

EUPL's Rationale & Drafting Process

IPA's Symposium on Software Licensing and IPR

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QUICK INTRODUCTION



BRUSSELS
= Capital of BELGIUM
= Siege of the EUROPEAN
COMMISSION

NAMUR = Capital of WALLONIE
FUNDP = University of Namur
CRID = University Research Center

European UNION



European Union = 27 Countries bound by a treaty
≠ federal state

- UE is a union, not a federal state.
 - Its member states have set up **common institutions** to which they delegate some of their sovereignty, so that decisions on specific matters of joint interest can be made democratically at European level.
 - Amongst the EU institutions :
 - **PARLIAMENT** = REPRESENTS THE PEOPLE
 - **COUNCIL** = REPRESENTS THE MEMBER STATES
 - **COMMISSION** = REPRESENTS THE INTERESTS OF EU AS A WHOLE
- => The Commission Promotes the **Common Interest**



EUROPEAN COMMISSION

→ DG « DIGIT »



- **COMMISSION = divided in Directorates-General (DG) or services**
 - **18 DG related to main policies**
competition / enterprise and industry / internal market / environment / Information society and media / ...
 - **6 DG for external relations**
development / enlargement / trade / humanitarian aid / ...
 - **general services**
anti-fraud office / communication / secretariat general / ...
 - **Internal services**
budget / legal services / data protection officer / ...
and **the DG INFORMATICS = « DG DIGIT »**



DG « DIGIT »

→ IDABC program



- EUROPEAN COMMISSION > DG DIGIT
 - Mission = the definition of IT strategy for the Commission and the provision of a modern, high-performance information technology and telecommunications infrastructure.
 - Services = development of information systems to support the business processes of the Commission as well as the Commission's activities (such as the E-Commission & IDABC programs)
 - IDABC program (Interoperable Delivery of European eGovernment Services to public Administrations, Businesses and Citizens)
 - managed by the IDABC UNIT –
 - to encourage and support the delivery of cross-border public sector services to citizens and enterprises in Europe, [A -> C & E]
 - to improve efficiency and collaboration between European public administrations and [A -> A]
 - to contribute to making Europe an attractive place to live, work and invest.



Why does IDABC promote Free / Open Source Software ?



- It is part of IDABC's legal **mission**
- European administrations develop numerous applications, that could be re-used (sometimes after small adaptations) : why should the tax-payer pay 2 times for the job? => **opportunity**
- The development and cooperation methods, as well as the legal framework (licenses), **fit** perfectly well for trans-border cooperation
- Opening the sources is likely to increase the **quality** of software (review by other specialists, competition,...)
- **FLOSS** is the key feature for interoperability, open standards developments, liberty of choice,...



Open Source Observatory (OSO) & software development



- **IDABC has set up and upkeeps the **Open Source Observatory (OSO)**** (to be upgraded into the Open Source Observatory **and Repository** – OSOR ongoing project)
 - Promotes the spread of good practice in the use of open source software by public administrations
 - Presents facts and references for experts (Case studies / expert reports / news /...)
- **IDABC develops **software applications** :**
 - **CIRCA** (Communication and Information Resource Centre Administrator) = Groupware for sharing information
 - **Elink** = middleware (ensuring communication and mediation between heterogeneous applications)
 - **IPM** (Interactive Policy Making) = Internet Based Tool allowing the administration to receive the citizen's feedbacks on policies, and to organize public consultations.



NEW STEP : Licensing the Commission's software under a Free/Open Source license...



... but under which license?

⇒ [Open Source Licensing of software developed by The European Commission
– report of 16 December 2004 – *Unisys/Crid*]

CHOSING AN EXISTING LICENCE ?

(Considered licenses : GPL / BSD / OSL / Mozilla PL / Cecill)

- **GPL 2.0 was the most interesting for several reasons**
 - Covers more than 2/3 of the existing FLOSS
 - Copyleft license (required by the EC)
 - Widespread / strong developers community /...

