

GPL-3.0 in the Chinese Intellectual Property Court in Beijing

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Abstract

With the increasing use of Free and Open Source Software (FOSS) in the world, the licensing issues and disputes regarding such licenses have been litigated in various jurisdictions. In the past, these lawsuits were concentrated in Europe and the United States, but less so in the Asia Pacific region. However, in 2018, the specialized Intellectual Property Right Court in Beijing, China, acting as a court of first instance, issued a decision in a software copyright infringement lawsuit related to FOSS. The defendant chose to invoke the copyleft mechanism in the GNU General Public License 3.0 (GPL-3.0) license as a defense against claims of copyright infringement. Although the court did not directly interpret the GPL license at this stage, the decision strongly implies that the GPL and the other FOSS licenses can be treated as valid in China. Even so, quite a number of details regarding the use of the GPL in China still require clarification, included as to how the license can substantially be enforced and implemented.

Keywords

Copyleft, GPL, derivative work, copyright infringement

Although most of the academic opinions are positive,¹ many commentators and practitioners did have doubts about whether a Free and Open Source Software license written in English could be enforced legally in China. After all, in 2014 the China Open Source Software Promotion Union (COPU)² once published a draft of “COPU Open Source General License Agreement V.1.0”.³ The text of COPU 1.0 was written purely in Simplified Chinese language and was meant to be used as an alternative solution in China for Chinese Free and Open Source Software projects. The COPU 1.0 actually was not used in any released Free and Open Source Software project due to the resource limitation for project development, and this license lasted only at the stage of public comments. However, the draft and publication of the COPU 1.0 reflected concerns as to whether Free and Open Source Software licenses written in foreign languages could be enforced in full in China without

1 As discussed in YANG XIA, *Introduction to Software Protection under Chinese Law*, <http://ifosslawbook.org/china/>, Section "Analysis of FOSS Under China Law".

2 <http://www.copu.org.cn/about> [retrieved June 2018]

3 <https://www.oschina.net/news/52060/coupl-license-comment> [retrieved June 2018]

obstacles. Back to 1991, it was stipulated in the "China Regulation on Computers Software Protection", article 18, that in the case of a license to exploit software copyright, the license shall be made in formality according to the related laws and regulations of the China government. This requirement for formality has been removed in the revised version of the regulation, however some people still have doubt that whether or not a software license or contract not written in Simplified Chinese language could be fully applied in disputes during trial proceedings. This doubt was one of the reasons that the COPU group, supported by the China government industrial administration departments, tried to to prepare a new FOSS license suite purely written in Simplified Chinese on their promotion activities. This doubt remained, but now it seems to have been answered in the recent case of DCloud vs APICloud.⁴ The plaintiff in this lawsuit is Digital Paradise (Beijing) Network Technology Co., Ltd. (DCloud), and the defendants are Pomelo (Beijing) Technology CO., LTD. & Pomelo (Beijing) Mobile Technology CO., LTD. (APICloud). The case, involving civil software infringement litigation, was filed in 2015 and a decision was handed down in April 2018. In this lawsuit, the GNU General Public License version 3 (GPL-3.0), especially the copyleft mechanism in it, was reviewed by the trial judges of the trial bench. The decision of the court affirmed the enforceability of the license.

Plaintiff's Claim

The plaintiff DCloud asserted that in September 2014 the defendant APICloud copied and adapted three independent plug-ins of plaintiff's HBuilder software development kit into the defendant's released APICloud toolset. The registered names of the allegedly infringed plug-ins in order in National Copyright Administration of China were "CIM plug-in", "ACR plug-in", and "HTML code drawing in real time plug-in". The plaintiff alleged it was the copyright owner of the HBuilder software, and that HBuilder was developed and largely released as shareware for limited use at no charge. While some of the modules and plug-ins in the HBuilder project were provided under certain FOSS licenses, including the GPL, these three allegedly infringed plug-ins were independent software works not provided under FOSS license. As such, the allegedly unauthorized copying and distribution of these three plug-ins infringed the right of reproduction, the right of alteration, and the right of information network dissemination protected under Article 9⁵ of the Copyright Law of the People's Republic of China (2010 Amendment). Based on that, the plaintiff sued for the judgment of the court, demanding that the defendants publish an apology statement on its website www.apicloud.com and also on the other appointed information platforms for one month. Other than that, plaintiff also demanded RMB 3.5 million as compensation for copyright infringement, economic losses and legal costs.

