China

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Introduction to software protection under Chinese law

Body of law

The regulations contained in the "The People's Republic of China Copyright Law" are formulated to protect the rights of copyright owners, to safeguard interests in the development, dissemination and use of computer software, to encourage the development and application of computer software, and to promote the software industry and the development of information technology in the context of the national economy.

The key legal regulation in the context of software is the general Copyright Act. While there is a Software Act, it is a special statute in relation to the general Copyright Act, and as such does not contain any specific provisions above and beyond its terms.

Software Act: Object of protection

Computer programs and preparatory material related to their development are protected by copyright and are equivalent to literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. According to the Copyright Law, only original computer programs enjoy copyright protection. This means that a computer program has to be an original intellectual creation of its author. No other criteria may be used to determine whether the program is subject to copyright protection. The ideas and principles behind computer programs or technical interfaces are explicitly denied copyright protection.

The term computer software (hereinafter referred to as software) refers to computer programs and related documentation.

The relevant terms are defined as follows:

(a) A computer program is the code sequence used by computers or other devices capable of processing information, or a sequence of symbolic instructions or statements which can be automatically converted into a sequence of coded instructions. The source code and object code is of the same program.

(b) A document contains the text data and charts used to describe the computer program's contents, composition, design, functional specifications, development and test results, such as details of the program design, flow charts, user manuals, and so on.

Software protection under these regulations must be independently developed acquired by the developer, and relates to a specific tangible object.

Legislation on copyright protection for software does not extend to the ideas used in software development, processing, and methods of operation or mathematical concepts and suchlike.

Authors/Beneficiaries

The relevant terms are defined as follows:

(a) A software developer can be a legal entity or organization responsible for the actual organizational development, direct development and software development; or can be an individual person responsible for the independent software completed by their own effort.

(b) A software copyright owner is an individual person, a legal entity or an organization that enjoys the copyright in accordance with this regulation.

Chinese citizens, legal entities or organizations enjoy copyright in accordance with this regulation regardless of whether their software is published or not. Foreigners and stateless persons enjoy copyright in accordance with these regulations if their software is first published in China. Foreigners and stateless persons also enjoy copyright protection under these regulations if the developer is a resident of a state that has signed an agreement with China or an international treaty to which China is a signatory.

Software copyright by default belongs to the software developer unless otherwise stated. If there is no proof to the contrary, the individual person, legal entity or organization holding the copyright is therefore deemed the developer whose name is on the software.

If the software is developed by two or more individual persons, legal entities or organizations, the co-ownership of the copyright is stipulated by a written contract.

If there is no written contract to describe ownership and rights, or the contract is not clearly defined, the jointly developed software can be used separately and the developers of each respective part may be entitled to independent copyright. However, the copyright protection afforded in this context does not extend to the entire software developed. If a situation where co-developed software cannot be divided and no contract or other form of mutual agreement exists between the co-developers, then no single developer may prevent the other developers from exercising their rights apart from the right of transfer, but the benefits have to be fairly distributed amongst all the co-developers.

Exclusive rights

Software copyright holders enjoy the following rights:

(a) Publication right

(b) The right of authorship

(c) Amendment right

(d) Reproduction right

(e) Distribution right

(f) Lending right

(g) Right to network Dissemination of information

(h) Translation right

According to the second paragraph of Article 10 of the Copyright Law, if the copyright holders allow others to exercise their rights, they are entitled to payment in accordance with the relevant provisions of the contract. By the same token, the owner of a software copyright may authorize others to exercise his or her software copyright and the right to receive remuneration, or fully transfer that copyright or renumeration right.

Exceptions to exclusive rights

Owners of lawful copies of software enjoy the following rights:

(a) The right to install the software on a computer and other devices capable of processing information;

(b) The right to make backup copies to prevent losses. These backup copies may not be made available to others for use by any means, and the owner must destroy the backup copies if he or she loses proprietorship of the lawful copy of the software;

(c) To use the computer application software and to improve its functionality and performance by making necessary modifications; however, unless otherwise provided, without permission from the software copyright owner the modified software may not be supplied to any third party;

In order to study and research the inner design and principle of a computer program, involving its installation, display, transmission, storage or other use, the granting of software copyright permission is subject to payment of remuneration.

