

Open-Source Violations

The open-source movement has blossomed in the past few decades, with the development of services like the internet and GitHub making it easier than ever to connect with other developers and coders around the world as well as view and contribute to open-source software. With this comes not only the ability for open-source to become more prevalent around the world than ever but also the caveat that it is much easier for those who wish to misuse open-source software to do so. With the rise of open-source violations, it has become necessary for legal enforcement of licenses to exist, and such enforcement policies have appeared in the past few years.

Various different types of open-source licenses are violated in different ways depending on the specific type of license that the software is under, and open source license violations present a significant challenge to the open source movement as they go against the spirit of open source software. There are many different types of licenses for open source software, each with its own subtle differences. Generally, the variations between different open source software licenses are in how much it enforces copyleft. Copyleft is “used to ensure that open-sourced intellectual property and software can be copied or distributed as open source” and can either be in the form of requiring any derivative works be also under an open source license, perhaps even the same license, or in the form of only requiring that the original software always be under that license.¹ Another variation between the different types of licenses is the permissiveness of the software, in other words how much the software is allowed to mix with closed source and

¹ <https://www.toptal.com/open-source/developers-guide-to-open-source-licenses>

differently licensed code in derivative works. For example, the GNU GPL license has very strong copyleft and very strict in its permissiveness, while the MIT License has weak copyleft and is very permissive in use with other software.² Due to either misunderstandings of or intentional breaking of the rules of open source, a significant amount of software companies violate open source licenses and incorrectly use code from open source projects. This has become big enough of a problem that in 2010, Linux launched the Open Compliance Program, establishing guidelines to help firms adhere to the rules of open source.³ A study by Mather et. al. demonstrated “a lack of proper use of the acceptor license in 3 out of the 4 cases of violations” and suggests a need to inform people how open source works, particularly through the legal system.⁴

One distinction that should be drawn before discussing specific open source violation lawsuits is the difference between copyright infringement and breach of contract. A copyright is “a legal device that gives the creator of a ... work the sole right to publish and sell that work [and] ... to grant or sell those rights to others ... Violation of a copyright is called infringement”.⁵ On the other hand, a contract is an exchange of “something of value ... such as cash, services or goods (or a promise to exchange such an item) for something else of value” in which “all parties are in agreement”.⁶ In the United States, copyright infringement generally falls

² <https://www.toptal.com/open-source/developers-guide-to-open-source-licenses>

³ <https://www.computerworld.com/article/2468757/smartphones/linux-foundation-launches-major-open-source-license-compliance-program.html>

⁴ <http://billthies.net/sew2012.pdf>

⁵ <https://legal-dictionary.thefreedictionary.com/copyright+infringement>

⁶ https://www.forbes.com/2006/11/20/smallbusiness-statelaw-gifts-ent-law-cx_nl_1120contracts.html#6c25f0586aff

under federal law, while breaches of contract are handled by states. The spirit of most open source software licenses are more in line with copyright laws rather than contracts. For example, for the GPL license is a “unilateral permission, in which no obligations are reciprocally required by the licensor” other than that users follow the terms in the license.⁷ In cases of legal troubles, it is important for open source to adhere to being a copyright agreement. As such laws are federal rather than at the state level, disputes across state borders have a universal set of laws to turn to. It is also important for courts to view licenses not as contracts because violations from contracts typically results in monetary fines, the amount of which is hard to assign for software. On the other hand, courts can issue injunctions for copyright infringement that adhere to the intention of the open source movement.⁸ It is thus paramount for open source software to maintain a reputation of being a copyright agreement.