However

- Drafted under the law of the USA
- Unwanted effects / Legal uncertainties
- No possibility to modify the license or adapt it to EU law
- English only license (no official translations)



NEW STEP : → EUPL Project



... or CREATING A NEW LICENCE

- Drafted under UE law
- Customized to meet the Commission's needs
- Total control on the license
 - Copyrights on the license
 - Evolution and upgrades
 - Official translations (to every EU member states' official languages)

But uncertainties and possible drawbacks :

- Creating a new license = contributing to the « licenses proliferation » issue
- Acceptation by the open source developers community
- Compatibility issues

⇒ **DECISION : TO CREATE A NEW LICENSE : EUPL**

The report of 16 Dec. 2004 provides a first “skeleton” of license



First Discussion Draft : EUPL V0.1



- Drafting of the V0.1 of the license (**discussion draft**)
 - **OUTSTANDING elements of the EUPL** (present since the beginning)
 - Use of **EUROPEAN** copyright law concepts
 - **PATRIMONAL** (economical) RIGHTS
reproduction / communication to the public / distribution
 - **MORAL RIGHTS** are dealt with in a specific provision
 - **Compliance with / implementation of other EUROPEAN legislations**
 - Such as the E-COMMERCE directive...
 - **Specific requirements of the European Commission**
 - Jurisdiction
 - Applicable law
 - **Clauses *influenced* by Member state's law**
 - Disclaimer of liability
 - No warranty clause
 - Acceptation mechanism



First Discussion Draft : EUPL V0.1



- **Note : specific warranty clause** as regards the **ownership of copyrights**

“Each Contributor warrants that the copyright in the modifications he brings to the Work are owned by him and that he has the power and authority to grant “the Licence” ”

⇒ **Bringing into focus the legal aspects of contributing to a FLOSS project**

⇒ **insisting on the undermining effect that copyright management negligence would have**

! This only applies for copyrights, not for patent rights !



Comments on the First Discussion Draft EUPL v0.1 / PUBLIC Consultation



- **Draft submitted to an expert group, mainly composed of experts from the member states' administrations.**
 - ⇒ [**Comments received on the draft EUPL V0.1 – report of 2005**]
 - **Main comment :**
 - We indeed need a license that is drafted under EU law, (and this is also true for other software than the Commission's)
but
 - We need a **GPL compatible** license
 - **Other comments on drafting or legal issues...**
(technological neutrality, gender neutrality,...)
- **Public release and presentation of the Draft License in June 2005**
 - + organization of a FORUM
 - ⇒ [**Outcomes of the public consultation about EUPL – report of 30 nov. 2005 - Unisys**]



EUPL V0.2 (Draft Version)



- **New outstanding features added to the license**
 - Clause covering **usage of patented** invention when developing or contributing to the development of the software
 - Clause providing the possibility for the European Commission to release **new versions** of the License
 - **Compatibility clause**



Patented software



- **Art. 2, last § :**

*“The Licensor grants to the Licensee royalty-free non exclusive usage rights to any patents held by the Licensor, **to the extent necessary to make use of the rights granted on the Work under his Licence.**”*

⇒ What is doable under the copyrights license must remain doable should patent rights interfere => **Patent rights license**

⇒ A **parallelism** is made between the copyrights license and the patent rights license



New Versions of EUPL



- **Art. 13, last §**

*“ The European Commission may put into force translations and/or binding new versions of this License, **so far this is required and reasonable**. New versions of the License will be published with a unique version number. **The new version of the Licence becomes binding for You as soon as You become aware of its publication.**”*

=> RAISED SOME CONCERNS as regards the Free/Open Source nature of the license

COMMISSION’S STATEMENT

=> [FAQ about EUPL - <http://ec.europa.eu/idabc/en/document/7296/#7>]

- *“The key word in this paragraph is **reasonable**. The European Commission (EC) can indeed update the license, e.g. **to cope with new or previously unknown legal problems** that would otherwise keep the license from functioning as intended”.*
- *“However, any such changes must be reasonable, meaning that **they cannot tamper with basic characteristics of the license**, such as the freedoms it grants you, the liability exemption, or its reciprocal character”.*

■ Introduction to the Compatibility Issue

■ Compatibility **definitions**

■ **Common sense**

1. capable of living together harmoniously
2. that can function or be used together without change or alteration
3. [*comput.*] designating or of
 - a) computer components, software, etc. that can be used with a specified computer or computer system: often in hyphenated compounds
 - b) computers or computer systems that can use the same components, software, etc.