To authorize others to exercise activities covered by software copyright restrictions, the parties have to enter into a written contract. If there is no written contract or agreement expressly stipulating an exclusive license, the right to exercise the copyright has to be treated as non-proprietary.

There are cases where such contracts are not necessary. Article 30 of the Computer Software Act explains the circumstances in which a copyright holder's authorization is not required for reproducing and/or translating a computer program in order to obtain interoperability information.

Article 30 is compulsory law, and contractual provisions to the contrary are deemed not to exist. However, exercising these statutory rights is often difficult

in practice because the licensee generally has no access to the source code of the application, and it is not legal to enforce source code access for the purposes of interoperability.

Dispute mediation

The software copyright infringement dispute may be mediated. If the mediation is inadequate or the mediation achieves the agreement latter side to renege on the mediation promise, they can go to the People's court to carry on litigation. If the litigant is not willing to mediate, may also go directly to the People's court.

Term of protection

The software copyright's protection period is 25 years, beginning from the initial publication of the software and ending on December 31 of the 25th year following. Before the expiration date of the protection, the software copyright owner may apply to the software registration management organization to get another 25 years, but the total protection period afforded to any software product cannot surpass 50 years.

Special measures

When the owner of copyright is not able to protect his or her rights related to software provided in an infringing manner, the end recipient of the illegal code still has a duty to destroy or otherwise cease use of the code once they are made aware of the situation. However, they have recourse to seek compensation for this loss and its ancillary consequences from the original supplier of the infringing code.

Unprotected software and non-commercial software

Software that is an intellectual creation of the author is regarded as original and can obtain copyright protection, while non-original software is excluded from such protection. Third party revision or sharing without agreement from the software copyright owner or their legitimate successor is prohibited.

Teaching activities, scientific research, and government agencies operating official functions can use software for non-commercial purposes; these non-commercial rights include the ability to make free copies of the software without the copyright owner or its legitimate successor's agreement. However, the software's name must be correctly mentioned in use and the exploiter should not infringe upon other rights which the owner and its legitimate successor enjoy. Additionally, after the copied software has completed its non-commercial use, it should be reclaimed or be destroyed properly and must not be used for other goals or be given to other people.

Unprotected software and public domain software

Only software that is an intellectual creation of the author can obtain copyright protection. Non-original software does not come into consideration for copyright protection and can, in principle, be used freely.

Under Chinese law, public domain software is considered as software to which the author has given up all rights and on which no other party is able to enforce any rights. This software can be used, reproduced or executed freely without obtaining permission from a rights holder or the payment of a fee to such a party or their representatives. Public domain software may in certain cases even be presented by third parties as their own work, and by modifying the original work, third parties can take certain versions of such code out of the public domain again.

The underlying principle is that software value can only be achieved through protection granted by intellectual property law. Under the general law in this field, value is presented by granting certain exclusive rights to the legal owner of a work, who may realize fiscal or other returns through contracts with third parties, with the proviso that such rights eventually cease and the work enters the public domain. This creates a circle of economic activity that supports industrial and economic development.

Proprietary software and open source software (free software) differ only in terms of their circulation mechanism, and not in terms of the applicability of Copyright.

Analysis of FOSS under Chinese law

Copyrights

From the view of most enterprises, software development differs from traditional creation of copyrighted work. It is no longer subject to a single person or even an organization. With the development of the Internet, very few people operate behind closed doors in the software industry. Building on the ideas and experience of predecessors' has become a crucial factor to the development of software technology.

Qualification of FOSS

Copyright law in China operates under the principle of "self-executing" protection. After a creative good is completed it is automatically subject to copyright protection regardless of whether it is published or registered. The right to publish source code — an intrinsically important part of the FOSS — belongs to the software's "publication right" range. The protections of software copyright may be considered as a mix of applicable law and contracts between the rights holder and any third parties. This model is from the province of international conventions and national copyright laws of the US, and the protection of software copyright law in China is no exception.