Defendants' Defense

The defense of Pomelo (Beijing) Technology CO., LTD. & Pomelo (Beijing) Mobile Technology CO., LTD. (APICloud), as the defendants, was that part of the modules and plug-ins in the HBuilder project released by the plaintiff were derived from previously existing GPL-3.0-licensed components, such as "Aptana"⁶ originally developed by Appcelerator, INC. under GPL-3.0 as a module in the Eclipse framework. Therefore, HBuilder project should be considered open source software made available under the GPL-3.0 license, and anyone has the right to use the code and create derivative works based on it under the terms of the GPL 3.0 license. Under this understanding of GPL-3.0, defendants asserted that plaintiff's consent was not required to use parts of the source codes from the HBuilder project for the APICloud project, and this kind of usages of software licensed under GPL-

4 (2015)京知民初字第631号 / (2015) Jingzhi MinchuZi No. 631 of 22/03/2010

<http://www.bjcourt.gov.cn/cpws/paperView.htm?id=100734294859&n=1> [retrieved Jan. 2019]

5 <http://www.lawinfochina.com/Display.aspx?lib=law&Cgid=127326#menu1>

6 <https://github.com/aptana/studio3>

3.0 should not constitute infringement of copyright. In addition, even if the disputed activities constituted infringement, the compensation requests have no facts or legal basis: APICloud project and DCloud project are both provided for free, the three disputed plug-ins are not core software of plaintiff, only minor parts of DCloud project are used, and defendants exhibited no subjective malice. Moreover, defendants asserted that there was no legal basis to demand publication of an apology statement. On account of the reasons above, the defendants requested that the court dismiss the plaintiff's claim.

Court Forensics and Judgement

The facts and legal judgements of the court in this case focus on copyright substantial similarity and forensics determining the relationship between the software. The identification task was entrusted to the Judicial Authentication Institute for IP Rights of CSIP.⁷ Based on its analysis, the Authentication Institute reported:

On the first phase of the identification work required by the claimant, between the source codes of HBuilder and APICloud on plug-ins with the same or similar functions, for the CIM plug-in, there are 29 of the 30 source code files in the APICloud project being identified as substantially similar to the HBuilder project. For the ACR plug-in, 18 of the 23, and for the HTML code drawing in real time plug-in, 44 of the 56.

Then on the second phase of the identification required by the defendants, the source code files found similar between HBuilder and APICloud, once more were verified with the third party's and Free and Open Source Software components prior to the release date of HBuilder provided by the defendants, for the CIM plug-in, there is none of the 29 source code files being identified as substantially similar to the previous Free and Open Source Software components. For the ACR plug-in, 13 of the 18, and for the HTML code drawing in real time plug-in, 2 of the 44.

In accordance with the reports of the forensics above, given that 13 of the 18 between the ACR plug-in and the Free and Open Source Software components are similar, one might argue the GPL derivative issue for the ACR plug-in can be studied further, however, the judges of the trial bench ruled in the written judgment that "Of the aforementioned source code of similarity, only a small part of the source code is the same as the third-party or Open Source Software provided by the defendants." Hence, the conclusion by the court (discussed further below) is that the three plug-ins in dispute are independent copyrighted works of plaintiff, not derivative works of GPL-licensed software, the court of trial held that defendant infringed plaintiff's right of reproduction, the right of alteration, and the right of information network dissemination protected by the Copyright Law of the People's Republic of China. Therefore, the court ruled that the copyright infringement shall be compensated in the amount of RMB 1.25 million in economic losses and RMB 39,480 in lawsuit costs.

