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The GPL Is a License, not a Contract

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December 3, 2003
By Pamela Jones, Editor of Groklaw

[*Editor's note: last week's article on GPL attacks drew some questions on just why the GPL cannot be enforced like a contract. We're pleased to announce that we have convinced Pamela Jones to expand on that issue for us.*]

There has been considerable FUD of late asserting that, if a company inadvertently incorporates GPL code into its proprietary code, it can be forced to release its proprietary code under the GPL. This isn't new FUD. It's old FUD, but it is coming from some new sources. Even some attorneys have been saying this in the media and at various conferences. While it's not a crime to misunderstand the GPL, and it certainly isn't rare, it does arouse unnecessary fears about whether the GPL is safe to use or work with. Is it true? Can you lose your code this way? No, and the reason why hinges on the GPL being a license and not a contract.

A lot of the confusion about the GPL stems from this central issue: Is the GPL a license or a contract? The reason this issue matters is that contracts are enforced under contract law, which is done state by state, and there are certain necessary elements to qualify as a valid contract. Licenses, instead, are enforced under copyright law at the federal level. The penalties available are not the same.

Let's analyze and see how this all relates to the recent FUD. First of all, what is a license? A license is just a permission to do something you otherwise wouldn't be allowed to do. When I want to go fishing, for example, I have to get a fishing license from the local municipality. That's a license, as its name implies. But why? Why isn't it a contract? Because there are no further agreed-upon promises, no reciprocal obligations. It would be a contract if I said to the owner of a pond: if you give me a license to fish in this pond, I'll give you half of all the fish I catch. In that scenario, each of us has voluntarily entered into a kind of promise. We each give the other something of value, so if I get the license and then I don't give over half of all my catch of the day, the pond owner can sue me for not living up to the terms of the contract.

Eben Moglen, the Free Software Foundation's attorney, who is primarily responsible for enforcing the GPL, explains the difference between contracts and licenses like this:

> The word 'license' has, and has had for hundreds of years, a specific technical meaning in the law of property. A license is a unilateral permission to use someone else's property. The traditional example given in the first-year law school Property course is an invitation to come to dinner at my house. If, when you cross my threshold, I sue you for trespass, you plead my 'license,' that is, my unilateral permission to enter on and use my property.
>
> A contract, on the other hand, is an exchange of obligations, either of promises for promises or of promises of future performance for present performance or payment. The idea that 'licenses' to use patents or copyrights must be contracts is an artifact of twentieth-century practice, in which licensors offered an exchange of promises with users: 'We will give you a copy of our copyrighted work,' in essence, 'if you pay us and promise to enter into certain obligations concerning the work.' With respect to software, those obligations by users include promises not to decompile or reverse-engineer the software, and not to transfer the software.

Very clear, but what about the GPL? First, the name tells you what the authors intended: General Public License. It doesn't say "General Public Contract" or even "General Public License Contract". So they intended it to be a license, not a contract. Does it fit the definition? Professor Moglen:

> The GPL, however, is a true copyright license: a unilateral permission, in which no obligations are reciprocally required by the licensor. Copyright holders of computer programs are given, by the Copyright Act, exclusive right to copy, modify and redistribute their programs. The GPL, reduced to its essence, says: 'You may copy, modify and redistribute this software, whether modified or unmodified, freely. But if you redistribute it, in modified or unmodified form, your permission extends only to distribution under the terms of this license. If you violate the terms of this license, all permission is withdrawn.'

Suppose a company really did mingle GPL code into a program with its own proprietary code and then distributed the merged product under a proprietary license or without living up to the terms of the GPL? Now what happens? What will the judge do now? Order the code released under the GPL over the wishes of the owner?

Stop and think. What happens if you violate the terms of a fishing license? For example, the license may restrict how much fish you can catch on a particular day or what kinds of fish you can keep, what sizes, etc. Suppose you violate the terms of the license. What happens? You lose your license to fish. There may be a fine to pay. That's essentially the same thing that happens under the GPL, except it's nicer, because the company gets to choose what it wishes to do under the terms of the GPL. If it still isn't resolved, and it goes to a judge, however, it's enforced as a violation of copyright law, not contract law. Here is Professor Moglen's explanation of what happens:

> Because the GPL does not require any promises in return from licensees, it does not need contract enforcement in order to work. A GPL licensor doesn't say in the event of trouble "But, judge, the licensee promised me he wouldn't do what he's doing now." The licensor plaintiff says 'Judge, the defendant is redistributing my copyrighted work without permission.' The defendant can then either agree that he has no permission, in which case he loses, or assert that his permission is the GPL, in which case he must show that he is obeying its terms. A defendant cannot simultaneously assert that the GPL is valid permission for his distribution and also assert that it is not a valid copyright license, which is why defendants do not 'challenge' the GPL.
>
> The claim that a GPL violation could lead to the forcing open of proprietary code that has wrongfully included GPL'd components is simply wrong. There is no provision in the Copyright Act to require distribution of infringing work on altered terms. What copyright plaintiffs are entitled to, under the Act, are damages, injunctions to prevent infringing distribution, and--where appropriate--attorneys' fees. A defendant found to have wrongfully included GPL'd code in its own proprietary work can be mulcted in damages for the distribution that has already occurred, and prevented from distributing its product further. That's a sufficient disincentive to make wrongful use of GPL'd program code. And it is all that the Copyright Act permits.

So when you read claims that the GPL is perhaps not enforceable because you don't sign it or click on a form, or because of a lack of privity, or because there is a lack of consideration, or some such, you'll know that the person misunderstood the GPL and thought in terms of contract law. It's a common error. They don't shoot you at dawn for not fully understanding the GPL. But at the same time, it's good to know that the problems people think they see in the GPL generally are the result of not understanding it, not from any weakness in the GPL itself.

Similarly, when you hear that the GPL is viral and can force proprietary code to become GPL, which a couple of lawyers have been saying, you'll know that isn't true. If you steal GPL code, you can expect an enforcement action. But this action can only be enforcement of a license, not a contract, and a forced release under the GPL can't be imposed on you under copyright law. It's not one of the choices, as Professor Moglen has explained. You do have a choice under the GPL: you can stop using the stolen code and write your own, or you can decide you'd rather release under

the GPL. But the choice is yours. If you say "I choose neither," the court can impose an injunction to stop you from further distribution, but it won't order your code released under the GPL. Your code remains yours, as you can see, even in a worst case scenario.

Of course, you could avoid all such troubles in the first place by not stealing GPL code to begin with. But if something happens inadvertently and some rogue employee sneaks some GPL code into your proprietary product, the sky isn't falling. It's a manageable risk and a solvable problem. No one wants to steal your code in retaliation or force it to be something you don't want it to be. The GPL is unequivocally a license, and that's the truth.

(Log in to post comments)

The GPL Is a License, not a Contract
Posted Dec 4, 2003 2:36 UTC (Thu) by **torsten** (guest, #4137) [Link]

"You do have a choice under the GPL: you can stop using the stolen code and write your own, or you can decide you'd rather release under the GPL. But the choice is yours. If you say "I choose neither," the court can impose an injunction to stop you from further distribution, but it won't order your code released under the GPL. Your code remains yours, as you can see, even in a worst case scenario."

PJ has clarified why a company will never be forced to release their code under the GPL, but she has not stated what would stop a company from incorporating GPL code to begin with.

I believe the most significant barrier to the theft of GPL code may be substantial per-infringement awards specified in copyright law. But the question is, do I need to demonstrate financial damage, or is simple infringement enough to collect? And if I need to demonstrate financial damage, would a judge buy that I have suffered financially when I don't even charge money for my software?