In the past few years, the open source community has made significant progress in getting legal backing for its rules. Although the rules of open source software are clearly laid out both in online resources and in the licenses that occupy the front page of any open source project, in order for such regulations to be effective there needs to be some legal precedence for enforcement and punishment by federal courts. One of the first instances of such a legal dispute was in 2008 with Jacobsen v. Katzer. This time, the violation was of the Artistic License, a relatively non-strict license that requires a copyright notice be kept in any derivative works. Jacobsen, developer of the Java Model Railroad Interface, used the Artistic License in his work. Another firm run by Katzer downloaded his open sourced work, removed the license notice in

⁷ <https://lwn.net/Articles/61292/>

⁸ <https://arstechnica.com/tech-policy/2008/08/court-violating-copyleft-copyright-infringement/>

front, and modified and redistributed the software without Jacobsen's permission.⁹ Though a lower court initially ruled that this was a breach of contract rather than copyright infringement, a federal appeals court later overruled this decision, establishing a needed precedent on "the enforceability of copyleft license".¹⁰ It was important for this case to "[cement] the legal footing' of open source licenses" as developers can then obtain injunctions to legally prevent violators from continuing to spread stolen and repurposed software.¹¹

On the other hand, some open source licenses have also established a contractual element to dealing with violations in that violators will have to pay a royalty for any economic gain from violating the license and distributing software without proper permission. In particular, the GPL has extremely strong copyleft and strict permissibility, but non open-source derivative works may pay developers a commercial licensing fee to allow for a bypassing of these rules. This is exactly the business model that Artifex, the developer of a piece of software called Ghostscript, used. Hamcom, a South Korean company, directly took the open-sourced Ghostscript and implemented it into their productivity app without obtaining such a commercial license or making their software open-source under GPL.¹² When taken to court, this was ruled as an enforceable breach of contract, with the Federal Court of Appeals saying that the license counted as both a copyright and contractual agreement between the developer and licensee.¹³ While it is

⁹ <https://arstechnica.com/tech-policy/2008/08/court-violating-copyleft-copyright-infringement/>

¹⁰ <http://btlj.org/2015/11/consequences-violating-open-source-licenses/>

¹¹ <http://btlj.org/2015/11/consequences-violating-open-source-licenses/>

¹² <https://qz.com/981029/a-federal-court-has-ruled-that-an-open-source-license-is-an-enforceable-contract/>

¹³ <https://qz.com/981029/a-federal-court-has-ruled-that-an-open-source-license-is-an-enforceable-contract/>

important for open-source licenses to establish themselves as copyright agreements so violators can be legally stopped from distributing disallowed code, it is also important for them to incorporate elements of a contractual agreement in that there is an explicit understanding and agreement to the terms of the license on the part of both parties involved. Without this precedence, violators may simply claim that there was no signed agreement, so the open-source license cannot count as an enforceable contract, exactly the argument made by Hanlon's lawyers.¹⁴ Hence, with this precedent developers may protect their software with monetary consequences for violators. However, this also raises the question of who the money goes to in cases of successful lawsuits for royalties from violators. Though it is undeniable that core contributors have given the most to an open-source project, many times there are countless contributions from others as well. When a lawsuit is successful, the money is most likely going to only go to the holders of the copyright. It seems slightly contradictory with the spirit of the open-source movement that only the people at the very top will be able to reap the benefits of violations.

While the open-source movement began in the United States, it has found its way into being a key issue in other countries around the world as well. The GPL license is currently well-respected in Germany and Europe in general, with a similar precedent for it being not just a contract but also a copyright agreement established in 2004. A GPL licensor was able to obtain an injunction for an infringer who refused to stop using his code without making it open-source.¹⁵ This established a German precedent for GPL relying "on all the enforcement means

¹⁴ <https://qz.com/981029/a-federal-court-has-ruled-that-an-open-source-license-is-an-enforceable-contract/>

¹⁵ <https://www.netfilter.org/documentation/licensing/dippadm1268746871.43.pdf>

established by the European ‘Directive on the enforcement of intellectual property rights’ when enforcing the GPL obligations,” an important step in ensuring that open-source is properly considered and enforced just as in the US¹⁶. On the other hand, China has been more lax on enforcing open source rules, with both the indifferent attitude of Chinese people towards intellectual property in relation to open-source software and the inactivity of the Chinese government in enforcing the rules resulting in only 4% of software to be legitimate according to a study by Patel.¹⁷ It will be interesting to see how open-source violations are handled with differing laws of different nations as open-source software moves to a global level

¹⁶ <https://www.netfilter.org/documentation/licensing/dippadm1268746871.43.pdf>

¹⁷ <https://hosted.law.wisc.edu/wordpress/wilj/files/2012/02/patel.pdf>

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