GPL Law

September 12, 2008
by James D. Barger
Law Student
Temple University James E. Beasley School of Law
Philadelphia, Pennsylvania

These are notes on the law surrounding the GNU General Public License (GPL), created by Richard Stallman. This is not intended to be exhaustive, as it's only preliminary academic research into a topic I find interesting and important. This document is not intended to be a statement of the law in any definitive, or even reliable, way. As academic notes, by a 2L law student, this document is subject to mistakes and omissions.

CONTENTS

Issue 1: What is the limit to distribution fees?

Summary

There is no upper limit defined by the GPL. There is no clear rule specifying an upper limit elsewhere in the law.

Analysis from "*GNU GPL Distribution Fees and Their Limitations*," by Benjamin P. Miller, J.D. (2006)

Statements by Richard Stallman, who created the GPL help inform users about the terms of the GPL. These statements, coming from outside the GPL itself, are merely indicators of the intent of the original author. *A court might not admit these statements into evidence in a dispute over a GPL agreement.* Parties should not rely upon Stallman's statements outside the GPL as if they were terms added to the GPL. They are not. They are merely helpful as guidelines to understanding the GPL terms themselves.

"Much of the literature by its creator, Richard Stallman, however, indicates that there need not be any relationship between the actual costs experienced by the distributor and the amount of money that the distributor labels a distribution fee."
GNU GPL Distribution Fees and Their Limitations, Benjamin P. Miller, J.D. (2006) at 2, abstract page (available at http://ssrn.com/abstract=911181).

> "In one of his writings, Stallman says "[s]ince free software is not a matter of price, a low price isn't more free, or closer to free. So if you are redistributing copies of free software, you might as well charge a substantial fee and make some

> money. Redistributing free software is a good and legitimate activity; if you do it, you might as well make a profit from it." FN45 He goes on to say the GPL has no requirements on how much can be charged for distribution and that the distributor "can charge nothing, a penny, a dollar or a billion dollars. FN46
>
> *Id*. at 9 (citing Richard Stallman, *Free Software, Free Society: Selected Essays of Richard M. Stallman* 32-33 (2002) at 63, 64).

Note: "...no court has specifically addressed the royalty restriction in the GPL." Miller at 6.

Stallman has said:

> "Many people believe that the spirit of the GNU project is that you should not charge money for distributing copies of software, or that you should charge as little as possible – just enough to cover the costs. Actually we encourage people who redistribute free software to charge as much as they wish or can. FN42"
> Miller at 8-9 (citing Stallman at 63).

Miller provides a five-element test for determining whether a fee is truly a valid GPL distribution fee.

> "These elements, derived from the GPL and situations in the above sections, establish a simple test to determine when a fee is actually a distribution fee for GPL purposes:
>
> "1. The fee must purport to be for the transfer of software. The fee need not be related to out-of-pocket expenses or result in zero profit from transfer.
>
> "2. The fee must be one-time fee, though it may be paid in installments. Perpetual fees are forbidden.
>
> "3. The fee must be for an established dollar amount that is not contingent on use or further distributions.
>
> "4. Payment of the fee cannot be secured by the license itself.
>
> "5. The licensor cannot have injunctive relief against the license for non-payment of the fee.
>
> "All elements must be met to be a GPL distribution fee. If a single element is not met, thefee fails as either a license fee or royalty."
>
> Miller, at 42-43.

Why and how does this work?

The Miller article and the Stallman statements make sense if one considers that no matter how high the distribution fee, the next holder of the source code can re-distribute that very same code for nothing. They could charge $1 per copy or they could just post it on the Internet.

A hypothetical situation:

1. FirstCompany makes ApplicationX.

2. FirstCompany distributes ApplicationX under the GPL.
3. SecondCompany wants the source code.
4. FirstCompany charges $50,000 for the distribution fee to deliver the source code to SecondCompany.
5. SecondCompany makes no changes to the code, but merely changes the trademark identifiers to re-brand the product.
6. SecondCompany distributes copies of the application (possibly including the source code) for $35 each.
7. SecondCompany distributes 2,000 copies for a total of $70,000 and makes a profit of $20,000 without creating anything.

