Warranties

As a Way to Promote Commercial FOSS

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Introduction

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Introduction

Excluding Liabilities ...
FOSS Licenses Try to Exclude Liability

• GPL version 3

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- BSD

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FOSS Licenses Try toExclude Liability

- **EPL version 1.0**

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Content of the clauses

- All these clauses are split in two
  1. They limit the warranties (i.e. the extent of the obligations)
  2. They limit the liability (i.e. the extent of the compensation)

- Deal with two different aspects
  - Material defects :
    - Common law : Fitness for purpose, Merchantability
    - French law: « défaut de conformité », « Vices cachés »
  - Legal defects :
    - Common law : warranty of title
    - French law: « garantie d’éviction »
Why Doing So?

- **The intent is to protect contributors**
  - The License is a contract between the copyright holder(s) and the licensee
  - Copyright holders do not want to assume liability for free
Nothing Specific to FOSS

- **Proprietary vendors also have exclusion clauses**
  - Sun Community Source License (SCSL)

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  - **Office Word EULA**

  LIMITATION ON AND EXCLUSION OF DAMAGES. YOU CAN RECOVER FROM MICROSOFT AND ITS SUPPLIERS ONLY DIRECT DAMAGES **UP TO THE AMOUNT YOU PAID FOR THE SOFTWARE**. YOU CANNOT RECOVER ANY OTHER DAMAGES, INCLUDING CONSEQUENTIAL, LOST PROFITS, SPECIAL, INDIRECT OR INCIDENTAL DAMAGES.

  [...] **THE LIMITED WARRANTY COVERS THE SOFTWARE FOR ONE YEAR AFTER ACQUIRED BY THE FIRST USER.** [...]
Question

What does it change when FOSS is commercially supported?

Software vendor  Copyright holders

FOSS license

Support Contract  FOSS license

Customer
Predicates

- **Thereafter, we consider exclusion clauses globally**
  - Exclusion of warranty (AKA exemption clauses), and
  - Exclusion (or limitation) of liability

- **NOT considering consumer law**
  - Focus on professional users

- **Focusing on European and, more specifically, French law**

- **GPL-centric view**
  - GPL is the most popular FOSS license
  - It is the basis of AdaCore’s licensing
Part 1

The Legal Perspective
Validity of Exclusion Clauses (1) : Finding Applicable Law

• The rule of conflict of law
  - Article 4 of the regulation 593/2008/EC of June 17th, 2008 “Rome I”
  - Article 4 of the Rome Convention of June 19th, 1980
  - (Article 5 of the Bern Convention of September 9th, 1886)

• Difficulties
  - The above rules are only applicable when one party belongs to one EU member state and the forum is located in the EU
  - The connecting factor is not very clear : what is the place of “characteristic performance” for a FOSS license ?
  - Articulation between :
    - Contract liability (“responsabilité contractuelle”)
    - Copyright infringement liability (“responsabilité délictuelle”)
Validity of Exclusion Clauses (1) : US Law

- "sous toutes réserves" 😊

- Exclusion clauses are generally admitted ...
  - Belong to contract law, not copyright law
  - Caveat Emptor!

- ... within some limits
  - Formal requirements:
    - "be conspicuous", hence the upper caps
    - Certain phrasing: hence the "as is"
  - Substantial requirements:
    - Exclusion of warranties: test of reasonableness
    - Limitation of liability: must meet the essential purpose and be conscionable
Validity of Exclusion Clauses (2) : French Law

- **Sources**
  - Article 1150 of the civil code
  - Cass. Com. 29 Juin 2010 *Faurecia II*

- **Exclusion clauses are tightly controlled ...**
  - *In abstracto* control : Does the exclusion clause harm the « *essential obligation* » of the contract ?
    - Derisory indemnification contradicts the essential obligation !
  - *In concreto* control : Is the behaviour of the debtor gross negligence ?
    - Not performing one’s obligations is not enough – behavior needs to be analyzed
    - Subjective vision

- **... or even forbidden in some cases !**
  - E.g. « *garantie des vices cachés* » cannot be disclaimed by professional sellers, except if the buyer is of the same speciality
Validity of Exclusion Clauses (3) : FOSS

• **In Abstracto control**
  - What are the « essential obligations » in a FOSS licence ?
    - Licensor : granting the license ?
    - Licensee : meeting the conditions ?
      - « provided that » phrasing in the GPL
      - Section 12 of GPL v3 supports this interpretation
  - Is a complete exclusion of limitation « derisory » ?
    - But the support agreement can include one (see later) ...
    - But the license is non-for-profit ...

