Taiwan

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Introduction to software protection under Taiwan law

Body of law

Copyright protection of software in Taiwan is regulated under the general Copyright Act of 10 Feb. 2010. Instead of drafting specialized regulations for computer programs, the legislature in Taiwan made all related norms and standards merge into the established provisions in Copyright Act[1].

The civil and commercial legislative system in Taiwan is designed as one integrated infrastructure. This means when it comes to copyright protection and infringement issues, treatments and procedures should be taken under the principles of the Civil Code[2]. However, some articles of Copyright Act are also deemed as special provisions to the general Criminal Code, that is to say, when a criminal prosecution of unlawful copyright infringement has been impleaded by prosecutor, Criminal Code as well as the Copyright Act should be put into reference. Moreover, when the computer programs are involved in the commercial use, the Consumer Protection Law[3] is the principal supplementary regulations to general laws. Besides, when a copyright issue occurs in Taiwan, there is also an optional dispute mediation procedure could be chosen in the adjective law area, the details of this mediation mechanism are defined in the Regulations of Copyright Dispute Mediation[4], in brief, considering that the formal lawsuit abiding by the Intellectual Property Case Adjudication Act[5], Taiwan Code of Civil Procedure[6], and The Code of Criminal Procedure[7] might take litigants too much time and expense, both parties in a copyright dispute event could

[1]Taiwan Copyright Act, Art. 5(1)(j), 22(2)(3), 59, 60, 80-2, and 87.The official translations in English can be reached by "Laws & Regulations Database of The Republic of China" at: http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0070017

[2]The official translations of the Taiwan Civil Code in English can be reached by "Laws & Regulations Database of The Republic of China" at: http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=B0000001

[3]The official translations of the Taiwan Consumer Protection Law in English can be reached by "Laws & Regulations Database of The Republic of China" at: http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0170001

[4]The official translations of the Taiwan Regulations of Copyright Dispute Mediation in English can be reached by "Laws & Regulations Database of The Republic of China" at: http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0070020

[5]The official translations of the Taiwan Intellectual Property Case Adjudication Act in English can be reached by "Laws & Regulations Database of The Republic of China" at: http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0030215

[6]The official translations of the Taiwan Code of Civil Procedure in English can be reached by "Laws & Regulations Database of The Republic of China" at: http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=B0010001

[7]The official translations of the Taiwan Code of Criminal Procedure in English can be reached by "Laws & Regulations Database of The Republic of China" at: http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=C0010001

choose this mediation procedure in consensus as an alternative solution. After a settlement of the mediation has been reached and ratified[8] by the Intellectual Property Court, the written mediation settlement statement shall have the same force as a final and unappeasable court judgment and constitute a writ of execution by itself as well.

Copyright Act: Object of protection

Computer programs are protected by copyrights as one special work in the intellectual domain similar to literary and artistic creation, this is declared in article 5, paragraph 1, subparagraph 10 of the Copyright Act as *"Works means a creation within an intellectual domain and shall include Computer programs."* However, there aren't many details being told in the Copyright Act about scales of creativities for copyright qualified computer programs. The only specific clause can be referred is article 3, *"Work protected by Copyright Act means a creation that is within a literary, scientific, artistic, or other intellectual domain."* Deduced from article 3, legal doctrine established that the originality is still needed to be seen for a computer program pursuing copyright protection, because the originality is the very essence of creation in intellectual domain. However, how intensive the originality should be and by which method it could be measured is yet to be extensive interpreted. By now, analyzed on most rulings by the courts and most comments from the jurists, there is only one clear line has been drawn on this topic, that is sweat of the brow doctrine should not be applied directly without proper elaboration in copyright area[9], which means, pure labour service output without originalities should not be deemed as intellectual creation, although the threshold of originality for copyright protection is fairly low by the courts, it is still obliged to be found nevertheless.

Moreover, as it says in article 10-1 of the Copyright Act: *"Protection for copyrights that has been obtained in accordance with this Act shall only extend to the expression of the work in question, and shall not extend to the work's underlying ideas, procedures, production processes, systems, methods of operation, concepts, principles, or discoveries."* This principle applies to computer programs like other copyright works. Generally speaking, two fundamental points should be sustained on computer programs for copyright protection, which are: (i) Producing process of the computer program doesn't only consist of merely registering or copying the reality or executing a functional routine. (ii) The originality involved in the computer program is required to make it qualified as an own intellectual creation of the author, no matter how minor the originality

[8]The court shall review the written mediation settlement statement with due dispatch. Unless it is contrary to act or regulation, public order, or good morals, or compulsory execution would be impossible, judge shall sign copies thereof and affix the seal of the court thereto.

[9]Take the verdict documented as "Intellectual Property Related Criminal Appealing Litigation Number 41 by Intellectual Property Court in 2008." For example, judges of the trial bench made a clear statement in their court judgment about legal opinions for not applying sweat of the brow doctrine directly in copyright area without proper and sufficient expression about minimum originality requirement.

is.

Authors/Beneficiaries

Article 11 and 12 of the Copyright Act provide that the author of a computer program should be the one who actually does the design and writing of the program, whether the author is completing the work as an employee within the scope of a persistent employment or as a contractor under a task-based commission. In most cases the author refers to the software engineer of a computer program, if it does have freedom of development when creating the work. As for the economic rights to the work, they belong to the employer in an employment relation, and to the contractor in a task-based commission. However, either in the employment relation or in the commission cooperation, all the assignments of authorship attribution and economic right allocation could be prearranged by a contractual agreement between both parties. Namely, in order to find out and make confirmation about which party is the one that authorship should be attributed to or economic rights should be adhered to, details of the contract of employment or commission need to be fully revealed to that purpose. Additionally, according to article 12, paragraph 3 of the Copyright Act: *"Where the economic rights are enjoyed by the commissioned person pursuant to the provisions of the preceding paragraph, the commissioning party may exploit the work."* That is to say, if there isn't any prearrangement in contract for authorship and economic rights between the opposite commissioning parties, then authorship and economic rights of the computer program would be appointed to the contractor as a default arrangement. However, the commissioning party does pay remuneration to the contractor for the work to compensate its offering, this clause makes a supplementary explanation for its lawful exploitation status on the work, whether this privilege is recorded in writing or not, it applies to the commissioning party as well at law.

Exclusive rights

The exclusive economic rights defined by the Copyright Act are listed from article 22 to 29, the whole package included (a) reproduce the work, (b) publicly recite the work, (c) publicly broadcast the work, (d) publicly present the work, (e) publicly perform the work, (f) transmit the work to the public, (g) publicly display the work, (h) adapt the work into derivative ones or (i) compile the work into compilation ones, (j) distribute the works through transfer of ownership, and (k) rent the work. Although all these rights are not fit in computer programs in theory and in essence, on account of computer programs are treated equal to other copyright works under the Copyright Act without specific differences, all the exclusive rights listed above could be covered in the software area, as long as it is applied in a realizable way.

