



Beyond Copyright - Charting a “Copyleft” Course for Open-Source Software in Malaysia

Adnan Sundra & Low

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A. Introduction

In today's tech-driven era, Open-Source Software (“OSS”) has emerged as a cornerstone of innovation, offering businesses a cost-effective and flexible solution to meet their technological needs. The allure of OSS lies in its collaborative nature, as it enables companies to tap into software that is both free and available for adoption and commercial exploitation. However, beneath the surface of this seemingly "free" software lies a complex legal landscape that organizations must navigate to ensure compliance and mitigate legal risks.

For Malaysian businesses, understanding the legal implications of OSS adoption, particularly if it intends to commercially exploit products which adopt OSS, is essential. While OSS may offer numerous advantages, including reduced costs and enhanced flexibility, it also comes with legal considerations that cannot be overlooked.

With the growing adoption of OSS, the need for a comprehensive legal framework becomes increasingly apparent. Without clear guidelines and regulations, organizations may find themselves exposed to legal uncertainties and disputes that could jeopardize their operations. In this context, charting a "copyleft" course for OSS in Malaysia is not just a matter of compliance – it would be a strategic imperative for businesses looking to thrive in this digital age. In this article, we will delve into the legal intricacies of OSS adoption in Malaysia and explore its position within the framework of contract and copyright laws and regulations.

B. What is an Open-Source Software?

Open-source software is typically free to use, but this freedom is subject to the open-source licence terms that accompany the software and set up the terms of use of the software. Most open-source licences permit the user to copy, modify, and redistribute the open-source code. However, these freedoms come with various conditions and contractual obligations, which can vary significantly depending on whether the licence is “permissive” or “copyleft”[1].

The ethos behind OSS is collaboration and freedom to innovate. One of the key principles of OSS is “copyleft”, a method of licensing that ensures any derivative works (either modified or extended versions of the original software) must also be released under the same licence and allow subsequent users to use it for free. This means that if someone modifies an OSS and distributes it, they must also provide their source code under the same licence terms, thus preventing the software from becoming proprietary. This principle is most famously embodied in the GNU General Public Licence (GPL), which was designed to ensure that software remains free and open for all users. [2]

Most of the permissive open-source licences, which are considered "weaker" than copyleft licences due to their minimal restrictions, such as the MIT Licence and the Apache Licence 2.0, would include basic compliance obligations such as maintaining copyright notices[3], providing attribution to the original authors[4], and including the licence terms with any redistribution[5]; these requirements ensure that the original source code owners receive credit for their work and that users are aware of the terms under which the software is being used. Conversely, “copyleft” open-source licences, which are more restrictive in nature, would impose further additional licensing conditions and obligations. For example, any software that includes or is derived from the OSS must also be licensed under the same open-source licence and the source code for that software must be made freely available[6]. This concept, often referred to as "tainting"[7], ensures that any modifications or enhancements to the software would still remain open and accessible to the community[8].

For commercial developers, particularly those aiming to develop proprietary software that can be licenced for a fee, “tainting” presents a significant challenge. The value of proprietary software can be severely diminished if the developer is required to license it under an open-source licence and make the source code available to the community. This is because the open-source licence grants recipients the right to copy, modify, and redistribute the software at no charge, potentially undermining the developer's business model.

Whether dealing with simple compliance obligations or even substantive requirements, failure to adhere to the terms of an open-source licence can still result in breach. Non-compliance with even simple compliance obligations or more substantive requirements can be considered a breach of contract. This breach can lead to the termination of the licence, which means the user would lose the right to use, modify, or distribute the OSS. Importantly, even after a licence has been terminated, the OSS source code owner retains the right to initiate litigation based on past breaches. This means that any unauthorized use of the source code that occurred before the termination can still be grounds for legal action, allowing the source code owner to potentially seek remedies for the infringement of their rights over the OSS.

