Legal Matters:
Impact on contractual documents

Benjamin Jean

IP Lawyer

bjean@linagora.com

LINAGORA

27 rue de Berri
75008 PARIS
Tél. : 01 58 18 68 28
Fax : 01 58 18 68 29

Logiciels et Services,
pour réussir les grands projets du Libre

✔ Introduction

✔ I- Use of FLOS licenses & impact on contractual documents

✔ II- Development of FLOS Software & impact on contractual documents

✔ Conclusion

✔ What is an Open Source license?

✔ When do problems arise? (and what to do when problems arise?)

✔ How can we prevent these problems?

✔ *Contractual Impact*

✔ Was: a free (gratis) contract based on a non-exclusive copyright license;

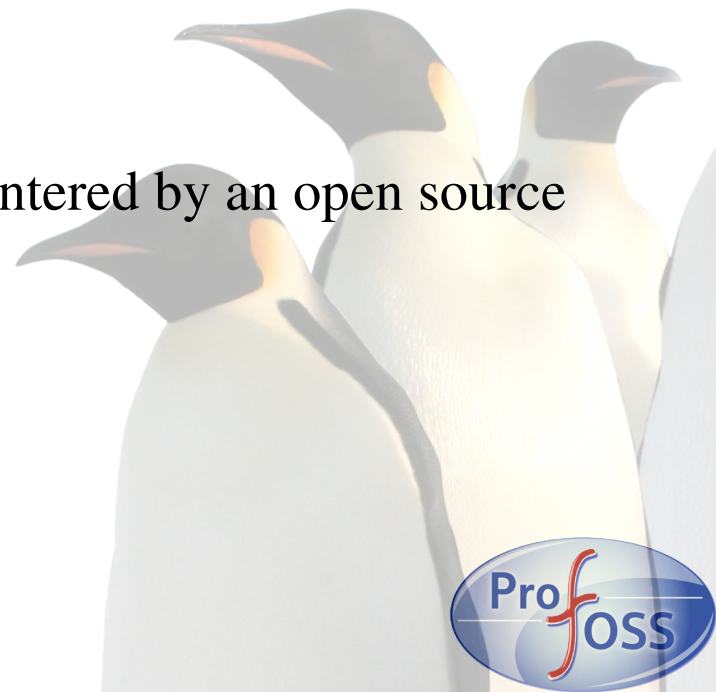✔ Now: Patents, trademarks, and other IP rights are also concerned by FLOS Licenses

(Ywein Van den Brande : Understanding Free and Open Source licenses)

✔ Mixing and linking open source codes;

✔ Best practices;

✔ FLOS Governance

✔ Auditing tools

(Bruno Lowagie : Practical licensing problems encountered by an open source developer)

✔ Developing best practices and using tool

✔ Importance of team work between technical and legal services

(Philippe Laurent : EUPL:: understanding it, and why it matters)

(Benjamin Docquir :Impact on business conduct: liability, due diligence processes, good practices, etc)

(Matthieu Farcot : Fossology, a free code auditing tool)

✔ **I- Impact of FLOS Licenses**

✔ **II- Impact of FLOSS development**

✔ In the relationship between *suppliers* and *customers*

✔ For *administration and public persons* (invitation to tender/call for proposals)

✔ other relationships

✔ Language

✔ Warranties/Liabilities

✔ Who control the license?

✔ Ownership

✔ NDA

✔ English only ?