⇒ **Idea of RECIPROCITY**

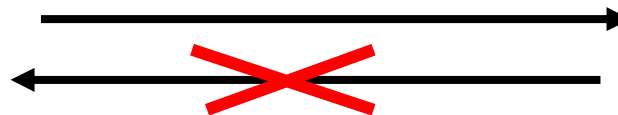
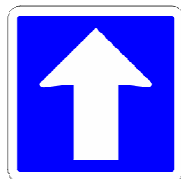
⇒ **no predominance, no alteration of the nature of the compatible elements**

>< ■ **Compatibility of FLOSS licenses**

- “May be integrated in a project that will be licensed under another license”

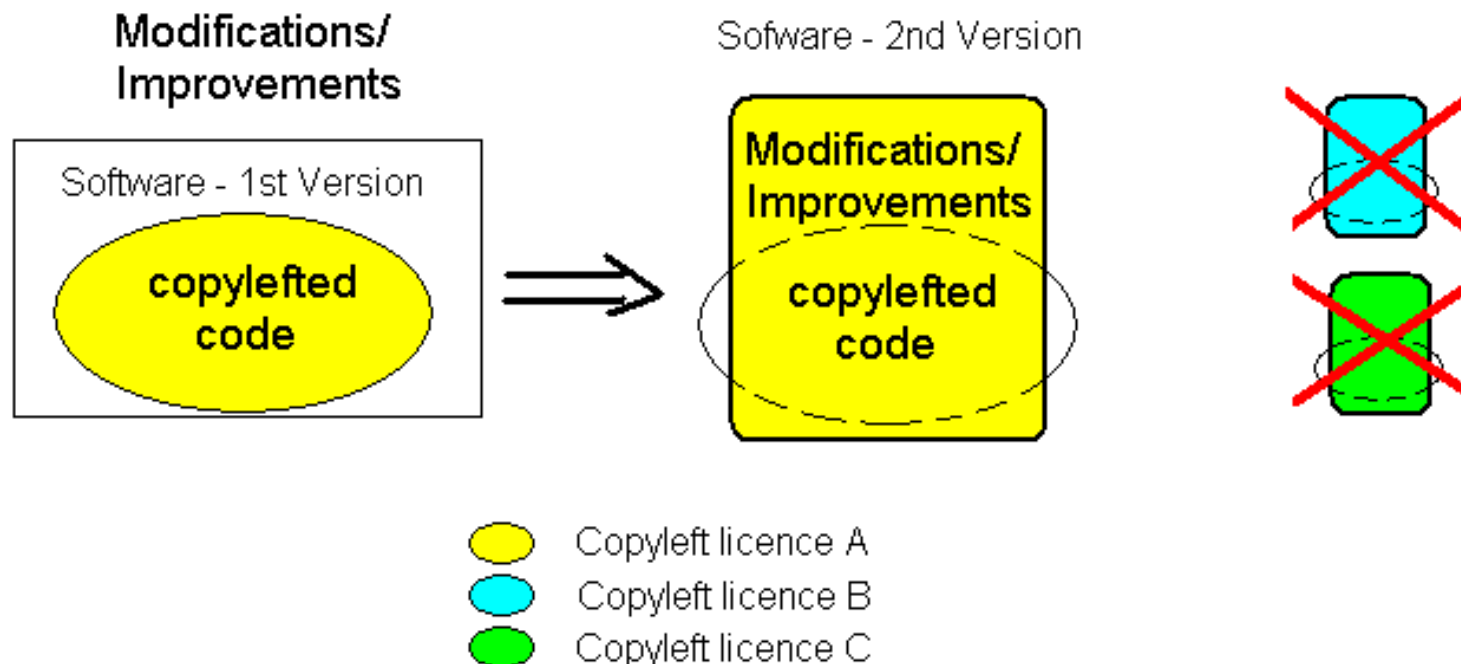
⇒ **COMPATIBILITY = ONE WAY ROAD**

Ex.: « BSD is GPL-compatible » **BUT** “GPL is **NOT** BSD-compatible”



