Report on open source licensing of software developed by the European Commission (applied to the Circa solution)

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Advice report

EUROPEAN COMMISSION

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IDA/GPOSS

Encouraging Good Practice in the use of Open Source Software in Public Administrations

Report on

Open Source Licensing of software developed by The European Commission

(applied to the CIRCA solution)

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Content of the Report

1. Executive summary

In recent years, Free[1] / Open Source Software (F/OSS) has developed as a novel form of collaborative production, ensuring in some cases cheaper acquisition, use and maintenance of software developed originally by or for public sector administrations: the adoption of an Open Source licensing policy is a prerequisite to create and reinforce a community of users and developers, which could hopefully – thanks to access to software code and to redistribution – generate a continuous steam of improvements, support and new releases.

The European Commission has developed and enjoys copyright in CIRCA, a groupware tool for sharing documents within closed user groups. CIRCA is used internally by more than 700 groups and externally by 20 other administrations.

This current CIRCA licence (V. 1.2) is not a F/OSS license and the question raises if such software application developed with Community funds can be distributed to the general public according to F/OSS.

The selected or created license must be proposed in French and English and to consider all legal issues to be in conformity to the European Union legal framework (choice of jurisdiction, applicable law, limitation of warranty and liability etc.). It should also be based, as much as possible, on current OSS licenses.

The most significant F/OSS licenses (BSD, GPL, MPL, OSL and CeCILL) have been compared and analysed according to the European legal framework, demonstrating that NONE OF THE EXISTING OSS LICENCES ANSWERS TO THE REQUIREMENTS.

The BSD license should be put aside given the absence of copyleft clause. This is however a fundamental feature in order to avoid the appropriation of the program by third parties.

The GPL's major problem is that the right of communication to the public is not provided explicitly amongst the granted rights, and that a clause limits furthermore the granted rights to what is explicitly provided by the license. Moreover, the GPL is known for being the most

[1] „Free" is always used here in the sense of freedom, except when we write „for free". In the present text, Open source software (OSS) may be used as synonym for „Free Software".

viral license ever, whereas massive spreading through dynamic linkage is not the aim of the European Commission.

The MPL's main problems reside in its applicable law and forum clause, referring to California.

Whereas the CeCILL could be deemed the best license given that it is the only one to be drafted according to EU terminology, its liability clause is really insecure and could jeopardize its compatibility with any other F/OSS license. Furthermore, its clause concerning its compatibility with the GPL is likely to turn rapidly the CIRCA license into a GPL license and therefore attract the drawbacks of this latter.

The OSL does not present any major problems, but is drafted using US legal terminology.

Based on the above the possible solutions are:

1. To choose the license that fits the best with the European Commission requirements and apply it "as is" (in that case, the OSL is the best choice, but it exists in English only, and uses US terminology).
2. To ask the author of an existing license to modify/translate/adapt according to the EU needs, with the advantage of facilitating recognition by the OSS community (see our proposal in Annex 1).
3. To create a specific OSS license, which is the more open solution, but implies more work, more commitment to promote it as best practice and the risk of non-acceptance by the OSS community (see our proposal in Annex 2).

2. Context and objectives of the Commission

a) The Free / Open Source Software and their licenses

In recent years, Free[2] / Open Source Software (F/OSS) has developed as a novel form of collaborative production. Since its origin as individual volunteer's alliance (or "Community") to avoid "exclusive software appropriation" or "proprietary software", it has seen success, both in terms of the commercial and technical strengths (Linux, Apache and many other examples), as model of organisation and development providing also a business model for a number of service enterprises. It has received attention from Public Administrations searching for cheaper acquisition, use and maintenance, also for existing software developed originally by them or for them. Going open source is seen as a pre-requisite to create or to reinforce a community of users and developers, which could hopefully – thanks to access to software code and to redistribution – generate a continuous steam of improvements, support and new releases.

Such communities operate according to rules, that are based or defined into the software license. To be considered as "Free / Open Source", a license must comply to a series of conditions [3]) that will basically grant four freedoms:

1. Run the program, for any users or purpose (e.g. commercial or not);
2. Access to source code to study how it works, and adapt it according to any need;
3. Freedom to redistribute copies;
4. Freedom to improve the program, and release improvements if whished.

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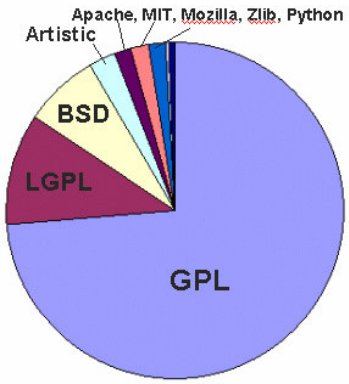
[2] „Free" is always used here in the sense of freedom, except when we write „for free". In the present text, Open source software (OSS) may be used as synonym for „Free Software".

[3] See in particular the nine conditions of the OSI – Open Source Initiative at http://www.opensource.org/docs/definition.html and the philosophy of the Free Software Foundation at http://www.fsf.org/philosophy/free-sw.html

By the time and the variety of licensors, they are many licences that correspond to the above criteria, in particular the list of “approved licenses” published nearly identically by both the Free Software Foundation and the Open Source Initiative. However, all licenses are not equal, at least in term of quantitative usage: on the 57.097 OSI compliant licensed projects hosted on the most popular American development site[4] 39.647 projects use the GPL license and 6.305 projects use its variant LGPL



Apart from its proper qualities, the predominance of GPL provides from hits historic weight, from the un-interrupted support from the very active Free Software Foundation, from its strong viral character towards all “compatible licenses” (GPL software can receive components from these licenses, but the reverse situation is not accepted) and from the fact new, small projects choose preferably the dominant license to avoid ideological controversies and attract a community of developers.

Although quantity does not always reflect quality, we should keep in mind that the impact of “dominant” licenses is important to create and maintain a developer community. While everyone can create a new license and declare it “open source” (if really corresponding to the OSI conditions) this should be justified to address serious legal needs (e.g. conformity to European regulations).

