

# **Legal Questions Relating to Open Source Software in the International Context**

**Verso Open Source Business Programme  
Anna Haapanen 4.9.2007**

## Open Source – Open World

Let's discuss today:

- International implications of using open source software ("OSS") in commercial context
  - Development and commercial exploitation of OSS
  - OSS and international legal context in general
  - OSS and legal context in different use cases



## ... Topics In More Detail

- OSS in development community
- OSS in business
- Global context of IPR protection
  - International conventions relating to protection of copyrights, patents and trademarks
- National IPR legislations
- How the applicable law is determined in an individual use case?
- Presenting some differences of national IPR legislations from OSS viewpoint
  - Copyrights in different jurisdictions
  - Protection and enforcement
  - Joint ownership and revenue sharing

## OSS Development



- OSS is developed in projects throughout the world and used e.g.
  - As software development tools
  - As part of proprietary programs (available embedded or for download)
- Project members come from different countries and jurisdictions
- The members (or contributors = copyright authors) improve and share OSS among the world's OSS community
- Contributors may be required to assign their copyright to the project or withdraw the copyright and place the code in Public Domain (e.g. FSF and Apache) This is to ease enforcement by the project as unified copyright status eases enforcement of the program's copyright against violations
- The rights may also be automatically transferred to employer
  - If the code is developed during employment employer will be the right holder on certain conditions
- OSS is available in the Internet → OSS is available all over the world!  
→ International development and sharing environment



## OSS is a Business Model

- And more specifically, very international of a kind!
- OSS as part of commercial products is
  - Developed, marketed, licensed, sold and distributed all over the world
  - Used all over the world by end users
- Increasing number of companies adopt the OSS model software development and commercialization due to e.g.
  - rapid development, maturity, effectiveness and low acquisition costs of OSS
- Legal implications
  - The applicable OSS licensing model must be understood and followed

## IPRs in Global Context: International Conventions

- IPR protection varies in different jurisdictions as the scope and level of protection is dependent on applicable national copyright and patent (+ trademark) laws
- Copyright and patent legislation is different in different jurisdictions
- International treaties have been concluded to unify the IPR legislation in different jurisdictions
- Bern Convention (1886)
  - Minimum levels of copyright protection
- Paris Convention on Protection of Industrial Property (1883)
  - Covers patents, trademarks and industrial designs
- TRIPS (1995)
  - Global IP protection and civil and criminal penalties for IP infringement
- Member countries are free to add additional protection if deemed fit

## Legal Context in Individual Use Cases



- Depends on the applicable law which is often difficult to determine
- Applicable law may be set forth in the OSS license under which the OSS program in question is licensed
- If not, the applicable law is determined according to the rules of private international law
  - Again, IPR legislation varies between different countries and jurisdictions

## OSS License and Applicable Law

- Primarily applicable law is the one defined in the license
- Often laws of either California or New York
- Just to mention a few:
  - Apple Public Source License (California)
  - Common Public License 1.0 (New York)
  - Eclipse Public License (New York)
  - IBM Public License (New York)
  - Mozilla 1.0 and 1.1 (California)
  - *Nokia Open Source License (Finland)*
  - Open Software License (licensor resides or licensor primarily conducts business)
  - Python License (Virginia)
  - Sun Industry Standards Source License and Sun Public License (California)



## What if Applicable Law is Not Defined in the OSS License?

- If applicable law is not defined in the OSS license the law is determined by
  - Agreement between the parties (reference to applicable law)
  - Rome Convention
    - Where the licensor primarily conducts its business
    - Where the intellectual property is registered
    - Where the transferee primarily conducts its business if the question is of transfer of intellectual property

## What if Applicable Law is Not Defined in the OSS License? II

- Criminal cases
  - Where the crime was committed
  - Where the damage appeared
- In addition to the applicable law, impact may be given to lex mercatoria derived from
  - Terms of standard international commercial contracts
  - Professional codes of conduct
  - Trade usage
  - General principles of law
  - Arbitral decisions



## Different Approaches to Copyright

- Finland and Germany
  - Traditionally the copyright system has emphasized author's right of personality and rewarding of the author
- US
  - Traditionally attention has been paid on economic exploitation of copyright and promotion of the interests of the community rather than the interests of the author
- Recently the different perspectives have approached each other