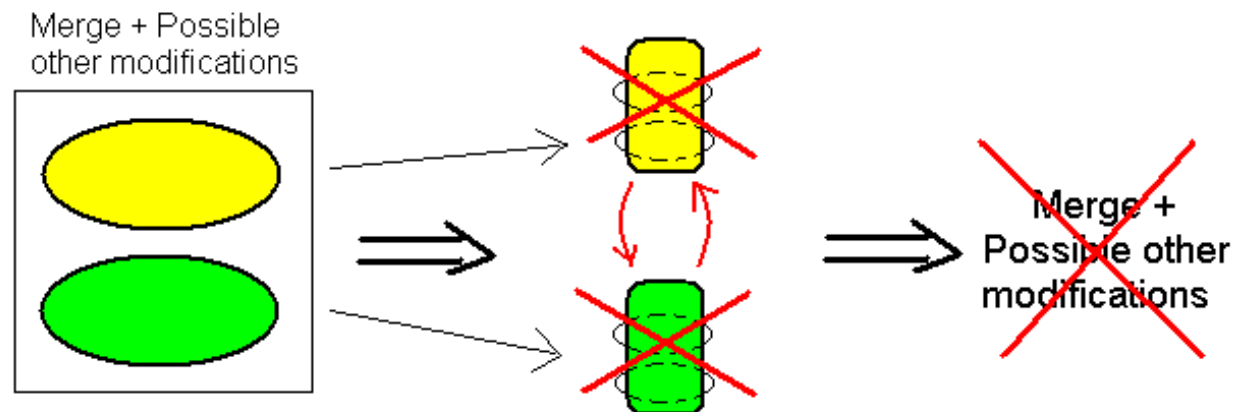
Compatibility Clause

- This is due to the **Copyleft effect** :
 - GPL is copyleft => the result of any merger with GPL code must be licensed under GPL
 - BSD is not copyleft => the result of any merger with BSD code may be licensed under any type of license



Compatibility Clause

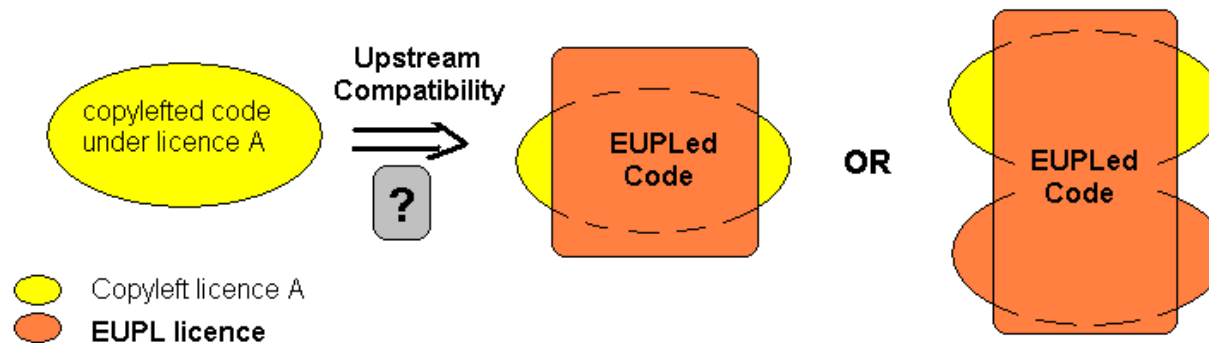
- **Merging some code with copyleft licensed code usually means that the copyleft license is predominant**
 - ⇒ The result of the merger must be licensed under this copyleft license
 - ⇒ The “compatible license” steps aside for the copyleft license
- **Incompatibility** is due to contradictory obligations provided in the copyleft licenses under which the 2 codes to be merged are licensed :