[4] (Source Forge – November 2004)

If the creation of the new license is clearly a "one shot" operation to answer its specific needs or protections, the author has more freedom, although he should care for compatibility with dominant licenses, in order to allow further developers improving the software to use their preferred license (just in the case of re-distribution, e.g. the GPL).

At the contrary, if the purpose is to establish a model of new license and to support it long term, for multiple software (not just for one) the author should be aware that success license will require long term commitment and constant support, sometimes political and controversial, from a strong organisation.

b) The CIRCA case

The Commission, through the Interchange of Data between Administrations programme (IDA) promotes the use of common tools and has developed CIRCA, a groupware tool for sharing documents within closed user groups. CIRCA is used internally by more than 700 committees and expert groups. As the European Community is owner of all intellectual property rights concerning CIRCA, it has also been licensed to public administrations in various Member States (around 20 licensees).

This current CIRCA licence (V. 1.2 of 15 March 2002) is ***NOT*** a free/open source license for the following reasons:

- The licensee can be only European Institutions and European Bodies, as well as to European national administrations: Member States, accession countries, TACIS countries and EEA countries (introduction) – this is contrary to F/OSS freedom 1;
- The license is not transferable and rules out further distribution (article 2 and 3) – this is contrary to F/OSS freedom 3 and 4;
- Access to the source code and modifications are permitted, although not granted (Article 3);
- Fees are excluded (article 4) – While it is understandable regarding CIRCA, the matter of fees (and commercial distribution in general) is normally left to the freedom of parties and therefore ignored from F/OSS licenses
- License duration is limited to 3 years (article 5) - this is contrary to F/OSS freedom 1.

c) New business objectives

Regarding CIRCA, the European Commission has the following new business objectives:

- Enlarge the user's base: main target is always public administrations, but any use for any users should be admitted (this transparent and non-discriminatory distribution do not exclude private or commercial use, possibly outside the European territory);
- Respond to public sector policies and requirements (a growing number of government policies insist on the necessity to access the source code of government software);
- Provide the source code in order to authorise adaptations to local requirements, improvements that will benefit to the security, to the quality of the application and to its interoperability with other applications;
- Encourage the integration of pre-existing F/OSS software modules (when licensed with compatible licenses)
- Increase volunteers developers community, and therefore the potential resources to provide advises, to ensure support and product evolution: perenniality at long term, independently from IDABC support and financing;
- Develop a service market around CIRCA: encourage all service companies, having equal access to the code, to propose more competitive CIRCA services.

At the same time, the business and legal objectives include a number of requirements:

- the software, or parts thereof, should be made proprietary by other parties
- Liabilities and warranty should be disclaimed, as far as permitted by law
- The License should be compliant with the EU regulatory framework
- The License should be provided in French and English

3. Assessment of existing OSS licenses concerning CIRCA needs

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b) Approach

As they are many examples of OSS licenses with often few variations between them, we selected 5 representative licenses: four well known American models[5] and one European (French) license attempt to present a license that is more compatible with European law and practice or culture.

- the GPL (General Public License V. 2) which is recommended by the Free Software Foundation, and its LGPL variant;

[5] Those licenses are available on http://www.opensource.org.

- the BSD (Berkeley Software Distribution - 1998) which is the most popular of the permissive non-copyleft licenses
- the MPL (Mozilla Public License 1.1)
- the OSL (Open Software License 2.1) which is promoted by the OSI - Open Source Initiative
- the CeCILL[6] which is the first OSS license claiming for conformity with the French law, promoted by the CEA, the CNRS and INRIA.

Those five licenses have been examined from a legal and an economic point of views so as to assess the opportunity to use one of these licenses for CIRCA licensing across the various Member States (and possibly outside).

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a) Legal Analysis

The legal approach consists of analysing the chosen F/OSS licenses according to a list of legal criteria, mainly:

- the international dimension of the licences,
- the grant of copyright and, more generally, the IPR dimension of the licenses
- their liability and warranty clauses,
- their compliance with contract law and the possibility to modify, adapt or create new versions of those licences.

For each criteria, the licenses are analysed and compared, the European legal framework is briefly explained and the compliance of the licences with this latter is assessed.
The objective of this methodology is twofold. On the one hand, it allows pinpointing the strengths and weaknesses of each considered license. On the other hand, it underlines all the important legal considerations to be taken into account in the drafting of a good F/OSS software licence.

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[6] CeCILL: (Ce:CEA ; C:Cnrs ; I:INRIA ; LL:Logiciel Libre) is supported by the French CEA (Commissariat à l'energie atomique), the CNRS (Centre National de la Recherche Scientifique) and INRIA (Institut National de Recherche en Informatique et en Automatique). It is available at www.inria.fr/valorisation/logiciels/Licence. CeCILL-V1.pdf

1. International Dimension

Law applicable to the licenses

Analysis of the licenses

Most of the considered licenses do determine which law is applicable to the litigation that could arise from the licenses. The MPL provides that it will be governed by California law provisions. The CeCILL License makes the contract governed by the French law.
The OSL is the most adequate to tackle this question as it states that any action related to the license will be governed by the laws of the jurisdiction wherein the Licensor resides or conducts its primary business.

Legal provisions in Europe

In case where the licenses do not include an explicit clause of applicable law, the contract will be governed either (1) by the law tacitly chosen by the parties or (2) by the law of the country with which the contract is most closely connected.

(1) In the considered licenses, which do not include an applicable law clause, there is no element[7] to imply that the parties have tacitly opted for the law of a specific country.

(2) The Rome Convention of June 19th, 1980, on the law applicable to contracts, states that the country with which the contract is most closely connected is deemed to be the country where the party who has to provide the "*performance which is characteristic of the contract*", resides (individual) or has its registered office (company or legal entity). As far as open source licenses are concerned, it might be assumed that the characteristic obligation is to provide the license to use the software. The national law of the country where the licensor

[7] If the license mentions some national legal provisions, it might be inferred that the law chosen to govern the license is the law of that country. No license we have addressed is that clear in indicating a legal reference. Most licenses are written with reference to US legal concepts but that does not mean, in our view, that such licenses really chose the US law, since no specific US legal provision is expressly referred to in the license. Nevertheless it is open to discussion and some judges could decide otherwise.

is established should therefore be preferred to rule any litigation arising from those licenses. For that matter, it is the solution chosen by the OSL.

