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# Open Source Software – UK perspective

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Monday 20 September 2010

# Jacobsen v Katzer



- Enforceability of the OSS Artistic Licence
  - Katzer (defendant, licensee) used portions of files downloaded from an OSS product provided by Jacobsen (licensor) as part of his own software. These software files did not comply with the terms of the OSS Artistic Licence.
- First instance
  - US District Court (Northern California) found Katzer had breached his obligations under the non-exclusive OSS licence giving rise to a claim for breach of contract rather than copyright infringement.
- Appeal decision
  - US Court of Appeals for the Federal Circuit vacated the decision, finding Katzer's obligations were conditions limiting the scope of the licence and not independent contractual covenants. Katzer had acted outside the scope of the licence by failing to comply with these conditions and therefore an action for copyright infringement could be brought by the licensor.
- Settlement
  - The case settled on 19 February 2010 (nearly 4 years after the case was launched) with Katzer agreeing to pay Jacobsen \$100,000 and accepting a permanent injunction against copying or modifying the software material at issue.

# English law



- No English authority so far
- What is the effect of the OSS licence
  - Contractual rights?
  - Defence to tortious (ie copyright) infringement?

# Does a OSS licence create a contract?



- A contract requires: offer, acceptance, consideration & intention to create legal relations
- Contractual terms must be sufficiently drawn to the attention of the contracting party  
*(Thornton v Shoe Lane Parking)*
- “...reasonable expectations of the parties...”  
*(Equitable Life v Hyman)*
- Breach of contract attracts remedy in damages

# ....Contract?



- Doctrine of part performance
  - Where a claimant partly performs their contractual obligations under the expectation the defendant will perform its obligations, a court may order specific performance
- Consequences of contract breach include:
  - Damages limited to those within the “*contemplation of the parties*” (*Hadley v Baxendale*)
  - Order for specific performance – equitable remedy to compel actual performance of contractual obligations
  - Injunction – balance of convenience, negative contracts, interim
- Criminal remedies exist for copyright infringement but not for breach of contract.

# Defence to copyright infringement



- The Licence as a defence
- If the licence is breached or terminated?
- Rights of copyright infringement

# Remedies for copyright infringement



- Tortious damages – reasonable compensation
- Statutory damages – additional damages awarded such as the justice of the case may require (*s97(2) CDPA 1988*)
- Account of profits
- Delivery up
- Disclosure

Enforcement Directive 2004/48/EC (Enforcement of IP Rights)

# OSS licence enforcement in Europe



## ■ Germany

- Deciding upon OSS cases since 2004, most prominently the Munich District Court (*Welte v. Sitecom Deutschland GmbH*)
- Failure to comply with the GPL licence terms constitute both a breach of contract and copyright infringement
- Agree with *Jacobsen v Katzer*: OSS licences may be enforced under copyright law **but** also in contract
- GPL licensors may rely on all enforcement means under Directive 2004/48/EC



# ....Europe



- **France** – pending “Paris GPL case”
  - Welte (German founder of gpl-violations.org) v French telecom company Iliad.
  - "Freebox", a DSL customer premises equipment which is extensively using various GPL licensed software.
  - Failure of obligation under the GPL to provide the complete corresponding source code is not fulfilled.
  - Iliad deny responsibility to provide the source code.
  - The first case in which an organisation is taking action in a foreign court (German organisation litigating in the French Courts).

# Outside Europe



- **Canada**

- No case law - but how would the rights management would have been decided in Canada?
- Canada has not enacted legislation to implement the WIPO Copyright Treaty (WCT), as the US and many other trading partners have, Canada has no laws that explicitly protect rights management information. An OSS licensor would have had to argue that the deletion of the attribution information infringed his moral right of paternity under the Copyright Act.

# GPL



- General Public Licence
- Grants licensee the right to copy, distribute & modify the open source software on the condition the software is again distributed under the very conditions of the GPL, such as:
  - reference to the GPL
  - accompanying GPL licence text
  - providing the source code
  - reference to disclaimer of warranty.

# .....GPL



- GPLv1 issued in 1989
- GPLv2 – issued in 1991, disadvantages:
  - 'Tivoisation' (cryptographic signing of software required to enable the unit to execute software, makes it impossible to modify and re-install software. GPLv3 removed this restriction)
  - unintentional incompatibility with some open source licences
  - US-specific legal terminology

# .....GPL



- The 4 current GPL licences together account for 65% of the total OSS licence world:
  - GPLv2 = 50%
  - LGPLv2 (Lesser GPLv2) - 10%. Aimed at software libraries;
  - GPLv3 - 5% (published June 2007)
  - LGPLv3 - 0.5%
- GPLv4 – coming soon?

# GPL compliance



- Breaches
- Enforcement – Germany leading the way

# Cloud Computing



- What is it?  
Hardware and software provided remotely as a service, on an as-needed basis. Cloud services can also be delivered regardless of using a PC, laptop or most handheld devices.
- Benefits:
  - Cost reduction
  - Flexibility
  - Energy saving

# ....Cloud computing



- Data protection concerns:
  - UK data handling requirements
  - Data exported outside the EEA
  - Multiple jurisdiction data protection requirements for data held centrally in EEA
  - Security risk of centralised storage



# ....Cloud Computing



- Present position:
  - Increased policing
  - Emphasis on “copyright enforcement” (US, Germany & France)
- UK?

# Commercial consequences



- Effects of *Jacobsen v Katzer*
- Permits enforcement of OSS licences
- Strengthens hand of Licensor
- Encourages growth of OSS licensing
- Accepted universally as a commercial tool

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