

HUGOTAVOCATS

CREATIONS. MEDIAS. COMMUNICATIONS.

22 rue saint augustin paris 75002
tél. +33 (0)1 44 94 83 83
fax +33 (0)1 44 94 83 84
www.hugot.fr



User Interaction

Who's who?

- Author
- (re)Distributor
- User
- ...all of them being the “*Public*”
- Analyze as a “*third party beneficiary*”
- Central notion: “*distribution*”, gives rise to duties under free licenses (especially copyleft)

Knowledge is Freedom

- ... No respect of copyleft without information;
- Distributor's first duty: to inform user (most basic violation);
- Without information:
 - User may only be passive, not informed of his rights and license terms;
 - User is not part of the “*public*”, no freedom;
 - Violation of license;
 - Entire burden of compliance rests upon the author.

Knowledge is Freedom – GNU GPL example

- *“For example, if you distribute copies of such a program, whether gratis or for a fee, you must give the recipients all the rights that you have. You must make sure that they, too, **receive or can get the source code**. And you must **show them these terms** so they know their rights.”* (preamble GNU GPLv2 & v3)
- *“Each time you redistribute the Program (or any work based on the Program), the **recipient automatically receives a license from the original licensor** to copy, distribute or modify the Program subject to these terms and conditions.”* (GNU GPLv2 – section 6)

Broad Exclusive Rights to Broad Users Freedoms

- US Copyright Act § 106:

“...the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to **reproduce** the copyrighted work in copies or phonorecords;*
- (2) to **prepare derivative** works based upon the copyrighted work;*
- (3) to **distribute** copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; [...].”*

Broad Exclusive Rights to Broad Users Freedoms

Directive 2009/24/EC of April 23, 2009 on the Legal Protection of Computer Programs lists the same exclusive rights:

“...the exclusive rights of the rightholder within the meaning of Article 2 shall include the right to do or to authorise:

- (a) the permanent or temporary **reproduction** [...]*
- (b) the translation, **adaptation**, arrangement [...]*
- (c) any form of **distribution to the public**, including the rental, of the original computer program or of copies thereof”.*

Broad Exclusive Rights to Broad Users Freedoms

- Exclusive rights dealt with by the GNU GPLv2:

*“Activities other than **copying, distribution and modification** are not covered by this License; they are outside its scope.”*
(GNU GPLv2, section 0);

- EU, US, free license: same rights are organized;

- EU directive defines rental (part of distribution right) as: *“the **making available for use**, for a limited period of time and for profit making purposes, of a computer program or a copy thereof”* (preamble #12).

Broad Exclusive Rights to Broad Users Freedoms

- Distribution: broader than mere tender of a tangible copy?
 - EU directive seems to say, can make available without transferring a “*copy*”;
 - Software program is a literary work: “*making available*” is a very common notion for this type of work;
- Consequence: if the exclusive rights vested in authors (e.g. distribution) are broader than the rights within the scope of the license, they remain reserved to the authors... (usually no choice of law clause).

Shift of Paradigm? From Copies to Interactions?

- Until recently: distribution was only achieved by “*making available*” a software program on a tangible, external medium (floppy, cd rom) to be installed on a computer;
- Two main modifications of the distribution and use scheme affect users interactions:
 - Devices embedding free software;
 - Interaction through a computer network.

Devices embedding Free Software

- Difference between a computer, a cell phone or a router ?
- Technologically: less and less;
- Legally: none;
- EU Directive: “...*the term 'computer program' shall include programs in any form, including those which are incorporated into hardware*” (preamble # 7).

Devices embedding Free Software

- Practical difficulty: almost all communicating devices use free software and almost none respect the license obligations;
- Difficulty # 2: no information to users (passive);
- Irrelevant: the fact that a device is designed to work a certain way (with limitation on users freedoms) because the authors never accepted / anticipated such restriction;
- Users freedoms apply regardless of the device or of the computer (otherwise it is a further restriction).

Network Interaction

- What are the rights/freedoms of the users in the cloud?
- Mere interaction with a software program running on a server is not “*distribution*”:
 - Expressly stated in GNU GPLv3;
 - ...to be compared with GNU AGPLv3;
- When do network interactions become “distribution” ?

Network Interaction

- Criteria: legal definitions:
 - Distribution & Reproduction;
 - Other rights / freedoms of the users;
- Example: rental of cloud space with software reproduced in such space:
 - EU directive: both exclusive distribution & reproduction rights are involved;
 - Privacy issues: as the user's private space, he should have control over it;
 - Property rights (even temporary property).

Quick Conclusion

- Extent of copyleft has / will evolve(d) to ensure the same basic freedoms as access and uses of software change;
- Notion of “*distribution*” will continue to raise questions;
- Intent of the authors (software are not licensed for a specific purpose) and fundamental rights are relevant;
- Rule of thumb (my proposal):

If each user has access, directly or indirectly, to a copy of the software program, then the software is distributed, regardless of where it is reproduced (device, computer, or cloud) or the specific usage of the device (because the author never agreed to such further restriction).