



# Viral Licences

Myth  
Or  
Reality ?



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# What is this presentation about



Notion of Share alike / Copyleft / Viral licences

Perception, and fears

Is fear real under the European legal framework?

# What is this presentation not about



No certainties: invitation to debate...

Many of you may disagree...

May be a “Minority report” ...

# 1. Viral licence(s) ?

Share alike licences (Gnu GPL in particular) have been categorized as “viral” because – by assumption – linking a covered source with another extends the licence coverage.

Like it or not, the deprecatory term “viral” generates fears: calls for tender ban components covered by copyleft licences.

Many lawyers agree that static GPL linking may produce derivative

Purpose is not to add a controversial stone in the GPL linking debate but to analyse (more specifically under the European legal framework and according to the recent case law) possible exceptions that could clarify or moderate “**virality**” and facilitate “**interoperability**” according to recent case law..

# Free/Open Source licences families

Permissive licences:  
software may be re-distributed  
under any licence.  
Weaker protection against  
appropriation  
(BSD, MIT, Apache v1)

Share alike or Copyleft  
licences:  
software may be re-distributed  
only under the SAME licence  
(Stronger protection against  
appropriation)

On **source code**: no  
impact on combined  
binaries  
LGPL,  
MPL  
EPL  
Apache v2

On **source & object**  
("Strong" if linking makes  
derivatives )...  
GPLv2  
GPLv3  
AGPLv3  
OSL  
EUPL

Not viral

Not viral

Viral ???

# The linking debate and questions

FSF assumption: Linking software with source covered by the GPL program creates a derivative and extend GPL coverage to the software

- A minority (?) of opponents (Lawrence Rosen)
- A long debated issue
- What is “strong copyleft”?
- Is it confirmed by Case law?

No! (in EU, no case of active copyleft clause enforcement as such, no case where infringers were forced to release a modified version under a copyleft/share alike licence; no case on “derivative works”...)

- What about exceptions or copyright exemptions?
- Is there a specific European Legal Framework?

# Why should we care?

- Licence proliferation has generated more incompatible « share alike » licences
- Linking software covered by conflicting share alike provision raises questions.... for F/OSS communities even more than for proprietary software vendors
- Fears resulting from « viral licences » are real, maybe due to lack of information / understanding: « GPL and similar » bans were reported during last months in public call for tenders

# Why is “orthodoxy” unsatisfactory ?

***“You have a GPL'd program that I'd like to link with my code to build a proprietary program. Does the fact that I link with your program mean I have to GPL my program?”***

***- Yes.”***

- Imagine the question is formulated differently:

***“You have a GPLv2 program that I'd like to link with GPLv3 (or AGPLv3) code to build a larger free software solution. Does the fact that I link with your program mean that distribution is legally impossible? ”***

***- Yes or no?***

- Has the European legal framework some answer?



# Usual exemptions from Copyright infringements

Exemptions vary from jurisdiction to jurisdiction.

- “Fair use” or “Fair dealing” exemptions (UK);
- “*de minimis exception*”, whereby trivial reproduction will not be covered (i.e. in England/Wales, extended by exemption for “insubstantial copying”)\*;
- EU legislative framework have created specific exemption use-cases, in favour of interoperability.  
In particular Directive 91/250 (“EUCPD” which has harmonised European software copyright law... 21 years ago!  
... and has just receive interoperability application... in 2012!

\* See: Malcolm Bain, Software Interactions and the GNU General Public License – Ifosslr / DOI: 10.5033/ifosslr.v2i2.44

# CJEU C-406/10 SAS v/s WPL (2 may 2012)

- At first look, nothing to see with F/OSS : a case between two proprietary vendors
- Recipient WPL (World Programming language) had a valid user / test licence from software vendor SAS
- WPL reproduced APIs, data formats and programming language from SAS → existing SAS client can switch to WPL software and, from the same input they will obtain the same output.
- Court stated that WPL (the user licence recipient) can reproduce APIs (interfaces), data formats and programming language and reuse it to make its own software interoperable with the original software inputs – without a specific licence or authorisation from SAS (the original software licensor)
- SAS/WPL provides no direct answer to open source linking. But...

# Could we interpret EUCPD exemptions in case of F/OSS linking?

- The 91 Directive has no consideration for Open source.
- Art 6 authorises *DECOMPILATION* by the user licence recipient, to **compensate** the fact he has no access to the source code
- In WPL case, no decompilation was reported: WPL carefully studied how program worked and they REPRODUCED the needed parts.
- **Q1**: Why should conclusion be different if the recipient had a *LEGITIMATE* access to the source code?
- **Q2**: What is the difference between “REPRODUCING” and “COPYING” the needed data formats, in the hypothesis where the source code is made available via an open source licence (like the GPL?)

# The EUCPD moderates its own exemption:

- Reproduction acts are confined to the parts of the original program which are necessary in order to achieve interoperability.  
(this should be the real purpose of linking two programs: you don't copy the functional source code, but the interfaces: APIs, data formats)
- It cannot be used for goals other than to achieve the interoperability of the independently created computer program;
- Exemption may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests

**Q3:** What are the legitimate interests of the original (GPL) licensor, placing its original software under the protection of a share-alike (or copyleft) licence?

# Conclusions (= assumptions):

After linking (statically , after compiling it) interfaces (APIs or dataformats) legitimately obtained via a valid share alike F/OSS licence (i.e. GPL)in order to ensure interoperability between the covered code and non covered software...

- A distribution of the larger work under a **proprietary** licence should not be authorised (because it prejudice legitimate interests of the licensor).
- Same of the above in case of distribution under a **permissive** licence (allowing appropriation).
- A distribution of the larger work under a **similar share alike** licence should be authorised (i.e; linking GPLv2 and GPLv3 components and distributing the work under one of these licences).

# Recommendations:

- All new release of share alike F/OSS licence should organise interoperability with:
  - Its own previous and later versions
  - Other share alike F/OSS licences
- Excessive « licence centric » or « viral » assumptions (the culture of « strong copyleft ») are not always beneficial for the F/OSS movement (due to share alike licence bans, burden for F/OSS communities) and may not be sustainable facing case law .



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