

# From the mailing list...

Presented by

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# Questions

- **Distribution of licence text: electronic / online distribution?**
- **Source code: online distribution?**
- **“AppStores” and open source**

# Questions

**Distribution of licence text: electronic / online distribution?**

# Distribution of licence text

## Why the debate?

- Environmental concerns
  - Unnecessary paper
- Impact on user experience
  - Carefully-designed “out of box” experience
- Or other reasons?

# Distribution of licence text: what do the licences say?

## GNU GPL 2.0

s1: You may copy and distribute verbatim copies of the Program's source code ... provided that you ... give any other recipients of the Program a copy of this License along with the Program.

## GNU GPL 3.0

s4: You may convey verbatim copies of the Program's source code ... provided that you ... and give all recipients a copy of this License along with the Program.

**Obligation in each case: “give... a copy... along with the Program”**

## Distribution of licence text: “give... a copy... along with the Program”

### Must it be a physical (i.e. paper) copy?

- Wording simply “a copy”
  - nothing to suggest a physical copy is required
- Reality check: online software distribution

### Electronic copy fine

- E.g. embedded on device, accessible via interface / browser

*What about a URL to an online copy of the licence?*

## Distribution of licence text: “give... a copy... along with the Program”

### Is a URL to an online copy sufficient?

- s1: “along with the Program”
  - Along: *together, in accompaniment, in addition*
- Preamble: “And you must show them these terms so they know their rights.”
  - Cannot “give” in a way which a user cannot access
    - What if electronic file in non-Free format? Or just an obscure format?

### URL insufficient: not “along with the Program”

- Handling of “edge cases”?
  - E.g. individual files online

## Distribution of licence text: “give... a copy... along with the Program”

### Is a URL to an online copy sufficient?

- Electronic copy fine – aim for an accessible format
- URL insufficient: not “along with the Program”



# Questions

**If distributing GPL'd code in object form, is online availability of the source code sufficient?**

# Online access to source code

**GNU GPL 3.0: s6 (simplified):**

**Permitted to convey object code:**

- **Physical product**
  - on a **durable physical medium**
  - accompanied by a **written offer** ... to give:
    - on a **durable physical medium**, or
    - **access to copy the Corresponding Source from a network server.**
- **No physical product**
  - **equivalent access**
  - **peer-to-peer transmission**, provided you **inform** other peers
- (Also non-commercial and occasional)

# Online access to source code

- **GNU GPL 3.0:**

- Relatively easy:

- Accompany product with written offer, to give access from a network server

# Online access to source code

## GNU GPL 2.0: s3:

**Can distribute in object form, provided that you accompany distribution:**

- **a) with the complete corresponding machine-readable source code ... on a medium customarily used for software interchange; or,**
- **b) with a written offer, valid for at least three years, to give any third party, for a charge no more than your cost of physically performing source distribution, a complete machine-readable copy of the corresponding source code ... on a medium customarily used for software interchange; or,**
- **c) [non-commercial only]**

# Online access to source code

## s3, GNU GPL 2.0 requires

- written offer
- to give
- on a medium customarily used for software interchange

# Online access to source code

- **Written offer**
  - If URL is provided on paper / electronically with product, is that sufficient?
  - Need the writing actually say “valid for three years” etc.?
- **To give**
  - Is making code available for download “giving”?
    - Clearly acceptable under GNU GPL 3.0
- **On a medium customarily used for software interchange**
  - Is making available online a “medium”?
    - Does it matter?!
- **Not everyone has Internet access?**
  - True – but GNU GPL 3.0 permits online access to source code
  - May have made sense when GNU GPL 2 drafted, with Internet access less common
    - But issue is simply one of drafting?

# Online access to source code

## Side issue: can someone else make the source code available for me?

- E.g. if I procure from a supplier, but distribute myself, can supplier make source code available?
- Intention: ensure source code is available to anyone with object code
  - Preservation of Freedoms
  - Who actually provides it is irrelevant as long as distributor of binary remains liable
    - Liability is important – legally enforceable responsibility
- Nothing in GNU GPL 2.0 or 3.0 prevents sub-contracting of obligations
  - But distributor / conveyor of object code remains liable
    - Consider nature of relationship with sub-contractor – apportionment of risk etc.

