol, O Reilly, 1999).
- [3] It must be noted that there are few licenses drafted specifically for one single program. Such licenses as GNU GPL (GNU General Public License) or BSD (Berkeley Software Distribution License) evolved into a kind of model law and are now widely used.
- [4] Eben Moglen, various papers available at: emoglen.law.columbia.edu; Yochai Benkler, *Intellectual Property and the Organization of Information Production*, *International Review of Law and Economics*, July 2002, 81; Lawrence Lessig, *The Future of Ideas: the fate of the commons in a connected world*, (New York, Random House 2001); Robert W. Gomulkiewicz, *De-bugging Open Source Software Licensing*, *University of Pittsburgh Law Review*, Fall 2002, 75; Patrick K. Bobko, *Linux and General Public Licenses: Can Copyright Keep "Open Source" Software Free?*, *AIPLA Quarterly Journal*, Winter 2000, 81.
- [5] Axel Metzger, Till Jaeger, *Open Source Software and German Copyright Law*, *IIC* 1/2001 (Vol. 32), 52; John Blau, *GPL may be unenforceable under German law*, *InfoWorld*, 6 Aug. 2003 (Interview with Gerald Spindler); Gerald Spindler, *Rechtsfragen der Open Source Software* [Legal questions on Open Source Software], available at: http://www.vsi.de/inhalte/aktuell/studie_final_safe.pdf. Some attention was given to the enforceability of GNU GPL under German law by the court in *netfilter/iptables* case, (Landgericht München, 19.5.2004, 21 O 6123/04).
- [6] The issue may have been settled for good in the U.S., but is still subject to a heated debate in the European Union. See: *State Street Bank & Trust v. Signature Financial Services*, 149 F.3d 1368 (Fed. Cir. 1998), cert. denied 119 S.Ct. 851, (1999); *International Business Machines, Corp./Computer program product*, Decision of Technical Board of Appeal 3.5.1 dated 1 July 1998, T 1173/97 (OJ 10/1999, 609); Proposal for the Directive on the patentability of computer-implemented inventions, 6580/02 PI 10 CODEC 242.
- [7] Johnson, *All Wrapped up? A Review of the Enforceability of "Shrink-wrap" and "Click-wrap" Licenses in the UK and the US*, *EPIR*, 2 Feb 2003.
- [8] See e.g. Spindler, note 5 supra.
- [9] *SCO Group, Inc., The v. International Business Machines*, No. 2:03cv0294 (Plaintiff's Amended Complaint) (D.Utah, filed June 16, 2003).