The Crucial Point

The crucial point of this lawsuit is that the defendants have proposed the copyleft mechanism in the GPL-3.0 as their primary defense method by claiming that the HBuilder project as a whole should be made publicly available under the GPL-3.0 license, and also alleged that their modification from the HBuilder project to the APICloud project are lawful acts permitted by the GPL-3.0 license. As for the GPL-3.0, the court of trial did not, in principle, deny the validity of it as a license agreement

⁷ Judicial Authentication Institute for Intellectual Property Rights at China National Software and Integrated Circuit Promotion Center (CSIP) of Ministry of Industry and Information Technology, at: <http://www.csipsfjd.org.cn/>

during the whole trial process. The court even introduced many paragraphs of the GPL-3.0 license in the written judgment for the factual section, for example, these contents of the GPL-3.0 have been translated into Chinese and quoted in the legal reasoning:

0. Definitions.

“The Program” refers to any copyrightable work licensed under this License.

[...]

To “modify” a work means to copy from or adapt all or part of the work in a fashion requiring copyright permission, other than the making of an exact copy. The resulting work is called a “modified version” of the earlier work or a work “based on” the earlier work.

5. Conveying Modified Source Versions.

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:

[...]

c) [...] This License will therefore apply, along with any applicable section 7 additional terms, to the whole of the work, and all its parts, regardless of how they are packaged
[...]

d) [...]

A compilation of a covered work with other separate and independent works, which are not by their nature extensions of the covered work, and which are not combined with it such as to form a larger program, in or on a volume of a storage or distribution medium, is called an “aggregate” if the compilation and its resulting copyright are not used to limit the access or legal rights of the compilation’s users beyond what the individual works permit. Inclusion of a covered work in an aggregate does not cause this License to apply to the other parts of the aggregate.

Overall, the court of trial supported the validity and enforceability of the terms of GPL-3.0 and seemed to be willing to issue a decision based on the relevant provisions of the GPL-3.0. The main reasons presented by the court of trial in the written judgement are:

1. Based on the two identification results, the three plug-ins in dispute among HBuilder project and APICloud project do have quite a number of similarity issues of source code citation and modification, and only small parts of those similar source code have similarity issues with previous third party and other Free and Open Source Software. And for that reason, the court held that APICloud has copied and modified those plug-ins of HBuilder project for defendant’s APICloud project.

2. Based on the copyright registration certificates for those three plug-ins, and plaintiff’s explanation, the court held that plaintiff is the copyright owner of those three plug-ins, and those three plug-ins are separate and independent works and can be executed independently. This finding was based on

the fact that there is no GPL license text in the subdirectories of the three plug-ins or in the root directory of the HBuilder project. Although one other subdirectory of HBuilder contains GPL license text, the court held that that license text does not apply to the three plug-ins in dispute. Furthermore, the court held that all the three plug-ins are not derivative works or modifications referred to in the GPL license, which would have required the source code of the plugins to be made available publicly under the GPL license.

3. Based on above 1 and 2, the court further held that defendants' defense that Claimant's software shall be Free and Open Source Software was not supported. As such, the court held that defendants infringed copyright owner's rights of copying, adaptation and information network dissemination.

Judging from the grounds of judgement above, this decision made in this first instance can still be reasonably appealed to a higher court. However, if the defendants can't substantiate that the three plug-ins in disputes are derivative works of GPL licensed software rather than independent works, such as by deeply analyzing the interaction relationship between the GPL licensed parts and the other parts, including the three plug-ins in dispute, as well to assert that license text is not attached doesn't avoid corresponding codes for the derivative works to be made available publicly under GPL license. Even if the appeal is allowed, the defendants still have much to do to turn the tide in the followed proceedings. Usually the rulings of the Beijing IPR court are based on the reliance and respect for the forensics made by the CSIP. That means if APICloud can't make a credible argument regarding the copyleft effect for the appeal, both in legal inference and technical analysis for explaining why the original judgment is in contravention of the laws and regulations, their appeal might be treated as meritless and not favored by the trial court on appeal. Still, if those evidences are successfully substantiated, it will make the appeal case to be very complicated, as the court would be required to determine what constitutes a derivative work under GPL license and, if software is considered a derivative work of GPL-licensed software, then whether or not the defendants can directly procure and use these source codes under GPL license without additional permission of the Claimant as they asserted, and whether the defendants can require the Claimants to provide the related source code under the GPL.