• **In Concreto Control**
  - What is « gross negligence » in a FOSS licence ?
    - Not trying to cure an infringement under section 8 of GPL v3 ?
  - What is « gross negligence » in a support contract ?
    - It all depends on the content
Practical Enforceability of Exclusion Clauses (1)

- **Software interactions are very complex**

- **Technically**: Many different kind of interactions
  - dynamic linking, static linking, RPC, introspection, copy/pasting, Middlewares ...

- **Legally**:
  - Various regimes: « Œuvre de collaboration », « Œuvre collective », « Œuvre composite » (AKA Derivative work)
  - Many licenses

- **Socially**: FOSS communities
  - From the very organized ones: FSF, Eclipse Foundation ...
  - To the very loosely-coupled ones
  - Potentially large number of contributors
Practical Enforceability of Exclusion Clauses (2)

- **It may be hard to find liabilities**
  - Finding who is responsible for a defect: Experts are key
    - One first need to find where the defect comes from
    - One need to find who is liable: contributions may be entangled in a very complex fashion
    - Multiple liabilities are possible

- **Contributors may not be reached**
  - Located in (multiple) foreign countries
  - Not solvent
  - No addresses

- **As far as I know, no one ever sued a contributor for a material defect in Free Software**
  - But suing providers for a breach of contract does happen
Part 2

The Business Perspective
The provider perspective (1)

- **Offering warranties is a differentiating factor**
  - From software available for no fee
    - FOSS communities provide *technologies*
    - FOSS providers can provide *products*
  - From competitors
    - Proprietary vendors usually provide very little warranties

- **But your customer segment needs to call for it**
  - Consumer market: no one cares about warranties, on the contrary
  - Professional market: some people do, e.g. those doing critical software in the embedded industry
The provider perspective (2)

- The provider can offer its liability to replace those of the contributors

- Warranties can be fine-tuned based on risk analysis
  - Kinds of warranties: Merchantability? Fitness for a purpose? Title?
  - Extent of warranties:
    - In time: fair enough as the license is not limited in time
    - In amount: amount of the fee paid by the customer for instance
The Provider Perspective (3)

- Lawyers are interested in warranties, customers in guarantees
  - A service contract can offer to perform a number of risk-reduction activities
    - E.g. provision of development versions
    - E.g. offer to verify and validate the software
    - E.g. limited time to fix a problem
  - More realistic legal regime: typically best-effort obligation
The customer perspective

• **When FOSS is provided by vendors**
  - There is a single point of contact both legally and technically
  - They are more likely to be solvent than individuals
  - Both warranties and guarantees can be effective
  - Eg. AdaCore 😊

• **If the vendor fails, do it yourself!**
  - Vendors DO fail:
    - M&A followed by a change of strategy (feared by some for MySQL when purchased by Oracle)
    - Bankruptcy (e.g. SCO)
    - End of a given technology (e.g. Solaris)
  - The license gives all the rights needed to perform risk-reduction activities
  - It may be more expensive, but still, doable
Risk-reduction activities

• Can be implemented by vendors and customers

• Need to put in place due diligence procedures
  – Legal due diligence
    – What is the structure of the code?
    – Who wrote it?
    – Who owns the copyright? Taking into account employees, work for hire, « œuvre collective », R&D contracts, etc ...
    – What is (are) the license(s)? Are they compatible?
  – Technical due diligence
    – Regression testing
    – Code reviews
    – Continuous integration
    – Etc ...

• The community can help
  – FSF, Eclipse Foundation, OPEES project, etc
Thanks for your attention!

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