The GPL Is a License, not a Contract
Posted Dec 4, 2003 3:17 UTC (Thu) by **coriordan** (guest, #7544) [Link]

huh?
Nothing can "stop a company from incorporating GPL code to begin with". Just as nothing can stop a company from incorporating this comment into their work. Prevention is just impossible. But it's illegal, and breaking the law has consequences, and society hopes that these consequences are scary enough to discourage people from breaking the law "to begin with".

> do I need to demonstrate financial damage, or is
> simple infringement enough to collect?

Infringement is enough to collect. Eben Moglen explained all this.

P.S great article.

The GPL Is a License, not a Contract
Posted Dec 4, 2003 6:41 UTC (Thu) by **dlang** (subscriber, #313) [Link]

in fact it's perfectly legal to incorporate GPL code into propriatary software, as long as you don't then distribute the result.

The GPL Is a License, not a Contract
Posted Dec 5, 2003 16:05 UTC (Fri) by **tcabot** (subscriber, #6656) [Link]

My alma mater's motto seems appropriate here: "Leges sine moribus vanae", or "Laws without morals are in vain".

financial damage
Posted Dec 4, 2003 3:34 UTC (Thu) by **pjm** (subscriber, #2080) [Link]

Even if you don't charge for redistribution etc. under GNU GPL terms, you are still entitled to charge for redistribution beyond what is permitted by the GNU GPL.

(If grant permission to do any copyright-limited actions with your work without charge, then there's no infringement, as one already has permission.)

The GPL Is a License, not a Contract
Posted Dec 4, 2003 7:08 UTC (Thu) by **brouhaha** (subscriber, #1698) [Link]

> But the question is, do I need to demonstrate financial damage, or is simple infringement enough to collect?

There are two kinds of damages that a court may order in a copyright case:

- statutory damages - the damages provided by copyright law
- actual damages - how much damage you can demonstrate to the court was caused by the defendant

For information on remedies for infringement, see 17 U.S.C. 504.

The plaintiff may choose whether to request actual damages or statutory damages. The amount of statutory damages awarded are left to the discretion of the court, and range from $750 to $30,000 per infringement (i.e., per copy distributed in violation of the license), or up to $150,000 if the court finds that the infringement was willful.

In the past, in order to be eligible to be awarded statutory damages for copyright infringement of a work, it was necessary for the copyright on the work to have been registered either prior to the infringement, or within the three month grace period following first publication. It appears that this requirement may have been lifted.

In addition, the court may allow recovery of attorney's fees.

Note that if even if you choose not to register a copyright, you are still required by 17 U.S.C. 407 to deposit two copies of the work with the Library of Congress. If you fail to do this, the Register of Copyrights can issue a written demand for the deposit, and can impose fines if the demand is not met within three months.

The GPL Is a License, not a Contract
Posted Nov 1, 2005 20:14 UTC (Tue) by **pjgust** (guest, #33537) [Link]

A couple of related question about copyright and GPL. Both are related to whether the ability for an author to offer software under GPL depends on having a valid/active copyright.

Question 1: What happens to the ability of the owner to continue licensing code under GPL once the copyright for the software expires? Can the author continue to require new licensees to adhere to the terms of the GPL anyway? What about existing licensees; are they now free of its provisions or must they continue to operate under the license?

Question 2: 17 USC 411 says that, "no action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made in accordance with this title". 17 USC 412 goes on to say that, "no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for ... any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work."

I'm willing to bet that most if not all source code licensed inder GPL has not been registered and no fees have been paid. How does this impact the validity and/or enforcability of the GPL for such code? Does the GPL depend on its enforcibility under copyright law? Or is it the case that the licensor can still seek injunctive relief for a violation of the license, independent of the enforcibility of the underlying copyright. If not, it's bad news for most if not all GPL licensors. If so it seems that GPL must be based on something beyond copyright law.

Typo?
Posted Dec 4, 2003 3:17 UTC (Thu) by **freethinker** (guest, #4397) [Link]

"We will let give you..."?

Typo?
Posted Dec 4, 2003 3:24 UTC (Thu) by **freethinker** (guest, #4397) [Link]

P.S. Thanks for a very clear and useful article!

Not So Simple
Posted Dec 4, 2003 3:28 UTC (Thu) by **ncm** (subscriber, #165) [Link]

The GPL is certainly a license. But can't it *also* be a contract?

The essence of a contract is in agreement and exchange of value. Certainly somebody violating the GPL is not party to any contract, because their actions don't indicate agreement, and they have not returned any value to the copyright holder. Such a case can be tried purely on license grounds, and legally it's very simple, because the body of license law is much simpler than contract law.

But, suppose somebody abides by the license, and releases a derived work under the GPL. Then, both requirements to an implicit contract are satisfied. Abiding by the license signifies agreement, and releasing one's own work under the GPL offers value. It would be a good thing to consider this productive relationship a contract, because it means that if the original copyright holder announced that the work was no longer licensed under the GPL, the owner of the derived work would be able to prevent that, because it violates the implied contract.

I'm not a lawyer, but I have discussed this with lawyers. The issue of GPL retractions has not been addressed by the FSF, but pretending it can't happen seems risky. Entirely disclaiming the contract implied in the GPL would leave us with no legal tools to work with, in the event.

Of course, the FSF itself is not subject to problems with retracted GPLs, because it takes copyright assignments for everything in (e.g.) Gcc. Other projects, such as Linux, have not been so careful and would be at risk if they also disclaimed that contract. Fortunately, what the FSF says doesn't govern anybody else's interpretation of the GPL. Linux copyright holders would still be able to claim an implied contract if somebody tried to retract their code, no matter what Eben Moglen has said. Prof. Moglen's assertion does risk muddying that water, even as it clarifies the current situation.

Unlike programmers, most lawyers seem to like muddy water. If duels had traditionally been conducted by wrestling in mud pits, rather than with firearms at ten paces, they probably would not have been outlawed. Law, as a representative profession, would then have been a very different sort of activity, and lots more fun for non-lawyers to watch.

no no no
Posted Dec 4, 2003 5:04 UTC (Thu) by **coriordan** (guest, #7544) [Link]

No. every paragraph above is wrong, probably every sentence. read the article again and an introduction to copyright, and some other stuff. It's not complex, new, or up for debate.

Not So Simple
Posted Dec 4, 2003 5:38 UTC (Thu) by **ncm** (subscriber, #165) [Link]

Nothing in the law is simple.

The law is messy because it involves people's messy problems, and because it's conducted by people whose livelihood depends on it remaining messy. Any time somebody tells you something in law is simple, you know you are being misled.

That said, it seems pretty clear that Prof. Moglen is not misleading anybody, as far as he goes. But, is Mr. O'Riordan claiming that a copyright holder is, somehow, not allowed by copyright law to withdraw a license? Who would have standing to complain about it?

Not So Simple
Posted Dec 4, 2003 6:47 UTC (Thu) by **coriordan** (guest, #7544) [Link]

> is Mr. O'Riordan claiming that a copyright holder is,
> somehow, not allowed by copyright law to withdraw a license?

yes.
When I give you a license, it it yours, not mine. I can stop giving out those licenses, but I cannot change, "withdraw", or take back what I have already given you.

Not So Simple
Posted Dec 4, 2003 17:19 UTC (Thu) by **ncm** (subscriber, #165) [Link]

Wishful thinking makes a very poor substitute for sound reasoning, never mind real case law analysis.

The GPL isn't "given" to you. The GPL describes conditions under which specific violations of copyright restrictions won't (therefore, can't) be prosecuted. If the owner later communicates to you a different set of conditions, you'd

better have something stronger than your belief that you "own" the license.

An implied contract is the only thing I know of that would allow you to defend continuing to re-distribute under the old license.