Exceptions to exclusive rights

Besides making a legal plea and excuse by asserting the fair use doctrine based on article 44 to 66 as limitations to exclusive rights, there is only one general exception applied in the Taiwan Copyright Act, which is the first sale doctrine under the jurisdiction of Taiwan. It is expressly provided by article 59-1 of the Copyright Act: *"A person who has obtained ownership of the original of a work or a lawful copy thereof within the territory under the jurisdiction of the Republic of China may distribute it by means of transfer of ownership."* All the copyright works apply to this provision, as well as computer programs. Hence, when a computer program was attached to a storage medium, or physical product, machine, and similar equipment, then be lawfully transferred to others with rightholder's consent, this transaction shall exhaust the distribution right of that copy of computer program under the jurisdiction of Taiwan, with the exception of the right to control further rental of the program if it is incorporated to a physical product, machine, and equipment rather than a simple storage medium, according to article 60, paragraph 2 in the same Act.

Other exceptions specific for computer programs are set forth in article 59 of the Copyright Act, *"(i) The owner of a legal copy of a computer program may alter the program where necessary for utilization on a machine used by such owner, or may reproduce the program as necessary for backup; provided, this is limited to the owner's personal use. (ii) If the owner referred to in the preceding paragraph loses ownership of the original copy for any reason other than the destruction or loss of the copy, all altered and backup copies shall be destroyed unless the economic rights holder grants its consent otherwise."* article 59 cited above is deemed as compulsory law. Therefore, contractual agreements in conflict with that are held to be nonexistence.

Moral rights

Moral rights are highly valued by the Copyright Act in Taiwan and applied to computer programs if realizable in essence like other copyright works as well. As expressed in article 21 and 18 of the Copyright Act, moral rights belong exclusively to the author and shall not be transferred or succeeded. Moreover, the protection of moral rights of an author who has died or been extinguished shall be treated the same as the author was alive or in existence and shall not be infringed upon by any person.

In other words, moral rights are deemed as the "specific exclusive rights without transferability" in Taiwan. That is to say, when the authorship attribution of a copyright work has been made, moral rights adhered to that authorship shall not be changed or transferred to other person or legal entity by any means, and it remains in force after the transfer of the proprietary rights and following the death of the author for evermore.

According to article 16 of the Civil Code, moral rights are generally considered to be an essential legal capacity, and declared to be not permitted to waive in

Taiwan. Although they are treated as inalienable rights, this does not mean that it is impossible for rightholder to renounce under certain circumstances. From the standpoints explained in official documents issued by the Ministry of the Interior in Taiwan[10], global renouncement of the future exercise of moral rights should be void. However, if the renouncement of the scope could be stipulated with well-defined boundaries, such as subject, duration, and applied area being prearranged for the renouncement, the renouncement of moral rights could be validly sustained. In other words, the "Principle of Freedom of Contract" shall be honored.

Moral rights protected by the Copyright Act in Taiwan consist of three parts:

Right of publicly release
The author of a work shall enjoy the right to publicly release the work provided by article 15 of the Copyright Act;

Right of paternity
The author of a work shall have the right to indicate its name, a pseudonym, or no name on the original or copies of the work, or when the work is publicly released. The author has the same right to a derivative work based on its work provided by article 16 of the Copyright Act;'

Right of integrity
The author has the right to prohibit others from distorting, mutilating, modifying, or otherwise changing the content, form, or name of the work, thereby damaging the author's reputation provided by article 17 of the Copyright Act.

Term of protection

For economic rights of computer programs, the same terms to works of literature, science, and art apply: 50 years as of December 31 following the death of the author, and if the economic rights in work are appointed to a legal entity, the 50 years duration should be counting from the day that work is publicly released. In case of co-authors, economic rights in a joint work subsist for 50 years after the death of the last surviving author. More details about the duration of economic rights could be provided in article 30, 31, 33, and 35 of the Copyright Act. However, there is no limited term of protection for moral rights of copyright works including computer programs. This is clearly declared in article 18 of the Copyright Act. However, in the latter part of the same article also emphasizes that *"After the death of the author, an act shall not constitute an infringement where it can be considered that the author's intent has not been contravened given the nature and degree of the act of exploitation, social changes, or other circumstances."* Hence, moral rights of copyrights shall not perish after the death of the author, but it would, to some extent, be applied in a more moderated and compromised way.

[10]Cited from the "Copyright Related Explanation Letter Number 8118200 by Ministry of the Interior of 2 Oct. 1992."

Copyright assignment

As mentioned previously about the default setting by article 11 and 12 of the Copyright Act, the authorship of a computer program is attributed to whom actually does the design and writing of it, and the economic rights are allocated to the employer in a persistent employment relation and to the contractor in a task-based commission. Nevertheless, all the assignments above could be transposed on a preconcerted contractual agreement. When the authorship and economic rights have been attributed and allocated at law or by a contractual agreement, moral rights are adhered to the authorship and can not be succeeded or transferred thereafter. However, there are no such restrictions imposed on economic rights, according to article 36 of the Copyright Act *"Economic rights may be transferred in whole or in part to another person and may be jointly owned with other persons."*

Generally speaking, economic rights of copyrights assignment procedure in Taiwan were made in a very flexible and customized way. Some people might even regard it as under a loose legal control. Because there are actually no any legal formalities required for an economic right assignment in Taiwan, none of them are asked by the Copyright Act and Civil Code. Although, according to article 116 of the Civil Code and article 4 of the Electronic Signatures Act, both parties in a economic right assignment agreement can still stipulate certain formalities by themselves, even the formalities are provided in an electronic record way could be served properly. However, if the parties did not arrange any definite form for the economic right assignment, the agreement will still be valid, even if it is agreed between the parties as a consensual contract. Even so, article 36, paragraph 3 of the Copyright Act expresses that *"The scope of the transfer of the economic rights shall be as stipulated by the parties; rights not clearly covered by such stipulations shall be presumed to have not been transferred."* In terms of that, although the economic right assignment could be made valid on the condition of a consensual contract, people still tend to make the agreement on a written document or through a similar method like that to preserve the related information as many as possible in order to clearly record the details of the stipulations.

