What do courts think the GPL means (so far)?

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1. **Introduction**
2. Short Vocabulary Lesson
3. Review Cases & Discussion

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- I am a Lawyer for CivicActions
- I was a systems architect and IT manager for 17 years
- Other things to talk to me about include camping and traveling to historic locations

- I am not your lawyer
- This is not legal advice

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What are we going to talk about

- Review several cases involving the GPL
- Talk about a few non-GPL cases
- Talking what the *courts* said
- CAUTION: none of these cases are the final word. Just what one court said about the license
- Focused on U.S. courts

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What are we NOT going to talk about

- GPL-Violations.org cases brought by Herald Welt in German courts
- Association pour la Formation Professionnelle des Adultes v EDU 4
- Busybox cases
- FSF v Cisco Systems
- Hellwig v VMware
- Patrick McHardy
- Most of the Artifex Software, Inc. cases

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Vocabulary Lesson

Holding - A court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision.

Obiter Dictum - A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).

Black's Law Dictionary, 3rd ed. (1996)

Vocabulary Lesson

Precedent - the making of law by a court in recognizing and applying new rules while administering justice.

- ***binding precedent* - A precedent that a court must follow**
- ***persuasive precedent* - A precedent that is not binding on a court, but that is entitled to respect and careful consideration.**

Black's Law Dictionary, 3rd ed. (1996)

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Planetary Motion, Inc. v. Techplosion, Inc., 261 F.3d 1188 (11th Cir. 2001)

- Trademark dispute over the use of the name “Coolmail” to describe internet email service providers Planetary Motion and Techplosion
- Darrah developed a email client called "Coolmail".
- Coolmail was distributed under the GNU GPL
- SuSe distributed Coolmail
- Darrah never sold Coolmail
- Darrah distributed it widely to a unknown number of "technically skilled UNIX-users"

End Discussion 4:05

Planetary Motion, Inc. v. Techplosion, Inc., 261 F.3d 1188 (11th Cir. 2001)

- Distribution of software over the internet is worthy of trademark protection
- The fact that GPL licensed software is commonly distributed without charge is no barrier to trademark rights.

- "That the Software had been distributed pursuant to a GNU General Public License does not defeat trademark ownership, nor does this in any way compel a finding that Darrah abandoned his rights in trademark. Appellants misconstrue the function of a GNU General Public License. Software distributed pursuant to such a license is not necessarily ceded to the public domain and the licensor purports to retain ownership rights, which may or may not include rights to a mark." (id. at 1198)

Wallace v. IBM Corp., 467 F.3d 1104 (7th Cir. 2006) (Judge Easterbrook)

- Daniel Wallace wanted to create a operating system to compete with “Linux”
- *Pro se*
- Sued for antitrust violation alleging that the GNU GPL was a conspiracy to fix the price of the GNU/Linux operating system at $0
- The alleged price fixing made it impossible for him to compete.
- Court reasoned that the GPL keeps software free forever. That it will not result in higher prices later, so there is no role for antitrust last.

Wallace v. IBM Corp., 467 F.3d 1104 (7th Cir. 2006) (Judge Easterbrook)

"Software that is not maintained and improved eventually becomes obsolete, and the lack of reward may reduce the resources devoted to maintenance and improvement of Linux and other open-source projects. If that occurs, however, then proprietary software will enter or gain market share. People willingly pay for quality software even when they can get free (but imperfect) substitutes"

"the GPL does not restrain trade. It is a cooperative agreement that facilitates production of new derivative works, and agreements that yield new products that would not arise through unilateral action are lawful. "

Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008)

Jacobsen managed the open source project, Java Model Railroad Interface

- JMRI programmed decoder chips that control model trains
- Licensed under the Artistic License
- Copyright notices and referred people to look to the license in the COPYING file.