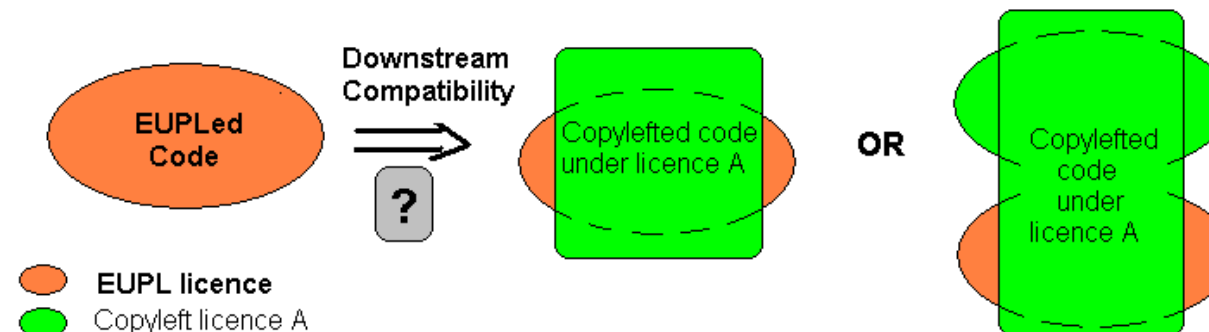
■ EUPL's compatibility issue

⇒ [Study of the compatibility mechanism of the EUPL – report of 11 Sept. 2006 - CRID]

