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JUDr. Eduard Szattler

GPL - "VIRAL" LICENSE OR "VIRAL" CONTRACT

(part of the paper originally presented by the author at CYBERSPACE 2005 conference in Brno)

2. License or contract?

2.1. USA

In our opinion the best way to provide a good insight into a legal understanding of GPL in USA, is to use the words of explanation from Eben Moglen. „The GPL ... is a true copyright license: a unilateral permission, in which no obligations are reciprocally required by the licensor. Copyright holders of computer programs are given, by the Copyright Act, exclusive right to copy, modify and redistribute their programs. ...but if you redistribute it (software), in modified or unmodified form, your permission extends only to distribution under the terms of this license."[1] This is a widely followed theory in the United Sates, but some opposition exists. The U.S. Copyright Act[2] contains the term „license agreement", but requires no specific form to grant an authorization to use a copyrighted work.

We accept Moglen's argument, however this is an interpretation provided by FSF, therefore we believe, that it applies only to software licensed under GPL by FSF only. Any other licensor may provide his own interpretation of GPL and this interpretation should be of legal relevance in case of an infringement.

Many critical remarks have been made shortly after making the first draft GPLv3 open for discussion. The new title of section 9 of the first draft of GPLv3 said "Not a contract" to emphasize a non-contractual character of GPL. FSF later accepted arguments coming from countries where GPL and other software licenses are considered regular contracts and had changed the title of section 9 to "Acceptance not required for having copies." Many of these remarks originated in Europe.

2.2. Europe

According to the applicable European directives no requirement to grant a license by any specific means exists. In most cases the situation evolved in favor of the contractual approach.

2.3. Slovak republic

However, in Slovakia, a member state of the European Union since 2004, GPL does not exist de iure. According to Paragraph 40 Section 1 of the Slovak Copyright Act[3] (SCA) license[4] to use the work is granted by means of a license agreement (contract)[5] only. Moreover such agreement must be in writing, otherwise it is not valid due to a defect in the form. It is obvious that such a strict principle of formality must complicate concluding license contracts, particularly those on software. This is especially true about licensing of software over the Internet or through the retail or other distribution networks, where it is very unusual to conclude a written contract, since shrink-wrap and click-through licenses are

1 Retrieved November 12, 2006, from < http://www.groklaw.net/art.icle.php?story=20031214210634851>.
2 US CODE: Title 17
3 Act. No. 618/2003 Coll. on Copyright Law and Rights related to Copyright Law
4 The term „license" is used in Slovak legislature as a synonym for „consent" or „authorization", not „contract".
5 e.g. under Slovak and Czech law „license agreement" is a contract and thus is under the scope of contractual law. Therefore we use the terms „agreement" and „contract" as synonyms here.

commonly spread.[6] According to to mentioned provisions of the SCA all of such licenses are granted in contrary to the law, therefore they are all non-existent, including the GPL. Unfortunately, the latest proposal for an amendment of the SCA does not include any provisions concerning the questions of formal/informal license granting.

On the top of it, one more major limitation to conclude a valid GPL (as a contract) exists within the Slovak law. This limitation refers to the general provisions on contract concluding regulated by the
Act No. 40/1964 Coll. Civil Code (CC). In Paragraph 43 and following CC demands, in order for a contract to be valid, that an offer (an expression of will aimed to conclude a contract) must be addressed to one or more specific persons. An interesting discussions has existed for almost a decade now, object to which is an „offer" to conclude a license contract published on the Internet. Some say such a display is a proper legal offer, regardless of how „unspecific" the addressees are, some consider it to be merely an invitation to make offers *(invitatio ad offerendum)7.* Some even say that the provisions of general law do not apply.[8] We incline to an opinion that a display of the text of a license contract on the Internet is indeed just *invitatio ad offerendum.* The major argument would be the that persons to which is the license offered to are indeed unspecific.

Further, there is one other complication resting within the provision of Paragraph 43c, according to which an acceptation of the offer becomes effective when the consent with the content of the offer is delivered to the offeror. This of course rarely happens with the GPL and most of other software licenses.

All in all, although there are no substantial difficulties to accept the content of the GPL under the Slovak law, the written form of concluding GPL as a license contract and some other questionable contractual law provisions hold the GPL from being valid.