When a consumer is party to the license contract, the law applicable to the contract is the law of the country where the consumer usually resides upon the condition that the consumer has received a proposition of contract and has concluded the contract in that country. The contract can determine another law as far as the latter do not prejudice to the public policy provisions that are enjoyed by the consumer in the country of his/her residence.

Compliance of the licenses with the EC regulatory framework

All EU Member States are parties to the Rome Convention on the law applicable to the contracts. No open source licenses that have been considered, but the MPL (that indicates the California law provisions as applicable law), contradicts the legal provisions of applicable law contained in that Convention. Those that include an explicit clause of choice of law do so within the legal limitations laid down for such choice by the Rome Convention. The license that keep silent on that point will be governed by the law of the country where the licensor resides. That would be the Belgian Law when a litigation arises directly between the European Commission, owner of rights in CIRCA, and a user of that software, or the country where a subsequent Licensor resides, if the litigation arises between parties, other than EC, along the distribution of the software. In this last case, the contract might be governed by the law of any country in the world and thus will elude the application of the EU regulatory framework. Should that be a problem for the European Commission, a clause indicating the law of a EU Member States or the Belgian Law should be included in the CIRCA license.

As far as consumers are concerned, the applicable law will normally refer to the law of the residence of the consumers. This means that at least, as far as consumers living in a EU Member State are concerned, the licenses will be governed by the law of their residence country and thus by the EU regulatory framework. The parties will have less freedom to derogate from that protection since no choice of law may lead to avoid the application of the consumer rights that have been granted to consumers by the EU lawmaker. Anyway, integrating in the CIRCA license a specific choice of law indicating a Member State's legislation might further safeguard the rights of consumers.

Competent jurisdiction

Analysis of the licenses

Some analysed licenses determine the jurisdiction competent for any litigation. The MPL states that all disputes related thereto shall be subject to the jurisdiction of the Federal Courts of the Northern District of California; the CeCILL license opts for the courts of Paris; the OSL provides that the competent jurisdiction will be the courts wherein the Licensor resides or in which Licensor conducts its primary business.

Legal provisions in Europe

As far as a defendant to a litigation arising from the application of the license resides within the EU, the competent jurisdiction will be decided by the Regulation 44/2001 of the 22nd December 2000 (Brussels Regulation). Its main principle is to confer authority over the dispute to the courts of the country where the defendant resides. When the contract includes a clause defining the competent jurisdiction, such choice will be valid if at least one party to the contract resides in a EU Member States, if the provision opts for a court of a EU Member States, and if the provision has been made in writing[8].

In the absence of such a jurisdiction provision, the competent court to rule over contract litigation might also be the court of the place where the obligation that gave rise to the litigation, had to be performed. However, this rule will not apply where it is difficult to determine the court, which has the closest connection with a litigation. Such a difficulty may arise with open source licenses to the extent that the obligation to authorise the use of the software has to be performed not only in a specific country, but also everywhere in the world. Therefore, this specific rule of competence might not be of application for open source licenses, which means that the competent court will normally be that of the residence of the

[8] The Brussels Regulation further states that any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing', which means that a license in electronic format accompanying the files of the CIRCA software is equivalent to 'writing'.

defendant, in the absence of any contrary provision in the license which respects the above mentioned conditions.

When a consumer is a party to the contract, an action can only be brought against him/her before the courts of the country where he/she resides. The consumer can sue the other party before the courts where the latter resides or before the courts of his/her own residence.

Additionally, the article 238 of the EC Treaty of the 25th March, 1957, states that the European Court of Justice can be competent to judge any litigation arising out of a private or public contract entered by the European Union when a choice of jurisdiction says so. Therefore, where the contract is entered between the European Union, acting as the Licensor of the Original Work, and any person, the License can refer to the jurisdiction of the ECJ.

Compliance of the licenses with the EC regulatory framework and needs

The choice of law made by the CeCILL license (courts of Paris) is compliant with the applicable EU regulatory framework. Conversely, the MPL (jurisdiction of California) will not be valid, to the extent that one party resides within the European union, since the chosen jurisdiction is not that of a EU Member State. As to the OSL (courts wherein the Licensor resides or in which Licensor conducts its primary business), its clause will be valid if the court determined is within the EU. That will be normally the case for any litigation arising between the European Commission, original Licensor of CIRCA, and any user of the software, as well as for other litigations between subsequent parties to the license if the subsequent Licensor resides in the European Union.

As a consequence, as far as the competent jurisdiction is concerned, all the considered licenses, but the MPL, comply with the relevant regulatory framework.

As to the licenses that do not include a specific choice of jurisdiction, any litigation should be brought before the courts where the defendant resides or has its primary business. That would mean the Belgian courts for disputes initiated by users against the European Commission, or the courts where the other possible defendants (users or subsequent Licensors) reside upon the condition that such defendants reside in a EU Member State.

The situation will be less certain when the defendant to a dispute arising from the CIRCA license resides outside of the EU. In such a case, the Court chosen by the plaintiff will have

to consider its competence according to its national law. Due to the various laws that may potentially apply, no legal certainty can be ensured, at the stage of the conclusion of the license. Therefore, inserting a specific provision determining the competent court (that could be located in the EU) in the finally chosen license would be advisable.

Use of terminology understandable under European law

Analysis of the licenses

All the considered licenses, but the CeCILL license, are expressed in an American style and vocabulary and refer to US legal notions. This is particularly apparent where the licenses define the rights granted to the user and the type of damages for which the Licensor declines any liability.

Compliance of the licenses with the EC regulatory framework and needs

However, this on-going reference to US legal notions does not challenge the validity of the licenses. Usually, licenses terms will be construed so as to give sense to the provisions of the license. Nevertheless, should the European Commission prefer the license chosen for CIRCA to have a European flavour, some license terms could be adapted to a more European terminology.