Special measures

Some articles of Copyright Act are deemed as special provisions to the general Criminal Code, those provisions applied to computer programs like other copyright works. In that case, when a legal complaint about copyright infringements has been submitted by the rightholder to the authority, and has been evaluated as an intentional offence by prosecutor, the prosecutor who undertakes this issue can therefore initiate the prosecution based on article 91 to 100 of the Copyright Act to place the proper criminal responsibilities on the infringer involved. The criminal punishment for copyright infringements varies with different accusations being charged. For a overall but not precise description, the most serious punishment could be imposed would be imprisonment for no more than

5 years, detention, or in lieu thereof or in addition thereto a fine not more than 5 million New Taiwan Dollars. However, if the benefit obtained by the infringer exceeds the maximum fine, article 96-2 of the Copyright Act hereon could be applied by court to increase the fine limitation to the whole obtained benefit. Besides that, according to article 103 of the Copyright Act: Upon complaint or information of an infringement of a person's copyrights, judicial police officials or judicial police may seize the infringing works to cease the ongoing unlawful infringements.

Except for the substantive law, when it comes to disputes concerning copyrights or plate rights, there is also one special measure could be taken in the adjective law area, which is the optional conciliation process regulated by the Regulations of Copyright Dispute Mediation in Taiwan. Both parties in a copyright dispute could choose this mediation procedure in consensus as an alternative solution to the normal litigation procedure. After a settlement of the mediation has been reached and ratified as not contrary to act, regulation, public order, good morals, and compulsory executabilities by the Intellectual Property Court, the written mediation settlement statement shall have the same force as a final and unappealable court judgment and constitute a writ of execution by itself as well.

Unprotected software and public domain software

As set forth above, two fundamental criteria should be met on computer programs for the copyright protection, which are: (i) Producing process of the computer program doesn't only consist of merely registering or copying the reality or executing a functional routine. (ii) The originality involved in the computer program is required to make it qualified as an own intellectual creation of the author, no matter how minor the originality is. As a matter of fact, the threshold of originality for copyright protection is fairly low, therefore most of the computer programs shall be protected by copyrights, no matter whether it is made in a proprietary software mode or under a Free and Open Source Software (hereinafter abbreviated as the "FOSS") license.

Opposite to the computer programs with copyright protection, there are also softwares which are not protected under certain circumstances described in article 42 and 43 of the Copyright Act. Briefly speaking, economic rights of computer programs are extinguished upon expiration of the term of protection, this kind of extinguishment applies to the situation that economic rights holder has died or been extinguished without any inheritors other than the nation or a local government. After the extinguishment, any person may freely exploit the computer programs without any legal restrictions. In fact, the common used word "Public Domain" or its synonyms are not declared in the Taiwan Copyright Act, however, most legal critics agree that the sentence used in article 43 as *"Any person may freely exploit a work for which the economic rights have been extinguished"* is a very much equivalent expression to the same thing.

Even so, there is still one thing needed further discussion and confirmation:

whether the economic rights of copyrights can be abandoned by their rightholders in advance to make the work into the area of Public Domain earlier. This question has not been fully answered by the Copyright Act directly. However, in legal theory, the property rights are always not be categorized as the "specifically exclusive rights without transferability" defined in article 16 of Civil Code. Moreover, according to article 40, paragraph 2 of the Copyright Act, an author of a joint work is expressly allowed at law to abandon its share of the ownership to other co-authors of the work. Therefore, if we apply this clause mutatis mutandis to article 42 of the Copyright Act, the deduction we shall find is that when all the authors have abandoned their economic rights in a joint work, the work shall hence be allocated into the Public Domain. Based on this very standpoint, an author who makes a work by its own can theoretically abandon the economic rights of that in the same way. Namely, economic rights of computer programs shall be allowed to be abandoned by the rightholders before expiration of the term of protection. In other words, the abandoning statements made by the rightholders will render computer programs as unprotected softwares, and therefore into the Public Domain area.

Analysis of FOSS under Taiwan law

Provided by article 10 of the Copyright Act, author of a work shall enjoy copyrights upon completion of the work. That means when a creation is completed, the author doesn't have to apply for extra registration or to go through any process, because with the essential originality the work will be subjected to copyright protection automatically. This is so-called "self-executing protection principle on copyrights". From this standpoint, computer programs with certain originalities should be protected by copyrights automatically, whether they are accomplished by a single author or by multiple authors cooperating under the FOSS licensing architecture.

When it comes to FOSS license analysis in the common law system, discussion upon differences between "bare license" to "bilateral contract" usually occurs. This analysis template might be one thing of importance in the applicable common law system. However, it doesn't seem to bring out much practical influence on the legal system in Taiwan. As a matter of fact, there are still some legal theory discussions about the differences between unilateral act, bilateral act, unilateral contract, and bilateral contract for the juridical acts, but most of those discussions remain as academic subjects. Judging from the fact that in Taiwan "bare license" is lacking of corresponding mechanisms either in substantive law or in adjective law, and in reality most courts always treat the computer program utilization agreement as a copyright contract, hereunder when it comes to analysis of FOSS, the FOSS licenses themselves will be treated as contracts and the licensing modes based on that will be reviewed from the fundamental copyright regulations to supplementary contract stipulations. In a nutshell, the FOSS licenses deviate a lot from conventional license agreements that under the law in Taiwan, they should be considered as the sui generis license agreements

based on the same fundamental copyright mechanisms but adjusted to some extent by contractual agreements for matching a new collaborative development methodology.

Copyrights

One very essential problem to the FOSS project is that it is made with accumulated multiple authors with or without coordination. On account of that, to well apply the current copyright regulations onto it could be a very challenging task because the cooperation methodologies operated in FOSS project might not be foreseeing and taking into consideration when the copyright regulations was enacted by the legislators. Generally speaking, a FOSS project could be deemed as a joint work in article 8 of Copyright Act in Taiwan or a derivative work in article 6 depending on which one fits the real situation most for the FOSS project. However, neither the joint work type nor the derivative work type could one hundred percent match the reality of a FOSS project.

Take the joint work for example, the feature for cooperation between multiple authors is equally found in a conventional joint computer program and FOSS project. However, most people think it is necessary that a joint work should be made by co-authors in consultation. In other words, there must be certain interactions and communications among the co-authors for the composition of a joint creation. Judging from that, quite a number of FOSS projects actually do not have anything to do with this prerequisite. In fact, many participants of a FOSS project might just take part in the code committing merely under the same coding style and licensing rules without knowing each other. This is so-called "Cooperation without Coordination"[11] mechanism of the FOSS projects. From this point of view, the type of joint work defined by the current Copyright Act can't not cover all the well-known features of a FOSS project.