C. Open-Source Software in Malaysia

So far, MAMPU[9], now revamped and placed under the purview of the Ministry of Digital of the Malaysian Government has only introduced the Malaysian Government Interoperability Framework for Open-Source Software (MyGIFOSS)[10]. This framework provides guidance on adopting OSS, open standards and technical specifications in Malaysia, supplementing the Malaysian Government Interoperability Framework version 1.0 (MyGIF) from August 2003[11]. Aimed at government agencies, it addresses issues related to OSS and proprietary software usage, integration with legacy systems, information exchange between diverse systems and compliance with open standards to ensure interoperability between systems and applications.

Other countries such as the United States[12], France[13], China[14] and Germany[15] have witnessed its share of OSS-related lawsuits; however, up until this juncture, Malaysia still currently lacks a dedicated legal framework for OSS laws.

(I) Position of Open-Source Software Licence & Code under the Malaysian Contracts Act 1950 and Copyright Act 1987.

An OSS licence operates slightly differently compared to a normal copyright and/or licensing contracts. In traditional contracts, licensees must perform certain acts and/or meet specific obligations to utilize intellectual property rights (“IPRs”), where these obligations might include paying royalties, adhering to usage limitations, or maintaining confidentiality. However, under an OSS licence, licensees are granted the freedom to use, modify, and distribute the OSS with minimal restrictions as long as the terms of use are adhered to and complied with – where this concept is termed as “copyleft”, a concept that ensures the software and any derivative works remain open and freely available to the public, and it ensures that the original OSS and any improvements made to it remain accessible to the community. This minimalistic approach to restrictions is what makes OSS particularly attractive to many developers and organizations. Although the Contracts Act 1950 does not distinguish between a ‘positive’ and / or ‘negative’ obligation, non-compliance with any terms under an OSS licence would still result in a breach of contract. Thus, compliance with the OSS licence terms is crucial.

For the purpose of copyright law, an OSS source code would also qualify as a literary work eligible for copyright protection under Sections 3 & 7(1)(a) of the Copyright Act 1987 and by virtue of the Berne Convention. Under Section 13(1) of the Copyright Act 1987, copyright owners have exclusive rights over their work, including the authority to control how it is used, granting them the ability to set specific terms and conditions for its usage. Thus, the terms and conditions contained in OSS licences may vary from one to another.

For OSS licensees i.e., users of the OSS code, they must comply with these terms to align with the exclusive rights vested to the copyright owners under Section 13(1) and, subject to the defences available under Section 13(2), under the CA 1987. This is further strengthened by Section 27(2) of the CA 1987 which specifically relates to the right to reproduce derivative works, subject to the defined scope of the licence terms by the OSS licence owners.

So far, there has been no reported case that addresses the legal position of OSS in Malaysia. However, the Australian Federal Court case in *Trumpet Software Pty Ltd & Anor v OzEmail Pty Ltd & Ors* [1996] FCA 560 (10 July 1996) which discusses about the modification of free-trial shareware, may be relevant in interpreting OSS licence terms. In this case, the facts concerned functionally limited proprietary software released under a shareware licence. The purpose of shareware software, unlike open-source software, is to provide users with a trial version of the software to encourage them to buy the full package. However, the defendant then distributed a modified version of the software, with copyright notices edited out, without the plaintiff's permission. The legal issue involved was whether the defendant could distribute the plaintiff's software without permission, given that the shareware licence was designed to ensure that the software was shared as widely as possible. This in turn rested on the question of whether a restriction of the defendant's use of the software could be implied into the licence.

Arguably, OSS is analogous to shareware, although it contains “copyleft” features, which allows one to use, modify, or incorporate an OSS, as long as, among other requirements, any resulting software is distributed free of charge. The resulting software product or derivative source code may lose its proprietary nature, and distribution for a fee would breach the copyleft terms, potentially resulting in a breach of contract and / or a copyright infringement claim.

(ii) Potential Causes of Action in Litigation involving the Misuse of Open-Source Software

In an OSS claim, the open-source code proprietors may primarily rely on the following causes of action:

1. **Breach of Contract:** In the context of OSS licensing, a breach of contract claim typically arises when a party fails to comply with the terms and conditions specified in the OSS licence agreement. These terms may include requirements for distributing derivative works under the same open-source licence or providing access to the corresponding source code. Failure to adhere to these obligations could constitute a breach of contract under the Contracts Act 1950.