Katzer offered a competing product, Decoder Commander, that also programs decoder chips for model trains

- Katzer used a portion of files from the JMRI project in Decoder Commander
- Katzer did not follow the terms of the Artistic license. Failed to include:
  - JMRI Author's name
  - JMRI copyright notices
  - JMRI references to the COPYING file
  - identification of JMRI as the source of the copied files
  - description of how the files were changed

Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008)

Trial court denied the motion for a preliminary injunction
Trial court reasoned case did not sound in copyright, but rather in contract.
Trial Court concluded that the only remedies available for violating the Artistic license was for contract claims based on the breech of the agreement.

Appellate court disagreed and concluded

- One who exceeds the scope of a license to reproduce a copyrighted work likewise is an infringer of the copyright.
- Artistic license is enforceable based on a theory of copyright infringement
- Preliminary injunctions are often available as a remedy for violating free software licenses
- Covenant v. Condition

Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008)

"Copyright holders who engage in open source licensing have the right to control the modification and distribution of copyrighted material. . . . Copyright licenses are designed to support the right to exclude; money damages alone do not support or enforce that right. The choice to exact consideration in the form of compliance with the open source requirements of disclosure and explanation of changes, rather than as a dollar-denominated fee, is entitled to no less legal recognition."

Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008)

Trial court also ruled that Jacobsen had adequately plead a claim for unauthorized removal or alteration copyright management information under the DMCA 17 U.S.C 1202(b).

Copyright management information includes

- **title or other information identifying the work**
- **name/identifying information about the author**
- **name/information about the copyright holder**
- **terms and conditions for use of the work**

The Ximpleware Cases

- Versata Software, Inc. et al. v. Ameriprise Financial, Inc. (D-1-GN-12-003588) Travis County TX 53rd Judicial District 2012)
- Versata Software, Inc. v. Ameriprise Financial, Inc. (1:14-cv-00221) (W.D. Texas 2013)
- XimpleWare, Corp v. Versata Software, Inc. et al, Docket No. 3:13-cv-05160 (N.D. Cal. Nov 5, 2013)
- XimpleWare, Inc. v. Versata Software, Inc. et al, Docket No. 5:13-cv-05161 (N.D. Cal. Nov 05, 2013)

The Ximpleware Cases

- Versata sued Ameriprise in Texas state court for a declaratory judgment that Versata had the right to terminate the contract
- Ameriprise canceled the contract
- Ameriprise countersued for breach of contract
- Ameriprise discovers Ximpleware's GPL code
- Ameriprise tells Ximpleware about GPL violation
- Versata removed the case to Federal court on the GPL claim in the countersuit
- Ameriprise won motion allowing suit of breach of contract based on GPL and sent back to State court
- Versata removed to Federal Court
- Ximpleware sues Versta and Ameriprise for copyright infringement
- Ximpleware sues Versata, Ameriprise and others for patent infringement

Versata Software, Inc. v. Ameriprise Financial, Inc. (1:14-cv-00221)

Question presented: are all of the breach of contract claims presented by either party preempted by copyright law?

Test:
1) claim is examined to determine whether it falls within the subject matter of copyright as defined by Sec. 102.
2) the cause of action is examined to determine if it protects rights that are equivalent to any of the exclusive rights of a federal copyright.

i.e. Does the cause of action require an extra element beyond what is required to show a copyright infringement claim.

Versata Software, Inc. v. Ameriprise Financial, Inc. (1:14-cv-00221)

Court held that:

- GPL's so-called "copyleft" scheme is not entirely distinct from copyright law
- But the ""viral" component of the GPL is separate and distinct from any copyright obligation.
- “Copyright law imposes no open source obligations”
- “Ameriprise has sued based on Versata's breach of an additional obligation: an affirmative promise to make its derivative work open source because it incorporated an open source program into its software. Ameriprise's claim therefore requires an "extra element" in addition to reproduction or distribution: a failure to disclose the source code of the derivative software. The presence of an additional contractual promise separate and distinct from any right provided by the copyright law means Ameriprise's claim is not preempted.”

Versata Software, Inc. v. Ameriprise Financial, Inc. (1:14-cv-00221)

- Court then went on to say there was no need for the federal court to determine if Ameriprise has standing to enforce the GPL as a third-party beneficiary, since that is an argument for the state court.

