# France

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## Introduction to software protection under French law

### Body of law

Under article L. 112-2 of the French Intellectual Property Code, software developments shall be considered as works of the mind and are, as such, protected in France by copyright law.

The copyright protection of software is regulated by Law n° 94-361 of 10 May 1994, which implements Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs in France. It provides some specific rules regarding software, which confirms and outlines the applicability of the general principles of copyright law to such works.

### Scope of the protection

Under article L. 112-2 of the French Intellectual Property Code, copyright law protects "software including preparatory design material". The Directive of 14 May 1991 defines such preparatory design material as "preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage".

Copyright law protects software that is original, regardless of its kind, form of expression, merit or purpose. Thus, originality is the sole criterion to consider when assessing whether a given piece of software is subject to copyright protection, which implies that the source and object code of software are protected in the same manner.

Generally, case law considers that a piece of software is original when its author has brought a personal intellectual contribution[1].

However, the ideas and principles, which underlie any element of software, including those which underlie its interfaces, are not protected by copyright.

### Authors/Beneficiaries

1. As a rule, authorship shall belong to the natural person, who has created the software, whether the author is an employee or not. However, according to article L. 113-1 of the French Intellectual Property Code, it shall belong, unless otherwise proved, to the person or persons under whose name the work has been disclosed.

[1] Cass. Ass.plén., March 1986,: JCP G 1986, II, 20631; Cass. Civ. 1ère, 16 April 1991,: JCP G 1991, II, 21770.

2. Furthermore, article L. 113-9 of the French Intellectual Property Code provides that unless otherwise provided by statutory provisions or stipulations, the economic rights in the software and its documentation created by one or more employees in the execution of their duties or following the instructions given by their employer shall be the property of the employer and he exclusively shall be entitled to exercise them.
   This provision also applies to the servants of the State, of local authorities and of public establishments of an administrative nature.

3. Software created by two or more persons may be a "collective work" or a "collaborative work".

   A collaborative work is a work in the creation of which more than one natural person has participated. It shall be the joint property of its authors.

   It differs from a collective work, which is a work created at the initiative of a natural or legal person, who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various participating authors are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created. It shall be the property, unless otherwise proved, of the natural or legal person under whose name it has been disclosed.

4. When a work integrates a preexisting work, without the collaboration of the author of the latter work, it is defined as a "Composite work". A composite work shall be the property of the author who has produced it, subject to the rights of the author of the preexisting work, which means that the author of the composite work has to (a) obtain the consent of the author of the integrated work for such integration and (b) share the remuneration derived from the composite work with the author of the integrated work.

**Exclusive rights**

According to article L. 122-6 of the French Intellectual Property Code, the patrimonial rights belonging to the author of the software shall include the right to do or to authorize:

- any permanent or temporary reproduction of software by any means and in any form, in part or in whole;
- any translation, adaptation, arrangement or any other alteration of software and the reproduction of the results thereof; and
- any form of distribution to the public, including the rental, of the original software or of copies thereof.

The right of performance, as defined by article L 122-2 of the French Intellectual Property Code, which is attached to any literary and artistic work, is not

expressly mentioned among the exclusive rights of the author of a piece of software. However, this is not to say that the software author does not enjoy such a right, which could apply to software under certain circumstances, such as a filmed execution or an online execution.

Reproduction shall consist of the physical fixation of a work by any process allowing its communication to the public in an indirect way. This may be through copying or recording onto any media. Insofar as loading, displaying, running, transmitting or storing the software necessitate such reproduction, such acts require the consent of the author.

**Exceptions to exclusive rights**

Similarly to the general copyright rules, the third paragraph of article L. 122-6 of the French Intellectual Property Code provides that the first sale of a copy of software on the territory of a Member State of the European Community or of a State party to the agreement on the European Economic Area by the author or with his consent shall exhaust the right of placing on the market of that copy in all Member States, with the exception of the right to authorize further rental of a copy.

Considering the specificity of software, article L. 122-6-1 also provides some exceptions to the exclusive rights of the author.