## Yes: distributor / conveyor can sub-contract source code distribution

- (English law: one is permitted to assign benefits, but not obligations
  - But this is not an assignment – it is subcontracting)

# Questions

## “AppStores” and open source licensing obligations



# “AppStores” and open source licensing obligations

- What is an “AppStore”
  - Not a legal concept!
  - Generally, a centralised software distribution system, containing “apps” from a range of developers
- Some examples:
  - Apple's iTunes store / AppStore
  - Android Marketplace
  - Nokia's Ovi store
  - Vodafone's 360 “Apps”
  - Netgear
- Store likely to contain a mixture of applications
  - Store provider's applications
  - Third party applications
    - “user generated content”

# “AppStores” and open source licensing obligations

- What’s the problem?
  - Distribution of a copyright work requires a licence
  - Application developer may not be able to grant a licence to all parts of its app
    - E.g. GNU GPL: “flow-down” of licences from upstream rightsholders
  - If AppStore owner is not providing written offer / accompanying with source code, likely to infringe third party copyrights, unknowingly.
- Not all applications are the same:
  - Store provider's applications
    - Provider liable for any infringements – business as usual
  - Third party applications
    - Intermediary liability exemption?
      - eCommerce directive: Art. 14 (Europe)
      - Digital Millennium Copyright Act 17 U.S.C: s512(c) (USA)
      - Copyright Act 1968: s112E (Australia)

## “AppStores” and open source licensing obligations

- Intermediary liability exemption for hosting services
  - General principle that service provider not liable for content uploaded by third party
  - Unless aware of infringement
    - Or aware of circumstances from which infringement is apparent
  - Once becomes aware, duty to act promptly to remove infringing content
- Rationale: encouragement of third party intermediary service providers
  - Protect those who are neutral to the infringement
  - Encourage hosting providers etc.
  - If ISP unaware of infringement, hosting exemption should prevent liability
- Only protects “passive” intermediaries
  - AppStores which select, or moderate content, unlikely to be considered “passive”
- Does not affect liability of third party infringer (i.e. the “underlying” infringement)

# “AppStores” and open source licensing obligations

## What can open source projects do, if feel rights are being infringed?

- Generally, exemption only applies when ISP not aware of infringement
  - Make ISP aware
  - (Even if ISP likely unable to benefit from exemption, notice ensures this)
- Check whether store has notice and takedown procedure
  - Often easiest to follow store's procedure
    - Sense check – if convoluted or cumbersome, consider whether compliance is a requirement
  - Some jurisdictions require prescribed form of notice
    - e.g. US (DMCA s512(c)(3))
  - Others have details which a court should take into account
    - E.g. Electronic Commerce (EC Directive) Regulations 2002 s22

# “AppStores” and open source licensing obligations

- Make it as easy as possible:
  - Identify application
    - If identifier (e.g. URL), provide it
  - Identify the right in question
    - e.g. literary work, comprising code in [application framework]
  - Confirm you are the owner of the copyright (or else entitled to take action)
  - Confirm that distribution of the application infringes your copyright
  - Make your request: identify that you require the application removing from the store
- When aware, ISP must act promptly to remove allegedly infringing material
- High likelihood that ISP will simply remove the application in question
  - If you want the source code, probably best to contact developer directly
    - ISP unable to provide code which it does not have
    - ISP might communicate with developer simultaneously, but questionable
- Act of last resort?
  - Engage with developer first?
  - Almost – last resort is suing the ISP

# “AppStores” and open source licensing obligations

## ISPs: making your store Free software friendly

- Do you place restrictions on freedoms?
  - Do developers have to use licence terms of your choosing?
  - Do developers have to pass particular terms to recipients?
  - Do developers have to maintain confidentiality / include non-Free software?
    - Even if non-mandatory, if you offer an SDK, are the samples Free software friendly?
- How will source code distribution work?
  - “equivalent access” requires distribution of source via application store
    - But is this really helpful, particularly if only able to access store on mobile device?
- More to freedom than “just” licensing
  - Application and data portability

# To conclude

## Distribution of licence text: electronic / online distribution?

- Electronic accompaniment fine; URL to licence insufficient

## Source code: online distribution?

- GNU GPL 3.0: fine
- GNU GPL 2.0: questionable

## “AppStores” and open source

- AppStore provider might be liable for infringement, unless merely passive
- Probably responsive to takedown notices, but unlikely to have source code
  - If want source code, likely to need to contact developer

# Questions?