    ✔ **The understanding and so, validity of the consent is unsure with nonprofessional/consumers**

        ✔ **ok between professionals**

        ✔ **ok if international contracts (elements of more than one country are involved)**

    ✔ **Sometime administration, public persons can't contract in foreign language (Loi Toubon in France: France administration have to contract in French)**

    ✔ **When they exist, translations are:**

        ✔ **Not very good**

        ✔ **Only informative**

✔ CeCILL or EUPL-like licenses are indeed useful

✔ The principal function of the company is to be the interface between the communities and the Customer :

    ✔ **Customers want functional solutions**

    ✔ **the provider must guarantee them**

✔ No difference with proprietary software:

    ✔ **Exclusion of Infringement warranty: valid except if the infringement is due to its own behaviour**

    ✔ **Exclusion of hidden defects / Conformity warranties: only between professionals of the same speciality**

✔ # The choice

- ✔ **Supplier is generally at the better place (community implication, knowledge, etc.)**
- ✔ **Sometimes, the customer want a particular license (for instance to integrate the new development with an other one)**
- ✔ **Sometimes, some license suppress or limit any choice (copyleft license like GPL)**

✔ # Interpretation of licenses

- ✔ **Who can interpret the license?**
  - ✔ **Supplier/customer**
  - ✔ **Only in case of ambiguity and on the new developments**
- ✔ **How interpret the license?**
  - ✔ **Use of generic files/text to complete or interpret blurred licenses/terms (sometimes it's safer not to follow the FSF linking legal theory)**
- ✔ **FAQ can be annexed to the license**
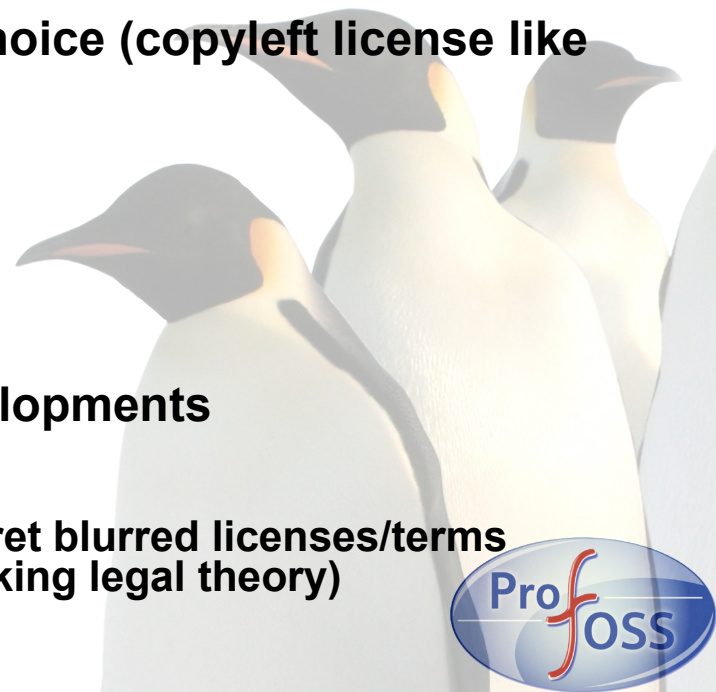
✔ What is the power of the redactors of licenses

  ✔ **GPL v2/GPL v3: lots of modification**
  ✔ **GFDL v1.2/GFDL v1.3: Wikipedia can choose to change its license in CC-By-SA**
  ✔ **EUPL v1.0/EUPL v1.1: Saas is now under the scope of the license**
  ✔ **CC-By-SA v3.0 / LAL v1.3: new compatibility**
  ✔ **Etc.**
  ✔ **=> where is the limit ?**

✔ # Who is the right holder?

    ✔ **Usually the supplier will retain ownership rights to keep control over the future development of software and support the sustainability of the solution.**

    ✔ **Nevertheless, customers may ask for shared the ownership (ie joint tenancy).**

✔ # What are the rights granted?

    ✔ **The assignment will be very often in accordance with terms of one or more free licenses**

    ✔ **they can evolve during the software design.**

✔ Use of Non disclosure Act

- ✔ **can't limit the rights given by the (copyleft) license used**
- ✔ **Definition of "confidential information" must be limit carefully**
- ✔ **Expressly authorized by the new GNU GPLv3**

✔ What consequences?