If we take the derivative work into consideration, the feature for continuing modifications to the original work is identically proved in a conventional derivative computer program and a FOSS project. However, most people think it is fundamentally required that a derivative work should be made with certain originalities to some extent, that is, there must be quite a bit creativities comparing to the original work for a ratification. Rethinking on this, quite a number of FOSS projects actually do not make modifications by that standard. As a matter of fact, many contributions committed to a FOSS project might just be taken as a bug fix or merely a patch being made of scripts without copyright protection on it. However, accumulated by all these little by little and piece by piece, many small contributions might eventually make a copyrights-meaningful derivative improvement. From this point of view, the type of derivative work defined by the current Copyright Act can't not explain all the details well about

[11] Cited from the speech given by Clay Shirky, How the Internet will (one day) transform government at TED: http://www.ted.com/talks/clay_shirky_how_the_internet_will_one_day_transform_government.html

when is the proper counting point that a derivative work to an original FOSS project has been made.

Roughly speaking, take the FOSS project into application, depending on its development process and phase, as a joint work or a derivative work under the Copyright Act in Taiwan could be doable without conflicts with legal regulations in essence. In fact, some FOSS projects are collaboratively or derivatively accomplished exactly in this way. Yet, either the copyright type of the joint work or the derivative work can not sufficiently express the features of a FOSS project in operation. Be on a eclectically thinking about this, for a FOSS project copyright application in Taiwan, it can be deemed as a joint work or a derivative work of the Copyright Act in the first place based on its development situation. Secondly, it shall follow up in accordance with its supplementary stipulations under the respective FOSS licenses. This might be a much more rational and workable way for an overall copyright protection on FOSS projects for the time being.

Qualification of FOSS

As mentioned above, with the essential originality the computer programs will be subjected to copyright protection automatically, this is clearly stated in the article 5, paragraph 1, subparagraph 10 and article 10 of the Copyright Act in Taiwan. Referring to current copyright types of the Copyright Act, an indivisible computer program made by multiple participants concurringly in the same period of time could be categorized as a joint work, and a modified computer program qualified for originalities made by multiple participants separately in different period of time could be categorized as a derivative work. However, most people think it is necessary that a joint work should be made by co-authors in consultation, and a derivative work should be made with certain originalities to some extent. With regard to these two criteria, some FOSS projects might not be able to pass the evaluation in full.

In that case, according to article 1 of the Civil Code[12], one can always apply the related provisions mutatis mutandis for a better resolution in the civil law area. That is to say, if a FOSS project fulfills the whole legal requirements as to the joint work or to the derivative work of the Copyright Act, then it shall be protected as its respectively proper copyright type. However, there might be some features of the FOSS project can not well expressed and put into practice only by the statutory provisions. This is where the contractual stipulations should be stepping in. Because only with the complementary circulation between the Copyright Act and specific FOSS licensing agreement should the FOSS licensing mode be able to operate smoothly as it sets to be.

Rights of the original co-authors

[12]If there is no applicable act for a civil case, the case shall be decided according to customs. If there is no such custom, the case shall be decided according to the jurisprudence.

Provided in article 8 of the Copyright Act *"A joint work is a work that has been completed by two or more persons where the creation of each person cannot be separately exploited."* According to that, a computer program can be estimated as a joint work when it is made by multiple authors with certain interactions and communications for the cooperation among them, and can therefore apply all the related provisions about the joint work of the Copyright Act for its utilization. By and large, when a computer program is deemed to be a joint work, the moral rights and economic rights upon it shall be owned and utilized in a sharing status. The details of moral rights utilization is provided in article 19 of the Copyright Act. And the explanation of economic rights exploitation is regulated in article 40 and 40-1 of the same Act. To be brief, in a sharing status of jointly moral rights and jointly economic rights on copyrights, all the rights in a computer program shall not be exercised except with the consent of all the joint rights holders. However, any one of the joint rights holders shall not be allowed to refuse this very consent without a legitimate reason. In addition, the joint rights holders of a computer program may select a representative among themselves to exercise their joint rights, either in the moral rights or in the economic rights aspect. However, there is still one crucial difference can be told between the jointly moral rights and the jointly economic rights. That is in article 40, paragraph 1 of the Copyright Act which expressly stated that there is certain sharing proportion mechanism defined for the jointly economic rights. These definitions include *"In the case of a joint work, each author's share of the ownership of such a work shall be as stipulated by the joint authors; where no stipulation has been made, ownership shares shall be determined according to the degree of each author's creative contribution. Where the degree of each author's creative contribution is not clear, it shall be presumed that each author owns an equal share."* However, this kind of sharing proportion mechanism is generally believed to be nonexistence in the jointly moral rights area. Because the moral rights are consisted of right of publicly release, right of paternity, and right of integrity, none of these three rights can be transferred from the owner to others, or be splited in part as well. On account of that, most people agree that the sharing proportion mechanism only works for the jointly economic rights. As for the jointly moral rights, every co-author should be treated equally and equitably in pari causa.

Although the joint rights of copyrights can only be exercised with the consent of all joint rights holders, there is still one exception provided in article 90 of the Copyright Act, that is, each holder of copyrights in a joint work may separately institute legal proceedings for an infringement of copyrights and demand remedies from the infringer, either acting as a moral rights holder or based on its share of economic rights ownership.

Authors of derivative works

Regulated in article 6 of the Copyright Act *"A creation adapted from one or more pre-existing works is a derivative work and shall be protected as an in-*

dependent work." According to that, a computer program can be judged as a derivative work when it is made by the modifier with certain creativities comparing to the pre-existing one, and can hence apply all the related provisions about the derivative work of the Copyright Act for its exploitation. According to article 28 of the Copyright Act, the authors of the pre-existing/original computer programs have the exclusive right to adapt their works into derivative works or to compile their works into compilation works, this prerequisite is fairly fulfilled by the FOSS licensing agreements. Because all the FOSS licenses clearly stated that the rights to modify, copy, and distribute copies of the FOSS projects will be granted to the recipients. Moreover, the derivative work will be protected as an independent one as article 6 of the Copyright Act provides, that is to say, when the derivative work has been made lawfully, the only right the original authors can perform is to indicate its name, a pseudonym, or no name on the derivative copies when they are publicly released. However, sometimes the later version of a FOSS project is just taking an unmodified adoption from the pre-existing project such as library components, and adding some new independent functionalities to interact with the adoption part through a predefined application program interface. Such an adoption should be deemed as a derivative work, a compound work, or even a compilation work arises some discussions in Taiwan, but no solid conclusion has been reached so far. Judging from the fact that in Taiwan there is actually no copyright type defined as compound work like German law does, the adoption mentioned above can therefore be deemed as a derivative work under conventional explanation, or a compilation work while the adoption is quite separative so as not to be treated as an adaption. And if it does have been categorized as a compilation one, it will still be protected as an independent work according to article 7, paragraph 1 of the Copyright Act. Even so, there is still certain difference between a derivative FOSS project and a compilation FOSS project, which is the copyrights included are basically commingled into a derivative work, yet not to a compilation one. In that case, if the recipients want to do modification directly to a specific FOSS component inside the compilation, it should still be proceeded under the rules stipulated by the respective license agreement of the component in question.