1. Will there be EUPL-compatible licenses (**upstream compatibility**)?

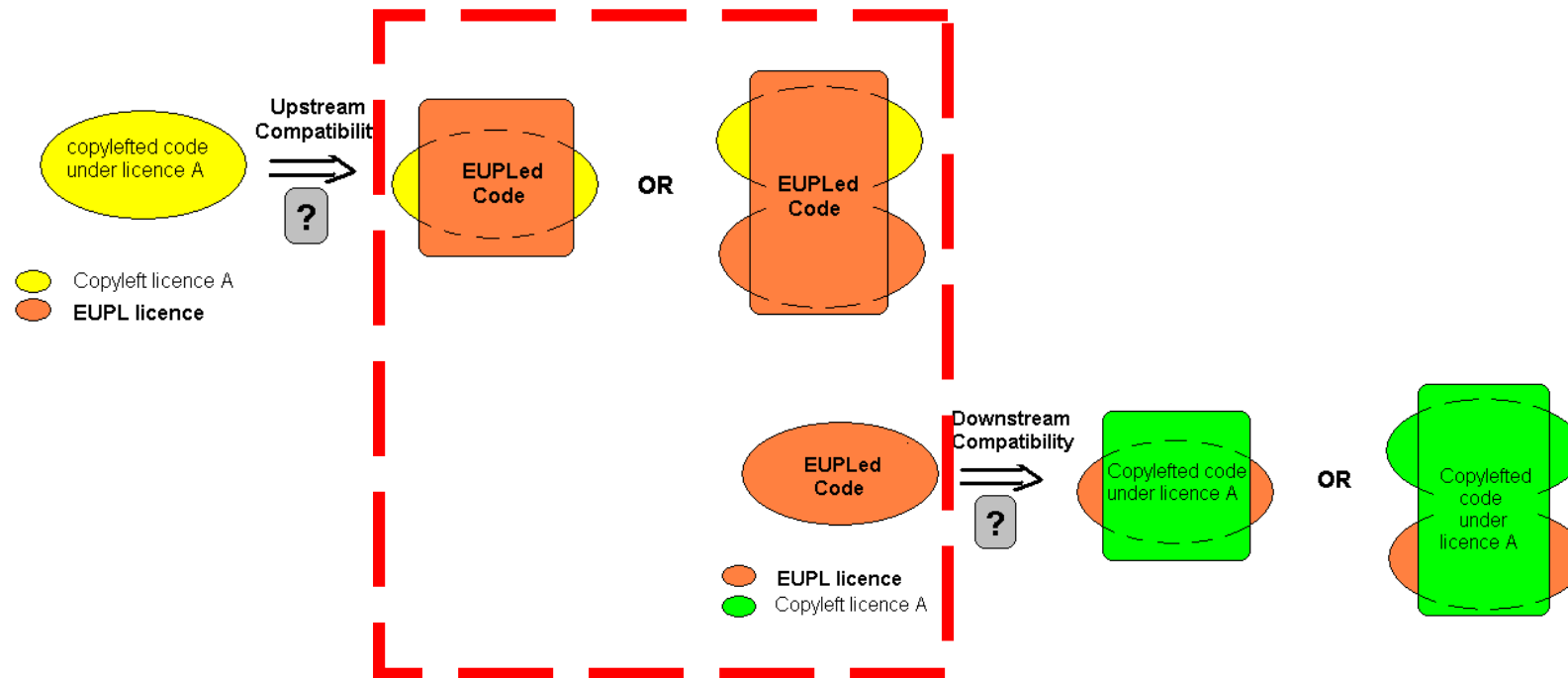


2. Will the EUPL be compatible with other licenses ? (**downstream compatibility**)?



Compatibility Clause

- The STREAM : ... the “one way road” ...

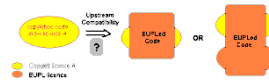


Before EUPL ----- EUPL ----- After the EUPL

THE STREAM = the development time line

■ ... Back to our 2 questions...

1. Will there be EUPL-compatible licenses (**upstream compatibility**)?



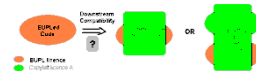
- This depends almost exclusively on the terms & conditions of the upstream license !

(it depends on - the nature of the license : copyleft / not copyleft

- the drafting of the copyleft clause and the obligations of the licensee
- the possible presence of a compatibility clause
- ...)

⇒ This issue cannot be solved in the drafting of the EUPL

2. Will the EUPL be compatible with other licenses ? (**downstream compatibility**)?



⇒ The EUPL being “copyleft”, this issue can be addressed by a compatibility clause



Compatibility Clause of EUPL V1.0



- **Art. 5, § 4**

*“**Compatibility clause:** If the Licensee Distributes and/or Communicates Derivative Works or copies thereof based upon both the Original Work and another work licensed under a **Compatible Licence**, this Distribution and/or Communication can be done under the terms of this **Compatible Licence**. **For the sake of this clause, “Compatible Licence” refers to the licences listed in the appendix attached to this Licence.** Should the Licensee’s obligations under the **Compatible Licence** conflict with his/her obligations under this Licence, the obligations of the **Compatible Licence** shall prevail.”*

- **MIND the “unnatural” definition given to Compatible Licence**

- It refers to the EUPL’s downstream compatibility

⇒ **IN THE EUPL license,**

Compatible Licenses = “ The licenses which the EUPL is compatible to”



Annex of EUPL V1.0 :

List of “Compatible Licenses”

(within the meaning of the EUPL)



FIRST LIST

- *General Public License (GPL) v. 2*
- *Open Software License (OSL) v. 2.1, v. 3.0*
- *Common Public License v. 1.0*
- *Eclipse Public License v. 1.0*
- *Cecill v. 2.0*

Starting from the OSI’s open source licenses list (+- 60 licenses) how did we come up with this 5 licenses list ?

IN A NUTSHELL

STEP 1. Use-oriented Selection:

⇒ Reference to the OSI’s categories :

“Licenses that are popular and widely used or with strong communities” (9)

+ **CECILL** (License prepared by CEA / CNRS / INRIA = important French public institutions)

+ **OSL** (copyleft “type” license that was considered as potential “candidate” in previous reports)



Annex of EUPL V1.0 :

List of “Compatible Licenses”

(within the meaning of the EUPL)



STEP 2. Discarding of non-copyleft licenses:

~~Apache License, 2.0~~

~~New BSD license~~

GNU General Public License (GPL)

GNU Library or "Lesser" General Public License (LGPL)

~~MIT license~~

Mozilla Public License 1.1 (MPL)

Common Development and Distribution License

Common Public License 1.0

Eclipse Public License

OSL

CECILL



Annex of EUPL V1.0 :

List of “Compatible Licenses”

(within the meaning of the EUPL)



STEP 3. Discarding of “weak copyleft” licenses or licenses with a copyleft effect which does not extend to linkage

GNU General Public License (GPL)
~~GNU Library or “Lesser” General Public License (LGPL)~~
~~Mozilla Public License 1.1 (MPL)~~
~~Common Development and Distribution License~~
Common Public License 1.0
Eclipse Public License
CECILL
OSL