Not So Simple
Posted Dec 4, 2003 20:06 UTC (Thu) by **piman** (subscriber, #8957) [Link]

The conditions for terminating a license are given in USC 17 203. It must be done within a 5 year period between 35 and 40 years after the grant was mode. It must be agreed to by a majority of the copyright holders. You must send out a written notice in advance.

And even then, 203b1 says that any derivative work made before the termination made can be distributed and modified under the terms of the (terminated) license. Since the GPL's granted rights are transitive, this means anyone receiving it from you has the full rights of the GPL.

An implied contract is the only thing I know of that would allow you to defend continuing to re-distribute under the old license.

Or, perhaps, you know. Copyright law.

Not So Simple
Posted Dec 4, 2003 22:09 UTC (Thu) by **ncm** (subscriber, #165) [Link]

Ha.

We've been through *this* one before. That clause was meant to allow musicians to terminate a license after 35 years even when they signed a contract granting the license in perpetuity. Only in California did the record companies find judges willing to take it to mean that a license couldn't be revoked before 35 years had elapsed. The decision is widely acknowledged as a mistake.

(The key line is "(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.")

Not So Simple
Posted Dec 5, 2003 14:08 UTC (Fri) by **piman** (subscriber, #8957) [Link]

Regardless of its purpose, USC 17 203 (especially 203b1, which still applies to 203a5) is there. It says that you can continue to abide by the terms of an otherwise-terminated license for a derivative work, and it lays out some pretty onerous terms for terminating the license in the first place.

But I've backed up my case -- where's your evidence that a copyright license can be revoked? How does it fit into USC 17 203?

I don't think a license is considered property.
Posted Dec 4, 2003 17:29 UTC (Thu) by **guybar** (guest, #798) [Link]

When I give you a license, it it yours, not mine

Are you sure about this ? AFAI understood the article, a license is
not property, i.e. it is neither "mine" nor "yours", but rather
it is a permission allowing "me" or "you" to use the owner's property.

A permission could be irrevokable, or not.

The GPL, AFAIK, cannot be revoked. But I see no reason why other
licenses (like, say, the permission to fish in a lake) couldn't.

I don't think a license is considered property.
Posted Dec 4, 2003 18:13 UTC (Thu) by **ncm** (subscriber, #165) [Link]

The GPL does not claim to be irrevocable. It's not clear that it would be even if it did say so. (That's probably why it doesn't.) The owner is allowed to change his mind about anything, including the revocation. He can't do it retroactively, but that doesn't help us much.

Revocation wouldn't make existing copies illegal, but it would keep you from distributing more.

Not So Simple
Posted Dec 4, 2003 20:05 UTC (Thu) by **dthurston** (guest, #4603) [Link]

> When I give you a license, it it yours, not mine. I can stop giving out
> those licenses, but I cannot change, "withdraw", or take back what I have
> already given you.

This is not so obvious (at least world-wide), and needs legal references.
For instance, I've seen Wood V Leadbitter (1845) 13 M and W 838 (in the UK)
cited as implying that licenses can be revoked upon due notice to licensee
under British law. I think I've seen a more specific instance of a
software license case in Australia.

no, he's 99% right
Posted Dec 5, 2003 17:12 UTC (Fri) by **giraffedata** (subscriber, #1954) [Link]

every paragraph above is wrong, probably every sentence.

I find every sentence and paragraph correct and valid (and consistent with the article) with one crucial exception: The implied assent to the contract. The comment suggests that simply availing oneself of a GPL license could count as agreement to a contract.

It's a fair theory, but not supported in case law. You have to do something more explicit to agree to a contract. There is such a thing as a unilateral, or public, contract, which means you publish an offer that says, "If you do X, then I promise to do Y." Most people who distribute GPL software don't make such an offer, but even if they did (where "Y" would be "grant you a GPL license"), the way unilateral contracts work is that the offeror cannot sue the offeree for noncompliance (because the offeree's compliance was what made the contract exist).

I'm a contract lawyer, by the way, but have only a passing acquaintance with intellectual property law.

no, he's 99% right
Posted Dec 8, 2003 5:55 UTC (Mon) by **ncm** (subscriber, #165) [Link]

Well, what about section 45 (quoted in another message below)?

Wrong
Posted Dec 4, 2003 5:30 UTC (Thu) by **spitzak** (guest, #4593) [Link]

Wrong. The GPL is *not* a contract.

Nothing forces the GPL user to return anything of value. In fact they could, quite legally under the GPL, modify the code and release a *worse* program. By your logic they have therefore managed to charge the original author some more by making the program worse. This is obviously silly.

Not So Simple
Posted Dec 4, 2003 5:47 UTC (Thu) by **ncm** (subscriber, #165) [Link]

While nothing forces a licensee to return something of value, once having returned something of value, the licensee can claim to have executed an agreement. It doesn't matter much how you, personally, or Mr. O'Riordan, or the revered PJ, or even Prof. Moglen feel about it. What matters is what makes sense to the judge(s) involved. Judges, as a rule, *like* to bring in contract case law. Often that was where they worked before they became judges.

There's hardly any human interaction that can't be turned into a contract, once you get to court, just as there's hardly a noun that can't be verbed.

Not So Simple
Posted Dec 4, 2003 7:13 UTC (Thu) by **brouhaha** (subscriber, #1698) [Link]

> While nothing forces a licensee to return something of value, once having returned something of value, the licensee can claim to have executed an agreement.

No, because the licensor is not under any obligation to accept any return of something of value, or to admit that the licensee has even provided anything of value. The licensor thus cannot unilaterally turn the license into a contract.

If I tell you that you can swim in my swimming pool on Thursdays, I've granted you a license. You can't turn it into a contract by dumping some chlorine into the pool and claiming that you've returned something of value.

Not So Simple
Posted Dec 4, 2003 7:16 UTC (Thu) by **brouhaha** (subscriber, #1698) [Link]

I wrote:

> The licensor thus cannot unilaterally turn the license into a contract.

That's true, but I meant to write that the **licensee** cannot unilaterally turn the license into a contract.

Not So Simple
Posted Dec 7, 2003 23:45 UTC (Sun) by **ncm** (subscriber, #165) [Link]

This seems to contradict the above:

> §45. OPTION CONTRACT CREATED BY PART PERFORMANCE OR TENDER
>
> (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree begins the invited performance or tenders a beginning of it.
>
> (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.
>
> Comments: a. Offer limited to acceptance by performance only. This Section is limited to cases where the offer does not invite a promissory acceptance. Such an offer has often been referred to as an "offer for a unilateral contract" .

(Thanks to gumout.)

Not So Simple
Posted Dec 8, 2003 5:28 UTC (Mon) by **ncm** (subscriber, #165) [Link]

Also, see

http://www.idea.piercelaw.edu/articles/33/33_2/p225.Jones.pdf

Not So Simple
Posted Dec 4, 2003 6:14 UTC (Thu) by **freethinker** (guest, #4397) [Link]

Check me on this, folks? This is my understanding of how the GPL keeps free software free, come what may.

You don't need legal tools to cope with a GPL retraction. Just add one comment to one source file. Congratulations! You have just created a derivative work, copyright *you*, and the original licensor can't stop you, as long as you abide by the GPL.

Not So Simple
Posted Dec 4, 2003 6:56 UTC (Thu) by **coriordan** (guest, #7544) [Link]

You will hold the copyright to your one line, but it won't change that the copyright for the rest of the work is held by the original author.

Not So Simple

Posted Dec 4, 2003 8:58 UTC (Thu) by **piman** (subscriber, #8957) [Link]

But either way, you still have the license to use the work under the terms of the GNU GPL. They can't withdraw it, whether or not you added a line. They can prevent further people from getting a license from *them*, but since the license in question (the GPL) grants you the right to distribute the work, there's little they can do to actuallly stop distribution and modification of it.

