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Doubts Wane Over GPL Enforceability

The GNU General Public License (GPL) has become the most common open source license since its release in 1989. But only recently has a body of case law begun to develop on whether it is enforceable. James Gatto argues that cases in the U.S. and Germany suggest that it is.

The GPL is the most commonly used of the 80 or so approved open source licenses. Since its initial release in 1989, the GPL has been plagued by questions from legal scholars and open source critics about its validity and enforceability. The Free Software Foundation (FSF), the originator of the GPL, has dismissed such concerns. Only recently has a body of case law begun to develop addressing the enforceability of the GPL. The relatively few, but increasing, number of U.S. and international lawsuits involving the GPL are gradually obviating those concerns. The soon-to-be-released Version 3 of the GPL has the potential to further allay concerns. For at least these reasons, it is quite likely that doubts about GPL enforceability will continue to wane.

What is open source?

Under copyright law, the developer of a software program owns the copyright in the software. The rights conferred by this ownership include the exclusive right to copy, modify and distribute the software (among other things). Most proprietary licenses rely on copyright law to preclude copying (except for a backup), modification or redistribution of the software. In addition, with most proprietary software programs, the software is released in object code form only. Object code is the machine-readable form of software. Typically, the human-readable source code version is not provided. To modify a program, a software developer typically needs access to the source code. So even if a licensee has a right to modify a program, it may be difficult to do so without the source code.

The GPL is a copyright license premised on the notion of CopyLeft (a word play on the concept of being the opposite of copyRight). Since GPL's release in 1989, the GNU project and Free Software Foundation, founded by Richard Stallman, have pioneered this effort as part of their work to support computer users' rights to freely use, study, copy, modify and redistribute computer programs. There has been one revision to the GPL, Version 2, which was released in 1991. GPL Version 3 is expected to be released in early 2007.

Like most open source programs, GPL code is typically distributed with both object code and source code. In contrast to proprietary licenses, the GPL expressly permits copying, modifying and redistributing the software to which it applies. With the GPL, these rights come with certain require-

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ments and conditions. One of the most important requirements is that if you redistribute the program, you must release the source code for the software and any changes that you have made. In this way others can benefit from the changes that you have made and can make additional changes.

GPL enforcement and validity

Most of the GPL enforcement cases that have occurred to date are based on the failure of people to comply with the source code distribution requirement. Some people erroneously believe that GPL software is in the public domain or that the GPL is not enforceable. They therefore believe that they can use the GPL software without adhering to all of the other requirements and conditions of the GPL. These people want the benefit of using the GPL without the burden of complying with the source code distribution requirements (and other requirements and conditions of the GPL.) They often argue that the GPL is not a contract to which they are bound because they never signed the GPL. Legal scholars raise additional academic arguments about the enforceability of the GPL based on the intricacies of contract law.

On enforceability of the GPL, the FSF's position is quite simple: the GPL is a simple license, not a contract. According to the FSF, if you want to use software covered by the GPL, you can only do so pursuant to the license. You need not enter into a contract to do so, but the only thing that gives you the right to copy, modify and/or redistribute the software is the GPL itself. For the license to remain in effect you must comply with all of its requirements or the license terminates by its own terms. If you have no license, then you do not have the right to copy, modify or redistribute the software. If you do so without a license, you violate the copyrights of the developer and are liable for copyright infringement.

Thus, it is the retention of copyright ownership in the open source software that enables the enforceability of the license. This is one of the significant differences between open source and public domain software.

Cases involving the GPL

The vast majority of the GPL enforcements have been private enforcements. That is to say, when the FSF (or copyright owner) becomes aware of a GPL violation, it sends a private letter to the violator and demands that the licensee either come into compliance with all of the GPL terms or cease copying, modifying or distributing the GPL software. These private enforcements have been largely successful. Many GPL violations have been inadvertent. Once notified, these innocent violators typically come into compliance.

In some instances, violators of the GPL have refused to either comply or cease unlicensed uses. In these cases, a lawsuit has been necessary to enforce compliance.