The acts referred in article L. 122-6 shall not require the permission of the author where they are necessary for the use of the software by the person entitled to use it in accordance with its intended purpose, including for error correction, unless otherwise specified in the contract. This means that the person entitled to use the program can copy it into his computer in order to run it.

A person having the right to use the software may make a backup copy where such is necessary to ensure use of the software.

A person having the right to use the software shall be entitled, without the permission of the author, to observe, study or test the functioning of the software in order to determine the ideas and principles, which underlie any element of the software if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the software, which he is entitled to do.

Reproduction of the code of the software or translation of the form of that code shall not require the permission of the author where reproduction or translation within the meaning of article L. 122-6 is indispensable for obtaining the information necessary to achieve the interoperability of independently created software with other software.

However, it is expressly provided that these exceptions to the exclusive rights shall neither prejudice the normal exploitation of the software nor cause unreasonable prejudice to the author's legitimate interests.

Any stipulation contrary to the provisions of article L. 122-6-1 shall be null and void.

**Moral rights**

The moral rights of the author generally include (i) the right to disclose his work, (ii) the right of respect for his name and his work and (iii) the right of withdrawal.

However, the Intellectual Property Code contains some specific rules limiting the extent of the moral rights over software. It provides that, except for any stipulation more favorable to him, the author may not (i) oppose to modifications of the software, as far as such modifications do not affect his honor or reputation, and/or (ii) exercise his right of withdrawal.

In the absence of any specific provision regarding the right of disclosure, opinion suggests that such right shall apply to software.

Moral rights are perpetual, inalienable and imprescriptible, which means that an author cannot waive his moral rights on a literary or artistic work or transfer them to a third person.

However, the moral rights may be subject to contractual waivers, provided that such waivers are special and limited. For example, an author can decide not to disclose his identity. The clauses imposing the preservation of the author's anonymity are valid, as long as the author does not permanently waive his right of paternity. An anonymous author may reveal his paternity at any time.

**Term of protection**

According to article L. 123-1 of the French Intellectual Property Code, the author shall enjoy, during his lifetime and for 70 years after his death, the exclusive right to exploit his work in any form whatsoever and to derive monetary profit therefrom.

In the case of collaborative works, the calendar year taken into account for the calculation of the 70 years following death shall be that of the death of the last surviving joint author.

In the case of collective works, the term of the exclusive right shall be 70 years from January 1 of the calendar year following that in which the work was published. This rule also applies to works produced anonymously or under a pseudonym.

Finally, a composite work is protected regardless of the preexisting work, even if the preexisting work has entered the public domain[2].

[2]Cass. Crim., 27 February 1845: DP 1845, 1, p. 130.

### Copyright assignment

Article L. 131-1 of the French Intellectual Property Code provides that the complete assignment of intellectual property rights in future works shall be null and void.

According to the general regime for literary and artistic works, assignment of the exclusive rights on software may be total or partial. The assigned rights shall be "separately mentioned in the instrument of assignment and the field of exploitation of the assigned rights being defined as to its scope and purpose, as to place and as to duration"[3].

Contrary to the general regime, which imposes that the remuneration of an author be proportional to the revenues derived from the sale or exploitation of his work, article L. 131-4 of the French Intellectual Property Code provides that the remuneration due to the author of software in compensation for the assignment of his rights can be calculated as a lump sum.

The assignment may always be done for free, considering the interest of the author to release its work and have it brought to the knowledge of the public.

### Special measures

Law n° 2006-961 of 1st August 2006, which implements Council Directive 2001/29/EC of 22nd May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, provides some specific rules regarding software.

Besides, general measures provided by the Intellectual Property Code to enforce copyright, article L. 335-2-1 provides for penalties against any person offering to the public a computer program aimed at providing public access to protected works without authorization.

In addition, pursuant to article L. 331-5, right holders may implement technological measures designed to prevent or restrict actions that they have not authorized. This article also provides legal protection against the circumvention of effective technological measures and against the provision of devices, products or services to this effect. Nevertheless, the article specifies that it is not applicable to the technological measures used in connection with software.

## Unprotected software and public domain software

As previously discussed, only original software is protected by copyright.