(Just to clarify for freethinker.)

Not So Simple
Posted Dec 4, 2003 14:38 UTC (Thu) by **freethinker** (guest, #4397) [Link]

I see. That makes sense. Thanks.

Not So Simple
Posted Dec 4, 2003 17:49 UTC (Thu) by **ncm** (subscriber, #165) [Link]

No. The GPL doesn't give you the right to extend their permission to anybody else. (That would be a power of attorney.) Everybody who gets a copy from you gets it under their license. If they withdraw the license, your permission to distribute more copies ends. The permission of other people who have copies also ends, although they can keep the copies they have.

Any copies you have distributed are still legal; the copyright holder can't retract that. But future publication is controlled by the latest license you know about. (It's probably their problem to make sure you know about the new license; they might have to send you certified mail before it's binding.)

Not So Simple
Posted Dec 4, 2003 17:59 UTC (Thu) by **amikins** (guest, #451) [Link]

I don't believe that's correct; one of the points of the GPL is that it can't be retracted. So someone who has received something that was licensed under the GPL lawfully (that is, all the people doing the licensing had right to do so) can still distribute, no matter what someone farther up the chain may be yelling. It was licensed, the GPL doesn't have any mention of being revocable, and the standard GPL says at *YOUR* discretion a new license (specifically stated to be a newer version of the GPL) may apply.

'Your' in this case meaning the licensee, not licensor. So if you change your mind later, you're kinda out of luck.

Not So Simple
Posted Dec 4, 2003 18:18 UTC (Thu) by **ncm** (subscriber, #165) [Link]

Where does anything say that a license can't be retracted? Thus far nobody has cited anything stronger than their own fervent wish.

The law certainly allows you to retract permission for the use of your property any time, subject to any contractual obligations you have entered into. If there's no contract, there are no obligations on the copyright holder.

Not So Simple
Posted Dec 5, 2003 21:11 UTC (Fri) by **freethinker** (guest, #4397) [Link]

Section 0:

This License applies to any program or other work which contains a notice placed by the copyright holder saying it may be distributed under the terms of this General Public License. The "Program", below, refers to any such program or work, and a "work based on the Program" means either the Program or any derivative work under copyright law: that is to say, a work containing the Program or a portion of it, either verbatim or with modifications and/or translated into another language. (Hereinafter, translation is included without limitation in the term "modification".) Each licensee is addressed as "you".

To me this says that as long as the notice is there, you're licensed. If you redistribute, as long as the recipients' copies have the notice, they're licensed. And so on, as long as anyone has a copy.

Not So Simple
Posted Dec 4, 2003 6:20 UTC (Thu) by **iabervon** (subscriber, #722) [Link]

So far as I know, you can't retract a copyright license (assuming the licensee has not violated it). If you've offered your code under the GPL, you can't retract that. You can stop offering this license to people in the future, but existing licensees retain their licenses, and in the case of the GPL, they are licensed to sublicense to others. So even if the FSF decided to stop giving away GNU software, I would personally be permitted by law to distribute it myself. (And all of the mirrors, for that matter, would be properly licensed to continue to distribute it).

Of course, the FSF could release proprietary versions of GNU software, which wouldn't be available under the GPL. But that doesn't stop someone else from taking over the GPL development of the same tools, since everybody who's download GNU software is properly licensed to do so. The case of Linux is even more significant; every Linux user is licensed to release versions of Linux under the GPL, but nobody at all is licensed to release versions of Linux under any other license. Even Linus couldn't take Linux proprietary. Even the entire set of Linux developers with known contact information may not be sufficient at this point (without significant effort put towards replacing anything whose owner could no longer be found).

The reason that the FSF is sure to keep the copyright to all of GNU is that they want to be able to offer later versions of it under a later version of the GPL if one becomes necessary. If there turned out to be some problem with the GPL, it would be extremely difficult in the case of Linux to get the right to release it under a revised version of the GPL. Fortunately, the current version of the GPL seems to be satisfactory.

So an implied contract isn't necessary to protect your ability to use the code. I doubt that the fact that someone had agreed to the GPL and released something (even something related) under it before would be sufficient to make the GPL a contract. Or at least, it would not be a contract for future work. If you and someone else have been working together on a GPL project, using the GPL as your license to distribute the others code and offering the GPL to the other, and suddenly your hard drive crashes, destroying your only copy, you might be able to compel the other party to send you a copy of the last version you provided under an implied contract (the two of you exchanged valuables and agreed on the license for the edition you've lost). Any future versions the other party might produce, however, are new works, and not subject to the contract (if there is one) but only to copyright.

Not So Simple
Posted Dec 4, 2003 18:03 UTC (Thu) by **ncm** (subscriber, #165) [Link]

In fact, you *can* retract a copyright license. You just have to communicate the retraction to the people who have the old license. It's no different from telling somebody who is used to coming over for dinner Wednesday nights that he's not welcome any more. If he insists, you can have the police eject him, and charge him with trespassing.

Furthermore, the GPL doesn't give you the right to sublicense the original work; everybody who gets a copy gets the right to re-distribute from the original licensor, not from you. (You are obliged to extend them rights to re-distribute your own contribution.)

The GPL only says what it says. You can read it and find out what it says, we don't need to speculate.

Not So Simple
Posted Dec 5, 2003 14:51 UTC (Fri) by **piman** (subscriber, #8957) [Link]

Revoking a license is not the same as uninviting someone to dinner, and evicting them for trespassing if they do. It's much more like telling someone that they couldn't have come over for dinner last week, when you happily served them, and then immediately demanding your time, food, and occupied space back.

Not So Simple
Posted Dec 7, 2003 23:37 UTC (Sun) by **ncm** (subscriber, #165) [Link]

This is getting silly.

Copyright law is about publishing. If you give somebody license to publish your book this year, you can decide to have somebody else publish it next year. Withdrawing your permission doesn't mean they have to recall and destroy all the books they published. It means they have to stop publishing. That's all it means.

The case of software distribution is the same. When your license to publish is withdrawn, you just have to stop publishing. If you have a derived work, you should make sure that they have promised not to withdraw permission. The FSF makes that promise.

Not So Simple
Posted Mar 5, 2004 21:49 UTC (Fri) by **crythias** (guest, #19997) [Link]

From Parent:
Furthermore, the GPL doesn't give you the right to sublicense the original work; everybody who gets a copy gets the right to re-distribute from the original licensor, not from you. (You are obliged to extend them rights to re-distribute your own contribution.)

I just wanted to make sure that this point isn't left unanswered:
From the GPL (http://www.gnu.org/licenses/gpl.txt):
1. You may copy and distribute verbatim copies of the Program's source code as you receive it, in any medium, provided that you conspicuously and appropriately publish on each copy an appropriate copyright notice and disclaimer of warranty; keep intact all the notices that refer to this License and to the absence of any warranty; and give any other recipients of the Program a copy of this License along with the Program.
3. You may copy and distribute the Program (or a work based on it, under Section 2) in object code or executable form under the terms of Sections 1 and 2 above provided that you also do one of the following: [Provide a reasonable way for recipient to obtain the source from you]
6. Each time you redistribute the Program (or any work based on the Program), the recipient automatically receives a license from the original licensor to copy, distribute or modify the Program subject to these terms and conditions. You may not impose any further restrictions on the recipients' exercise of the rights granted herein. You are not responsible for enforcing compliance by third parties to this License.
-=-=-=-=-
The GPL is a fully cascadable license. Each recipient of GPL code can be a distributor. The only true option of a copyright holder (not GPL licensee!) is to distribute a (hopefully, revised, updated, better) new program under a different (perhaps, proprietary) license. Even if the copyright holder revokes the GPL, the acceptors of the GPL version of the code (source or object), even 2-3 levels deep, because they accepted a viable license, have to have full faith and credit of the license they received.