XimpleWare, Corp v. Versata Software, Inc. et al, Docket No. 3:13-cv-05160 (N.D. Cal. Nov 5, 2013)

- Copyright infringement case
- XimpleWare sued Versata and Ameriprise.
- XimpleWare sought a preliminary injunction twice.
- Court denied both injunctions.
- Versata was given almost a year to develop and deploy a patch to remove the GPL licensed code from the software deployed at customer sites.
- Case ultimately settled for undisclosed terms

XimpleWare, Corp v. Versata Software, Inc. et al, Docket No. 3:13-cv-05160 (N.D. Cal. Nov 5, 2013)

- Ximpleware claimed that Ameriprise committed copyright infringement by distributing the GPL licensed software without complying with the conditions of the license
- Ameriprise defended claiming it only distributed to its own financial advisors.
- Ameriprise maintains that it doesn't matter that the financial advisors are independent contractors, not regular employees.
- Court found that Ximpleware sufficient plead a claim for copyright infringement by alleging "the majority of Ameriprise financial advisors are not Ameriprise employees"

XimpleWare, Inc. v. Versata Software, Inc., Docket No. 5:13-cv-05161 (N.D. Cal. Nov 5, 2013), Document 85

- Patent infringement case
- “Because an express license is a defense to patent infringement, XimpleWare’s direct infringement claims against Versata’s customers turn on whether the customers’ distribution is licensed under the GPL. . . . the only real issue to resolve is whether XimpleWare has sufficiently alleged that its software was ‘distributed’ . . . . The act of running the Program is not restricted, . . .”
- “Sharing the software with independent contractors working with the customers alone does not constitute distribution. Put another way, this is effectively internal distribution, and internal distribution is not enough to breach the GPL.”

XimpleWare, Inc. v. Versata Software, Inc., Docket No. 5:13-cv-05161 (N.D. Cal. Nov 5, 2013), Document 85

- Patent infringement case
- "The GPL requires, among other things, that:
  - (1) any changes made to the code carry notices stating that the files were changed, and the dates of all changes;
  - (2) any code created or derived from GPL-protected code must also be licensed under the GPL;
  - (3) copyright notices must print or display when the code is run; and
  - (4) when distributed, the program must be accompanied by the complete machine-readable source code.

  All four conditions must be met, and the GPL requires strict compliance."

XimpleWare, Inc. v. Versata Software, Inc., Docket No. 5:13-cv-05161 (N.D. Cal. Nov 5, 2013), Document 85

Direct licensing works:
"Because an express license is a defense to patent infringement, XimpleWare's direct infringement claims against Versata's customers turn on whether the customers' distribution is licensed under the GPL. The reason is that the GPL provides that even if the original licensee – here, one of the Versata entities – breaches its license for whatever reason, ***third-party customers of that original license retain the right to use XimpleWare's software so long as the customer does not itself breach the license*** by "distributing" XimpleWare's software without satisfying an attendant conditions."

XimpleWare, Inc. v. Versata Software, Inc., Docket No. 5:13-cv-05161 (N.D. Cal. Nov 5, 2013), Document 85

Distribution to Independent Agents

"After considering the arguments, both at the hearing and in the papers, the court adopts in its entirety Judge Ilston's recent conclusion that the kind of source code distribution alleged here can establish a breach of the GPL sufficient to render the use of code unlicensed."

XimpleWare, Inc. v. Versata Software, Inc., Docket No. 5:13-cv-05161 (N.D. Cal. Nov 5, 2013), Document 85

"The customers marshal two primary arguments against such a conclusion. First, the customers argue that any independent contractor or the like working for the customers has no need for the software because the software is designed to calculate the commissions owed by the customers on various financial transactions. In short, there is no need in the field to use what is back office software. Second, the complaint does not allege Versata's customers shared the software with independent contractors who then themselves copied, distributed or used it, and sharing the software with independent contractors working with the customers alone does not constitute distribution. **Put another way, this is effectively internal distribution, and internal distribution is not enough to breach the GPL.**"

XimpleWare, Inc. v. Versata Software, Inc., Docket No. 5:13-cv-05161 (N.D. Cal. Nov 5, 2013), Document 85

GPLv2 contains a patent license:

"the Customer Defendants are free to use XimpleWare software under the GPL. To state a claim for direct infringement by the Customer Defendants XimpleWare must allege distribution in violation of the GPL."