2. Intellectual Property

Definition of the rights granted by the license

Legal provisions in Europe

According to the EC 91/250 Directive, computer programs have been considered and protected as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. The directive expressly grants the following rights to their authors:

1) The **reproduction** right;
2) The right to translate, adapt, arrange or alter the program (what we will hereafter call

the **modification** right); and

3) The **distribution** right (which means the right to distribute, sell or rent physical copies of the program).

   According to article 4 of the WIPO Copyright Treaty of 20 December 1996 (which the directive implements in Community law), and in order to fully respect the "literary work nature" of computer programs, a last right has to be added to this list:

4) The right of **communication to the public** (this right namely encompasses the right to distribute computer programs code throughout the internet).

To be fully efficient, and to allow everyone to benefit from all the freedoms that open source software licenses are supposed to give, all these four rights should be licensed.

Analysis of the licenses and their compliance with this regulatory framework

One of the potential problems of the considered licenses, CeCILL apart, is that they are written according to American law. Therefore, the rights granted do not perfectly fit within European legal categories of rights. For instance, the American notion of "distribution" encompasses the diffusion of copies throughout the web, whereas the European distribution right concerns only the distribution of tangible copies of the program, such as CD, disks,… The European notion of communication to the public includes the right to publicly perform or to diffuse works through the air or networks (TV and radio diffusion, diffusion through the Internet…) whereas the American law distinguishes the right to perform the work and the right to display the work to the public, and none of the latter encompasses the right to distribute copies of the work through the Internet.

The GPL/LGPL licenses grant only the rights to copy, modify and distribute the program. Article 0 of those licenses expressly excludes any other copyrights ("Activities other than copying, distribution and modification are not covered by this License; they are outside its scope"). The BSD license grants only the rights to "redistribute", use and modify the program. A European judge construing these licenses within a strict European point of view and applying only European law would therefore be very likely to deem that these licenses exclude the right to diffuse the program throughout the web. This legal uncertainty could be

solved by the judge by referring to common practices or usage in the open source community so as to include the communication to the public in the orbit of licensed rights, but that could be, in some countries, contrary to the principle of strict interpretation of copyright contracts. In any case however, besides the legal insecurity this situation brings out, some rights of communication to the public would never be recognised as granted by the GPL/LGPL or by the BSD: for instance, the licensee is not allowed by those licenses to show the loading or running of a GPLed program in public. On the contrary, licenses such as the MPL and the OSL grant the licensee all the rights the American Copyright Law provides for.

On this matter, only the CeCILL uses European terminology and tackles all the rights belonging to the authors according to European law. Only the CeCILL license is clear and safe regarding the inherent risks of interpretation.

Compliance of the license with the needs of the EC

As already said, the validity of the license is not inhibited by the use of US notions, but a license adapted to the EU terminology would avoid a judge a fastidious construction task.

Determination of the author of the software or of the author of derivative software

Legal provisions in Europe

Authorship of open source software should not be analysed "globally" or as a "subject matter in perpetual evolution". On the contrary, authorship of a program has to be assessed version per version.

a. Initial version

According to article 2, §1 of the EC 91/250 Directive, the author of the computer program is the natural person or group of natural persons who has created the program, or the legal person designated by the applicable Member State legislation. If the program is created by an employee in the execution of his employment contract, the automatic transfer of the author's right to the employer is presumed unless the contract provides the contrary.

From the information we were provided with, we assume that the European Commission has benefited from this legal presumption and is to be considered as the copyrights' owner on the initial CIRCA computer program. In this quality, the Commission is entitled to choose the license under which this program will be distributed. The intended license is an open source license: this license will authorise everybody to modify the program, in other words to create derivative works.

b. Derivative works.

Due to the license, any licensee is allowed to modify the program (to create derivative works of the program). It is indeed compulsory to get the authorisation of the author of a work prior to the integration of this latter or part of it in another work.

It must be stressed however that even if the licensee needed the authorisation of the author of the initial program to create his derivative work, this licensee is the owner of all the copyrights pertaining to this derivative work. This licensee is therefore the only one to have the rights to grant licenses on his new work and to lodge claims before courts in case of copyright infringement. On the other hand, in a copyleft scheme, this licensee is obliged to grant similar copyleft licenses on his own work in case of its redistribution.

c. Subsequent derivative works.

The here above explained rules are applicable *mutatis mutandis* to every subsequent derivative work.

One must pay attention however to the fact that the author of original elements always remains the copyright owner thereof: this influences the whole scheme of derivative works in a way that each time any of these original elements is reintegrated in a new derivative work, the copyright owner on this element must give its prior authorisation. For instance, even if B has the right to integrate all or part of the initial work of A in its derivative work, C must have the authorisation of A in order to integrate any original element of the initial work of A, even if B gave C a license to integrate B's work in C's derivative work.

Analysis of the licenses – possible problems and solution

In practice, this should not normally entail any difficulties, since the initial author A, as well as any contributor B, C,… , distribute their works to everybody (publicly) under the same conditions. This is expressly reminded at art. 6 of the GPL, but this system is the same for any license. This could however cause problems and legal uncertainties in case of withdrawal of one of the contributors from the authorship chain. This kind of problem can be avoided by clauses authorising sublicensing. Indeed, in this case, every contributor is entitled to grant a license on the whole program. The MPL and OSL expressly grant this right to sublicense. US legal scholars (mainly Lawrence Rosen) consider that the GPL and LGPL also (implicitly?) grant the right to sublicense.

Besides the fact that it describes itself as a "transferable" license (this non legal term could be construed as "sublicensable"), the CeCILL license specifically provides that the copyright holder undertakes to maintain the distribution of the Initial Software under the conditions of the Agreement, for the duration of the copyrights (art 6.1).

Compliance of the license with the needs of the EC

In order to avoid any legal uncertainties, the license of the CIRCA software should state that the licensee is granted a license by the initial author and each contributor and should also provide a clause allowing sublicensing.

Limits to the rights granted by the license

Contract law in Europe

Generally in software licensing, the rights are granted by the licensor as long as the licensee respects the terms and conditions of the license. Amongst others, these obligations (conditions) encompass keeping the copyright notices and disclaimers on the program and keeping the source code of the program available to any licensee.