LINKAGE OK
“PER FILE BASIS”
“PER FILE BASIS”

**NB: => Remaining licenses have a copyleft clause based on the notion
« DERIVATIVE WORK »**

RESULT

GNU General Public License (GPL)
Common Public License 1.0
Eclipse Public License
CECILL
OSL



Updating the Compatibility List



- **Proposed criteria for possible additions to the list**
 - Practical / minimal **use** of the license
 - **Recognized Free / Open Source Software license** (either by the FSF or the OSI)
 - **Strong copyleft license**

AND

- + a **public administration** of a Member State of the European Community **or developers partially or totally funded** by the European Community or one of its Member States **make use of this license** (as licensee or as licensor) for existing code

(and express the willingness **either**

- to include this code, or part of it, with or without modification, inside EUPLed code, **or**
- o to include EUPLed, with or without modification, code inside the code under this license.)



What about EUPL V1.0 and...



■ Application Service Providers (ASP):

- This issue was not specifically addressed when drafting the license *up to now*
- BUT :
 - ART 1 Definitions :
 - **Distribution and/or Communication**: any act of selling, giving, lending, renting, distributing, **communicating, transmitting**, or otherwise making available, on-line or off-line, *copies* of the Work at the disposal of any other natural or legal person.
 - ART 5 Copyleft clause :
 - « ... **this Distribution and/or Communication will be done under the terms of this Licence** »
- **CONCLUSION**
 - ⇒ the trigger of the copy left clause is *willingly* very broad
 - ⇒ one could interpret that ASP are included in it



What about EUPL V1.0 and...



- **Digital Rights Management measures (DRMs) and/ or Technical Measures (TMs) :**

(“Tivoization” / hardware lock up issue)

⇒ There is no clause in the EUPL dealing with DRM / TM



Adoption of the EUPL V1.0



- **EUPL adopted on 9 Jan. 2007: Decision C(2006) 7108**

- **Released in 3 languages :**
 - **French**
 - **English**
 - **German**

- **CIRCA and IPM software released under EUPL V1.0 on Feb. 2007**



NEXT STEPS



- **Translation** of the license into the 20 other official languages of the EU.
 - First translation made by the EC translation services
 - Reviewed by national experts
 - Workshop with these experts (25 Jan. 2008)
- Considering the **upgrading** of the license
 - The translation work raised new issues about the drafting and some effects of the license under different national laws
 - Updating the compatibility list (GPL3 ?)
 - Addressing other specific issues (asp, version clause,...)

⇒ **CONCLUSION : the work remains ONGOING**



Conclusion



- **EUPL is the first and only open source license**
 - Authored by the European Commission
 - Officially valid in multiple EU Member States languages
 - Targeted for European public sector legal services with:
 - Full « European » copyright coverage (communication / moral rights)
 - EU compatible liability and warranty clauses
 - EU compatible applicable law and jurisdiction clauses
 - Compatible with GPL 2.0 and other Copyleft Licenses

- **Even if a first official version was released, there is still work to be done...**



Information Sources



- **IDABC website**
<http://ec.europa.eu/idabc/>
 - **Preparations for the EUPL V 1.0 - Studies and Drafts**
<http://ec.europa.eu/idabc/en/document/5425>
 - **European Union Public Licence (EUPL v.1.0) + working documents**
<http://ec.europa.eu/idabc/en/document/6523>
 - **Study of the compatibility mechanism of the EUPL – report of 11 Sept. 2006**
<http://ec.europa.eu/idabc/servlets/Doc?id=27472>
 - **FAQ about EUPL**
<http://ec.europa.eu/idabc/en/document/7296/#7>
- SEE ALSO**
- **Study on the Economic impact of open source software on innovation and the competitiveness of the Information and Communication Technologies (ICT) sector in the EU**
<http://ec.europa.eu/enterprise/ict/policy/doc/2006-11-20-flossimpact.pdf>



www.CRID.be

Legal researches in Belgian, EU and International law



- **Research center in IT and Law – exists since 1979**
- **Attached to the University of Namur (FUNDP)**
- **Director : Yves POULLET / Team : +- 30 members**
- **5 Units :**
 - **Intellectual property**
 - IP in the Information Society
 - **Freedom in the Information Society**
 - Privacy / E-government / E-criminality / IT-Medical law /...
 - **E-Commerce**
 - E-Contracting / Evidence-law in IT / E-payment /...
 - **Electronic Telecommunication**
 - EU and Belgian telecom legal framework
 - **Technology and security**
- **Main activities : LEGAL RESEARCHES / TEACHING**
 - Working on European research projects (EU financed)
 - Working on national projects
 - Teaching / dissemination activities
 - ...