Basically, GPL isn't intended to be revokable. If that may be one's intent, one shouldn't use GPL.

Re: Not So Simple
Posted Dec 4, 2003 17:42 UTC (Thu) by **Ross** (guest, #4065) [Link]

I think the answer is no, but it doesn't really matter.

Even if a defendant claimed it was a contract there would be clear evidence that they agreed to it if they are distributing or modifying the work.

Not all contract require signatures. Buying a candy bar at the store is a contractual agreement.

As for consideration, the licensee agrees to grant the same rights to others, including the original author, for their own changes.

So even if someone wanted to argue it was a contract so they could back out of it, how would they do so without showing that they agreed to the contract? Or are you talking about the original author backing out?

Re: Not So Simple
Posted Dec 4, 2003 17:54 UTC (Thu) by **ncm** (subscriber, #165) [Link]

I'm talking about the original author backing out.

Re: Not So Simple - Revoking permission
Posted Dec 4, 2003 19:22 UTC (Thu) by **Ross** (guest, #4065) [Link]

The combination of sections 4 and 6 of the GPL seem to cover this. They don't have any time limits and they make it clear that the grant of rights is renewed everytime a work is distributed for the third party and that the rights are granted only as defined in the license.

Under what conditions can someone normally back out of a contract?

This would seem especially difficult if the other party had acted on the grant of permissions believing them to have been granted by the license and believing they had met all obligations of the agreement.

Damages
Posted Dec 4, 2003 4:20 UTC (Thu) by **andrel** (guest, #5166) [Link]

Prof. Moglen says:

> A defendant found to have wrongfully included GPL'd code in its own proprietary work can be mulcted in damages for the distribution that has already occurred, and prevented from distributing its product further.

Why can't the judge decide forfeiture of the proprietary source code is the appropriate penalty? There are many programmers who would prefer this to a cash payment as compensation for the illegal use of their code. Their layers will certainly suggest to the court that releasing the infringing code under the GPL is an acceptable remedy.

Damages
Posted Dec 4, 2003 7:15 UTC (Thu) by **brouhaha** (subscriber, #1698) [Link]

> Why can't the judge decide forfeiture of the proprietary source code is the appropriate penalty?

Because that is not one of the remedies for infringement set forth in 17 U.S.C. 504.

Damages
Posted Dec 4, 2003 17:23 UTC (Thu) by **andrel** (guest, #5166) [Link]

But forefeiture is one of the remedies set forth in 17 U.S.C. 506. My question still stands.

Damages
Posted Dec 5, 2003 22:18 UTC (Fri) by **piman** (subscriber, #8957) [Link]

Forfeiture of their rights to use the work they infringed upon. Not forfeiture of any of their own copyrights.

From the customer's perspective
Posted Dec 4, 2003 4:59 UTC (Thu) by **error27** (subscriber, #8346) [Link]

Thank you for clearing that up.

I have another question. What would happen if I purchased software that was licensed under the terms of the GPL? Let's imagine that the software printed a message that it was licensed under the terms of the GPL when it started. Would there be any legal recourse if I asked them for source code and they refused? Is there any way I could ask a judge to force them to give me the source code?

Short answer: no
Posted Dec 4, 2003 5:23 UTC (Thu) by **ncm** (subscriber, #165) [Link]

Only the copyright holder has standing to sue for violation of copyright.

From the customer's perspective
Posted Dec 4, 2003 5:31 UTC (Thu) by **JoeBuck** (subscriber, #2330) [Link]

My guess is that it depends. If they promised you that the software was under the GPL, I would assume that this promise to you is enforceable (especially if you paid them cash; in that case there's a contract, but it isn't the GPL, it's the deal between you and them). If they didn't make such a promise, but it turns out that they are shipping GPLed code, then they are engaging in copyright infringement, so it would be up to the copyright holder to enforce the copyright, and they couldn't be forced to relicense the part of the work that they own.

One thing I have no idea about is whether GPL violation can ever be a criminal rather than a civil matter, as other forms of copyright infringement can be.

From the customer's perspective
Posted Dec 4, 2003 10:18 UTC (Thu) by **MathFox** (guest, #6104) [Link]

One thing I have no idea about is whether GPL violation can ever be a criminal rather than a civil matter, as other forms of copyright infringement can be.

Legally seen: copyright infringement is copyright infringement and you can be criminally prosecuted for GPL infringement. So far the theory. In practice I don't think that a prosecutor will go after a GPL violator because

1. there is little economic damage done,
2. they lack specific knowledge about free software,
3. GPL violations aren't allways clear cut. (It is easy to hide a "written offer" for sourcecode within 4.7 Gb of data.)

So I think that vigilance in the free software movement will remain the main defence against GPL infringement.

The GPL Is a License, not a Contract
Posted Dec 4, 2003 6:15 UTC (Thu) by **proski** (subscriber, #104) [Link]

The problem is that GPL is sometimes (mis)understood as a contract by the software authors. An example of such software is XFoil. The webage says:

> By downloading the software you agree to abide by the GPL conditions.
> The most important conditions are:
> * Any port of this XFOIL software to another platform must be made public under the GNU GPL
> * Any port of this XFOIL software to another platform must be provided with the source code
> * Any port of this XFOIL software must retain the "XFOIL x.xx" name and the original copyright

So what happens if I download XFoil, port it to another OS (say, Mac OS) and use it only for my projects? Can the author go after me and demand that I release my changes in the code? GPL (when understood as a licence) doesn't require it. In fact, it has no effect on me as long as I don't distribute the software.

But on the other hand, the author clearly considers GPL to be a contract that binds the users from the moment they download the software. The judge could be sympathetic to the argument that the interpretation of GPL as a contract was posted by the software author, and thus GPL should be treated as a contract. This could be a disaster for a large company doing aircraft designs if its lawyers trusted the words of Professor Moglen without looking at the homepage of the project.

Similar problems can happen with other software that can be significantly reworked without being distributed, e.g. web applications and server software in general.

The GPL Is a License, not a Contract
Posted Dec 4, 2003 9:01 UTC (Thu) by **piman** (subscriber, #8957) [Link]

There are a number of software authors that use the GPL without understanding it, or copyright law. The XFoil author seems to be one of these. In fact, all 3 of those are conditions above and beyond what the GPL requires; the result is that XFoil is licensed inconsistently, and probably can't be distributed and modified at all (except by the original author).

So, Prof. Moglen is correct that the GPL can never be a contract; the problem is that XFoil isn't under the GPL, but some inconsistent GPL+otherstuff license.

The GPL Is a License, not a Contract - XFoil
Posted Dec 4, 2003 17:51 UTC (Thu) by **Ross** (guest, #4065) [Link]

Items 1 and 3 don't appear to be correct interpretations of the GPL.
As such, wouldn't they be extra conditions and therefore incompatible
with the GPL?

Oops
Posted Dec 4, 2003 17:53 UTC (Thu) by **Ross** (guest, #4065) [Link]

I didn't notice the other response to your post. They are correct,
items 2 is also overly broad because a port could also be shipped
with a written offer for the source code.

The GPL Is a License, not a Contract
Posted Dec 4, 2003 7:22 UTC (Thu) by **henriksorensen** (guest, #6313) [Link]

On the same topic.
Since the GPL is very powerfull as written, could some explain why developers
contributing to GCC have to assign their copyrights to FSF.