This is based on general principles of contract law allowing contractors to bind them with terms and conditions they set up.

In a copyleft scheme, these obligations entail also the redistribution of the program, with or without modification, under the same copyleft license or at least, under the same terms and conditions. This clause is primordial if the licensor plans to take advantage of the modifications and developments made by its licensees. This clause is also advantageous for the whole open source community as it is also enabled to benefit from these modifications. If the Commission intends to be protected against the appropriation of the application by third parties and to benefit from further developments made by its licensees, a copyleft license is necessary.

All the considered licenses are copyleft except the BSD license that does not state that the modifications of the software have to be distributed under the same licensing scheme.

Compatibility

The drawback of copyleft licenses is that they usually are not compatible with each other. Compatibility means the possibility either to create software on the basis of a combination of software distributed under different licenses, or, when open source code is used in a software, to distribute this latter under another license.

For example, when the FSF deems that the BSD license is compatible with the GPL, it means in fact that any code under BSD can either be included in a program that will be distributed under GPL, or be added to a GPLed software, to create a bigger GPLed software. We can already stress that none of the other considered licenses is certified (by the FSF – on the www.gnu.org website) to be compatible with GPL. However, the article 5.3.4. of the CeCILL license provides that a modified version of the program can be distributed under the GPL license, and that code of the program can be added in a GPLed software. This clause has to be interpreted as an exception to the traditional copyleft provisions that appear in articles 5.3.2 and 5.3.3 of CeCILL (and to any other clause that would be different from the GPL).

Compatibility is a tricky word as regards the relations between open source licenses, since in that context, this notion does not encompass reciprocity. Indeed, whereas the BSD is deemed compatible with the GPL license, the contrary is far from being true. In fact, the GPL is compatible with no other license except future versions of the GPL. Indeed, any software

including GPLed code must, according to the terms and conditions of the GPL, be licensed under the same terms and conditions, which means under the GPL license.

Compliance of the licenses with the needs of the EC

This compatibility question is of great importance, specially knowing that the Commission's interest in open source licenses is partly founded on the perspective of integrating existing OSS applications in CIRCA. In this view, one should bear in mind that the choice of a copyleft license excludes quasi systematically the integration of software code licensed under other copyleft licenses. On the contrary, integration of non-copyleft code (under "academic" licenses such as the BSD license for instance) in copyleft code is usually permitted. For example, if the Commission chooses to publish CIRCA under the CeCILL license, BSD code may be integrated in that software whereas GPLed code may not. Further more, should the CeCILL license be actually compatible with the GPL (we think that the article 5.3.4. effectively works in that sense), it must be stressed that as soon as GPLed code will be integrated in CIRCA, the license will switch to GPL. In other words, choosing or creating a license that is compatible with the GPL entails that sooner or later CIRCA is very likely to switch in its development from this license to GPL.

Outreach of copyleft (which derived products are concerned by the viral nature of the license)

Copyleft and virality – notions – analysis of the licenses

The effect of Copyleft is that a small part of copyleft-licensed code integrated to a larger software entails the spreading of this license to the whole program. In other words, introducing a red cell into a blue organism will turn the organism red. All the considered copyleft licenses follow this logic (GPL, OSL, MPL and CeCILL).

Some drafters of copyleft licenses (the GPL'author FSF for instance) intend to push this spreading effect as far as possible. For example, the article 2.b) of the GPL is written in very broad terms and provides that "you must cause any work that you distribute or publish, that in whole or part contains or is **derived from the Program** or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this license". The FSF construes

those terms also very broadly and says that even a program that dynamically links with a GPLed program is derived from this latter and must therefore be licensed under the GPL in order to comply with its terms and conditions. In other words, to put a red cell in a blue organism will turn this latter red, as well as any other organism that enters in contact with it.

Other licenses exclude explicitly this viral effect.

The LGPL provides a linkage exception for libraries: when a program dynamically links with the library, the license provides that this software does not have to be licensed under the license applying to the library, i.e. the LGPL. It should be noted that the application of the LGPL to any software, beyond mere libraries, is still controversial. The logic and terminology used in the license might impede its application to executable computer programs.

The MPL makes clearly the difference between contributor versions (that is a modified work), which must be distributed under the MPL license, and larger works, which do not have to be licensed under MPL as a whole (only the files of this larger work that are Contributor Versions must be under MPL license).

The CeCILL license states clearly that dynamic modules linking with the program do not have to be licensed under the CeCILL terms and conditions.

Legal provisions in Europe

The “copyleft” is legally well grounded: indeed, by introducing some original elements of a work into a new work, this latter is a derivative work of the former. To do so, the authorisation of the copyright owners of those elements is required, and this authorisation can be given under certain conditions. This copyleft effect applies to any case where code is reproduced (including static linkage).

The viral effect through mere dynamic linkage (also called “strong copyleft”) is a much more debated question, and currently discussed on its legal grounds. From our point of view, there is no legal provision in the EC 91/250 directive on which this viral effect could be grounded. On the contrary, when a program dynamically linked with another, no code is reproduced in the program as such: the only reproduction of code that is made occurs in the RAM of the computer, where both the programs are “merged”. The reproduction occurs therefore at the

execution of the program. This kind of reproduction could be deemed covered by the utilisation exception provided by article 5, §1 of the directive EC 91/250. However, this is only an opinion, and given the absence of any legislation or case law on that point, no clear-cut answer can be given so far on that topic.

Besides, too overbroad a viral effect will contradict a key principle of copyright, i.e. the exclusivity of the rights. Each author is the sole person entitled to decide upon the ways of exploiting his/her work. If the software he/she has developed is "contaminated" by the dynamic link that another program, under GPL, has with it, it implies that the author of the first software has lost his/her exclusive right to decide what to do with the software. When the software is derived from a GPLed software, this obligation to exploit the software under a copyleft scheme is valid, but it is more doubtful when the contamination only results from the dynamic linkage.