Most of these lawsuits are resolved before a full trial and, in some cases, the issue of GPL enforceability was only tangentially addressed by the court. Significantly, no case has held the GPL to be unenforceable. On the contrary, in a number of rulings, U.S. and German courts have rendered decisions acknowledging the enforceability of the GPL.

One of the biggest misconceptions about open source software is that it is in the public domain. This is false because with the GPL, the original developer retains the copyrights in the original program (and subsequent modifiers retain the copyrights to their improvements). Therefore, if you do not

comply with the license, the license terminates and you do not have the right to copy, modify or redistribute without violating the owner's copyrights.

GPL's expanding case law

One of the first U.S. cases to address GPL validity was *Progress Software Corp. v. MySQL AB*. In 2001, MySQL sued Progress Software for allegedly distributing a database product that linked directly to MySQL's code (which had originally been released under the GPL), without distributing the source code for the database product. According to the GPL, under certain circumstances, if a second program is linked to a GPL program, the source code distribution requirements may apply to the linked program as well. MySQL sought a preliminary injunction to prevent Progress Software from distributing its database programs during the trial. Ruling on this injunction, U.S. District Judge Patti B. Saris treated the GPL as an enforceable and binding license. Judge Saris, however, did not issue the injunction, noting that there were questions as to whether Progress' software was a derivative or independent work under the GPL (that is, whether the source code distribution requirements applied to that work). The case was eventually settled out of court without any further guidance from the Court.

Other U.S. federal courts have had occasion to deliberate on GPL issues and have consistently held that the GPL, and open source licenses in general, are valid licensing agreements (at least in dicta).

In 2001, the Court of Appeals for the Eleventh Circuit discussed the GPL as part of a trademark infringement dispute. The case involved use of a trademark that had been, before being registered with the United States Patent and Trademark Office, associated with a product released under the GPL. In an attempt to support its finding of ownership, the appellate panel noted that "software distributed pursuant to such a license [GPL] is not necessarily ceded to the public domain and the licensor purports to retain ownership rights" (*Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F 3d 1188, 1198 (11th Circuit 2001)).

Perhaps the clearest acknowledgement by a U.S. court of validity of the GPL came in 2005, in *Wallace v. Free Software Foundation, Inc.* (2005 US Dist LEXIS 31728, 7-8 (SD IN 2005)). The United States District Court for Indiana had occasion to consider GPL issues in the context of an antitrust suit. In that case, a disgruntled software developer alleged that, via the GPL, the FSF unlawfully conspired with its distributors to fix the price of computer programs. In its initial grant of summary judgment in favor of the FSF, the Court held that the GPL is a vertical agreement (meaning it is an agreement among different levels of users within the same chain of distribution) and, as such, cannot alone form the basis of a per se violation of U.S. antitrust laws. Ruling on an amended complaint, the court again granted summary judgment noting that the GPL "is a software licensing agreement through which the GNU/Linux operating system may be licensed and distributed to individual users ... it merely acts as a means by which certain software may be copied, modified and redistributed without violating the software's copyright protection."

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The pending *SCO Group, Inc. v. IBM* matter has the potential to provide additional judicial direction on the enforceability of the GPL (*SCO Group, Inc. v. IBM*, Civil Action No 2:03cv0294). SCO filed a complaint in 2003 alleging that IBM breached a contract by including portions of SCO's proprietary Unix code in IBM's open source Linux product. IBM answered by denying all claims. Open source proponents, including FSF and the Open Source Initiative, have criticized SCO's case. To date SCO has refused to publicly identify the source code at issue. A significant issue in this litigation relates to whether SCO actually owns the copyright to the Unix code in question (see *SCO Group, Inc. v. Novell, Inc.*, Civil Action No 2:04cv139).

Internationally, Germany has developed perhaps the most comprehensive body of GPL case law. In part, this is due to the efforts of an open source evangelist named Harald Welte. Welte has established an open source enforcement project in Germany, details of which can be found at www.gpl-violations.org.