The original nature of software has been the subject of numerous debates on principles and in courtrooms. The notion of originality, which is traditionally defined as a reflection of an author's personality, is difficult to apply to a technical work like software.

[3] Article L. 131-3 of the French Intellectual Property Code.

Some authors agree that such reflection of an author's personality through software would mainly reside in "the choice to use one or several possible methods, fulfilled in the final program"[4].

In this respect, the full assembly of the Court of Cassation held that software was original if it contained the "intellectual contribution of the author and that originality extended to a personal effort over and above the simple implementation of a restrictive and automatic software and that the realization of said effort resulted in an individualized structure"[5].

Software that fails to meet this criterion is not liable to protection under copyright law. This is the case for "applets", for example, which are used for web animation. Such software can be freely executed, reproduced and modified without the author's permission.

Software that comes into the public domain may also be freely used and reproduced. Given the length of protection afforded under French copyright law it can safely be considered that, at present, no software has yet come into the public domain.

It can be questioned whether software can, at the author's desire, be created directly in the public domain. Contrary to free licenses, public domain licenses are supposed to make the work in question as freely accessible as if that work had come into the public domain. They suppose that the author has renounced all rights over the software. This type of license would appear to be possible as far as the author may freely waive his patrimonial rights. The use of the software would, however, be subject to the respect of the moral rights of the author.

## Analysis of FOSS under French law

Free software licenses have once been defined as "licenses through which the author allows the copy, modification and distribution of the work modified or not, concurrently, without transferring the author's copyright and without the user being able to limit the rights attached to the original work and any derivatives thereof"[6].

Hence, free software is not free of all rights. It is in fact protected by copyright, but its source code may be freely executed and modified by its user community. Depending on the type of license under which the software was released (which may — or may not — include a copyleft), the members of such user communities are — or are not — obligated to disclose any modifications or improvements they made and communicate the corresponding source codes to other users. For these reasons, many authors favor the "Open Source Software" designation over that of "Free Software", as they find it more expressive and understandable.

[4] P-Y Gautier, *Propriété littéraire et artistique*, PUF, 6th edition 2007, n° 532.
[5] Cass. Ass.plén., 7 March 1986, op. cit.
[6] M. Clément-Fontaine, *Les oeuvres libres*, Thèse Montpellier, 2006.

The determination and the expression of rights between different contributors will depend on the qualification given to the work.

### FOSS definitions

In accordance with the principle of free modification of software distributed under a free license, a certain number of persons will contribute to the evolution of the original software. The modified software may then be defined as a collaborative work, a collective work or a composite work.

The term "collective work" is applicable if the creation and the disclosure of the software are carried out under the direction of the initial author of the software. This definition allows the latter to benefit from all rights attached to the software to the detriment of the successive contributors.

The term "collaborative work" could also be used. However, in such case, a concerted action on the part of all contributors is required — an idea, which seems incompatible with the very nature of a free license. Certain authors consider that this definition is the one that comes the closest to the spirit of free work. Indeed, it has the advantage of taking "the global evolving work and the equality of the authors"[7] into account. The use of this definition does, however, raise difficulties, as it offers an indivisible right over the work to each of the authors.

The final possibility is the definition as a derivative or composite work. According to this definition, each original modification of the software gives rise to a distinct version of the preceding work. It allows the rights of each contributor to be clearly defined, provided that each modification made to the original software can indeed be individualized. This definition is the most commonly admitted in principle[8]. It is also the one that appears to have been accepted by the Court of Paris, in a decision dated 28 March 2007[9].

None of the definitions given by the Intellectual Property Code fully accounts for the specific nature of free software, due in particular to its evolutionary character resulting from the unusual granting of a right to modify to all users. The remainder of the current paper is based upon the most commonly admitted definition for open source software, namely that of a derivative work.

### Copyright

The evolutionary character of free software makes the definition of each author and contributor's rights extremely complicated. Literary and artistic ownership, which grants the author a monopoly over the exploitation of the work, is

[7] M. Clément-Fontaine, *Les oeuvres libres*, op. cit.