Compliance of the licenses with the needs of the EC

Besides the legal uncertainties on the enforceability of the viral effect of some licenses, it belongs to the EC to make the political choices as regards the viral degree of the CIRCA license. From our experience, we can however stress that some application under viral licenses such as GPL are ostracized by developers because of their fear to see their programs, which merely link with the open software, being contaminated by the license. From a legal point of view, this exaggerated viral effect might be contrary to the exclusivity of rights, which is a key principle of copyright.

3. Liability & Warranty

Analysis of the licenses

A common provision in all open source licenses aims at exonerating the Licensor from any liability arising from the use of the software. No warranty of any kind is offered to the licensee, and the software is provided "as is". Most licenses provide that no damages arising from the use of the software, including any direct or indirect damages (e.g. loss of use, data or profits, business interruption), will entail the liability of the Licensor. Some licenses (GPL,

Mozilla Public License, Open Software License) limit however this liability exoneration to what applicable law permits. That means that the Licensor might remain liable in some cases, where the applicable law does not allow to contract out of the legal regime of liability.

The CeCILL License is somewhat peculiar in that respect. It distinguishes, more clearly than in other licenses, the liability of the Licensor, arising from his/her obligations under the license and the warranty of the software that is the product provided by the license. As to the contractual liability, CeCILL license states that the Licensor will be fully responsible of the proper execution of his/her obligations, except (i) for damages resulting from the inexecution of his/her obligations by the Licensee, (ii) for damages resulting from the use of the software by a professional using it for a professional purpose, (iii) for indirect damages resulting from the use of the software. This approach is legally founded and compliant with the legal analysis of the liability regime applying to open source licenses, but its formulation, that starts with recognizing a full liability, only limited in three cases, might raise some doubt, amongst the open source community, about the compatibility of the CeCILL License with the open source principles and philosophy.

As to the warranty of the software, the CeCILL license is similar to its counterparts and states that the software is provided "as is". Consequently, it does not guarantee the absence of any bugs or errors in the software nor its compliance with the equipment or needs of the Licensee.

Legal provisions in Europe

The legal provisions related to liability and particularly to the validity of limitations of liability are not identical in all Member States, except when a consumer is concerned[9]. However, the key principles of such a regime are rather similar in all Member States. Therefore, even though our analysis of the licenses is based on Belgian Law, our conclusions might be valid under other EU legal regimes, save for small differences.

[9] In that case, the EU directive on the unfair consumer terms can be applied to consider invalid some liability limitations.

The Licensor of a software might be held liable under four causes of liability: the general contractual liability, the liability for defaults of the product, object of a sale, the liability for defective products, and the warranty against eviction or dispossession.

The first one is the general liability for the execution of his/her obligations. The Licensor will be liable for any damage resulting from the inexecution of his/her obligations under the License. This liability can be contractually limited. Such limitations will be valid except where:

- the Licensor has committed a fraud (dolus) or an intentional fault. For instance the Licensor will never be allowed to limit his/her liability if he/she has intentionally inserted a computer virus in the software he/she distributes under an open source license;
- the Licensor has committed a serious offence (*faute grave)*. In some countries, no liability limitation will be accepted for such faults, in others, it will be valid only if such a limitation is expressly stated in the license. Some of the considered licenses indicate that the exoneration of liability extends to the case where the Licensor knew that a damage could occur. That could be construed as exonerating the Licensor for his/her serious fault;
- the Licensor has not performed an obligation that is essential to the contract. In open source licenses, the obligation to provide the source code of the software, the obligation to authorise the free use and distribution of the software or the obligation to attach the copyright notice to the copy of the software, can be considered as key obligations of the contract. The limitation of liability could never be construed as to exonerate the Licensor from his/her liability regarding the performance of such obligations. The no liability provisions do not have such an intent or purpose, anyway, as it clearly results from the CeCILL License;
- the law regulates the legitimate extent of the limitation of liability or states that some liability regimes are of mandatory nature (*ordre public)*. To our knowledge, there are no cases where this could apply to liability arising from open source licenses.

The second source of liability is the liability for defaults of the product that is the object of a sale. The nature of a software license contract is still discussed by legal scholars. Many consider that it is certainly not a sale, which means that such a warranty will not be of application. That does not imply that the seller of a tangible copy of a software, who can also be its Licensor, will not be liable for any defaults of that tangible copy, but such a guarantee will not apply to defaults of the software itself, that is an intangible product.

European law also imposes to Member States, according to the EC Directive 85/374/CEE of 25th July 1985 related to the defective products, to set up a specific liability regime upon the maker of products for the defaults such products might have. However, this liability only applies to damages caused to the physical integrity of the person and to his/her property. There will be no liability under this regime for interruption of business or loss of data. Therefore, the relevance of this liability regime is rather limited as far as software is concerned.

Finally, in sales contracts, the seller has to guarantee against eviction, i.e. that no one has a title in the object of the sale. Even though such an obligation is not of application to other contracts than sale contract, most open source licenses expressly state that the Licensor does not make any representation or warranty concerning the software. Such provisions are valid.

When a consumer is a party to an open source license, the contract provision limiting the liability of the licensor will have to comply with the legal provisions about unfair terms in consumer contracts. First, a term in a consumer contract might be deemed unfair if it conveys a significant unbalance between the rights and obligations of the parties, e.g. when the limitation of the liability is too broad compared to the other obligations and rights of the Licensor or the obligations of the consumer. Secondly, a term might also be considered as unfair when it is included in the list of prohibited contractual provisions laid down in national laws. For instance, a limitation of liability will be invalid if it relates to a key obligation of the contract, to an intentional fraud or serious offence or if it takes away from the consumer all legal actions and remedies.

Compliance of the licenses with the regulatory framework and the needs of the EC

The limitation of liability that can be found in all the considered licenses will normally be held valid, since freedom of contract is a major principle in EU law. The provision stating that no damages, of any kind, arising from the use of the software will lead to the liability of the Licensor does not harm the economy of the contract nor a key obligation thereof. On the contrary, it sounds logical that, in an open source environment, an absence of liability is the counterpart of the many freedoms that are granted to the user of the software. However, if the European Commission guarantees to provide to public administrations a software that complies with all their needs, the economy of the contract might be different and too broad a

limitation of liability and warranty of the software might be held unfair and invalid. However this problem could be solved by the provision by the EC of an independent warranty contract, which is not prohibited by the open source licenses.