Except for the name indicating right has been expressly reserved for the original authors at law, sometimes the original authors will also impose some other contractual obligations by the FOSS license agreements. The related information about the validity and enforcement of those impositions will be presented later in the "Copyright principle" section of this chapter.

The assignment of copyrights

In order to gather all related copyrights in a FOSS project to make an efficient management or timely disposal of the FOSS project, sometimes the copyright holders will transfer or set up a trust on their rights to a sustained legal entity such as a foundation. On account of that, all the rights of the FOSS project could be governed by the hands of full-time specialists employed by the legal entity.

The collective management of copyrights is perfectly possible and doable under Taiwan law. According to article 21 and 36 of the Copyright Act, economic rights of copyrights can be transferred in whole or in part to another natural person or legal entity, only if the details of the transferring have been clearly recorded between the both parties. Besides that, according to article 1 and 2 of the Trust Law[13], a right of property can be transferred to the trustee for administration or disposal purposes by a contract. Furthermore, none of the legal formalities are required at law for an economic right transfer or fiduciary contract in Taiwan. And if both parties agree, according to the Electronic Signatures Act[14], the contract can also be made in an electronic record way without losing its validities. In a nutshell, the assignment of economic rights of copyrights for a FOSS project could be successfully sustained at law in Taiwan, there isn't any known legal conflicts with the assignments.

In fact, provided by article 81 of the Copyright Act, economic rights holders may, with the approval of the Intellectual Property Office, establish copyright collective management organizations for the purpose of exercising rights or for collecting and distributing compensation for use. Details about this copyright collective management organization can be found in the Copyright Collective Management Organization Act[15]. Although this Act is currently put into practice mainly for organizations dabbling in pop music or motion pictures, the computer program is nevertheless not excluding from the applicable list. Therefore, building a copyright collective management organization devoted to one or multiple FOSS projects, to initiate management actions and other civil, criminal, and administrative suits and complaints, is actually quite feasible and practicable at law in Taiwan.

Moral copyrights

As aforementioned, moral rights of copyrights are highly valued by the Copyright Act in Taiwan and they applied to computer programs as well as other copyright works. Moral rights here consists of three parts, right of publicly release, right of paternity, and right of integrity on a copyright work. They belong exclusively to the author and shall not be transferred or succeeded. And the protection of moral rights of an author who has died or been extinguished shall be treated as remaining. In general legal theories and official explanation letters by the authorities, global renouncement of the future exercise of moral rights should be deemed as void, yet the renouncement can still be sustained at law if its scope could be stipulated with details such as subject, duration, or applied area

[13]The official translations of the Taiwan Trust Law in English can be reached by "Laws & Regulations Database of The Republic of China" at: http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=I0020024

[14]The official translations of the Taiwan Electronic Signatures Act in English can be reached by "Laws & Regulations Database of The Republic of China" at: http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0080037

[15]The official translations of the Taiwan Copyright Collective Management Organization Act in English can be reached by "Laws & Regulations Database of The Republic of China" at: http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0070019

information. After the brief review of moral rights protection in Taiwan, one might wonder if we put the FOSS licensing principles in perspective, will the FOSS licensing principles and the moral rights protection rules be in conflict with each other in a way? It seems that the protection duration won't expire for the moral rights. Yet according to Open Source Definition specified by Open Source Initiative article 5 and 6, the author of software distributed under a FOSS license can not oppose the use of the software by certain people and groups or for certain areas of application. So if the author of a FOSS project does declare his everlasting moral rights to lift a ban on certain use of that computer program, will it cause a compromising solution between the moral rights protection and the FOSS licensing principles?

As a matter of fact, such a conflict shall not happen under most circumstances according to the restrictive interpretation of article 17 of the Copyright Act. In this very article, it regulates that *"The author has the right to prohibit others from distorting, mutilating, modifying, or otherwise changing the content, form, or name of the work, thereby damaging the author's reputation."* This provision mainly applies onto literature works for the most part. Although it can also be covered on computer program, with regard to technical neutralities embodied in the computer programs, a purely functional adaption or modification should not be deemed as distorting, mutilating, modifying works in reputation damaging way to the original author. Moreover, when the original author participates voluntarily in a FOSS project, it is evidently well understood to it that utilization purpose later on to the FOSS project will not be limited. This understanding could be fairly deemed as one acknowledged renouncement of its moral rights with scope revelation and explanation.

Enforcing FOSS licenses licenses

As mentioned previously, due to the lack of corresponding mechanisms either in substantive law or in adjective law for the unilateral act, most courts in Taiwan tend to treat the computer programs utilization agreement directly as a copyright contract dealing with right and duty allocation. Therefore, when it comes to analysis on FOSS licenses validity and enforcement, the licenses themselves will be judged as contracts in most cases. In view of that, as long as the FOSS contractual agreement can be lawfully sustained and can be put into operation, the license carried on that will also be deemed as valid and enforceable. So there are two essential questions needed to be heeded: (i) between whom is a contract reached and when it is reached, and (ii) has the contract been validly reached with all the legal formalities required? Based on these two points, we shall further the analysis on the FOSS licenses validity and enforceability hereunder.

Contracting parties

According to article 153, paragraph 1 of the Civil Code *"When the parties have reciprocally declared their concordant intent, either expressly or impliedly, a contract shall be constituted."* So, for a contractually based analysis on the

FOSS project, two fundamental questions should be answered, which are: (i) between whom is a contract reached, and (ii) upon when is the intent mutually declared and accepted?

About the first question, if the FOSS project in question is made by a single author, then the answer will be much easier to clarify: the contract has been constituted between the original author and the respective recipients to the FOSS project. And when it comes to multiple authors, the answer will become a little bit indirect to perceive. But if the multiple authors did contribute to the FOSS project in an intensive consultation way, then the project itself will be deemed as a joint work at law. Therefore, the contract has been constituted between all the co-authors in accordance and the respective recipients to the FOSS project. And if the project has been modified by the successive participant with notable originalities, it can be treated as a derivative work at law. Hence, the contract has been constituted between the successive author and the respective recipients to the derivative FOSS project. However, if there is actually no any tangibly consultative relation between the multiple participants, or the very FOSS project has been modified repeatedly with slight contribution without certain originalities, or even the whole project was made in combination with the other FOSS component as a simple adoption without much modification between the two parts, all these described above will lead to a much more complicated situation. Briefly speaking, all the three hypotheses can not easily be explained in full according to the current Copyright Act, either in its copyright type categorization or in copyright management and disposal aspect. Even so, most of the FOSS licenses have been proved to be of assistance to deal with those puzzles, with the help of its complementary contractual stipulations. Take MIT license and Apache License 2.0 of BSD-like FOSS licenses for example, in these two licenses sublicense mechanism on copyright[16] is expressly provided, therefore no matter how far the modification to an original MIT License or Apache-2.0 project has been reached, the modifier will always be entitled to license a derivative work or merely a modification one in its own name. Moreover, although there is no such a sublicense mechanism provided on copyrights in GPL-like FOSS licenses like GNU General Public License v2.0, v3.0, GNU Lesser General Public License v2.1, v3.0, and GNU Affero General Public License v3.0, a license relay mechanism has been well explained in similar way of these license agreements. Take GPL-3.0 for example, "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." To be brief, the aforementioned sublicense mechanism and this kind of automatic licensing to downstream recipients have made up a deficiency to the Copyright Act regulations for FOSS projects, on account of those complementary stipulations: the contracting parties of a FOSS project under a complicated circumstance shall therefore be able to be defined on a case by case basis.