[8] See in particular: Ch. Caron, *Les licences de logiciels dits "libres" à l'épreuve du droit d'auteur français*, Dalloz 2003 p. 1556; M. Vivant, C. le Stanc, L. Rapp., M. Guibal et J-L. Bilon, *Lamy Droit de l'informatique et des réseaux*, Lamy 2010, n° 2942.

[9] TGI Paris, 28 March 2007, Educaffix c/ CNRS, Gaz. Pal., n° 22, 22 January 2008, p. 35.

effectively difficult to reconcile with the freedoms of use and modification that govern free software in practice.

The definition of free software as a succession of derived works allows the author of each modification to be clearly defined, together with the scope of his rights. Each contributor adding original modifications to the software thus creates an independent work from the modified work. Consequently he enjoys all moral and patrimonial rights pertaining thereto.

Under these circumstances it is important to distinguish the rights of the initial author from those of the contributors.

The initial author is free to determine the fate of his patrimonial rights. Contrary to moral rights, patrimonial rights may be assigned in whole or in part, gifted, or licensed. Nothing prevents the author from assigning or awarding operating permissions free of charge[10]. This gratuitous nature is in accordance with article L. 122-7 of the Intellectual Property Code, which provides that "the right of performance and the right of reproduction may be transferred, for or without payment". It is therefore up to the author to decide whether to license free uses of his work.

Law n°2006-961 of August 2006 on the droits d'auteur and related rights in the information society, introduced, among others, a new article L. 122-7-1 into the Intellectual Property Code in response to the legislator's wish that the development of the "free" movement be taken into consideration. This article states that "the author is free to provide his work to the public free of charge subject to the rights of any future co-authors and third parties as well as in respect of any conventions, which he may conclude". The "free of charge" provision is thus admitted in French law and has been acknowledged by courts[11].

However, it would appear arguable, under copyright law, whether so-called copyleft licenses compel contributors to give up their own patrimonial rights over the work in order that others may freely copy, modify or distribute the program. This assignment of a future right disregards the fundamental right of the author to exploit his work.

Moreover, article L. 131-3 of the Intellectual Property Code imposes a duty to mention each assignment separately in the instrument of assignment and to define the field of exploitation of the assigned rights as to its scope and purpose. Case law has thus consistently held that general assignment clauses are invalid[12]. The application of this provision to software and licenses entails that a free license granting the rights to copy, distribute and modify with no further precision, such as the BSD license[13], should be considered null and void.

[10] M. Vivant, *La pratique de la gratuité en droit d'auteur*, RLDI mai 2010, n° 60 p. 59.

[11] See in particular: CA Versailles, 20 January 1987, D. 1988, somm. 207; Cass. Civ. 1ère, 23 January 2001, Comm. Com. Electr. 2000, comm. n° 23.

[12] Cass. 1ère. Civ., 15 February 2005: Légipresse 2005, n° 211, I, p. 65.

[13] BSD licenses (*Berkeley software distribution license* allow all or part of a software subject to such a license to be used without restriction (in particular to be integrated into a free

In practice, the principle of strict interpretation of contracts shall reduce the scope of such permissions to the methods of exploitation defined in the contract.

However, case law has shown proof of flexibility in this field. Certain decisions have been based on the real will of the parties[14] or actual use[15] in order to validate an assignment and to appreciate its scope.

### Moral copyrights

The mechanisms of free licenses are based on the freedom for licensees to use and to freely modify software. This freedom is liable to clash with the moral rights of the author and those of the different contributors.

### Right to disclose

The author of the initial software exercises his right to disclose through his decision to distribute the software under a free license. He thus authorizes all modes of disclosure of the work, namely copying, distribution and modification.

Licensees also enjoy a personal right to disclose over their own contributions, where such contributions are of an original character. The scope of such right depends on the conditions of the license under which the software is disclosed.

Certain licenses require that the modified software be disclosed under the same license. Such licenses are known as "Copyleft".

With copyleft licenses the licensee may elect whether or not to disclose his modifications, but cannot decide the conditions of such disclosure. The author of the modified software's disclosure rights are thus considerably limited. However, this limitation of rights does not seem to call the principles of copyright law into question considering that, while the composite work is the property of its author, its exploitation remains subject to the rights of the author of the preexisting work. The author of the original software may therefore define the conditions under which his work is disclosed without affecting the moral rights of future contributors.