The only cases where such limitations will not fully operate will be where the Licensor tries to escape liability for an intentional fraud or, in some countries, for a serious wrongful conduct.

The analysis is similar when consumers are parties to the license. Due to the specific philosophy and regime of the open source licenses, a limitation of liability and warranty does not prejudice the balance between the rights and obligations of consumers and Licensors whatsoever. One can even say that, in open source licensing, the scales of the balance strongly tilt in favour of the users who might be consumers.

That said, it is worthwhile to note that most of the considered licenses expressly state that their limitation of liability and warranty will only apply if the applicable law permits so. Therefore, it is not the intention of the drafters of such licenses that the limitations of liability receive an application that is contrary to the applicable law.

Stating such a boundary to the no-liability clause is advisable but not necessary.

4. Contract Law

Acceptance of the license contract

Analysis of the licenses

The acceptance of some of the considered licenses is of key relevance for the drafters of open source licenses.

The GPL (article 5) and OSL (article 9) infer the acceptance of all the terms and conditions of the license by the licensee from the fact that nothing else but the license grants the permission to modify or distribute the Program or its derivative works: as these actions are prohibited by law without the author's authorisation, the fact of modifying and distributing the Program would indicate acceptance of the License.

The CeCILL adopts the same logic, inferring the acceptance of the license by some uses of software (loading or downloading the software). The CeCILL also peremptorily states that a

copy of the agreement has been provided to the licensee prior its acceptance, and that the Licensee acknowledges that it is aware thereof.

The BSD and the MPL do not provide anything thereabout.

Legal provisions in Europe

All theses contractual clauses concerning the licensee acceptance are useless and do not avoid the traditional problems on that topic according to European law.

According to general contract law principles, the acceptance of terms and conditions can only be inferred from the certainty 1) that the licensee had the opportunity to read these terms and conditions and 2) that he agreed with these latter. The fact of using the licensed program, modifying it or distributing it does not entail that the user is aware of all the terms and conditions and has accepted them.

A signed written deed is of course the best way to prove the acceptance of a contract. However, general case law and scholars have recognised some acceptance systems.

The shrink-wrap system is a well-established practice of the software industry. It consists of wrapping a copy of the program and putting a license prominently on the wrapping, stating that breaking the wrap entails the acceptance of the terms and conditions of the license. This practice is commonly accepted, as the licensee is confronted to the license before using the program. The click-wrap license is an application of this system on the screen of the computer, just before the installation of the program. The installation software makes the license appear on the screen, and the user has to click on a button “I agree” before proceeding further on. Both systems are commonly accepted throughout the European Community.

Most of open source software do not however rely on those acceptance systems. Indeed, most of them are only made available for download on websites, the license being a file amongst other program files. The mechanism that consists of referring (by way of hyperlink for example) to the terms and conditions without asking the licensee to validate anything is called the browse wrap system. This system is also usually accepted as long as the user had the attention reasonably attracted on his opportunity to read and acknowledge the license agreement without any exceeding efforts. This depends on the visibility of the hyperlink, or the location of the license file in the package. Once one is reasonably certain that the licensee

has read the license (or at least, has had the opportunity to do it), one can infer a tacit acceptance of the license from the fact of using, modifying and distributing the software. This must however be assessed on a case-by-case basis. For example, the recent German Netfilter court case (District Court of Munich I, Judgment of 19/05/2004) has accepted that the terms and conditions of the GPL were part of the contract, as general terms and conditions would be, by the fact that a reference was made to a web page, that is still available to the public.

Compliance of the licenses with the needs of the EC

No matter which license is chosen by the EC, for sake of acceptance certainty, the CIRCA program should display the license terms and conditions on screen during the installation of the program, and asks the licensee to click on a button to mark his agreement thereof.

That said, when the software is provided to the licensee through an electronic network, such as the Internet, that provision can be qualified as an information society service. Consequently, the website offering the CIRCA software should be compliant with the legal provisions laying down the requirements for offering an information society service, e.g. the EU directive on legal aspects of electronic commerce and the EU directive on distance contracts. Those texts require certain information about the steps to conclude the contract (such as a click-wrap contract) and consumer rights to be posted on the web site offering the service (i.e. the downloading of the software).

Enforceability of the license

Once the licensee has undoubtedly agreed with the terms and conditions of the license, this license should not raise any kind of problem as regards its general enforceability. This license is valid (save potential illegal clauses that could be put aside by the judge) and constitutes the law between the parties.

The OSL, GPL, MPL and CeCILL encompass a traditional severability clause, according to which the unenforceable provisions will be reformed to the extent necessary to make them enforceable.

Except for what concerns the CeCILL, the fact that the license is drafted in English, using U.S. notions does not impede its enforceability. If the terms and conditions are not clear, the judge will construe them according to the application of local legislation and paying due attention to the supposed intentions of the parties at the moment of the execution of the contract. In the aforementioned German decision Netfilter the District Court of Munich stated that the license was valid and enforceable, even if written in the English language, which is the common technical language in the computer industry.

Duration and consequences of termination on rights enjoyed by users

Analysis of the licenses

The OSL license is perpetual, but terminates immediately if the licensee fails to honour the copyleft provision.

The GPL and MPL license do not provide any duration but encompass a termination clause in case of infringement to the conditions of the license. The CeCILL license provides that the rights are granted for the copyright protection period and also provides a termination clause.

Contrary to the GPL, The MPL and the CeCILL provide that rights granted terminate only after a 30 days period subsequent to a contract breach notice.

Parties who have received copies or rights of a licensee infringing the terms and conditions of the GPL or MPL will not have their license terminated so long that these parties comply with the terms and conditions of the license. Similarly, the CeCILL license states that the licenses granted prior to termination remain valid if they have been granted in compliance with the license.

The BSD does not contain any clause on that matter.