[16]However, the patent sublicense is expressly declared and provided in the GPL-3.0, LGPL-3.0, and AGPL-3.0, such a mechanism is currently seldom to be observed in other FOSS licenses.

As for the second question, according to article 161, paragraph 1 and 2 of the Civil Code, *"In cases where according to customs or owing to the nature of the affair, a notice of acceptance is not necessary, the contract shall be constituted when, within a reasonable time, there is a fact, which may be considered as an acceptance of the offer. The provision of the preceding paragraph shall be mutatis mutandis applied when at the time of offer the offerer has waived notice of acceptance."* Judging from the provisions above, a contract in Taiwan could be deemed as concurring reached and constituted, if the notice of acceptance is pre-declared to be fulfilled by action similar to a tangible reply. This is exactly what is happening among the FOSS contractually licensing relations. Most of the FOSS licenses do consist of this kind of waivers of acceptance notice, take GPL-3.0 for example, *"by modifying or propagating a covered work, you indicate your acceptance of this License to do so."* In this way both parties of the FOSS licensing contract have made their intent mutually reached and concordant. Therefore when a FOSS project has been received and exploited by the recipients, upon that time the contract between the rightholders and the respective recipients shall be validly sustained at law.

Validity of the FOSS licenses

For the full validity of a contract, not only the intent should be reached concordantly between both parties, but also the contents and formalities must be deemed as not contradicted to the regulations at law. In Taiwan, the legal principles of validities of a juridical act are basically provided in article 71, 72, and 73 of the Civil Code. And all the principles mentioned hereunder are equally applied to the contract as well as a type of the juridical act, such as:

Article 71
A juridical act which violates an imperative or prohibitive provision of the act is void except voidance is not implied in the provision.

Article 72
A juridical act which is against public policy or morals is void.

Article 73
A juridical act which does not follow the formality required by the act is void unless otherwise provided by the act.

Moreover, because of the "All Rights Reserved" principle set forth by the Copyright Act, exploiting computer programs without the author's expressly consent could be a copyright violation. That means without a legal license, the utilization of softwares downloaded from the internet could jeopardize oneself in the danger of a copyright infringement. And even the user claims that the softwares in question were received as they have already been put into Public Domain, when the legal issues arouse this will still need to be proved by the user. As a result, most people will not try to dispute the very existence and validity for a FOSS contract if they just receive this FOSS project without other legal stands. Because if they do assert that the FOSS contract between the authors

to them don't exist, then this implies no legally valid copyright license has been granted to them, and the users hence might not be able to use those softwares at all. Judging from the legal deductions and case analyses above, the contractual FOSS license agreements should be sustained at law and therefore be able to be enforced without disputes in Taiwan.

Contractual stipulations contrary to these three articles are deemed not to exist. On the other hand, if none of the regulations above have been violated, then according to article 153 of the Civil Code, both parties in a contract relation can therefore constitute an agreement to exchange and distribute their duties and rights freely on their own. The doctrine is treated as the "Principle of Freedom of Contract" in Taiwan. Judging from the fact that the composition of a FOSS contract has nothing in conflict with any compulsory regulations as being mentioned in article 71 and take the public policies and good morals into consideration as being asked in article 72, such an uncertain legal concept can only be further explained on a case by case basis. On account of that, a FOSS contract won't violate this provision directly only because the utilization based on that contract is unlimited in purposes. Finally, none of the legal formalities are required at law for an economic right transfer or disposal contract in Taiwan. So neither being made in writing, notarization, nor other formalities is demanded in a FOSS contract. That is to say, the contract made in FOSS licensing way also doesn't have any inconsistency to article 73 of the Civil Code. Briefly speaking, a FOSS license contract is evaluated to be sustained according to the "Principle of Freedom of Contract" and the reviewing based on the three criteria listed above.

Waiver and liability

Typically, there will be certain exoneration clauses declared as a disclaimer of warranty and limitation of liability in the FOSS licenses. Those clauses relieve the authors and contributors of the FOSS project from as many liabilities as possible. Judging from the fact that most of the FOSS projects are distributed on a royalty-free basis, and put the "Right and Duty Equity Principle" into consideration, this kind of liability prerelease mechanism will be reasonably sustained at law to some extent in Taiwan. However, it is explicitly demanded in article 222 of the Civil Code, that the *"Responsibility for intentional or gross negligent acts shall not be released in advance."* Abide by that, if respective one FOSS license does mean to relieve the authors and contributors from all kinds of liabilities including the one that is caused by an intentional or gross negligent act, the exceeding part according to article 222 and 111 of the Civil Code will be deemed as void at law. However, for this FOSS license, the other part within the scope permitted at law shall remain valid. This "partly void yet partly valid" mechanism presented in article 111 happens to echo article 7, paragraph 2 of the GPL-2.0[17]. All in all, if the FOSS project is distributed as

[17]If any portion of this section is held invalid or unenforceable under any particular circumstance, the balance of the section is intended to apply and the section as a whole is intended

noncommercial purpose and free of charge, then the disclaimer of warranty and limitation of liability clauses will be respected to a maximum extent. However, the responsibility for intentional or gross negligent acts will not be relieved in advance, any waivers come to this degree will be treated as void at law.