2. **Copyright Infringement:** Such claims may be brought against parties who reproduce, distribute, or modify OSS code without authorization from the copyright owner. Under the Copyright Act 1987, copyright owners have exclusive rights over their works, including the right to control how they are used and distributed. Unauthorized reproduction or distribution of an OSS code may also give rise to claims of copyright infringement.
3. **Unfair Competition:** OSS thrives on collaboration, but the line is blurred when it comes to competition. If someone uses open-source code to create a derivative product that directly competes with the original project, but unfairly so (e.g., by locking users into a proprietary ecosystem), this could lead to claims of unfair competition. It is pertinent to identify how derivative works can be created and distributed in accordance with the terms and conditions stipulated under the specific OSS licence deployed.

(iii) Claiming of Damages Arising from the Breach of Open-Source Licence Terms.

If an OSS code owner succeeds in establishing their causes of action premised upon either breach of contract based on the open-source licence terms and / or infringement of the copyright source code, the proprietor may be entitled to claim damages. Essentially, it allows the owner to seek compensation for any losses or damages incurred due to the unauthorized use or distribution of their software. In any intellectual property dispute, the general rule is that an IPRs owner can elect to claim either (i) damages, or (ii) account of profits.

Damages are monetary compensation for the loss suffered due to the infringement, and it can be in the form of general damages, exemplary damages, and/or statutory damages. On the other hand, an account of profits requires the infringing party to account for the profits made from the unauthorized use of the intellectual property and to pay those profits to the rightful owner. This remedy is aimed at preventing the infringer from unjustly benefiting from their infringement.

Whichever option the IPR owner elects, they bear the burden of proving the quantum of their claims. This involves providing detailed evidence to substantiate the extent of the losses or the amount of profits generated by the infringing party from the unauthorized use, which can be highly complicated and may require expert testimony, financial records and other documentation to accurately quantify the damages or profits demanded. It is advisable for the IPR owner to gather and prepare this evidence prior to commencing a lawsuit to strengthen their case and enhance the likelihood of a successful claim. Some evidence may potentially be obtained through discovery proceedings. For this reason, it is advisable to reach out to IP lawyers to strategize effectively, ensuring that all necessary evidence is identified and collected to support the claim comprehensively.

(iv) Injunctive Relief in Open-Source Software against Copyleft Infringer

Furthermore, the court has the discretion to award additional remedies, such as injunctive relief, which can prevent the infringing party from continuing their unauthorized use of the OSS source code. This can be particularly important in preventing ongoing or future harm to the OSS owner's intellectual property rights.

If an infringer breaches the terms of an OSS licence, the derivative source code created by the infringer would be subject to significant legal consequences. Depending on how the terms in the specific OSS licence are structured, the infringing party may be required to stop distributing and using the original OSS source code. In some cases, they might also be compelled to release the source code of their derivative OSS work under the same OSS licence. Thus, it is imperative for companies to conduct thorough due diligence on the OSS they deploy, as this not only ensures compliance with licensing terms but also minimizes potential legal risks and liabilities in the event of an OSS breach.

D. Conclusion

The lack of a dedicated OSS legal framework in Malaysia casts a shadow over the immense potential of open-source software. While OSS embodies collaboration and innovation, the uncertainties surrounding copyright and contract law in Malaysia may stifle the development of OSS within the Malaysian developer community. Unlike proprietary software, which operates within established copyright legal frameworks, OSS operates in a more decentralized and collaborative environment. However, without specific laws or guidelines tailored to OSS, Malaysian developers may face uncertainties regarding copyright, licensing, and contractual obligations in relation to the usage of OSS, and thus limiting the adoption of OSS solutions by businesses, and hinder innovation in the Malaysian tech ecosystem.

Adnan Sundra & Low - Sri Sarguna Raj, Steven Cheok Hou Cher and Lim Chaw Zen

If we can be of assistance, please visit asl.com.my, or email to enquiry@adnansundralow.com

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