## Author



- Finland and Germany
  - Only a natural person can be considered as author
  - However, economic rights can be assigned to a legal entity
  - Immediate transfer of economic rights to employer with regard to software copyrights
- US
  - Natural person
  - According to the “work-for-hire” doctrine the employer becomes the author and the initial owner of the copyright if the work is prepared within the scope of employment
- Practical Implication
  - Despite of the differences of national copyright laws, employer automatically becomes the right holder of software copyrights in the jurisdictions under review

## Scope of Moral Rights

- Finland and Germany
  - The rights of attribution and integrity
  - These rights may not be withdrawn totally but only waived with respect to limited use of the work
- US
  - Minimum protection of moral rights
  - Only in respect of visual arts
- Practical Implication
  - Notwithstanding the US regime, complete transfer of copyrights is not possible in all jurisdictions where moral rights can not be assigned exhaustively



## Copyright Enforcement

- Finland and Germany
  - Copyright exists immediately and automatically on the creation of the work
  - Registration is not needed to enforce the right
  - For the sake of defining a date of creation and priority it can in some cases be advisable to place a copy of the work before a public notary in Germany
- US
  - Registration of the right with the Copyright Office is a prerequisite for the enforcement of the copyright
  - However the protection of the work exists immediately and automatically on the creation of the work
- Practical Implication
  - Registration of the copyright in the US is important in order to enable enforcement

## Joint Works and Disposition

- Finland and Germany
  - Consent of all joint authors is needed to exploit the copyright unless otherwise agreed between the parties
  - Claims can be asserted by each of the authors independently
- US
  - Each author may exploit the work and e.g. grant licenses to third parties without the consent of other right holders
- Practical Implication
  - Consent of all the authors may be required for exploitation of the software copyrights resulting in practical problems as software by nature is usually a joint work

## Revenue Sharing



- Finland and Germany
  - No mandatory regulation of revenue sharing
  - The proceeds may be distributed in accordance with the number of authors or in proportion of their contributions unless agreed otherwise
- US
  - In principal, the proceeds from the exploitation are divided between all the authors even if one of the authors has exploited the work independently
- Practical Implication
  - Revenue sharing should be agreed in advance in order to avoid confusion upon commercial exploitation of the joint work

## Other Differences: Contract Law Principles

- Finland and Germany
  - Declarations of will:
    - Offer
    - Acceptance
- US
  - Offer + Acceptance *and* Consideration
  - Consideration:
    - Monetary payment, of course, but also conditional license which may be revoked if the conditions are violated -> contract



## Other Differences: Contract Law Principles II

- Practical Implication
  - Are OSS licenses contracts or mere bare licenses and does this even matter?
    - Yes, it does: If OSS license is considered as contract, contract law applies in addition to IPR laws
- Are OSS licenses even enforceable?
  - At least GPL is: Welte vs. SiteCom, District Court of Munich, May 2004
- Eventually, rarely contract applied between parties has been tested in courts and this fact does not usually result in question whether the contract is enforceable

## Other Court Cases



- MontaVista Software Inc vs. Lineo Inc
  - MontaVista alleged that Lineo violated GPL, which was accepted by both parties as valid and enforceable by distributing a program copyrighted by MontaVista. However, the code was distributed without any references to MontaVista and without its copyright notices and contact information. The case was agreed outside the court in 2003
- Computer Associates vs. Quest Software
  - Quest alleged that CA derived parts of Quest's GPL'ed code. However, code developed by CA was not required to license under GPL though using GPL'ed code in the development as under the applicable special exception of GPL certain output files were not under the source code distribution obligation
- SCO vs. IBM
  - SCO alleged that IBM copied UNIX code to Linux in violation of the license agreement. SCO also claimed that IBM continued distributing the operating system based on UNIX after the SCO cancelled the license

## Conclusions Regarding Interpretation of Rights and Obligations in Different OSS Use Cases

- Question:
  - Which law shall be applied?
- Answer:
  - Depends on the use case
- Question:
  - What are the rights enforceable by the right holder?
- Answer:
  - Depends on the applicable law
- Conclusion
  - Depends on the use case!



## Thank you!

Anna Haapanen  
Technology

Tel. +358 (0)400 992 925  
anna.haapanen@roschier.com

Keskuskatu 7 A  
FIN-00100 HELSINKI  
FINLAND