Even so, when it comes to commercial distribution with fees charged, the question about whether the disclaimer of warranty and limitation of liability can stand at law shall be examined and evaluated on a case by case basis. Moreover, because of the preconcerted and fixed characteristic of a FOSS license, the FOSS license itself could be easily recognized as the "Standard Contract" defined in article 247-1 of the Civil Code and article 12 of the Consumer Protection Law in Taiwan. One of the legal effects of being treated as a standard contract is that if the court finds that certain stipulations in the contract are turning to be obviously unfair, such as releasing or reducing the responsibility of one party and increasing the responsibility of the other party which is contrary to the principle of the equality and reciprocity, it can be declared as void directly by court at law. In view of article 354 and 355 of the Civil Code, it also tells that "*The seller of a thing shall warrant that the thing sold is free from any defect in quality which may destroy or impair its value, or its fitness for ordinary efficacy, or its fitness for the efficacy of the contract of sale.*" According to this clause, when a FOSS project has been put to use as a selling product, the prearranged disclaimer of warranty and limitation of liability clauses would be regulated and modulated to a certain degree. Unless the seller has already expressly revealed the defect to the buyer, otherwise he will still be held responsible for the quality of it offering. That a FOSS project being part of the offering or not does not affect this legal demand on a compulsory basis.

The copyleft principle

Copyleft is not necessarily an ideological term though it is indeed created to make a contrast to the notion of copyright. Its discourse, however, still works within the scope of the copyright basis. In other words, the notion of copyleft can be summarized as "A way of sharing that computer programs within the framework of the copyright system, albeit in ways different from the common practices." Based on that, authors of FOSS projects can therefore still claim the rights given to them by the copyright law and at the same time set the rules by stipulations on how other people can use their works. Furthermore, authors can only allow other people to perform applications, modifications, and adaptations to the original computer programs on condition that the distribution of the original and derivative works would be in exactly the same way by a FOSS license agreement. So it is assured that these works can continue their free circulation. This is the central idea of the notion copyleft "Authors requiring their original and derivative works to be continuously available under the same rules to the public."

to apply in other circumstances.

Principle

The classic model of such a licensing mechanism is the respective versions of GNU licenses[18] drafted by Free Software Foundation. Some critics even give the characteristic supported by copyleft principle in the GNU licenses a new term, such as "License Capture" or "License Inheritance". Take GPL for example, License Inheritance means an adopter's entire project might be considered as a derivative work of a GPL-licensed component if one of the following conditions is fulfilled when the adopter copies the codes either in source form way or in binary form way from a GPL-licensed component into its ongoing software project. First, the portion copied comprises a substantial part of the software project; or second, the GPL-licensed component provides core function for the software project and inseparably interacts with the other components of such software project. If any of the conditions above has been positively reached, then the software project in question will be deemed as a creation adapted from the pre-existing GPL-licensed component, therefore renders it as a derivative work of the GPL-licensed component. As a result, the adopter can only distribute its accomplished software project under the same GPL if it chooses to.

Frankly speaking, in the area of computer programs, defining the scope of a "work based on the original work" has been recognized as relatively challenging. This is because components in a mid or large size software project often call or access each other to cooperate. In addition, when different components are developed, each author may develop its own components independently without consulting others for accessibility and license compatibility. Unless the correlating and co-pending relationships of different components are determined on a case by case basis, it would be difficult to directly determine whether there is actually such tight connection of inheritance and reliance so as to determine whether the entire software project is derived from one specific component.

Nevertheless, simply putting a GPL-licensed component into a software project does not necessarily trigger its License Inheritance based on the GPL. In fact, many users somehow misunderstood and thus wrongfully interpreted the License Inheritance and used the "all-inclusive" terminology as a simplified but not specified metaphor to describe the License Inheritance effect. As a matter of fact, lots of the core members and opinion leaders of the respective GPL projects have now and then stated something similar: If a GPL-licensed component is not strongly related to the other components in the entire software project, it renders the License Inheritance of the GPL component as unable to be expanded to the other components of the software project. Such standpoints might include that the GPL-licensed component communicating with the other components through a dynamic link or the developer of the software project in question might be able to find similar components in function yet under the other licenses to easily replace the GPL-licensed one. However, if the GPL-licensed component communicates with the other components through a static link, or it represents a core function of the whole software project, such GPL-licensed component hence

[18]GPL-2.0, GPL-3.0, LGPL-2.1, LGPL-3.0, AGPL-3.0.

becomes highly correlated with the entire software project and can not be easily replaced in any case. Accordingly, separating such GPL-licensed component would cause a chain reaction and affect the entire software project. In other words, the other components of such software project will be considered as derivative works of the GPL-licensed component, and the entire software project will fall within the expansive scope of the License Inheritance of the GPL.

Validity

To find the answer about how the copyleft principle can be sustained and held valid under Taiwan's legal system, three questions should be fundamentally guided. The first question is, whether author of the original work can validly make an arrangement for how the derivative works need to be distributed. Second, if affirmative, how to explain the copyleft principle on a copyright analysis, namely, can the interpretation of copyleft be sustained in form at law? Third, can the enforcement of copyleft be validated at law without falling into the dispute of right abusing, and therefore be held valid substantively?

About the first question, it could be well explained according to article 28 of the Copyright Act, which is, an author of the original work has the exclusive right to create a derivative work, or compile into a compilation of the original one. Therefore, if a software component is not developed from scratch but rewritten from or derived from other person's preexisting work, the original author's consent needs to be acquired before such later developer may perform certain modifications or adaptations on the preexisting work. Similar clauses can be found in section 101 of title 17 of the United States Code *"A derivative work is a work based upon one or more preexisting works."* So, the original author does have the right to determine which person can and which person can not perform the modifications and adaptations onto its original computer program. Moreover, take the "Principle of Freedom of Contract" into consideration, the original author hereby is entitled to lay down the utilization of the derivative work for a particular use, or link certain conditions onto it.

It turns out the author does have the right to make certain arrangements to the derivative works based on its exclusive right on modifications and adaptations of the original work as a trade off between it and the recipients. Such copyleft content in a FOSS license agreement seems to be sort of terms of interchange, but how we define that in the legal system of Taiwan? Can it be determined in nature and found the right place at law to fit in? Here comes the second question and its answer, according to article 99, paragraph 2 of the Civil Code the copyleft principle could be deemed as a resolutory condition adhered to the contract because when the violation of it has been reached, the license granting contract between the original author and the recipients shall cease to be in existence. Take GPL-3.0 for example, it declares such a statement in the termination section as *"You may not propagate or modify a covered work except as expressly provided under this License. Any attempt otherwise to propagate or modify it is void, and will automatically terminate your rights*

under this License." Therefore, copyleft principle could be treated and sustained as a resolutory condition at law in form, it will not be activated by the time when the recipients just receive the FOSS project, however if the recipients do make modifications or perform certain adaptations on the FOSS project and distribute the derivative works in a wrong way which is forbidden by the FOSS license. In that case, this disobedience to the copyleft principle will fulfilled this resolutory condition and hence terminated the contract between both parties. After that, the legitimate status for the recipients to continuously perform the modifications, adaptations, or distributions on the original work and derivative works has been breached or revoked. In view of that, the author of the original work can therefore initiate the complaint or litigation to the recipients for the copyright infringements.