According to the online article⁸ published by the plaintiff's attorney in this case, although the defendants proposed to invoke the copyleft mechanism of GPL-3.0 as its defense, the arguments of the APICloud group were weak and not persuasive. That is, the defendants neither can explain what is their interpretation for the copyleft mechanism of GPL-3.0 in detail, nor can respond properly to the distinction between covered work as a whole and aggregation as separate parts in a compilation solution proposed by the plaintiff. In brief, assuming that the Hbuilder software contained some GPL 3.0 software, the court could either have viewed the Hbuilder software as subject to the GPL 3.0 license as a whole or instead as an aggregate not subject to the GPL 3.0 license. In this lawsuit, since the involved plug-ins are treated as separate works not based on prior GPL 3.0 software according to the entrusted forensics, the burden of persuasion fell upon the defendants, and the defendants failed to persuade the judges in court their way is the right way to do the copyleft interpretation, the judges made the final decision on the side of the plaintiff.

In Conclusion

In comparison with other international Free and Open Source Software litigation, this verdict does not provide much further analyses and in-depth explanations of how the Free and Open Source Software licenses should be evaluated and enforced in judicial proceedings. However, from a symbolic point of view, this case does have the value of being recorded and tracked. The main

⁸ *Will your cheese be taken away on account of Open Source licenses? - The constitution of copyright infringement of computer software involving open source licenses*: <http://www.unitalen.com.cn/html/report/18040838-1.htm> [retrieved June 2018]

reason is that the Beijing Intellectual Property Right Court is a specialized court in the intellectual property right field, the presiding judge and the other two People's Assessors in this trial, comfortably showing their support for the validity of GPL-3.0 without raising any doubt or objection. The disputed plug-ins in this ruling such as CIM plug-in, ACR plug-in, and HTML code drawing plug-in alleged as copyright infringements by the plaintiff are deemed to have no copyleft issues based on the CSIP forensics in the conclusion. However, because the defendants claimed the copyleft mechanism as their defense in the early stage, for the first time, the differences between a “covered work” and an “aggregate” for the Modified Versions of the Programs licensed under GPL-3.0 have been introduced by the Beijing IPR court. This lawsuit can be regarded as the beginning of judicial interpretation of Free and Open Source Software licenses in China.

As a matter of fact, the APICloud group, as the defendants of this case, have already made a positive statement⁹ that they are appealing to the higher court for the second instance. In this statement, the APICloud group did admit that due to the lack of due diligence, back to 2015, when part of the plug-in codes from the HBuilder project were imported into the APICloud project, they didn't do it very well on filtering out the third party modules with no Free and Open Source licensing notice. However, after the dispute occurred and was notified by the DCloud in the same year, they subsequently released a new version of the APICloud project, which all has been licensed under GPL-3.0, and provided publicly to anyone on the hosting page of APICloud project onto GitHub¹⁰. By now, the APICloud group still believe that on account of the application and interaction method to the original GPL-3.0 modules in the HBuilder, the HBuilder project as a whole should be made available under GPL-3.0 without a difference. Therefore, more distinction and clarification for the covered scope of GPL-3.0 in the scenario of derivative or adaptation will likely be further discussed in the legal proceedings to come, and the subsequent effects and impact are worthy of continuous observation.

About the authors

Lucien Cheng-hsia Lin, legal adviser both of Open Culture Foundation and Gemly Int'l Intellectual Property Right Office, has been participating in the Open Source, Open Data, and Creative Commons Licenses interpretation and clarification among the local communities, official agencies, and companies in Taiwan for more than 10 years. He is best known for being the main proposer and drafter of the "Open Government Data License Taiwan 1.0" (<https://data.gov.tw/license>), with an one-way CC BY 4.0 switching mechanism implemented, which can make most of the materials on Taiwan Open Data portal available under CC BY 4.0 license.

Navia Shen, legal counsel of Huawei Technologies Co., Ltd, has been working in Huawei for copyright and open source related affairs for about ten years.

⁹ <https://community.apicloud.com/bbs/thread-86486-1-1.html> [retrieved June 2018]

¹⁰ <https://github.com/apicloudcom/APICloud-Studio> [retrieved June 2018]

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