



Warranties

As a Way to Promote Commercial FOSS

Romain Berrendonner

General Counsel

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Introduction

1. The Legal Prospective

- A. Validity of Exclusion Clauses
- B. Enforceability of Exclusion Clauses

2. The Business Prospective

- A. The Providers' Point of View
- B. The Customers' Point of View
- C. Joint Considerations on Risk Mitigation

Conclusion

Introduction

Excluding Liabilities ...

FOSS Licenses Try to Exclude Liability

- **GPL version 3**

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FOSS Licenses Try to Exclude Liability

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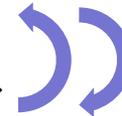
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Content of the clauses

- **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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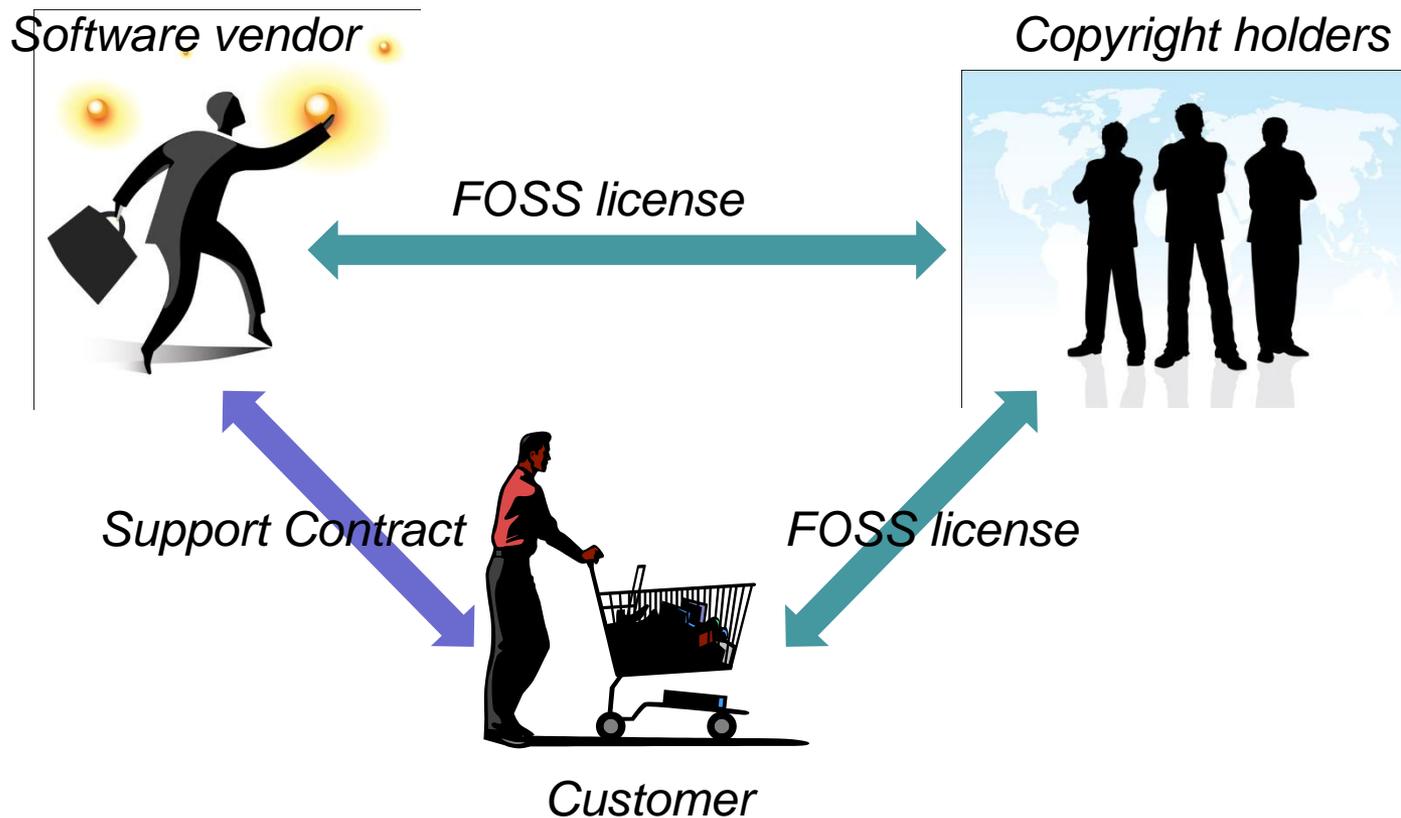
- Office Word EULA

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 ?



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 !

Romain Berrendonner
General Counsel

AdaCore
46 rue d'Amsterdam
F-75009 Paris

berrendo@adacore.com