- ✔ **Termination of the license if this NDA is not authorized (licensor should have give all right listed by the license)**
  - ✔ **By authors of the software**
- ✔ **Situation unsure for the customer:**
  - ✔ **Must respect NDA**
  - ✔ **Benefit of rights granted by the license**

✔ **needs derogation to promote FLOSS**

    ✔ **CCAG (general terms): they don't give this right option**

    ✔ **Derogation is needed: with a CCAP (particular terms)**

        ✔ **copyright license enough to mutualise**

            ✔ **non exclusivity**

            ✔ **right to use, modify, reproduce, diffuse**

            ✔ **without limitation**

            ✔ **source code needed**

        ✔ **publisher can continue to develop the software**

✔ need to justify LL by non functional needs

- ✔ **They are no user/time/services limit**
- ✔ **The code source can be read and modified**
- ✔ **The software will be share between administrations**
- ✔ **No new fee for using or distributing software**

✔ # Communities

    ✔ **Are not part of the contract**

✔ # other concurrent societies

    ✔ **Can contribute to the same product**
    ✔ **Have the same interest**

✔ What customers ask to FLOSS companies (assistance and guarantee)

✔ How FLOS companies share FLOS Software?

✔ How FLOS companies control particular FLOS Software?

✔ a real assistance (as good as with proprietary software)

✔ A good governance (companies must manage perfectly FLOSS risks)

✔ a real assistance (as good as with proprietary software)

   ✔ **In any case of problem with an open source software, the supplier can always offer the customer a support and an assistance whose level is equivalent level than those of a traditional publisher.**

   ✔ **It's other professional services**

      ✔ **For instance : the "OSSA" (OpenSource Software Assurance) include technical support services on 100s of OSS**

✔ A good governance (companies must manage perfectly FLOSS risks)

   ✔ **Customers can ask to prove these good practices**

   ✔ **Some tools are useful: Black duck certificate, Fossology scanning, etc.**

   ✔ **Risks about bad governance:**

      ✔ **Infringement**

      ✔ **Bad blood**

✔ relationships between multiple stakeholders (employees, community, etc.) are parts of the overall policy of the company's corporate governance:

✔ Everybody have the same obligation:

    ✔ **We have to share our (copyrightable) works**

    ✔ **our clients too (if they distribute)**

    ✔ **Our concurrent too (sometimes it's useful)**

✔ Everybody have the same rights

✔ If you choose to share everything, it will be easier to keep a global control on your contributions and to be (nearly) sure that you are not violating any free license

✔ **the control directly linked to the competitiveness of the company and the freedom/sharing needed by the communities**

✔ **What we can't control**

  ✔ **Sometimes, a third-party can force us to use or not use certain licenses.**
  ✔ **The customer will have the same rights**

✔ **Use of other exclusive rights**

✔ **In case of community software**

✔ **Trademarks policy (i.e. Red Hat and many others)**

    ✔ **Commercialization are prohibited without express authorization**
    ✔ **Works (but CentOS is a fork without any trademark)**

✔ **Patents (Microsoft/Novell – seem useless)**

✔ **Contract**

    ✔ **If you want assistance, you can't do this and this**
    ✔ **If you want to be a certified distributor, you can't support community version**
    ✔ **etc.**

✔ **By implication in communities**

✔ **Community is generally not part of contract but can benefit of these ones**

    ✔ **Red Hat/Firestar: patent transaction benefit to the whole community**

✔ **Employee's split their work time between communities and companies**

    ✔ **Involve community experts**

✔ **Copyright assignment: looking for an other equity**

    ✔ **Gratis**

    ✔ **With promises about the company's future conduct**

    ✔ **There are also lots of joint copyright assignment now.**

✔ Companies and customers must be careful

✔ We can be optimistic:

✔ there is a trend which encourages mutualization around these practices by companies

  ✔ **through websites (like FossBazaar)**
  ✔ **series of conferences (like ProFOSS, EOLE and other workshops).**

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Thank you !

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