Thank you for your attention !



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GPL 3 in Europe...



- During the **drafts discussions** : process followed by
 - some IT-specialized magazines.
 - open source communities, which expressed their expectations, their point of views,...

- At the **release** (end June 2007):
 - Reaction of :
 - The communities and FSF supporters : they welcomed the GPL3 (even though some of them where disappointed that the ASP loophole was not dealt with)
 - The IP lawyers :
 - tore their hair out trying to understand the license (...ongoing process...)
 - “wait and see”...
 - The “industry” : seemed mixed but, anyway, not very talkative : no clear public statements, no clear stands (except some exceptions... *cfr. infra*)



- We quickly entered in sort of a “**cooling off**” period
- It is definitely too soon to draw conclusions on the acceptance of the GPL3 in Europe
- There does not seem to have a specific “European” reaction towards the GPL3

- Some first reactions...



PHILIPS' clearcut position : Mr A. Engelfriet's articles



- **A. Engelfriet**
 - Lawyer & Patent Attorney at Philips (Coordinates Philips' use of Open Source Software)
 - “**Uit principe : de GNU General Public License (GPL) versie 3**”, *Computerrecht* 2007, p. 146 et seq.
 - “**GPL versie 3 is in feite tegen open source**”, available at www.livre.nl

- “**GPL version 3 is, in fact, against open source**”
 - “**GPL2 was FOR :**
 - *For collaboration / For the sharing of the code*
 - *That is why Open Source is a success -> motor for innovation*”
 - “**GPL3 is AGAINST:**
 - **Against Patents :**
 - *However, this will not rid users and developers of patents*
 - *+ Reference to Open Invention Network and OSDL Patent Commons*”

- A. Engelfriet
 - **“GPL3 is AGAINST:**
 - **Against Microsoft**
 - **Criticizes the the anti – “Microsoft/Novell like” - deal clause**
 - **Strategy to “attack” Microsoft = relies on the same Grokster case law that was criticized by FSF...**
 - **Against DRMs**
 - **“GPLed Software is no part of DRM systems” : this does not make sense : DRM techniques would not be developed on “sharing bases” => would certainly not be made with open source code**
 - **Against Signed Code**
 - **Signed Code is used in order to prevent problems (ex.: think of the mobile phone that could interfere with an airbag because its power or bandwidth have been modified)**
 - **The result of the license extends to the hardware !**
 - **Mr Engelfriet concludes : “the creation of GPL3 risks to create FORKs” (divisions between GPL 2 and GPL 3 users...)**



Mr. Paapst's neutral position



- Mr H.M. Paapst
 - *Lawyer at Yacht Groningen (Dutch interim Agency)*
 - **“EUPL en GPL: Nieuwe licenties in 2007”**

- *“The modifications in the GPL3 are not unacceptable”*
 - *Nobody was compelled to use software under GPL2...*
 - *Nobody is compelled to use software under GPL3*

 - *It's just a **matter of business opportunity***
 - *the use of software under GPL3 or not will be decided according to the same economical reasons.”*



L. Laffan (VisionMobile) : prudent but seems optimistic



- **Mrs L. Laffan**
 - **Senior Analyst at VisionMobile (consultancy in the wireless sector - UK)**
 - - **“GPL2 vs GPL3”, available on VisionMobile’s website**
- **“it would be more advantageous to choose GPL3 over GPL2 for the additional patent protection it provides”**
- **“This *practical advantage outweighs other more intangible concerns* as understood in these early days of GPLv3 interpretations and understanding, notwithstanding the fact that the full implications of the anti-tivoisation section are as yet unknown”**