The GPL Is a License, not a Contract
Posted Dec 4, 2003 7:30 UTC (Thu) by **coriordan** (guest, #7544) [Link]

So that FSF can...
* defend the code in court.
* updated the license if a flaw is found in GPLv2.
* change the license (LGPL -> GPL, or vice versa)
* update the license after a developer goes out of contact

(note that the charter of FSF requires that they release all software as Free Software. So if a bunch of alien clones took over FSF, they still couldn't take the software proprietary) By assigning copyright, the legal stuff becomes FSF's responsibility, and the devs can concentrate on deving.

The GPL Is a License, not a Contract
Posted Dec 4, 2003 7:44 UTC (Thu) by **henriksorensen** (guest, #6313) [Link]

But does this mean that other Open source projects are taking a risk, by not following
the same guidelines ?

If the code is published under GPL, or should I say under the intensions behind GPL, for
other projects, FSF seems to be willing at least to offer support in case of legal troubles.

Also the change of license, what if FSF (even very unlikely), decide they just had
enough of this open source thing, and changes all the licenses to a non-open license ?

And if the developer goes out of contact, what has changed ? The source code is still
available for anyone to change or clone.

The GPL Is a License, not a Contract

Posted Dec 4, 2003 9:08 UTC (Thu) by **piman** (subscriber, #8957) [Link]

> But does this mean that other Open source projects are taking a risk, by not following the same guidelines ?

If the project's copyright is infringed, they (the authors) will need to pursue the violations themselves. This can be costly, and a company is more likely to scoff at a few programmers (forcing a court case) than at the FSF.

> If the code is published under GPL, or should I say under the intensions behind GPL, for other projects, FSF seems to be willing at least to offer support in case of legal troubles.

"Support" is defined in many ways; I'm sure if the situation is serious enough, they may offer an amicus curiae brief, or (if not in court) help explain the GPL to the persons in question.

> Also the change of license, what if FSF (even very unlikely), decide they just had enough of this open source thing, and changes all the licenses to a non-open license ?

The FSF (and others) never bothered to get into "this open source thing", and thankfully still advocate free software.

However, if they do start using a non-free license, then you are screwed unless you can get all the contributors together (the contract one signs with the FSF allows you to use your own code for whatever you want; if you get all those people together, you can start over). Nathaniel Nerode, a GCC contributor, has argued the FSF has already done this with the GFDL, so it's not a complete hypothetical anymore.

Probably so
Posted Dec 4, 2003 17:57 UTC (Thu) by **Ross** (guest, #4065) [Link]

If there are multiple copyright holders enforcing the copyright can be difficult. Collecting damages without registering the copyright can also be difficult.

As an example I found a port of the x48 calculator emulator to MacOS X including some nice changes to the timer. However they didn't abide by the GPL. I reported the violation to the authors but their email addresses do not appear to be current. I also reported it to the FSF but they can't do anything about it. So the license will probably not be enforced.

The GPL Is a License, not a Contract
Posted Dec 4, 2003 8:48 UTC (Thu) by **henriksorensen** (guest, #6313) [Link]

There were some links explaining FSF's position:

http://www.gnu.org/licenses/why-assign.html
http://www.gnu.org/software/gnue/community/copyleft.html

The GPL Is a License, not a Contract
Posted Dec 4, 2003 8:52 UTC (Thu) by **bbencic** (guest, #9213) [Link]

First of all, thanks for this great article.It is very clear.
But I have a question. This article explains what is the GPL (and its consequences) under the US laws.
Can someone explain me if the GPL can be interpreted in the same way under the European laws (or in my case, under Belgian laws) ? Aren't there any subtle differences which allow a different interpretation of the GPL in other countries ?

The GPL Is a License, not a Contract
Posted Dec 4, 2003 9:38 UTC (Thu) by **sasha** (subscriber, #16070) [Link]

I do not know about West-European lows, but I can speak about Russia.
Some lowers thinks that GPL is enforcable in Russia, and some lowers think in other way. There are 2 problems:

1. GPL can't be translated to Russian. Well, there are some translations, but they have no legal force, as it is written in the GPL. Russian low is very complex in this point, and there are circumstances when license in foreign language can't be forced.

2. Russian lows are not USA lows. GPL is constructed to work with USA lows, with their concepts and so on. The usual thing -- many USA people thinks that USA is the only country in the world. As a result, it does not work.

There are some known violates of GPL in Russia. Nobody tries to do anything with this.

The only good thing is that MS EULA does not comply to Russian low as well as GPL. And there exist some court decisions about MS EULA. Of course, most people does not know about all that things.

I think, it is good time to re-write GPL and make it work in many contries.

The GPL Is a License, not a Contract
Posted Dec 4, 2003 9:59 UTC (Thu) by **coriordan** (guest, #7544) [Link]

Actually, one of the main goals of the GPL was to have it work in every country. That's why it doesn't contain any references to US law, or US precedent.

I haven't heard anyone suggest that it's not enforceable in the EU. (except for two legal studys that were funded by Microsoft.)

GPL and foreign laws
Posted Dec 4, 2003 16:05 UTC (Thu) by **emk** (subscriber, #1128) [Link]

Hmmm. I'm not a lawyer, but I can see several potential issues here.

The GPL is a license under copyright law. Because of various treaties, copyright law tends to be fairly similar in most countries.

The GPL is a unilateral permission--it simply allows you to do something you would not normally be allowed to do. Therefore, if the GPL is invalid in a given country, it's probably technically illegal to distribute GPL'd software at all. In this way, the GPL is a lot stronger than Microsoft's EULA in many jurisdictions.

It's also possible that a country might have different laws about how invalid licenses are handled, or what consitutes an implicit contract. So it's not clear-cut.

Now, it's not worth any US author's time to sue in Russian courts anyway. Maybe in Europe (or possibly Japan).

Anyway, this is just my random thoughts. Hire a lawyer if you need legal advice.

The GPL Is a License, not a Contract - Russian law
Posted Dec 4, 2003 18:02 UTC (Thu) by **Ross** (guest, #4065) [Link]

First off I'm not a lawyer and I don't know anything about Russian law.
Having said that...

Actually the GPL was designed to work in many countries. I assume
Russia signed the Berne convention. If so, it should be enforcable
because copyrights are recognized without registration and cover
distribution and creation of derivative works.

So even if item 1 is a problem which makes the GPL invalid, 2 is not
a problem (from an enforcability standpoint) because people would have
no rights to distribute or create derivative works. And if they don't
do those things there isn't a compliance problem in the first place.

The GPL Is a License, not a Contract
Posted Dec 4, 2003 9:59 UTC (Thu) by **dmantione** (guest, #4640) [Link]

I can explain what will happen under Dutch law, but because of EU regulations and the
Benelux treaty our copyright laws are quite similair. (See
http://www.ivir.nl/wetten/nl/auteurswet.html for the text of the law.)

First, a copyright violation is a criminal act for which you can be punished with jail and
fines (article 31 and 32 and 33).

Besides this, the copyright holder is entitled to any damages he has suffered, all profits
the violator has made with his work and can claim himself owner of all illegally duplicated
material (article 27, 28 and 29).

Nothing in the law says a word about licenses. It just says you need a permission from
the copyrightholder. Dutch law does not protect contracts or licenses, it protects
agreements, and sees a contract or license as a form of proof of such an agreement.

This makes the situation no so clear. There is not much difference between a license
and a contract. It is my expectation that a judge would not accept that there is proof of
an agreement that the one would publish his own source code under GPL, however, it is
not so sure.

The GPL Is a License, not a Contract
Posted Dec 4, 2003 12:40 UTC (Thu) by **coriordan** (guest, #7544) [Link]

> It is my expectation that a judge would not accept that there is proof of
> an agreement that the one would publish his own source code under GPL

If I release my work under the GPL, the GPL is the *only* thing that gives you permission to redistribute my work. So if you redistribute, you are either obeying the GPL, or you are infringing my copyrights. So all I have to do is prove that you have not obeyed the GPL.

