

# When is Distribution not Distribution?

Andrew Katz<sup>1, 2</sup> & Björn Lundell<sup>1</sup>

1: University of Skövde, Sweden

2: Moorcrofts LLP, U.K.

[andrew.katz@moorcrofts.com](mailto:andrew.katz@moorcrofts.com)

[bjorn.lundell@his.se](mailto:bjorn.lundell@his.se)

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## *Context:*

# **Contracts** for provision of **FOSS** in schools

- Swedish schools require students to sign a contract as a precondition of using IT equipment in schools
- The contracts cover school-issued laptops as well as internal IT equipment
- The laptops are sometimes issued with FOSS programs installed, such as Audacity and GIMP.
- The FOSS programs include GPL programs.
- The contracts sometimes seek to restrict the four freedoms, and in particular, have terms which are potentially in conflict with the GPL ...
- ...if the programs are distributed (or propagated/conveyed).

<b>Software type</b>	<b>Software</b>	<b>License</b>
Sound	Audacity	GPL v2 (or later)
e-books	Amis	LGPL
Graphics	Blender	GPL v2 (or later)
Text editing	Bluefish	GPL v3
Mind mapping	Freemind	GPL v2 (or later)
Web browser	Firefox	MPL v2
Graphics	Gimp	GPL v3
Mathematics	Geogebra	GPL v3
Graphics	Inkscape	GPL v2 (or later)
Office suite	LibreOffice	LGPL v3
Office suite	OpenOffice	LGPL v3 / Apache license 2.0
Desktop publ.	Scribus	GPL v3
Graphics	TuxPaint	GPL v3
Media player	VLC	GPL v2 (or later) / LGPL v2
Mind mapping	Xmind	LGPL v2 / EPL v1
Archiving	7-zip	LGPL v2 (with unRAR restriction)

## *Example statements from contracts (1/5) ... Is the freedom to **use** restricted?*

- “The equipment must not be loaned, or otherwise transferred or appropriated by anyone other than the pupil that this contract applies.”
- “User programs can not and must not be installed on school equipment. It is not allowed to copy or use the school's software outside the school.”
- “The equipment must not be used for commercial purposes.”
- “The computer and software provided by the municipality are owned throughout the loan period by the school and may not be sold or lent to someone else.”

## *Example statements from contracts (2/5) ...*

### *Is the freedom to **modify** restricted?*

- “You may not **manipulate or distribute** the software that the school provides.”
- “The pupil may not change the computer's default configuration, **manipulate, or distribute** the preinstalled software.”
- “The following are considered as criminal acts and are therefore prohibited: manipulate hardware or software that is part of the computer system.”
- “It is not allowed: to deliberately spread viruses or modify hardware or software that is part of the computer system.”

## *Example statements from contracts (3/5) ...*

### *Is the freedom to **copy & redistribute** restricted?*

- “It is also prohibited to copy the software on your computer and **install on other computers** (e.g. at home) unless the school has given permission to do so.”
- “With reference to licensing conditions and licensing laws I am only allowed to install applications approved by <name-of-school> on the equipment. Nor may I reinstall or reconfigure the preinstalled operating system without authorization from the computer manager. It is forbidden by law to copy the software, any violation will be prosecuted. Shareware and Freeware is not covered by this.”
- “It is not permitted to copy software other than the so-called freeware. Others are forbidden by law.”

# Example statements from contracts (4/5) ...

## Is the freedom to **copy** & **redistribute** restricted?

- “You are a **local administrator** on your computer which means that you can install software on your computer. Hence, you are also **responsible** for that only software with valid licenses are installed on your computer. It is also prohibited to copy the software on your computer and install on other computers (e.g. at home) unless the school has given permission to do so.”
- “It is strictly forbidden and in some cases also illegal to ... install or copy software that is protected by copyright law or agreements. Respect all forms of copyright! You are solely responsible for ensuring that the necessary licenses are available for all materials that are not provided by the school and are responsible for all financial requirements imposed for breach of e.g. the Copyright Act. You can not take for granted that everything on the Internet is free. If you are unsure, you can e.g. ask one of the municipality's development educators.”