The disclosure rights granted to contributors by licenses without copyleft are much more flexible. The contributors are free to use and modify the software without being bound to subject their modified work to the conditions of a given license.

### Paternity rights

Paternity rights over the initial or modified software are not treated uniformly by all free licenses.

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or owned software). In 1999, the BSD License was modified to remove a publicity clause requiring a copyright mention in all advertising or documentation supplied with the software.

[14] Cass. Civ. 1ère, 27 May 1986, Bull. Civ. 1986, I, n° 142.

[15] Cass. Civ 1ère, 15 May 2002, JurisData n° 2002-014336.

Copyleft licenses are extremely detailed on paternity issues for successive authors.

For example, the GPL license[16], which is the best known and most widely used free license, requires contributors to indicate their names and to specify the modifications they made to the work to avoid any mistaken attribution to a third party. As a result, anonymity rights, which result from paternity rights, cannot be exercised when the software is distributed under a license of this kind.

### Right of integrity

Free licenses allow any person, who accepts the terms thereof to modify the work.

According to software law, the author of the software cannot object to modifications unless such modifications harm his honor or reputation. Modifications made to correct or develop a program without the author's permission are thus valid.

However, prior authorization of any and all kinds of modifications to the software by third parties is contrary to the right of integrity of the work. Indeed, case law underlines the "inalienable right of respect for work, a public order principle, which is opposed to the author abandoning or assigning in a premature or general manner the exclusive enjoyment of use, distribution, withdrawal, addition and changes, which this latter may like to carry out"[17]. Any software modification may therefore expose its author to a future action based on the right to respect for the original work.

## Enforcing FOSS licenses

### Contractual organization

The originality of the distribution of free licenses lies in the fact that the author does not simply disclose his work; he also organizes the use which can be made thereof. He thus allows, through contract and under certain conditions, the copying, transmission and modification of the software he created. Any and all persons accepting such conditions enter into a contractual relationship with the author.

The license agreement thus establishes a contractual relationship between the licensees and the initial author. Each licensee who modifies the work by virtue of the permission granted by the initial author enjoys copyright protection for his original contributions. He may then grant the same freedoms over his contributions. Users of the modified work would then find themselves contractually bound, not only to the initial author but also to the authors of subsequent modifications.

[16] Otherwise known as "GNU General Public License" or "Licence générale publique GNU".
[17] Cass. 1ère civ., 28 January 2003, Bull. civ. I, n° 28.

In theory users of the modified work must have permission to use and modify the work, not only from the initial author but also from all authors of subsequent modifications.

This being said, certain licenses, such as the GPL, specify that rights over the modified work be granted only by the initial author to the detriment of the rights of other contributors.

### Validity of the agreement

The validity of such licenses can be called into question under basic contract law, or under consumer laws.

From a contract law perspective, it should be noted that free software is generally subject to standard licenses, which are real subscription contracts ("take it or leave it"). Acceptance of the license is often by tacit agreement, demonstrated by the carrying out of certain actions allowed by the author. Indeed, it is consistently accepted by the courts that the performance of an agreement may constitute acceptance of an offer.[18]

Turning to consumer laws, numerous standards are contrary to this type of license. Consequently, should the licensee be a consumer or a non-professional (as defined by French case law), a certain number of clauses — such as those excluding all guarantees or those limiting or excluding the developer's liability[19] — could automatically be considered abusive.

Certain licenses could also find themselves in breach of the French law imposing the use of the French language (generally referred to as the "Toubon law")[20], which may lead to the payment of fines and/or the unenforceability of such licenses.

Likewise, certain licenses do not comply with the rules regulating online agreements (e.g. prior information of the licensee; "double click" requirement to express acceptance…empty)[21], which may lead to the unenforceability of such licenses.

In spite of these notions of French law, the Court of Appeal of Paris indirectly acknowledged the validity of such free licenses in a decision dated 16th September 2009[22].

### Breach of license conditions

Failure to comply with the provisions of a license constitutes a breach by the licensee of his contractual obligations as well as a breach of the copyright rules.