One pertinent example is that the Chinese government issued a special regulation on software copyright protection as part of the Copyright Law with the subject "Computer Software Protection Regulations". This provides that without the copyright owner or his legal transferee's consent the use of software is equal to copyright infringement; in the "Computer Software Protection Regulations" Article 18 and 19 the provision of software licenses and transfer of rights must be in the form of a written agreement. In this sense, protection of software copyright in China and international copyright norms are virtually identical.

Article 12 of the Copyright law of the people's republic of China states that where a work is created by adaptation, translation, annotation or arrangement of pre-existing work, the copyright in the work shall be enjoyed by the adaptor, translator or arranger, provided that the exercise of such copyright shall not prejudice the copyright of the original work. Interpretation of the original author should be via their consent and include remuneration, while right of authorship remaining with that party. If the interpretation is created out the period of protection for creative works, it should be with the original author's consent, but no remuneration is necessary. Naturally the original work shall not be violated or distorted in the process of interpretation.

Article 13 of the Copyright law provides for co-ownership of copyrighted works, covering situations where a work is created jointly by two or more co-authors. Put simply, in these cases copyright in the work shall be enjoyed jointly by those co-authors while any person who has not participated in the creation of the work may not claim co-authorship. If a work of joint authorship can be separated into independent parts and exploited separately, each co-author may be entitled to independent copyright in the parts they have created, provided that the exercise of such copyright shall not prejudice the copyright in the work as a whole. The general consideration is that the creation of a work of joint authorship requires cooperation and arrangement between the authors. If one party does not get consent from the other, then each party only has copyright and its attendant right of modification or distribution in their own section of the work.

Rights of the original co-authors

"Participation" in co-authorship refers to expression in the form of a creative and intellectual work applied either in conceptual planning or writing operations. If a party does not do creative work that falls under this definition of participation, then they cannot become regarded as a joint author. This participation and its attendant copyright in the work of joint authorship can be further regarded in two different ways, either with the whole coauthored work taking a form that can be split into individually authored sections or a form that cannot be split into separate parts. The ability to distinguish individual contributions as opposed to entirely combined contributions naturally has implications for personal rights and property rights and their exercise in market transactions.

Unless the components of software can be clearly distinguished, it is almost certainly going to be defined as an "indivisible work" under Chinese law. These are works whereby it cannot be concluded clearly what the individual contribution of every author is, e.g. when two authors write the source code together.

Where a work is created jointly by two or more co-authors, the copyright in the work shall be enjoyed jointly by those co-authors. Any person who has not participated in the creation of the work may not claim the co- authorship.

If a work of joint authorship can be separated into independent parts and exploited separately, each co-author may be entitled to independent copyright in the parts that he has created, provided that the exercise of such copyright shall not prejudice the copyright in the joint work as a whole.

On the other side, if a work of joint authorship can't be separated into independent parts and exploited separately, the copyright in the work shall be enjoyed jointly by those co-authors, in which case the authors are free to regulate the exercise of the copyrights by agreement. If they can't reach any kinds of agreements relating to the moral rights and have no cogent reasons, No party shall prevent exercise of the rights except for the transfer request, but the proceeds should distribute to all the other parties with attendant rights.

Authors of derivative works

FOSS often falls under the category of a derivative or composed work. Derivative works and composed works are works whose originality may be definable, but whose existence depends on existing work(s), from which at least some original characteristics are copied.

Where a work is created by adaptation, translation, annotation or arrangement of a pre-existing work, the copyright in this work thus created shall be enjoyed by the adaptor, translator or arranger, provided that the exercise of such copyright shall not prejudice the copyright in the original work.

The copyright in a work created by compilation shall be enjoyed by the compiler, provided that the exercise of such copyright shall not prejudice the copyright in the pre-existing works included in the compilation. The authors of such works included in a compilation as can be exploited separately shall be entitled to exercise their copyright in their works independently.

