

Comparative Law of Licenses and Contracts in the US, UK and EU

FOSDEM^{'18}

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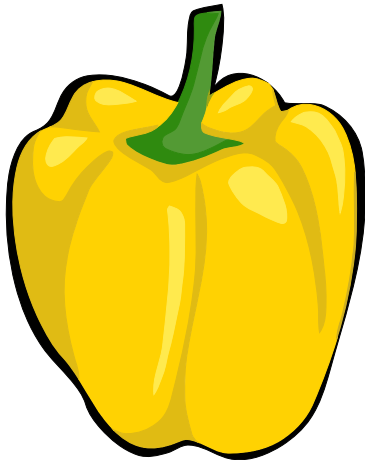
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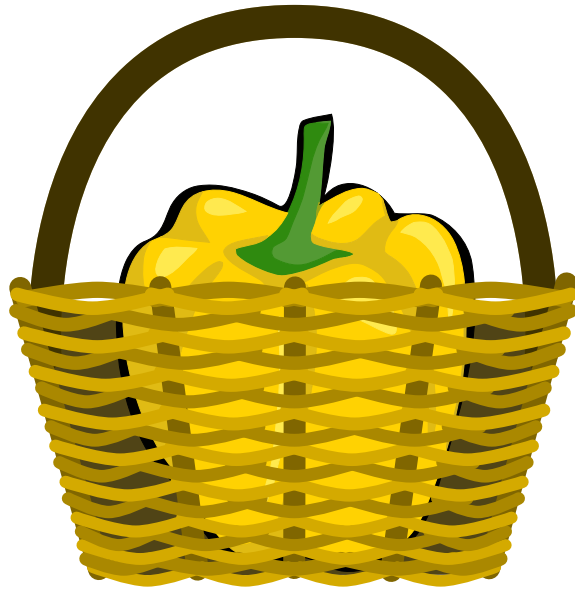
Non-exclusive license



Contract
(agreement)



license agreement



License agreement



An example of a condition ...

“You may convey a work based on the Program, or the modifications to produce it from the Program, in the form of source code under the terms of section 4, *provided that you also meet all of these conditions:*”

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US

	Bare license?	Contract?
Fair License	??	
BSD		X
Apache		X
GPL		X

English Law

Law of England and Wales.
Northern Ireland is similar.
Not Scotland

Rationale

‘Bare licence’ is a promise not to sue.

Enforceable by estoppel – licensee acts in reliance of the licence, may no longer be revoked.

Acting outside the scope of the licence is copyright infringement.

Carlill -v- Carbolic Smoke Ball Co.

Unilateral contract

Promise to pay £100 to anyone using the smoke ball who contracts influenza.

Consideration is the economic benefit to the suppliers in selling more smoke balls.

Is it necessary to imply a contract?

No -

“An implication may only be made if this is necessary, and then only of what is necessary and no more.”

Robin Ray v. Classic FM

English Law

	Bare licence?	Contract?
Fair License	Yes	No
BSD	Yes	No
Apache	Yes	No
GPL	Yes ???	No ???

EU

Civil law jurisdictions

European legal systems

OS licences are interpreted as enforceable bilateral contracts

Bare licence not an independent, *sui generis* concept

Rationale

OS licence is “an agreement whereby the licensor grants the licensee permission to perform certain acts with respect to a copyright protected work, acts which would otherwise be prohibited on the basis of the licensor’s exclusive right on the work.”

Guibault, L., van Daalen, O. *Unravelling the Myth around Open Source Licenses* (2005 TMC Asser Press)

EU

	Bare license?	Contract?
Fair License	No	Yes
BSD	No	Yes
Apache	No	Yes
GPL	No	Yes

Summary

We are lawyers but not your lawyer.
We could be wrong.

Taxonomy

	US	English Law	EU
Bare License	A defense, not a document	No acceptance required. Defence to infringement claim	N/A
Unilateral Contract	Acceptance by conduct	Acceptance by conduct. Communication not necessary	No acceptance required – does not apply to software licences
Bilateral Contract	Acceptance by any means	Acceptance must be communicated	Acceptance by any means

Revocability

	US	English Law	EU
Bare License	Revocable at any time unless licensee has relied on it	Revocable at any time (unless licensee has relied on it)	N/A
Unilateral Contract	Not revocable after partial performance	Potentially irrevocable	German law (free revocation) / Italian law (promise is irrevocable)
Bilateral Contract	Terminates only on material breach	Potentially irrevocable	Potentially irrevocable

Third Party Beneficiary Rights

	US	English Law	EU
Bare License	No	No	N/A
Unilateral Contract	Depends on wording	Yes	Yes?
Bilateral Contract	Being tested for copyleft licenses	Yes	Yes

Specific performance by licensee

	US	English Law	EU
Bare License	N/A	No	N/A
Unilateral Contract	Rarely granted, but theoretically possible	Yes (at discretion of court)	Yes – statutory remedy
Bilateral Contract	Rarely granted, but theoretically possible	Yes (at discretion of court)	Yes – statutory remedy

Legal Costs

	US	English Law	EU
Bare License	No	Costs follow event (discretionary)	N/A
Unilateral Contract	No	Costs follow event (discretionary)	
Bilateral Contract	No	Costs follow event (discretionary)	

Exclusion of liability

	US	English Law	EU
Bare License	N/A	Enforceable (mainly)	N/A
Unilateral Contract	Most likely	Subject to reasonableness (UCTA), and Consumer protection	Requirement of proportionality, consumer protection
Bilateral Contract	Most likely	Subject to reasonableness (UCTA), and Consumer protection	Requirement of proportionality, consumer protection