Based on the above legal deduction, copyleft principle stipulated in the FOSS licenses could be supported at law as a resolutory condition provided by the Civil Code in Taiwan. To be precisely specified, a FOSS license agreement can be deemed to be a "bilateral contract with resolutory conditions"[19]. However, according to the legal principles, there is no rights entitled at law can be abused by the holders in any extreme ways, this is also fairly elaborated in article 148 of the Civil Code in Taiwan as *"A right can not be exercised for the main purpose of violating public interests or damaging the others, and it shall be exercised and a duty shall be performed in accordance with the means of good faith as well."* Judging from these criteria upon copyleft principle in the FOSS licenses, could it be likely to be deemed as rights abusing in a way or not? As a matter of fact, there is no any solid legal inference has been concluded on that. Even so, most critics in Taiwan think that except for the worst situation might be found on a case by case basis, the copyleft principle is basically having nothing to do with the right abusing. Take the currently most applied FOSS licenses with copyleft principle for example, such as GPL-2.0, GPL-3.0, LGPL-2.1, LGPL-3.0, MPL-2.0, EPL-1.0, and AGPL-3.0, the extensive scope regulated by copyleft principle in them is still fundamentally limited to the typical area of the derivative work defined by the copyright law or other related software acts. In the MPL-2.0 and EPL-1.0, the regulated scope has even been restrained to the file-based or module-based boundaries. Although in the GPL-3.0 and AGPL-3.0, the drafters take the term "work based on" to replace "derivative work" in the previous license versions, it still shows that the extensive scope based on copyleft principle is limited to some extent. On account of that, the third question about whether the enforcement of copyleft principle can be validated at law or not in the substantive point of view, the answer should be positive. Moreover, sometimes authors do choose a FOSS license with copyleft principle for certain reasons, one might hence be able to set forth its dual-licensing business model with a copyleft FOSS license and a proprietary software license on the same software project at the same time, or one might therefore make a confirmation that the software released can continue its free circulation and be brought back

[19]Chyan Yang, Hsien-Jyh Liao, and Chung-Chen Chen, "Analysis on GPL in terms of the legal system in Taiwan" at: http://ccckmit.wdfiles.com/local—files/re%3Apaper/GPL.pdf

to its own utilization one day in exactly the same way as it was given away at the beginning. As a whole, judging from the fact that the copyleft principle might be chosen by an author with discretion for its own lawful copyright management, and under most circumstances it will also not be deemed as exceeding beyond the protection of public interests. Therefore it should be sustained and held valid at law in Taiwan, either in form or in substantive evaluation aspect.

Damages

As set forth previously, some articles of Copyright Act in Taiwan are deemed as special provisions to the general Criminal Code. Therefore, when a copyright infringement has been made on purpose, it is the prosecutor who can initiate the prosecution upon complaint and suggests the imposition of fine, detention, or imprisonment onto the intentional violator. Considering that an intentional or malicious copyright infringement could already be punished by criminal measures, there is actually no punitive damages to double or triple amount could be claimed under the Copyright Act. And this rule is applied to computer programs as well as other copyright works. According to article 88 of the copyright Act, a person who unlawfully infringes other person's economic rights out of intention or negligence shall be liable for damages. With regard to the damages, the injured party may make claim in any of the two manners provided in article 88, paragraph 3 of the Copyright Act at its choice. The first option is to request the submission from the infringer about the amount of benefit obtained on account of this infringing activity. Basically the damages will be equal or close to the obtained benefit, which is the revenue derived from the infringement deducting the costs and other necessary expenses. However, if the infringer is unable to establish the details for the costs and related expenses, then the obtained benefit in question should be deemed as the total revenue derived from the infringement.

The second option to calculate the damages is in accordance with the general applicable principles of the unlawful act, provided in article 216 of the Civil Code. Abiding by that, the damages shall be the injury suffered and the interests lost to the injured party owing to the infringement. However, if the injured party is unable to prove damages in detail, an analogy calculating alternative can hereby intervene. According to article 88, paragraph 3, subparagraph 1 of the Copyright Act, the injured party may base the damages on the differences between the amount of expected benefit from the exercise of such rights under normal circumstances and the amount of benefit from the exercise of the same rights after the infringement. This analogy license claim is quite useful and practical for an author in need of claiming its compensation on the infringement of a FOSS project. Although there are certain doable and flexible business models could be performed for benefit earning on the FOSS projects such as service providing, product value-adding, dual-licensing way and so on, quite a number of the FOSS projects are still basically provided on a copyright royalty-free or even patent royalty-free basis. By making the analogy license claim, the

injured party can therefore save the situation if the calculation to the injury suffered and interests lost are proven to be too complicated or time-consuming in reality. Or, if it is still difficult for the injured party to prove actual damages in accordance with the two solutions provided above, the injured party may request the court directly set compensation at an amount of not less than ten thousand and not more than one million New Taiwan Dollars based on the seriousness of the matter. If the damaging activity was intentional and / or serious, the compensation set by the court may be increased to five million New Taiwan Dollars maximum.

FOSS cases in Taiwan

By the time the Taiwan chapter finished, there is still no FOSS cases have been reported (July 2013). However, if it comes to the "Freeware" project lawsuits, as in similar general public licensing way, "Chinese Chess v.1.0 Software" case might be a fine reference. This verdict has been ruled by the Taipei District Court of criminal case number 2055 in 1998 as its first instance of court, and by the Taiwan High Court of criminal case number 5401 in the same year as its second instance of court. The author of Chinese Chess v.1.0 is Sheniun Wu. Mr. Wu once uploaded the Chinese Chess v.1.0 developed by him to the educational TANet of National Tsing Hua University in Taiwan. He distributed it under a simple license condition as "being free for everyone to redistribute the program with limitation of no more than the physical cost of the redistribution can be charged." After a period of time, the program has been included into a CD medium by the computer program vendors, and hence been sold together with the CD copies for commercial profits. When Mr. Wu realized the situation, he submitted a legal complaint to the authority, and therefore this case has been brought to court by prosecutor. Due to the software in question is fundamentally a Freeware, none of the copyright assignment and the copyleft principle topics have been discussed by courts at all. However, either the court of first instance or the court of second instance ruled the contract binding and relation between the software author and the software recipients are perfectly established by the general public licensing way, and should be held valid according to article 161 of the Civil Code when the notice of acceptance in a contract is predeclared to be fulfilled by action similar to a tangible reply. This standpoint by courts should be sustained thereafter in FOSS cases as well, because the "taking/downloading without additional notice of acceptance" mechanism is fairly applied to them without a difference to Freewares.