# *Example statements from contracts (5/5) ...*

## *Is the freedom to **copy** & **redistribute** restricted?*

- “You may never download, **distribute** or store copyrighted material without the permission of the rights holder. Rights holder is the person who originally created the material, such as a piece of music, a movie, or a work of art. File-sharing of copyrighted materials is prohibited at all times.”
- “The agreement expires when the student completes his/her education in <name-of-school>. After the loan period has expired, the student has the opportunity to buy the computer. The price is set to 560 SEK.”
- “Under Swedish law, it is forbidden to ... copy software and games that are not free. Explanation: What should those who make software live off if nobody pays?”



# Our findings and recommendations (1/2)

- Many schools seem unaware of the significance of FOSS licensing, and the effect of conflict between the contracts and the relevant FOSS licences
- Both for legal compliance purposes, and for pedagogical reasons, it is sensible to amend the contracts so they are FOSS aware

# Our findings and recommendations (2/2)

- Many of the inconsistencies arise where allowing the student access to the computer means that the software is distributed (...conveyed or propagated).
- There is a spectrum of use-cases which may or may not amount to 'distribution' and trigger the copyleft obligations

# The Spectrum (1/3)

- Student benefits from the use of a computer system by the school without interaction) e.g. viewing lessons on an electronic whiteboard
- Student has a minor interaction with school software (e.g. student describes to teacher the solution to a problem which the teacher writes on the whiteboard)
- Student controls school software (e.g. teacher asks student to write the answer to a problem on the whiteboard)
- Student accesses software installed on a school computer (e.g. doing an exercise on classroom computers in a coding lesson)

# The Spectrum (2/3)

- Student accesses software installed on a school computer (e.g. communal computers used for doing free-form research/essay writing)
- Student accesses software installed on a school laptop for use in a specific lesson.
- Student accesses software installed on a school laptop which is issued to the student for a week.
- Student accesses software installed on a school laptop which is issued to the student for a year.
- What if, in the above cases, the computer is locked down so the school retains admin rights to install/remove software?

# The Spectrum (3/3)

- Student is issued with a school laptop, and is granted root privileges, so can install and remove software
- Student is required to download specific software for use in school on their own laptop
- Student uses own laptop at school, decides to download various FOSS programs to carry out schoolwork (e.g. GIMP, Libre Office, Audacity)

# Related Questions

- A set top box contains GPL code. It is supplied to the consumer as part of the monthly subscription scheme, but remains owned by the cable/satellite company. Does the cable company have to make the source available to the customer, in order to comply with the GPL?
- A car contains GPL code and is leased by the customer from the car manufacturer's leasing company. Does the leasing company have to release the source?
- A customer purchased a VM preconfigured with Linux from AWS for use in an AWS instance. Does AWS have to release the source?

# The Core Question

- e.g. a student is issued with a laptop by the school for a year or more. Laptop remains owned by the school.
- The computer is preloaded with certain programs, many of which are FOSS.
- Is the software distributed to the student, thus requiring the school to comply with the distribution conditions (GPL)?
- Do the conditions imposed on the student conflict with the licence (GPL) under which the school received the software?

# Notes on 'distribution'

- GPLv2, LGPL v2.1 talk about distribution
- GPL, LGPL v3 talk about propagating and conveying
- The legislative background...



# WIPO Copyright Treaty 1996

## Article 6 - Right of Distribution

(1) Authors ... shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

## Article 7 – Right of Rental

Authors of ... computer programs...shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works...[except] where the program itself is not the essential object of the rental

## Article 8 - Right of Communication to the Public

Authors ... shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them

# Information Society Directive 2001/29/EC

## Article 3 - Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

## Article 4 – Distribution Right

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

# Software Directive 2009/24/EC

1. ...the exclusive rights of the rightholder ... shall include the right to do or to authorise:

(a)...

(b) ...

(c) any form of distribution to the public, ***including the rental***, of the original computer program or of copies thereof.

2. The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.

Recital (12):

'rental' means the making available for use, for a limited period of time and for profit-making purposes, of a computer program

# Terminology:

- WIPO
  - ‘Making available to the public...through sale or other transfer of ownership’
  - ‘Communicating to the public’
- Information Society Directive
  - ‘making available to the public’ and
  - ‘communicating to the public’
  - ‘distribution to the public by sale or otherwise’
- Software Directive
  - ‘distribution to the public’

# Peek & Cloppenburg KG v Cassina SpA

Case C-456/06, 17 April 2008

“Neither Article 4(1) of Directive 2001/29 nor any other provision of that directive gives a sufficient explanation of the concept of distribution to the public”

The court relied on the WIPO copyright treaty and phonographic performance treaty.