So, the author(s) of the derivative or composed work are the only persons with a copyright on their work. This is not independent and full copyright, which is restricted, however, because the derivative or composed work cannot be operated without the consent of the holder of the copyright on the original work. In the case of FOSS licenses such consent is not a problem, subject to respecting the terms and conditions (e.g. regarding further distribution of the derivative work).

The assignment of copyrights

In order to control the rights related to a specific FOSS project, it may be useful to collect all copyrights concerning this project within one organization. The existence of such an organization can simplify the management and enforcement of joint rights, with the collective management of copyrights is usually, but not necessarily, regulated by the fiduciary transfer of copyrights. This assignment is relatively trivial, with ownership of copyright in a commissioned work being assigned via contract between the commissioning and the commissioned parties. In the absence of a contract or of an explicit agreement in the contract, the copyright in such a work shall belong to the commissioned party.

Moral copyrights

FOSS originated in America, and therefore attaches less importance to the moral rights of the author than it might under a country governed by Civil Law. The Open Source Definition specifies that the author of software distributed under a FOSS license cannot oppose the use of the software by certain people and groups or for certain areas of application.

For example, according to article 22, in some cases, a work may be used without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work shall be indicated and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced. Furthermore, article 23 specifies the statutory license of copyright.

Whether an author is able to give up all his rights on a work is more complex under Chinese law, as such law contains the principal indefeasibility of the moral rights. Although renouncement of moral rights is possible in principle, the global renouncement of the future exercise of moral rights is void, and this naturally also applies to moral rights on software.

The author of a work distributed under the FOSS license shall therefore probably be able to oppose any use of his work by people or groups or for certain purposes which affects his honour or reputation, based on his moral rights.

Moral rights are reflected in derivative works. The author of the original work will therefore, based on his moral rights, not only be able to oppose the use by third parties of his work, but also the use of derivative works which affect his honour or reputation.

Enforcing FOSS licenses

The question whether a FOSS license can be enforced depends on whether a valid license was issued. The essential questions are: (i) between whom is a license granted, and (ii) has the license been validly granted?

Contracting parties

In China, the Contract Law governs all kinds of licenses, but it can be questioned whether FOSS licenses fall into the sphere of the Contract Law of China. There is no clear stipulation about FOSS licenses in its wording, and no case has yet came before the People's court to provide a ruling about the validity of the license. Pending this, a more general interpretation in view of existing rules and norms may be proposed.A creative work that needs two or more people to complete normally involves an agreement to arrange copyright allocation or grants. If one author makes his work available under a FOSS license, the answer is clear: the license is reached between the licensee and the author. But in some cases, the works are finished by different people and they are all contributed to the programs. At this time, the question becomes more complicated. With whom the licensee reaches a contract depends on the different cooperation methods applied by the co-authors.

If a work of joint authorship can be separated into independent parts and exploited separately, each co-author may be entitled to independent copyright in the parts that he has created, provided that the exercise of such copyright shall not prejudice the copyright in the joint work as a whole. This would allow for the author who created the independent parts to grant a license to contracting parties based on his or her individual section of the work. Meanwhile, if the work cannot be separated in such a fashion, and the authors do not collectively agree on general license terms, a license and implied contract should be reached between the licensee and every author of the program.

Most FOSS licenses solve this through agreements such as BSD, Apache and GPL licenses. For example, the GPL creates a contractual bond between the licensee and all authors in the chain. GPL version 3 contains the following clause: "Each time you convey a covered work, the recipient automatically receives a license from the original licensors, to run, modify and propagate that work, subject to this License" and GPL version 2 states that "each time you redistribute the Program (or any work based on the Program), the recipient automatically receives a license from the original licensor…" While apparently effective in US and other markets and internally consistent with the rest of the license, it is not clear that this construction will be regarded valid under China Copyright Law.

Validity of the FOSS licenses

An author chooses a FOSS license because he wants to distribute his work and make it available to others — possibly with certain restrictions. For him it is important that he can enforce these restrictions. However, the status of FOSS author rights in China is not entirely clear.