[18] Cass. Com., 25 June 1991, Bull. Civ. IV, n° 234.
[19] Articles L. 132-1 and seq., and R. 132-1 and seq. of the Consumer Code.
[20] Law n °94-665 of 4 August 1994 concerning use of the French language.
[21] L. 121-16 and seq. of the Consumer Code.
[22] CA Paris, 16 September 2009, RG n° 01/24298, SA EDU 4 c/ Association AFPA.

With copyleft licenses, the free use of software is subject to the condition that the user releasing a modified version of the software allows free access to the modified source code and its further modification to third parties. According to Professor Gautier, this is a sort of condition subsequent to the legal act, which is generally stated in the license terms[23]. If the contributor fails to comply with the terms of the license, the license is automatically revoked by his fault, without prejudice to any future claims on grounds of piracy by the original author.

On that basis, the Court of Appeal of Paris in a decision dated 16th September 2009, pronounced the revocation of a contract for a violation of the license conditions: a free software was used by a licensee as a basis for the development of an application, but the licensee removed the original copyright notice referring to the authors of the two files and replaced them with his own, removed the contents of the license under which the original software was released and failed to provide the source code of his modified version of the free software. The Court of Appeal therefore held that several conditions of the GNU GPL had not been complied with.

**Waiver and liability**

The majority of free licenses includes a limitation or exemption of liability. This is the case with GNU and Mozilla licenses, for example. The question arises as to the validity of such licenses under French law.

Article 1150 of the French Civil Code allows for the limitation of contractual liability. Such limitations are valid in the absence of gross negligence or fraud, in as far as they are agreed between professionals.

Looking at consumer law, clauses "excluding or limiting the non-professional or consumer's legal rights in the event of a failure by the professional to comply with any of his obligations" are unquestionably deemed abusive and consequently held to be null and void, potentially leading the distributor and/or the editor to be considered fully liable for all direct damages[24]. In order to determine the validity of such clauses, it is therefore necessary to determine the status of who modifies the software source code: professional or consumer.

Finally, there is the question of liability for defective products in the realm of free software[25], whereby the producer is automatically responsible for any material damage or personal injury caused by a defect in his product. Opinion is divided on this point, as to whether such liability can be applied to software. Some authors consider that the law only applies to material products and that article 1386-3 of the French Civil Code was not intended to include products of

[23] P-Y. Gautier, *Propriété littéraire et artistique*, op. cit.

[24] Article R. 132-1, 6° of the Consumer Code.

[25] Articles 1386-1 and following of the Civil Code resulting from Law n° 98-389 of 19 May 1998 applying Community Directive n° 85-374 of 25 July 1985 concerning the unification of legislative, regulatory and administrative provisions in Member States on liability for defective products.

intellectual origin[26]. It is not impossible that case law will extend the scope of the law to include intangibles.

Where it is admitted that software falls within the scope of liability for defective products, this will only concern professional suppliers. The independent developer, whose profession is not to supply software, is therefore not concerned. The professional developer could take refuge behind the principle of "development risk", which would allow for an exclusion of liability, as far as the professional may prove that the state of scientific and technical knowledge did not allow the existence of the defect to be known at the time that the product came into circulation. It is within this meaning that the warranty clause in the CeCILL license has been produced[27].

## FOSS Cases in France

Although it can be said that the free domain relatively generates few cases of litigation, users of free software are nevertheless subject to rules governing use and distribution. Developers and other organizations involved with free software no longer hesitate before pursuing users, who fail to comply with the conditions of applicable licenses, particularly in matters of distribution.

Three cases have come before the French courts.

1. The first case before the High Court of Paris in November 2008 concerned a claim brought against the access provider Free, by three free software developers. The latter accused Free of distributing the Freebox (the modem provided by the ISP to its customers), containing free software components, in breach of the terms of the associated GPL license. The courts have not yet published a decision on this case.