2.4. Czech republic

Due to a former existence of Czechoslovakia,[9] a very similar legal uncertainty has existed in Czech republic, where the same general provisions on concluding contracts of the aging Civil Code linger on.[10] Unlike Slovak lawmakers, Czech legislator has recently passed an extensive amendment to the Copyright Act,[8] where among many other novelties the process of concluding copyright agreements was changed. According to the current statutory text a

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6Sometimes the acceptance with a license is performed by simply by installing or running the program.
7 According to Article 14 Section 2 of the U.N. Convention On Contracts For The International Sale Of Goods *a proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.*
8 e.g. in Czech republic. see Aujezdský, J. (2003)., *Právni aspekty prodeje krabicového software.* Retrieved November 12, 2006, from <http://www.itpravo.cz/index.shtml?x=156548>. or Smejkal, V. (2001)., *Právo informačnich a telekomunikačných systému.* CHBeck, Praha, p.364.
9 After a political agreement was reached in 1992, two sovereign states, Czech republic and Slovak republic exist since 1 January 1993.
10 §43 and following, Act No. 40/1964 Coll. Civil Code
8 Act No. 121/2000 Coll. on Copyright law and Rights related to Copyright law
12 A non exclusive license does not have to be in writing.
13 Retrieved November 12, 2006, from <http://www.microsoft.com/presspass/exec/craig/05-03sharedsource.mspx>.

contract offer has no longer to be addressed to the specific persons and a valid license agreement can be concluded without an acceptance being delivered to the offeror. Thus GPL and all other usual distant contracts (concluded between parties not present) are in Czech republic no longer a non-existing legal concept but valid contracts (license agreements) under the Copyright Act.[12]

3. Viral license or viral contract?

One of the major legal concerns regarding enforceability of GPL is its so called „viral" effect, the effect concisely summarized by Craig Mundie, Microsoft Senior Vice President, in his speech given on "The Commercial Software Model" at the New York University Stern School of Business in 2001, where he also said: „The GPL mandates that any software that incorporates source code already licensed under the GPL will itself become subject to the GPL. When the resulting software product is distributed, its creator must make the entire source code base freely available to everyone, at no additional charge. This viral aspect of the GPL poses a threat to the intellectual property of any organization making use of it."[13]

This is also one of the major reasons why FSF originally withdrew the GPL from the scope of contractual law (lex contractus) and placed it, in its entirety, under the scope of copyright. FSF and other non-contractual pursuers of GPL argue that „...there is no provision in the Copyright Act (copyright law in general) to require distribution of infringing work on altered terms... (therefore)... the claim that a GPL violation could lead to the forcing open of proprietary code that has wrongfully included GPL'd components is simply wrong."[9] We must agree this is an adequate justification. We believe that in case of an infringement the clause which requires a distribution of a program under GPL if other GPL'd code was included[10], is to be considered a limitation of the granted rights.[11] But what if GPL is a contract?

In countries where GPL is considered a regular contract, it falls under the scope of contractual law. To determine whether a contractual GPL can have „viral" effect, there are two points of view to consider carefully. Even in countries with contractual understanding of licenses there are certain doubts about determining whether certain aspects of licenses, such as the interpretations of the license grant or the formal requirements of a license, should be considered contractual or non-contractual.[12]

If we choose to follow the non-contractual approach, we come to the same conclusion as above in compliance with the FSF argument.

Although in GPL there is no obligation to actually use the program (run it on a computer) or exploit it, a requirement to publish and distribute program (code) derived from other GPL'd code also under GPL might be regarded as consideration rather than just as limitation of granted rights.

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9 Retrieved November 12, 2006, from <http://www.groklaw.net/article.php?stoiy=20031214210634851>.
10 Section 2b of the GPLv2
11 see Schulz, C., *Contractual Relationships in Open Source Structures.* p.4. Retrieved November 12, 2006, from <http://oss.fh-coburg.de/events/OSSIE04/schulz_contractional_relationships.pdf>.
12see Metzger, A., Jaeger, T. (2001)., *Open Source Software and German Copyright Law.* Retrieved November 12, 2006, from <http: //www .t.i11ja.eger.de/a.rt.10.pdf>.

We therefore believe both arguments (limitation of granted rights and consideration) are possible. Nevertheless, we do not therefore consider GPL to be „a threat to the intellectual property". We only state that a plaintiff in a case of infringement may sue for a breach of contract and therefore we can expect a court decision by which an obligation to publish the code at issue may be imposed upon the infringer.