The most common use of FOSS code development and therefore the application of the licenses is through the internet. While conventional IT agreements are reached by the explicit acceptance of the terms and conditions by the licensee following the signing of the terms and conditions, FOSS software is made avail-

able with some simple specification on a website or in the source code form that it concerns FOSS. The license usually does not need to be explicitly accepted. In other words, the act of opening the packaging or clicking "I agree" button — methods to reach a licensing agreement are generally considered to be valid and are covered by "The electronic signature law of the People's Republic of China" — tend not to apply with FOSS.

Having to click and confirm every time could in some cases interfere with the use of the software, according to the international common practice. The Open Source Definition opposes demanding explicit agreement with the license conditions with the aim of confirming the agreement between licensor and licensee.

The question is whether in these cases a valid license is possible. The answer to this question is not clear under Chinese law. The reason is that the user of a copyright protected work needs to be able to indicate the grounds on which he is able to use the work. FOSS is still under the protection of present copyright law and using the software without the author's consent implies a copyright infringement, with the implication that everyone who wants to use software which they find via the internet, they should actively look for the license, at least if they know such software will be under the terms of a license. If the user cannot prove that they elected obey the license, they must refrain from using it. But without a mechanism to do so, a potential grey area exists.Of course it is doubtful whether a user would benefit from disputing the existence of a FOSS license. If the user disputes the conclusion of the FOSS license, this implies no legally valid copyright license was granted and the user therefore is not allowed to use the software. Renouncement of copyrights should not be open to conjecture, but needs to be proven. The availability of a work on the internet does not mean it becomes public domain.

Validity of the contract

Rights holders can place contracts and any party violating the agreement must assume responsibility for their actions. When an author chooses a FOSS license it is relatively clear that he wants to distribute his work and make it available to others — possibly with certain restrictions. For him it is important that he can enforce these restrictions.

The exception in China is that for public welfare or personal use, people can accord to the principle of reasonable use, and do not need to conclude contracts or pay any remuneration in this context. This does not preclude the necessity of the authors and users signing a contract for licensing, but may impact some of its scope. It would be expected that such a contract would include licensing rights, whether licensing right is exclusive or not, the scope and space of using, the remuneration's standards and methods if applicable and the events that may be regarded as breach of contract.

Whatever the situation, the Regulation for Computer Software Protection in China provides that the licensing of software copyright shall be in possession of

a contract for licensing. And the licensee may not exercise the right that has not been licensed by the software copyright owner in the contract for licensing.

Normally, rights holders in FOSS write programs collaboratively under a license that permits users to use, change, copy, and distribute the works free of charge, provided that they follow the licensing guidelines of the software. This can cause some confusion because commercial software doesn't usually allow you to change a program and redistribute it unless you specifically negotiate that in an additional license. But in both cases if you make copies or distribute modified versions of the software without permission, you infringe the copyright, and you must take the responsibility. By implication when locating software on the internet it is very important to explore what license is being used. If the user can't prove that he knows the content of the license applicable to the work, he must refrain from using it, and cannot seek to assume that no license or contract is in play. Only in cases where the terms applied to the contract are manifestly unfair can a move be taken to void its applicability.

Waiver and liability

Typically, FOSS licenses contain very strong exoneration clauses, which discharge the author from all liability. The reason for this is that FOSS is often made available without a fee, as a result of which the author generates insufficient income to pay for liability insurances and legal costs. In China, the validity of this clause is not entirely clear, with the reason being questions that arise about the extent to which such exoneration clauses comply with the general validity requirements under Chinese law due to the existence of no specific legal regulation of FOSS licenses. Liability requirements are scattered in Chinese civil law, with an example being that Article 53 of the contract law of PRC states that the following types of exoneration in contracts are invalid:

(i) that causes the personal injury,

(ii) that causes property loss by intentional misconduct or gross negligence.

Meanwhile, Article 52 in the contract law stipulates: if only there is one of following state, the contract shall be invalid:

(i) obtain the contract by means of fraud or stress, at the same time causes damage to the interests of the state.

