Open Source Software

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Legal protection of software is included in the copyright system. Yet software protection under copyright constitutes a kind of "regulatory enclave" that, by undermining many of the traditional assumptions about copyright legislation, basically strengthens the position of software producers[1]. Among other things, the "secrecy of the program content", which applies to computer programs, completely departs from the canons of copyright. It includes source code unavailability and, except for some exceptional cases indicated in the law, the prohibition against decompiling it (that is to re-create it). The user can only know the object code, which is incomprehensible to him and the programmer,.

The legal basis and legal practice, however, are not commonly accepted. It finds its reflection in the free software movement. This movement dates back to the first half of the 1980s and is associated with programmer **Richard Stallman**, who came up with a manifesto popularizing the idea of "free software" (the GNU-manifesto) and who set up the ***Free Software Foundation (FSF)*** in the U.S., the aim of which is to realise the slogan: "software should be free, just like air". The main purpose was to create a system to enable the sharing of software (first and foremost UNIX-compatible programs) under particular conditions, where copyright would not be used to "own software" but to ensure its free use. This would challenge the prohibitory privileges that allow the control of the use of a computer program and subject any use to the owner's (producer's) permission and to related privileges of profiting from that exploitation (principally in the form of licence fees).

The basic ideas presented above have been adapted and are now being implemented by the ***open source software movement***, which is a movement that promotes software with a disclosed source code. Undoubtedly, the best example of *open source software* is the Linux operating system[2].

In practice, there are a number of licences that cover *open source software* (licences of the *open source* type). Let us concentrate, however, on the fundamental one that is most widely known , what one could call a "model" licence which is GNU General Public Licensing (GNU GPL)[3] created by the Free Software Foundation. The licence is of a 'general' (common) and 'public' character; it is addressed 'to all', not to specific entities. The text of the licence document can be classified as a **model agreement**, that is to say a set of clauses (provisions) prepared unilaterally and in advance, prior to signing an agreement, providing for mutual rights and obligations of the parties. Obtaining GPL-established rights and imposing obligations happens not by way of individual negotiations, but by unilateral acceptance of the model and by starting specific actions with respect to software (modification, distribution). In this way, a **non-exclusive licence** is granted to the user with no time limit with respect to **the copyright to the computer program**.

The **licensee's rights** include:

1. the right to access the source code; the program distributor is obliged to provide the user with the code either immediately or within three years from the user's (the licensee's) request;
2. the right to reproduce the program in an unchanged form, both in object and as source code;
3. the right to make changes to the program (its alteration, modification, for any other purpose, creation of its new, 'improved' versions)[4];
4. the right to reproduce the program in its altered form;
5. the right to redistribute (market, disseminate) copies of the program, in its original and altered form.

What is important is that all of the above rights are, in principle, obtained free of charge. It is forbidden to collect licence fees for program use. Remuneration can only be for: 1) copy production, 2) the price of the data-carrier on which the software was recorded[5].

GPL not only grants considerable rights to licensees but also imposes certain **obligations**[6]. The key obligation is to make *open source software* available to other persons based on the same conditions under which the program was obtained (that is on GPL conditions). This concerns redistribution of the program both with and without changes.

The second important obligation is to ensure that the person who receives the program will have access to the source code. The person should also be provided with the GPL text so as to become familiar with the rights and obligations. This obligation also includes inserting a clear note concerning both exclusion from liability for program faults and lack of guarantee[7].

The special character of said agreements also stems from the fact that although some users of "free software" obtain it from other (earlier) users of the software, there is no further transfer of rights or further authorisation (through granting successive sublicences). In the case of each new user, a new, separate licence agreement is concluded directly with the holder of copyright to the program.

If a user's exploitation of the program under the General Public Licence infringes on the conditions imposed by the GPL, the **rights** granted by the licence **expire 'automatically'** *ex nunc*. In consequence, further use of the program within the boundaries set by the GPL is an infringement of copyright with all the consequences.

To conclude, it is worth noting that reading the provisions of the licence quickly reveals its American origin. This does not mean, however, that it would be possible to question it *en block* in Europe, depriving it of its legal force[8]. At most, the effectiveness of some of the provisions are disputable. There is, however, no reason to claim that this license goes beyond the limits of contractual freedom in civil law.

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1. In principle the increasing admission of computer program patenting is a means to the same end. The EU's rejected draft directive on patentability of computer implemented inventions was a step in the same direction.
2. The development of Linux was initiated by a Finnish computer science student, Linus Torvalds. He decided to furnish his PC with a UNIX-compatible operating system that would have the functionality of the costly UNIX. In order to do so, he decided to take advantage of help from other computer scientists through the Internet and used the Internet to distribute the software that resulted from the cooperation under a special licence.
3. The licence, as stated in its introductory part, concerns programs in which the holder of the copyright put information that the given program may be distributed under conditions of the General Public Licence. The licence applies to most of the software published by the Free Software Foundation and all other programs whose authors undertake obligations to use the licence.
4. Yet it must be noted that this particular right does not impose any obligation to develop the program, improve it, remove errors or adapt it for specific needs. The user can do it but he does not have to. Let us stress that adapting the program (like adapting it to one's own needs) does not produce any obligations. It is only with the further distribution of the changed program that the GPL conditions (obligations under the general licence) must be fulfilled. As a result, it

should be assumed that granting the right to use the open source software takes place under the conditions set forth in civil law.

5. The fees collected by in-betweens (distributors) of the open source software. Their income comes mainly from: - providing (selling) materials accompanying the software (books, instructions, etc.), - providing a variety of services (installations, maintenance, etc.),- furnishing a guarantee and its handling.
6. These obligations that restrict the freedom of software use were introduced in the GPL to protect free software user's rights, so that it would be impossible to question their rights or suggest that they give them up.
7. It should be mentioned here that the exclusion of liability for software faults raises many doubts and objections and prompts many questions about the efficiency of such a clause and the agreement on including it in European countries, especially in view of regulations that oppose liability exclusions on the grounds of consumer interest protection.
8. This point of view is adapted by the court in Munich on 14th April 2004 in the case against Sitecom Germany Gmbh. It may be the first published judicial decision of a European court in which effectiveness of the GNU GPL was acknowledged and the distribution of a piece of software was incurred because the conditions of that general licence with respect to source code distribution were deemed to have been infringed. See: http://www.netfilter.org/news/2004-04-15-sitecom-gpl.html