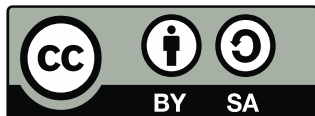


Open Source license compliance and infringement issues

Dr. Till Kreutzer

Attorney-at-Law, iRights.Law – Lawyers for the Digital World



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AGENDA

1 License compliance and infringement - The basics

2 Potential consequences of license violations

3 Potential consequences on the relation to the rights owners

4 Potential consequences on the relation to a contractual partner

5 Potential non-legal consequences

6 Potential criminal law consequences

License compliance and infringement

- The basics



- To use a copyright/patent protected software, the user needs a license
- Open Source Software is not public domain! Open Source Licenses are no waiver of rights but a consent to use the software under certain conditions
- In general, Open Source Licenses grant copyright and – if needed – patent licenses to use the software under the terms of the license

License compliance and infringement

- The basics



- Esp. copyleft licenses use an automatic termination mechanism: The license terminates automatically upon any violation of the license terms
- That effect can be caused by the violation of any license obligation

Typical license infringements

- The use of Open Source components is not mentioned at all
- License texts are not provided
- Source code of copyleft components is not or not completely provided
- Copyleft obligation is violated
- Copyright notices are not or not properly provided
- Liability disclaimers are missing

License compliance and infringement

- Effect of the automatic termination mechanism: User loses the right to use the software. Any further use (unless license compliance is established) is a copyright/patent infringement.
- Legal consequence: Non-compliance triggers the full range of copyright/patent/contractual remedies

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Potential consequences of license violations

- **Potential consequences range over:**
 - 1. Effects on the external relationship to the rights owners: Rights enforcement by the copyright/patent right owner
 - 2. Effects on the internal relationship to a contractual partner: Contractual remedies including damages, in worst-case-scenario termination of the whole software project
 - 3. External, non-legal, consequences: Economical issues, Reputation damages, PR disasters, unsolvable conflicts with the community, M&A issues
 - 4. Criminal law consequences

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1. Potential consequences on the external relationship to the rights owners



- **1. Injunctions**
- Rights owner can claim (preliminary) injunctions: Unless compliance is established the software or the product including the software must not be distributed anymore
- Depending on the applicable law: any further distribution of the non-compliant software/product can lead to penalties
- Injunctions can be enforced e.g. by seizing products at import or on trade fairs etc.

1. Potential consequences on the external relationship to the rights owners

- **2. Claims to recall products from the channel of commerce and to destruction**
- Under EU law, the rights owner can claim to recall IP infringing products/software from the market and the destruction of in-stock copies
- Potential consequences: Products that contain infringing software (e.g. embedded systems) must be recalled from the market*, stocks must be destroyed, online available programs must be taken offline as long as compliance is established etc.

1. Potential consequences on the external relationship to the rights owners



- **3. Obligation to disclose source code**
- Depending on the applicable law, violations of copyleft clauses can lead to obligations to disclose source code of own developments
- Copyleft clause obligation: If you distribute a “modification” of the work, it must be licensed under the initial or a compatible license
- Copyleft clause in sec. 2b GPLv2:
 - „You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License.“

1. Potential consequences on the external relationship to the rights owners



- Copyleft affects modifications of the original component (e.g. a modified Linux kernel) and possibly own code that is combined and distributed together with copylefted component (“larger work”)
- i.e.: If own components are combined with copyleft components in a certain manner, the source code of own (potentially “proprietary”) code must be disclosed as well. If it is not, the rights owner can claim to fulfil the license obligation and to refrain from distribution without disclosing own source code

1. Potential consequences on the external relationship to the rights owners



- **4. Damages**
- Copyright- and Patent infringements cause claims to damages
- On what basis damages are calculated depends on the applicable law
- US law: punitive damages possible
- EU law: damages calculated on average license fees + potentially punitive damages (e.g. double license fees for violating the right to name the author)

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2. Potential consequences on the internal relationship between contractors and commissioners



- In a software project, the contractor owes to deliver an accurate product. A product that infringes OS license terms is not accurate because of the lack of title in the open source components. Any use of the commissioner that is deemed a distribution will be a copyright infringement.

2. Potential consequences on the internal relationship between contractors and commissioners

- Such breeches of contract on the contractor's side lead to contractual remedies.
- Such as:
 - Damage claims
 - Damages caused by delay
 - Regress claims
 - Claims to further improvement, re-development
 - Rights to terminate the contract (!)

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3. Potential non-legal consequences

- Software that is not OS compliant cannot be legally used and distributed
- **Economical and technical issues will arise!**

3. Potential non-legal consequences

- If non-compliance is **internally revealed** (before use or distribution), potential consequences are:
 - Additional, time-consuming and costly redevelopments;
 - Delayed introduction, roll-out, distribution;
 - Disappointment/complaints from the customers;
 - In a worst case scenario uselessness of the whole product.

3. Potential non-legal consequences

- If non-compliance is **revealed by third parties**, potential consequences are:
 - PR disasters and damages to reputation;
 - Loss of trust from the communities side. Remember: Open Source Software users are highly dependent on a good relationship to the community!;
 - Potentially unsolvable disputes with the community;
 - HR issues with hiring competent developers.

3. Potential non-legal consequences

- M&A issues: Software assets that are affected by a lack of title (no rights in OS components) have a reduced or no value
- In M&A transactions OS compliance is an ever-increasing issue
- If compliance is not ensured systematically it must be established in the course of the M&A transaction (often impossible regarding the time pressure)

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4. Criminal Law consequences

- Under some legislations (like e.g. German law), nonnegligent IP infringements, esp. for commercial purposes are considered a criminal offence
- Prosecution is rare but pursued in cases of infringements on a large scale

Examples for lawsuits according to Open Source License violations:

The GPL enforcement

GPL enforcement in Europe

- Numerous GPL violations led to legal proceedings in Germany and other European countries.
- Driving Force: www.gpl-violations.org
- Motivations:
 - Compliance of the software industry
 - Missing credit for the free software community
 - Fairness: industry that is aware of its own copyrights shall respect the copyright of free software authors
 - Interest in concrete source code

Procedure of GPL Enforcement in Europe **iRIGHTS** *law*

- Cease and desist letter to the violator
- Declaration to cease and desist and ancillary claims (information about distribution chain, source code, costs of enforcement)
- Settlement in most cases
- Grace period if the non-compliant company is unable to establish compliance – donation to community projects

Procedure of GPL Enforcement in Europe **iRIGHTS** *law*

- Demand for a preliminary injunction (within a deadline of one month after obtaining knowledge of the infringement)
- Competent courts: all German District Courts if the product is sold/the software can be downloaded all over Germany, similar rules in other European countries
- Preliminary injunctions are often granted within a few days and without oral hearing – defendant must actively object, if he does not accept the ruling.
- Injunctions and other legal measures can be enforced, e.g. by seizing products at import or on trade fairs etc.

Effects of GPL Enforcement

- Apart from the time-consuming and costly lawsuits
- Products had to be recalled from the market
- Companies lost the trust of the developers and communities which is difficult and takes long to be re-established

**Thank you for your
attention!**