Of course, in a capitalist market, this scenario will likely never happen. The creator company will either dominate the market and reap the distribution profits themselves, or there will be no market and nobody will want to pay the distribution fee to FirstCompany.

If the product has a ready market of thousands of potential users, the original creator will be in the best position to profit from distributions to that market, due to expertise, support services, reputation, and the promise of future upgrades. The creator company will either leverage that market directly or through a contract with a distribution company (a company with a warehouse and packaging equipment, for example). If there were potentially significant profits from distributing a greater volume at a lower fee, FirstCompany would adjust to the market and FirstCompany would lower their fee to $35 (or whatever is optimal). Competitors who enter the market to distribute copies of the product could do so legally, but would be at a disadvantage from the start (which is why they are not likely to surface).

On the other hand, if the product has no ready market, because it requires specialized expertise and/or business acumen to make use of it, then SecondCompany will not be able to profit substantially by re-distributing it without modifications. SecondCompany still might opt to pay the $50,000 fee, but only if willing to invest the required resources to develop the specialized expertise and business acumen to make use of it. If the product were not available under the GPL terms, SecondCompany could still compete by spending money on their own product development.

Conclusion

A creator may use a GPL product, improve upon it, and charge very high distribution fees, with no upper limit, so long as they fit the legal requirements of the GPL (purports to be distribution fees, etc.).

Issue 2: What is "distribution" under the GPL (and under the AGPL)?

When is something "distributed?" ...AND... What about GPLv3?

The latest revision of the GPL, GPLv3, has clarified the fact that SaaS applications are not "distributed" when users access the application over the Web. (see http://www.linux-

mag.com/id/3017/) In other words, a Drupal-based website is not "distributed" to each and every user who browses the site. It is only distributed when the application is installed somewhere. The clarification in GPLv3 may provide additional cover for uses of earlier version of the GPL also, because it provides insight into the intent of the older language as well.

> ...the FSF not only struck the text that would extend the GPL to software delivered as a service but clarified just what "to 'convey' a work" actually means.
>
> > Mere interaction with a user through a computer network, with no transfer of a copy, is not conveying.
>
> In other words, software delivered as service is now officially not covered by the GPL. More than the patent protection, more than the digital restrictions, this one change to the GPL could have the biggest impact on the license's importance in the future.
>
> *from "The GPL Has No (Networked) Future" at http://www.linux-mag.com/id/3017/*

Is there a case in which an SaaS application is "distributed" merely by virtual of web access?

Yes. There is a GPLv3-compatible license, called the Affero General Public License (GNU AGPL) that may be used in products that are licensed alongside GPL products. If a developer does license a creation under the AGPL, then that product is considered "distributed" as soon as web users access its interface via the Web. This is different from the GPL terms which do not trigger the distribution conditions unless the source code is given to someone or is installed somewhere.

For discussion of this, see "FSF Approves Affero GPL for SaaS Apps," by Katherine Noyes, E-Commerce Times, Nov. 20, 2007 (available at http://www.ecommercetimes.com/story/60414.html?wlc=1221239016).

See also: Free Software Foundation - "GNU Affero General Public License," at http://www.fsf.org/licensing/licenses/agpl-3.0.html.
FSF recommends use of AGPL for web applications (a.k.a. Saas), at http://www.fsf.org/licensing/licenses/index_html.

Conclusion

A work is "distributed" under the **GPL** when the application is installed somewhere outside the owner's property or when the source code is given to someone. However, under the slightly different **AGPL**, a web application or other SaaS work is "distributed" as soon as someone accesses that product's interface over a network -- including simple web access of the application, including a web page that has been dynamically produced or output by the product.

Further Research Needed

It may be worthwhile to devote more research time to the question of what constitutes a sufficient part of the product to qualify as a part of that product that is exposed on the Web. In other words, if a new accounting application is designed to handle all aspects of enterprise accounting, and one optional feature of the product generates a 100-word annual summary of the company's revenues for posting on the corporate website, does publication of that single, annually generated page constitute "distribution," even under the AGPL? Common sense would say "no," but where is the line?