Court cites: "Activities other than copying, distribution and modification are not covered by this License; they are outside its scope. The act of running the Program is not restricted, and the output from the Program is covered only if its contents constitute a work based on the Program (independent of having been made by running the Program). Whether that is true depends on what the Program does."

Artifex Software, Inc. v. Hancom, Inc., No. 16-cv-06982-JSC, 2017 BL 136537 (N.D. Cal. Apr. 25, 2017)

"Defendant contends that Plaintiff's reliance on the unsigned GNU GPL fails to plausibly demonstrate mutual assent, that is, the existence of a contract. ***Not so***. . . . These allegations sufficiently plead the existence of a contract. . . . Accordingly, Defendant's motion to dismiss Plaintiff's breach of contract claim is denied. Plaintiff has adequately pled the claim and Defendant has not proved at this stage that the claim is preempted by the Copyright Act."

Questions

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Drauglis v. Kappa Map Grp., LLC, 128 F. Supp. 3d 46, 2015 ILRC 2503 (D.D.C. 2015)

- P licensed Photo under CC BY SA
- Photo was used on the cover of a published atlas
- P alleged the CC BY-SA 2.0 license meant the atlas had to be offered for free
- Court Rules:
    - The atlas was not a derivative work of the photo
    - The cover was not a derivative work of the original photo (not enough alteration of the photo)

Drauglis v. Kappa Map Grp., LLC, 128 F. Supp. 3d 46, 2015 ILRC 2503 (D.D.C. 2015)

- "[T]he interpretation of a Creative Commons license is an issue of first impression in this Circuit ..."

- "Creative Commons has unique names for each of its six licenses . . . license at issue . . . easily located online by the phrase 'CC BY-SA 2.0.' . . . Therefore, the Court finds that defendant's reference to the name of the License on the back cover of the Atlas was sufficient to satisfy the section 4(a) notice requirement, and defendant is entitled to summary judgment on this issue."

Motion to File Amicus Curiae Brief, *Great Minds v. FedEx Office & Print Services, Inc.*, Case No. 17-808 (2d Cir. July 5, 2017) , Doc. 40

"In the proposed brief, Creative Commons seeks to aid the Court's consideration of this appeal in two ways: first, by walking through the mechanics of how this widely-used license works; and second, by discussing relevant public policy concerns . . that can only be fairly and fully addressed by CC. With respect to the first issue, Creative Commons' experience and intimate familiarity with the license it drafted in consultation with legal experts and creators around the world **affords a unique, if not definitive, perspective** on the operation of the license and its terms. . . . Creative Commons seeks to share its own perspective on the public policy issues at stake, given CC's unequaled experience with the license, its purpose, and the diverse licensors and licensees who use it."

Motion to File Amicus Curiae Brief, *Great Minds v. FedEx Office & Print Services, Inc.*, Case No. 17-808 (2d Cir. July 5, 2017) , Document 40

"IT IS HEREBY ORDERED that Creative Commons Corporation's motion for leave to file an amicus curiae brief is DENIED"

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Philpot - Creative Commons Attribution 2.0 litigation

- About 34 cases filed since January 2018
- Two claims
  - Copyright Infringement (CC-BY)
  - Copyright Management Information
- Based on use of photos contributed to Wikipedia of musicians
- Cases
  - Philpot v. Planck, LLC, Docket No. 1:17-cv-04513 (S.D.N.Y. Jun 15, 2017)
  - Philpot v. Entravision Communications Corporation, Docket No. 4:18-cv-07255 (N.D. Cal. Nov. 20, 2018)
  - Philpot v. Hubbard Radio Phoenix LLC, Docket No. 2:18-cv-03084 (D. Ariz. Oct 01, 2018)
  - Philpot v. New Orleans Tourism Marketing Corporation, Docket No. 2:18-cv-09087 (E.D. La Oct 1, 2018)

Questions