2. The second concerns the CNRS, in a case brought by Educaffix[28]. The latter company had concluded software transfer agreements with several higher education establishments and the CNRS. The transferred software could, however, only work with a free piece of software, JATLite, developed by the University of Stanford under GNU GPL license. Educaffix requested that the contract be declared null and void for fraud on the basis that CNRS had concealed the fact that the existence of the free software included in the transfer agreement required permission from a third party holder of the rights over said free software, in this case the University of Stanford. Further, Educaffix requested that the contract be revoked for

[26] P. Oudot, *Le risque de développement. Contribution au maintien du droit à réparation*, thèse Dijon, 2005; Ph. Le Tourneau, *Droit de la responsabilité et des contrats*, Dalloz Action, 2009-2010.

[27] Article 9.1: "The Licensee acknowledges that the scientific and technical state-of-the-art when the Software was distributed did not enable all possible uses to be tested and verified, nor for the presence of possible defects to be detected. In this respect, the Licensee's attention has been drawn to the risks associated with loading, using, modifying and/or developing and reproducing the Software which are reserved for experienced users".

[28] TGI Paris, 28 March 2007, op. cit.

the sole fault of CNRS because the exploitation of the transferred software implied by necessity the commission of an act of piracy over the free software.

The Court held that "this program has the particular feature of depending on a GNU license, which allows free use of the software, but requires a license if the work based on the program can not reasonably be identified as independent and must therefore be considered as a derivative of the JATLite program."

This decision constitutes an application of the provisions of the GNU license and refers to, without directly citing, article 2 of the GNU license according to which "these requirements apply to the modified work as a whole. If identifiable sections of that work are not derived from the Program and can reasonably be considered independent and separate works in themselves, then this License, and its terms, shall not apply to those sections when one distributes them as separate works. Although, should one distribute the same sections as part of a whole based on the Program, the distribution of the whole must be placed under the terms of this License, whose permissions to other licensees extend to the whole, and thus to each and any of its parts, regardless of who wrote them". Through this decision, the judges recognized the contaminant nature of GNU GPL on a derived program.

It should be noted, however, that the decision does not recognize the validity of the GNU-GPL license, as far as it would have been up to the holder of the rights (University of Stanford, or transferee) to act on the legal principle of piracy and to request the recognition of its rights, which was not the case here.

3. The validity of the GNU GPL license was finally recognized in a decision issued by the Court of Appeal of Paris dated 16 September 2009.

   In this case the National Association for Adult Education (AFPA) issued a call for tenders for the implementation of learning spaces, which was finally granted to EDU 4. Doubting the sincerity of the offer submitted by EDU 4, AFPA declared the contract terminated. EDU 4 felt that the product they delivered matched the expectations and sued AFPA for abusive breach of contract, which claim was upheld by the High Court of Bobigny in 2004.

   Before the Court of Appeal, AFPA claimed that EDU4 had not clearly informed them that a free piece of software had been incorporated into the provided solution, that the copyright mentions relating to this piece of software had been modified and that the text of the GNU-GPL license had been removed. The Court of Appeal of Paris upheld the claims made by AFPA and held that EDU4 had failed to comply with the terms of the GNU license.

This decision is important because it was feared that France, one of the countries with the highest levels of copyright protection, would deem the free license to be null and void. It also reminds developers, who have decided to integrate free software that this decision is not without consequences and that a free software is not a software free of rights.

## Legal procedures

Free software developers enjoy several methods of ensuring the compliance with their rights. They can act on the basis of contract law or copyright law.

On the basis of contract law, where one of the parties to a license agreement fails to perform his obligations, the other party may sue to demand the execution of the promised obligations[29] or the termination of the agreement[30]. That party may also claim damages where the execution becomes impossible or where the failure by the licensee to carry out his obligations has resulted in repairable damages.

On the basis of copyright law, failure by the licensee to comply with the terms of the license is tantamount to piracy. Effectively, article L. 335-3 of the Intellectual Property Code states that "the crime of piracy is the violation of one of the rights of the author of a piece of software, as defined at article L. 122-6". Any and all reproduction, representation, distribution, modification, or marketing of software without the consent of its author is a civil tort and a criminal offense. As a result, the licensee can take action in civil and criminal courts to ensure the compliance with his rights. Before criminal courts, the pirate risks up to 3 years in prison and fines of up to 300,000 Euros[31].

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