The Berne Convention makes copyright very similar in every country.

The GPL Is a License, not a Contract
Posted Dec 4, 2003 10:28 UTC (Thu) by **MathFox** (guest, #6104) [Link]

The GPL is based on an international treaty: the Berne convention on copyrights. (excuse me if I have the name wrong.) The effects of the GPL should be very similar in every country that signed the treaty. (And this includes all EU countries.)

The GPL is based on an international treaty
Posted Dec 4, 2003 15:37 UTC (Thu) by **hippy** (guest, #1488) [Link]

If this is true, which I have no reason to doubt, it would be very useful
to have the excellent explanation of the GPL provided in this article
recast in terms of the provisions of this convention.

I am a supporter of Free and Open Source Software and often find myself
explaining the GPL and its provisions to sceptical UK business people. It
is difficult to deal with some of the questions asked because all of the
good legal descriptions are written from the perspective of US law.

It appears clear that the GPL will be enforcible by legal systems in
countries that have signed the Berne convention. However this is only part
of the picture because the nature of the penalties for violation have only
been properly explored for US law. What are the likely penalties under UK,
Belgium, Russian etc. law? In this article, the answer to the FUD of "you
will be forced to GPL your proprietary code" is covered in terms of the
provisions of the US copyright act: "There is no provision in the
Copyright Act to require distribution of infringing work on altered terms.
What copyright plaintiffs are entitled to, under the Act, are damages,
injunctions to prevent infringing distribution, and--where
appropriate--attorneys' fees." Is this true in other countries.

I am comfortable with use of the GPL in general but until it has been
tested in a UK (i.e. the one with jurisdiction over me) court I will still
be a little nervous.

Regards

Richard

PS. Thanks for a great article.

The GPL Is a License, not a Contract
Posted Dec 4, 2003 16:27 UTC (Thu) by **gleef** (guest, #1004) [Link]

bbencic asks
Can someone explain me if the GPL can be interpreted in the same way under the European laws (or in my case, under Belgian laws) ? Aren't there any subtle differences which allow a different interpretation of the GPL in other countries?

Questions about GPL licensing can be directed to licensing@gnu.org, it sometimes takes them a few days to respond, but I have gotten very good answers out of them. I haven't tried asking questions about the GPL under EU Laws, but they say they have looked closely at it, so I would imagine that they have many of the answers already.

Another resource you might find helpful is the Free Software Foundation Europe; they are a separate but related group focusing on encouraging Free Software in Europe, and they work very closely with the Free Software Foundation. Similarly, there is a Free Software Foundation India, focusing on India. These groups might have more detailed insights on GPL issues in their regions.

The GPL Is a License, not a Contract
Posted Dec 4, 2003 14:50 UTC (Thu) by **vblum** (guest, #1151) [Link]

Excellent article - that clarifies the issue thoroughly!

It is, however, amazing, that a number of legal professionals (Mr Henry comes to mind) claim to be unaware of these facts. To me, that implies that someone may yet sue to treat a GPL infringement case by means of (implied) contract law, in spite of the facts. It might be fun to see that thrown out ...

Stealing GPLed works
Posted Dec 4, 2003 17:37 UTC (Thu) by **Ross** (guest, #4065) [Link]

I assume she meant "stealing" as a synonym for copyright infringment and not in a literal taking which is intended to deprive the rightful owner of the property. The property in this case is the grant of exclusive monopoly rights... that's difficult to steal :)

The GPL Is a Contract.
Posted Dec 5, 2003 13:09 UTC (Fri) by **danw6144** (guest, #14336) [Link]

Eben Moglen has been sharing David Heise's moonshine.
The GPL is a unilateral contract (in every respect) for a copyright license. When examining the questions raised by the GPL the Courts will first look to The Restatement (Second) of Contracts and similar contract law authority.

The good professor's attempts to claim that the GPL is controlled purely by the Copyright Act because it is not a bilateral contract (which it's not) is misguided.

The GPL Is a Contract.
Posted Dec 5, 2003 14:14 UTC (Fri) by **piman** (subscriber, #8957) [Link]

> The GPL is a unilateral contract (in every respect) for a copyright license.

The GPL *is* a copyright license, not a contract for a copyright license. This is the difference. While much of the language in contracts and copyright licenses are to be interpreted the same way, and many precedents can apply to both of them, they are not identical. The largest difference is that there is a list of things that you can request for damages for a copyright license violation (this list is in USC 17 5), where the recompense for a contract can be much further-reaching (and is often defined in the contract itself).

An easy (but not always legally sound) way to consider the issue is that copyright is a "subcontract" between two parties, one of which (the copyright holder) has another contract with the government that limits what the subcontract can do, and provides a number of implicit terms.

The GPL Is a Contract about a License
Posted Dec 5, 2003 17:25 UTC (Fri) by **danw6144** (guest, #14336) [Link]

"A defendant cannot simultaneously assert that the GPL is valid permission for his distribution and also assert that it is not a valid copyright license, which is why defendants do not 'challenge' the GPL." --- Eben Moglen

This statement is plain moonshine nonsense. Ever hear of SCO v. IBM (2003) ? The SCO Group is asserting just such a claim.

When the Court examines this SCO claim , do you think the Judge will reach for a copy of the Federal Copright Act? The Copyright Act provides for original authors an exclusive right to license their work and prescribes damages for infringement. The Copyright Act is absolutely silent about the terms upon which an author may license his work.

The Court will look to see if the GPL is (or is not) a valid license and if SCO has (or does not have) valid permission. The Judge will look at the promise the GPL makes not to sue a distributor and whether SCO accepted the terms imposed for that promise when they distributed (the works). He will analyze this promise not to sue in light of unilateral contract law... not copyright law.

The way in which damages will be assessed for infringement is controlled by federal copyright law. Whether the plaintiff is entitled to damages will be assesed in light of a promise not to sue and acceptance of offeror's terms. The manner and terms upon which an author promises not to sue someone will be scrutinized under prevailing contract law and/or the Uniform Commercial Code Statutes.

The GPL Is a Contract about a License
Posted Dec 5, 2003 22:22 UTC (Fri) by **piman** (subscriber, #8957) [Link]

"*A defendant cannot simultaneously assert that the GPL is valid permission for his distribution and also assert that it is not a valid copyright license, which is why defendants do not 'challenge' the GPL.*" --- *Eben Moglen*

This statement is plain moonshine nonsense. Ever hear of SCO v. IBM (2003) ? The SCO Group is asserting just such a claim.

The SCO Group is not the defendant in SCO v. IBM, which is why their name comes first, they're the ones who filed the suit, etc, etc. The prosecution is free to claim that the GPL is invalid, or that a particular GPLd work is invalid (by virtue of it not being legal to GPL it in the first place). The defendant usually doesn't claim anything, except that the prosecution is wrong.

(What's with the word "moonshine" today? ...)

The GPL Is a Contract about a License
Posted Dec 6, 2003 1:06 UTC (Sat) by **danw6144** (guest, #14336) [Link]

IBM as counterclaim plaintiff filed against the SCOG as counterclaim defendant. SCOG has asserted the invalidity of the GPL as a defense in SCO v IBM.

The GPL Is a Contract about a License
Posted Dec 11, 2003 15:47 UTC (Thu) by **mik** (guest, #87) [Link]

Huh? Moglen is merely expressing that such an assertion is nonsensical, not that some entity could not utter those words. At least superficially, it would seem to be equivalent to X&&!X, but presumes that there is no other means by which an entity could acquire blanket rights to copyrighted code licensed only under GPL.