(ii) viciously collude, to damage the interests of the state, the collective, or a third party.

(iii) use legal form to cover up illegal purpose.

(iv) do harm to the public interests. And

(v) And violate the compulsory laws or administrative rules.

Generally speaking when considering FOSS license as a form of civil contract, all the regulations of the contract behaviour are available for the FOSS license.

But with such licenses being quite different from typical contracts there remain areas of differing potential interpretation and therefore potential confusion. One remedy in the mid to long-term is to add FOSS licenses as a special form of contracts in the contract law of PRC.

Chinese legislation doesn't normally perceive a large difference between guarantee liability from amateur and professional sellers, but there are some considerations to take into account regarding FOSS. Theoretically, there is difference if the stipulating party be considered as a professional seller. The professional seller is deemed to know the defect in the software, and in pursuance of article 153 of the contract law of PRC, contractual provisions of non- indemnity for surface or hidden quality defects have no effect if the seller knew about the defect at the time of the sale. Additionally, according to Article 150, the seller has the duty to guarantee defects. The professional seller of FOSS will therefore be liable in principle for issues with FOSS code provided unless he can also provide proof of ignorance regarding defects. Such proof may be hard to provide.

The copyleft principle

Principle

A characteristic found in many FOSS licenses is the so-called "copyleft" principle, which is a new and different way of enforcing copyright in software. FOSS licenses which incorporate the copyleft principle lay down by contract that everyone in the chain of consecutive users, in return for the right of use that is assigned, needs to distribute the improvements he makes to the software and the derivative works he makes under the same conditions to other users as those under which he received the original work. In other words, software which incorporates copyleft FOSS needs to be distributed as copyleft FOSS. FOSS means sharing with each other, instead of monopolizing.

This has the consequence that it is not possible to incorporate copyright protected parts of copyleft software in proprietary licensed work directly.The copyleft principle can restrict the commercial possibilities of the software, at least regarding business models or product deployments that assume proprietary behaviour. Sometimes warnings are issued for the dangers that companies could encounter if a negligent or vindictive employee were to incorporate a piece of copyleft code in the code of proprietary software and parties relatively new to FOSS worry that a company would be obliged to make its proprietary software available under a copyleft FOSS license. Although caution is necessary regarding the use of the third party work, one can ask oneself whether such scenarios are realistic under Chinese law. Copyright protection is still strong and absolute in current Chinese legal system. The sanction for incorporating copyleft code in proprietary software will usually be restricted to a prohibition to distribute the software which is in breach or the obligation to remove this piece of code from the program. If the unlawful use has caused damage to the author, this damage will need to be reimbursed, but not more than they actually suffered

damage. As such, the implications of copyleft are restricted to normal measures of expected remedy under copyright law.

Validity

Questions regarding the validity and implications of copyleft clauses coincide with questions regarding whether an author is able to validly lay down how derivative works need to be distributed. The answer to this question under Chinese law is not definitive.

The copyright owner or copyright-related right holders are able to lay down the use of the work for a particular use, or link certain conditions to this. Such a right was recognized and based on an interpretation of Article 9 of the copyright law of 27 October 2001. According to the rule, the copyright owner can determine the destination of a work, to copy or distribute, to rent or to exhibit, to performance or screening, etc. They also can license or transfer the rights, with an example being that a copyright collective management organization can claim in its own name for copyright owners, and can carry on lawsuit and arbitration activities as copyrights owner.

The right to determine the destination not only applies inter partes, but "erga omnes", provided that the third parties, in all reasonableness, should know what the destination is. The author can therefore lay down the copyleft condition based on his right to determine the destination of his work, though aspects of derivative work use/reuse may challenge this. According to the provisions of Article 12 of the copyright law, the author of the original work has no rights on the derivative work; that's to say "A work derived from adaptation, translation, annotation or arrangement of a pre-existing work, the copyrights belongs to the author of the derivative work which be operated doesn't subject to the consent of the copyright owner of the original work, but the exercise of such copyright shall not infringe the copyright in the original work".

