Do you know your open-source licences?

December 1, 2021

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Do you have the right to copy source code written and developed by someone else? The answer to this question depends on the situation; however, even in the context of open innovation, intellectual property rights will be the starting point for any analysis required to obtain such an answer.

In the software industry, open-source licences allow anyone to access the source code of corresponding software, free of charge and with few restrictions. The goal is generally to promote the improvement of this code by encouraging as many people as possible to use it. Linus Torval, the programmer of the Linux kernel (certainly one of the most well-known open-source projects) recently stated that without the open-source approach, his project would probably not have survived.[1]

However, this approach has legal consequences: Vizio was recently hit with a lawsuit alleging non-compliance with an open-sourceGPL licence used in the SmartCast OS software embedded in some of its televisions. It is being sued by Software Freedom Conservancy (“SFC”), an American non-profit promoting and defending open-source licences. As part of its lawsuit, SFC alleges, among other things, that Vizio was required to distribute the SmartCast OS source code under the above-mentioned open-source GPLlicence, which Vizio failed to do, thereby depriving consumers of their rights[2].

In Canadian law, section 3 of the *Copyright Act*[3] gives the author the exclusive right to produce or reproduce all or any substantial part of an original work. This principle has been adopted by all signatories of the 1886 Berne Convention, i.e., almost every country in the world. A licence agreement, which may *inter alia* confer the right to reproduce the work of another person, can take different forms. It also establishes the extent of the rights conferred and the terms and conditions of any permitted use.

However, not all open-source licences are equivalent. Many allow creators to attach various conditions to the right to use the code that has been made available. Under these licences, anyone may use the work or software, but subject to the following constraints, depending on the type of

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licence in effect:

1. Obligation to display: An open-source licence may require disclosure of certain information in the software or in the source code itself, such as the following:
   - The author's name or pseudonym, or even maintaining the anonymity of the author, depending on their wishes, and/or a citation of the title of the work or software;
   - The user licence of the redistributed open-source work or software;
   - A modification note for each modified file; and
   - A warranty disclaimer.
2. Contribution obligations: Some licences require the sharing of any modifications made to the open-source code, with said modifications being under the same licence conditions. In some cases, this obligation extends to any software that incorporates the open-source code. In other words, code derived from open-source material can itself become open-source. This obligation to contribute can generally be categorized as follows:
   - Any redistribution must be done under the original licence, making the result open-source as well;
   - Any redistribution of the code, modified or not, must be done under the original licence, but other code may be associated or added without being subject to the open-source licence; or
   - Any redistribution is done without any sharing constraints.
3. Ban on commercialization: Some licences prohibit any use for commercial purposes.

Apache v2

Level of obligation to contribute upon redistribution	**Mandatory elements to display**	**Commercial use permitted**
Any redistribution of the software, modified or not, or with added components, may be done under other terms.	Licence of the redistributed open-source software Identification of any changes made to the code Copyright notice Warranty disclaimer	Yes

BSD

Level of obligation to contribute upon redistribution	**Mandatory elements to display**	**Commercial use permitted**
Any redistribution of the software can be done without any obligation to share.	Copyright notice Warranty disclaimer	Yes

CC BY-NC 4.0

Level of obligation to contribute upon redistribution	**Mandatory elements to display**	**Commercial use permitted**
Any redistribution of the software can be done without any obligation to share.	Licence of the redistributed open-source software Identification of any changes made to the code Copyright notice Warranty disclaimer	No

CC0 1.0

Level of obligation to contribute upon redistribution	**Mandatory elements to display**	**Commercial use permitted**
Any redistribution of the software can be done without any obligation to share.	Licence of the redistributed open-source software	Yes

GPLv3

Mandatory elements to display

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Level of obligation to contribute upon redistribution
Any redistribution of the software, modified or not, or with added components, must be done under the terms of the original licence

Licence of the redistributed open-source software
Identification of any changes made to the code
Copyright notice
Warranty disclaimer

Commercial use permitted
Yes, but sub-licensing is not allowed

LGPLv3

Mandatory elements to display

Level of obligation to contribute upon redistribution
Any redistribution of the software, modified or not, must be done under the terms of the original licence. New components can be added, but not integrated, under other non-open-source licences

Licence of the redistributed open-source software
Identification of any changes made to the code
Copyright notice
Warranty disclaimer

Commercial use permitted
Yes

MIT

Mandatory elements to display

Level of obligation to contribute upon redistribution
Any redistribution of the software can be done without any obligation to share.

Licence of the redistributed open-source software
Copyright notice
Warranty disclaimer

Commercial use permitted
Yes

It is important to make programming teams aware of the issues that can arise when using modules governed by what are known as “viral licences” (such as the **CC BY-NC 4.0** licence) in the design of commercial software. Such software could lose significant value if such modules are incorporated, making it difficult or even impossible to commercialize said software.

In the context of open innovation where developers want to share their code, in particular to encourage collaboration, it is important to understand the scope of these different licences. The choice of the appropriate licence must be made based on the project’s objectives. Also, keep in mind that it is not always possible to change the licence used for the distribution of the code once said distribution has commenced. That means the choice of licence can have long-term consequences for any project.

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1. David Cassel, Linus Torvalds on Community, Rust and Linux's Longevity, The NewStack, Oct. 1, 2021, online: https://thenewstack.io.
2. See the SFC press release: https://sfconservancy.org/copyleft-compliance/vizio.html.
3. RSC 1985, c. C-42.

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