In a 2004 lawsuit between Sitecom and Welte, a Munich court granted a preliminary injunction against Sitecom (see *In Re Welte v. Sitecom Deutschland GmbH*, No 21 0 6123/04 (LG München 1) (May 19 2004), unofficial English translation available at www.jbb.de/judgment_dc-munich_gpl.pdf).

Welte brought this action as one of the developers of open source networking software released under the GPL. The suit alleged that a German subsidiary of Sitecom used the open source software in one of its wireless products without complying with the source code distribution requirements of the GPL (and without complying with certain notice requirements regarding marking the software with the GPL text.) The Court ruled that Sitecom's subsidiary could not distribute its wireless product without including the GPL text and distributing the networking software code free from royalties. The case resulted in an injunction that confirmed that violations of GPL are actionable.

In September 2006, Welte's [gpl-violations.org](http://www.gpl-violations.org) project prevailed over D-Link, a Taiwanese network solutions manufacturer. The case involved distribution of a D-Link network storage device that used a Linux-based operating system (see *In Re Welte v. D-Link Deutschland GmbH*, No 2-6 0 0224/06 (LG Frankfurt) (September 22, 2006), unofficial English translation available at www.jbb.de/judgment_dc_frankfurt_gpl.pdf).

As a result of a private enforcement, D-Link agreed to stop distributing its product. However, D-Link did not acknowledge any legal obligation to do so. Welte sought the legal fees incurred in connection with this private enforcement. D-Link refused to pay these fees. As a result, [gpl-violations.org](http://www.gpl-violations.org) brought this action to recover its out-of-court enforcement expenses and legal fees. During the proceedings, D-Link argued that the GPL is not a legally binding license. The District Court of Frankfurt disagreed. The court confirmed the validity of the GPL under German law and ordered D-Link to reimburse [gpl-violations.org](http://www.gpl-violations.org) the enforcement expenses. This case is one of the first court decisions to rule on damages arising from a GPL violation.

In another recent international case, the GPL is about to be scrutinized by an Israeli court. During 2006, the writer of Jin, an open source chess game, filed a lawsuit against IChessU and its owner. The suit alleges that

IChessU's newly released chess program incorporates open source code from Jin without complying with the GPL. This case is pending.

GPL3: self-enforcement

GPL Version 3 (GPL3) is being finalized after two separate drafts were released earlier this year. These drafts include numerous proposed changes from Version 2. In particular, some of the changes attempt to clarify existing provisions related to enforcement. If incorporated in the final draft, these changes may help enforcement efforts under the license. In particular, Sections 2, 8 and 9 contain specific self-enforcement language. Each of these sections references copyright law applicability in the event the GPL is violated.

Section 2, newly added to GPL3, discusses the basic permissions granted under the GPL. It specifically grants these permissions for the term of the copyright on the covered program. Under this section, users are permitted to run the unmodified program or privately modified versions of the program. But permission to all versions of a program ceases if a user brings a suit against anyone for patent infringement based on a program in compliance with GPL3.

Section 8 of GPL3 states the provisions for termination of the GPL license. Unlike earlier versions, this section now includes language discussing a copyright holder's rights in the event a user violates the license. The new text notes that copyright holders may put a violator on notice by any reasonable means within 60 days of a violation. Once notice is given, a copyright holder can then terminate the license at anytime. This new language creates great specificity regarding the process to follow in the event the GPL is violated.

Section 9, addressing acceptance of the GPL terms, also contains further enhancements that relate to self-enforcement. Similar to GPL2, this section signifies that users may receive or run GPL-protected work but may not "propagate" (for example, distribute) or modify a program or work without agreeing to the license. New language, however, explicitly states that propagating or modifying a program without accepting GPL terms is copyright infringement.

Waning doubt

It is entirely possible (and likely) that the GPL and portions of it will continue to be challenged in court. But, with the growing record of successful court results, strengthened self-enforcement language in the GPL and the strong influence of the open source community, the likelihood of a successful legal challenge to the general concept of the GPL seems to be waning.

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