In summary, all rights are subject to abuse, including the copyright. An author can therefore not randomly exercise his economic and moral rights. A lawful tangible or moral interest needs to be proven. The implications of Article 9 are in no measure overridden by those of Article 12, but the applicability of both will probably have an impact in any case involving right of use issues and FOSS licenses in a court of law.

The traditional use of copyrighted work in China would see approval from a right holder subject to some form of remuneration, and the simple outcome that other situations probably constitute infringement. But licensing a work under a copyleft restriction will in principle not constitute an abuse of rights, and with "reasonable use", you can make use of the work without the consent of the copyright holder and without the need to pay remuneration. Of course, the licensing or assignment contract of the copyright owner has not explicitly been transferred, and you can't randomly exercise the rights without the consent of the copyright owner, otherwise will constitute infringement.

Viewed formally under Chinese law, a FOSS license is a contract. According to the contract law, it is effective as long as the parties signed the contract voluntarily, it contains no violation of the mandatory regulations applicable to contracts, and if the parties strictly obey the law to exercise rights and perform obligations. A legitimate moral interest applied by a rights holder could be the decision to keep his work within the FOSS community, also in a derivative format, through the measure known as copyleft. Companies which have constructed a business model around distributing software under copyleft restrictions will usually be able to prove the existence of a legitimate interest.

Damages

Damage caused by copyright violations are compensated under copyright law in accordance with the general civil liability of the illegal act. This implies that the injured party of a copyright breach needs to be compensated.

According to the provisions in Article 47 of the copyright law the copyright administration has the rights to stop the infringement, confiscate the illegal income, destroy the infringing reproductions, and may impose fines under the condition of infringing the public interests. If the circumstances are serious, they also can confiscate materials, tools, and other equipment which was used for making infringing reproductions. The one who infringe the copyright can be considered as constituting a crime, and shall bear criminal responsibility.

According to Article 36 of the regulations of copyright law of 2 August 2002, parties who have violated Article 47 of the copyright law and also offended public interest should be punished with a fine that is 3 times of the income of the illegal operation or 10 thousand Yuan if the income of the illegal operation is difficult to calculate.

Infringements of software copyright are regarded in the same light as infringements of every other copyright. The aforementioned principle is therefore applicable in case of copyright infringements of software.

Additionally, according to the provisions in article 23 and article 24 of the software protection regulations, all actions which have infringed the software copyright should hold the following civil liabilities:

1. Stop the infringement
2. Eliminate the bad effects
3. Apologize
4. Compensation for the losses
5. Civil sanctions.

FOSS essentially seeks to provide software as the effective public intellectual property of all mankind, and allows for sure software to be distributed freely

between the persons of preparation and application. Any restrictions of the intellectual property rights will eventually limit and obstruct its development.

Therefore certain legal experts may assume that the damage to the copyright owner will be limited, as he has made his work freely available via the internet.

However, the essence of FOSS is not free, but "thought sharing, knowledge sharing and resource sharing". The user can freely operate, copy, distribute, research and improvement the software, and avoid the intervening from the proprietary software. One can modify the program to make it better, make it more applicable. One can experience the excitement which comes from the achievement which be improved more efficiency. But one retains certain obligations to all others.

Besides establishing a reputation and recognition with the related value creation, an author can have other reasons to make his work "freely available". The author may also have a direct monetary advantage from the free distribution of his work. The simplest way is circulating the free works f advertising. Another way is granting specific services to support the software. Taking this further into a specific economic example, the free circulation of the work can provide that it has as many users as possible, allowing the author to generate income from the provision of technological support and consulting services, or "licensing proprietary add-ons". Another business model is the so-called dual licensing model. This model uses — as the name allows us to deduce — two different licenses. The first license is often a copyleft license intended to provide a wide range of users. The second license without the copyleft system can then leveraged to obtain payment from interested parties who want to avoid the copyleft principle.

FOSS cases in China

No cases have been reported yet (June 2011).