“...the relevant international Treaties link the concept of distribution exclusively to that of transfer of ownership.”

“...the concept of distribution to the public, otherwise than through sale, of the original of a work or a copy thereof, for the purpose of Article 4(1) of Directive 2001/29, covers acts which entail, and only acts which entail, a transfer of the ownership of that **object**”.

***‘Distribution’ only occurs when there is transfer of ownership of an object.***

# Usedsoft GmbH v Oracle C-128/11

“...a ‘sale’ is an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him.”

“...the operations [of downloading software and entering into a licence agreement] examined as a whole, involve the transfer of the right of ownership of the copy of the computer program in question”.

“... the existence of a transfer of ownership changes an ‘act of communication to the public’ provided for in Article 3 of [the Information Society Directive] into an act of distribution referred to in Article 4 of the directive...”

“the distribution right under Article 4(2) of Directive 2009/24 concerns both tangible and intangible copies of a computer program”

***Distribution occurs where there is transfer of ownership of tangible and intangible copies of a computer program***

# Dimensione Direct Sales v Knoll International SpA

## Case C-516/13

There may be an infringement of the exclusive distribution right, where a trader, who does not hold the copyright, sells protected works or copies thereof and addresses an advertisement, through its website, by direct mail or in the press, to consumers located in the territory of the Member State in which those works are protected in order to invite them to purchase it.

Indeed, although it is true that the Court has held, in its judgment in Peek & Cloppenburg ... which concerned the option of using reproductions of a protected work, that the concept of distribution to the public of the original of a work or a copy thereof, for the purpose of Article 4(1) of Directive 2001/29, entails a transfer of the ownership of that object, the fact remains that an infringement of the distribution right can be observed where consumers located in the territory of the Member State in which that work is protected are invited, by targeted advertising, to acquire ownership of the original or a copy of that work.

***Distribution can occur where you advertise the possibility of considering a transfer of ownership. Stuff Peek & Cloppenburg.***

## 'Distribution' and the licences

GPLv2 - 'distribution' - will be interpreted according to local law?

GPLv3 - 'conveying' - covers any act which is an infringement of copyright if done without permission – includes, potentially, rental and lending

MS-RL - 'distribution' to be defined in accordance with US law - US Copyright Act assumes 'distribution' includes 'rental, lease or lending'. Can't import US copyright law wholesale to EU, but if the rental/lending is infringement, even if not distribution in EU sense, then CJ will interpret it as 'distribution' for that licence.



## Extreme interpretations

- For GPL2, lending/leasing/renting a device to someone with no transfer of ownership means no 'distribution' (Peek & Cloppenburg); or
- Even advertising (the purchase of) a product containing GPL code is distribution which triggers copyleft obligations (Dimensione Direct)

## Sensible Interpretations

- GPLv3 - 'conveying' includes rental/lending/leasing software, so copyleft applies in these circumstances.
- GPLv2 – although must be interpreted in line with EU law, 'distribution' can be interpreted consistently with US law, as the drafters had this in mind when drafting, therefore 'distribution' imports rental/lending/leasing.
- Line of cases is inconsistent – software directive explicitly says 'distribution to the public...including...rental'
- The physical computer may be being lent, but is the software?
- Remember, GPL defaults to 'safe mode'.

## Software transfer distinct from Hardware Transfer

- **Someone** needs a license to the software – school or student
- Student is making pertinent decisions relating running etc. the software
- Even if student is an agent of the school (strange interpretation), if they break the rules, the agency ceases, so they need a licence.
- Relevant question is degree of control the student has over the software (e.g. admin rights, ability to distribute etc).

# Thank you

A paper detailing the underlying research is due to be published at [ifosslr.org](http://ifosslr.org)

A further paper setting out the thinking in this paper may also be published in the same place.

[andrew.katz@moorcrofts.com](mailto:andrew.katz@moorcrofts.com)

[bjorn.lundell@his.se](mailto:bjorn.lundell@his.se)

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