Indeed, SCO seems to be preparing to assert the theory (1) that GPL is an invalid license, (2) therefore there is no legal license to use/distribute GLPed code, (3) in order to prevent immeasurable financial damage to the industry due to the loss of legal right-to-use, all GLPed code should be assigned to the public domain, thus (4) gaining SCO the rights to use whatever they want.

Doesn't seem too likely to succeed, but then IANAJ.

SCO's wacky legal theories
Posted Dec 13, 2003 4:46 UTC (Sat) by **goaty** (guest, #17783) [Link]

I love (3), there's a sort of crazed genius to it. Of course, if all GPL'd code was assigned to the public domain, that would amount to confiscation of "intellectual property" on a massive scale. I've no idea what the rules are for confiscation of property, but I'm pretty sure a court can't go confiscating property belonging to people who are not parties to the trial, so the US Government would have to do it. And if the US Government confiscated all GPL software, all us non-US copyright holders would be writing to our political representatives pretty sharpish :-)

But I don't think even that would get SCO out of jail. After all, they've already been distributing GPL software for quite some time. No, they need to claim that all GPL'd code is already de-facto public domain, by some sort of intellectual-property version of a "right of way". But then the same "right of way" theory would clearly make Unix public domain too (assuming that it isn't already). What's delightful about this is it basically trashes copyright law, but in completely the opposite way to their other wacky legal theory (the "we own all software ever" one). It would also achieve many of the aims of the FSF were this to become law.

It's funny how much SCO's argument resembles:
(1) the GPL is an invalid license
(2) therefore there is no legal license to use/distribute GPL software
(3) ...
(4) Profit!

What About What Constitutes a "Derived Work?"
Posted Dec 11, 2003 15:01 UTC (Thu) by **mimurphy** (guest, #17752) [Link]

What about the problem of what constitutes a 'Derived Work?' If I look at a bunch of GPL code then work on a proprietary product, wouldn't there be an exposure to the claim that the proprietary product is now a 'derived work' of that GPL product?

So, if the proprietary product were to be released... it would have to be under the GPL to avoid damages, lawyer fees, and distribution-stopping injunctions.

Considering the ever increasing availability of GPL software, it would seem to get more and more difficult to claim that no GPL software has ever been looked at.

Mike

What About What Constitutes a "Derived Work?"
Posted Apr 28, 2004 14:35 UTC (Wed) by **MeMyself** (guest, #21227) [Link]

How does merely "looking at software" make similar work derived?
If I read a sci-fi novel, then surely I am not prevented from ever writing one myself in the future? Yes, I am prevented from copying chunks of text from existing sci-fi novels, even if I change the names of all the characters (eg: variable names in software).

I am free to read a book and then write my own, as long as I do not copy from any existing copyrighted work. Similarly, I am free to look at someone else's code, and then write my own code that is similar, yet not a copy of their work.

IANAL, so I am asking rather than stating...

There does appear to be some room for question
Posted Dec 12, 2003 15:30 UTC (Fri) by **Baylink** (guest, #755) [Link]

Let's look at that again:

> The GPL, however, is a true copyright license: a unilateral permission, *in which no obligations are reciprocally required by the licensor*. Copyright holders of computer programs are given, by the Copyright Act, exclusive right to copy, modify and redistribute their programs. The GPL, reduced to its essence, says: 'You may copy, modify and redistribute this software, whether modified or unmodified, freely. But if you redistribute it, in modified or unmodified form, your permission extends only to distribution under the terms of this license. If you violate the terms of this license, all permission is withdrawn.'

Italics mine. And that italicized clause could well be held to be incorrect -- and since it appears to be on point here, it's worth investigating more deeply.

The GPL is different from many common licenses because it permits the user to redistribute the licensed item with their own changes. This could be considered added-value to the license. It then imposes restrictions on that added-value, in enumerating the conditions under which you can exercise that right. Since those restrictions, in effect, require the licensee to render unto the licensor some of the extra value which they would otherwise be granted were the grant of rights *not* so limited, it seems to me that a case could in fact be made that "obligations **are** reciprocally required of the licensor". Whether such a case could be won, I don't know; I'm not a lawyer, I just play one on TV.

But I don't see that either PJ or Eben (or any of the 74 other posters, half of whom were Ciaran :-) has actually *addressed* this specific point.

There does appear to be some room for question
Posted Mar 16, 2004 20:03 UTC (Tue) by **tailgunner** (guest, #20251) [Link]

I am not a lawyer, however, this seems to be a simple misunderstanding.

1 I do not know if the licence is revokable, however, any revokation cannot be retrospective therefore as long as you continue to honour the terms of your licence you cannot be sued.

2. The GPL is NOT viral. That is to say, if you use GPL'd software to create an original work, you may distribute this any way you wish under any licence you choose even MS EULA.

3. Your software and the GPL. If you, for example, wrote an extension for a wordprocessor that was distributed under the GPL, you could not itegrate the software into and sell the whole as proprietory under the terms of the GPL. HOWEVER you could supply the wordprocessor under the GPL and sell your extension to the wordprocessor as proprietory under any licence you choose, provided you hold the copyright to all of the code within the extension.

The GPL Is a License, not a Contract
Posted Jan 26, 2005 17:02 UTC (Wed) by **torgerk** (guest, #27496) [Link]

If the GPL is merely a copyright license: a unilateral permission, in which no obligations are reciprocally required by the licensor, how is the licensor supposed to plead the NO WARRANTY clauses in GPL Section 11 at 12? The NO WARRANTY clauses are limitations on the licensor's liability towards the licensee, NOT limitations on the right to distribute the program as a copyrighted work. Hence, the NO WARRANTY clauses are contractual obligations (obligations to limit the licensee's right to hold the licensor liable) which requires acceptance from the licensee.

How could the GPL be considered merely a unilateral permission, which rules out the limitations of liability which the GPL emphasies in its preamble?

The GPL Is a License, not a Contract
Posted Sep 4, 2006 9:55 UTC (Mon) by **sailor** (guest, #40318) [Link]

I often wonder what is and what is not considered as "distribution". Making a product publicly available (freely or commercially), providing it to others within the same company, giving it to a relative? Probably the reply is obvious to all those in the legal profession, but us IT people tend to get confused on this basic principle. Could someone provide some insight on this?

The GPL Is a License, not a Contract
Posted Aug 10, 2015 7:50 UTC (Mon) by **Bleakwise** (guest, #103976) [Link]

Yeah, you don't gotta do anything man, crime is always an alternative so there! And if you ever get backed into a corner you could just blow your head off instead of going with the courts! GPL for life!

The GPL Is a License, not a Contract
Posted Aug 10, 2015 7:57 UTC (Mon) by **Bleakwise** (guest, #103976) [Link]

Seriously, "you can't steal!" Yeah right. People steal all the time! I mean what other lies are these anti-GPL propagandists going to come up with next? "You can't murder people!" Really? People get murdered all the time. There is a new murder trial in the media every week. Obviously you CAN murder people. So there, the GPL doesn't restrict what you can do with the code in any way!

The GPL Is a License, not a Contract
Posted Aug 10, 2015 8:02 UTC (Mon) by **Bleakwise** (guest, #103976) [Link]

I mean, unless you're some kind of conformist, but that's your choice. Follow the rules, or don't. It's all up to you. The GPL can't make that choice for you.

The GPL Is a License, not a Contract
Posted Aug 10, 2015 13:45 UTC (Mon) by **corbet** (editor, #1) [Link]

I have no idea what you are trying to say or why you are posting it onto a 12-year-old article, but I don't really think this is appropriate here. Could I ask you to stop, please?

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