Compliance of the licenses with the related legal framework and the needs of the EC

To provide that license terms and condition will last for a period exceeding the legal term of protection is normally deemed illegal. The courts and tribunals therefore reduce the term to the legal protection period. On that regard, only the CeCILL license sticks to the legal theory. However, this has no influence on the whole validity of the licenses.

Termination clauses are accepted and quite common in contract law. Automatic termination or notice period are indeed two possible modalities.

As regards the Commission, the 30 days notice period procedure seems a bit more complicated, as it requires a greater vigilance regarding the respect of the agreed procedure. An automatic resolution is much more simple and avoid this heavy procedure : the Commission is therefore immediately entitled to invoke the resolution of the licence for breach of contract. On the other hand, the fact that a license encompasses an automatic resolution clause does not mean that the licensor cannot waive his right to terminate the license. Indeed, instead of claiming the enforcement of such automatic termination clause, the licensor still has the opportunity to contact the infringer and ask him to comply with the terms and conditions of the license

5. New versions - Possible modifications/translation of the License

New versions

Analysis of the licenses

Any software distributed under a given version of the CeCILL may be subsequently distributed under the same version, a subsequent version of CeCILL or the GPL (cfr supra). Only the authors of the CeCILL license may modify it.

Article 9 of the GPL provides the FSF with the right to publish and revise new versions of the GPL. If the version number of the GPL applicable to the program is specified, the licensee may choose to apply that version or any subsequent version. If no version number is available, the licensee may chose between all the available versions of GPL.

The MPL allows to distribute the program under the present of any future version of the license. However, the MPL expressly forbids any alteration of the terms of the license, but allows to add a complementary contractual document granting additional warranty, support, indemnity or liability obligations. The MPL provides that the program and modified versions can be published under any subsequent version of the license. The Nescape society reserves however itself the right to modify the terms applicable to code covered by the MPL license.

The OSL and the BSD do not address that point.

Legal considerations

This possibility that the licensee has to choose between several versions of the licenses must be analysed as a way to leave the licensee a certain contractual freedom. In other words, the licensor leaves him the choice between several contractual modalities. Such clause must therefore be considered as valid.

Possible modifications/translation of the License

Analysis of the licenses

The OSL may not be modified without the express written permission of its copyright owner, i.e. Lawrence Rosen.

Similarly, only the author of the CeCILL license may modify it.

The Netscape Company reserves the right to modify the terms applicable to code covered by the MPL license.

The GPL forbids adding any restriction to the rights granted by the license. Furthermore, only the FSF has the right to create new versions of the GPL license.

Legal considerations

Generally, the drafters of copyleft licenses reserve the right to modify or create further version of the license text. One must stress the fact that license texts are also subject to copyright protection. Therefore, one needs the authorisation of the author before copying, translating or integrating all or part of the text into another license.

Compliance with the needs of the EC

Given what precedes, the two main options at the disposition of the Commission are either to choose a license as it is, or to create a new one.

Choosing a license and translating and/or adapting it will not be possible without the authorisation of its author.

COMPARISON TABLE ON LEGAL REQUIREMENTS

The red boxes indicate a discrepancy between the license and the requirements of the European Commission regarding CIRCA. The green boxes indicate the clauses that would be necessary to comply with the requirements of the EU regulatory framework.

	CeCILL	GPL/LGPL	OSL	MPL	BSD	Recommended Future CIRCA License
1. INTERNATIONAL DIMENSION **1.1 applicable law clause**	Explicit clause: French Law	NO CLAUSE No legal reference Rome Convention: law of the licensor's country	Explicit clause: The laws of the jurisdiction wherein Licensor resides or conducts its primary business	Explicit clause: California Law	NO CLAUSE No legal reference Rome Convention: law of the licensor's country	Explicit clause: laws of the EU jurisdiction wherein Licensor resides or conducts its primary business / Belgian law if Licensor resides or conducts its primary business outside EU
1.2 competent jurisdiction clause	Explicit clause: Court of Paris	NO CLAUSE Brussels Regulation: Country of the defendant.	Explicit clause: The courts of the jurisdiction wherein the Licensor resides or conducts its primary business	Explicit clause: Federal Courts of the Northern District of California	NO CLAUSE Brussels Regulation: Country of the defendant	Explicit clause: Jurisdiction of the European Court of Justice for all litigations arising out of the contract entered by the EU (According to Art 238 EC treaty Otherwise: The courts of the EU jurisdiction wherein the Licensor resides or conducts its primary business / The courts of the EU jurisdiction wherein the Licensee resides or conducts its primary business if Licensor resides or conducts its primary business outside EU

1.3 used terminology	EU terminology	US terminology	US terminology	US terminology	US terminology	EU terminology
2. INTELLECTUAL PROPERTY **2.1 rights granted by the license**	- Use - Reproduction (permanent or temporary) - Modification (translation, adaptation, arrangement) - Distribution, publication -Communication to the public - Sublicense ? ("transferable" license)	Copy Modify Distribute Explicit exclusion of any other right	Reproduce, Prepare derivative works, Distribute, Display, Perform, Sublicense	Use, Reproduce, Modify, Distribute, Display, Perform, Sublicense	Modify Redistribute (Copy is implied)	- Reproduce - Modify - Distribute - Communicate to the public - Sublicense
2.2 Chain of authorship 2.2.1 initial author licensor system	implicit	Expressly provided	implicit	implicit	implicit	Expressly provided (stipulation pour autrui / stipulation for third party clause)
2.2.1 sublicense system	Yes? "transferable license"	Not explicit: No? (contra US scholars)	yes	yes	no	Yes
2.3 Conditions 2.3.1 Attribution, copyright and disclaimer notices	Yes	Yes	Yes	Yes	Yes	Yes
2.3.2 Copyleft	Yes	Yes	Yes	Yes	No	Yes

2.3.3 "Virality" (understood as contamination through dynamic linkage)	No (exclusion of copyleft effect for dynamic linkage with modules)	Intended (legal ground?)	No	No (difference between "contributor versions" (file level) and "larger works")	No	No
3. LIABILITY AND WARRANTY 3.1 Warranty Clause / "as is" clause	No/ yes	No/ yes	No/ yes	No/ yes	No/ yes	No/ yes
3.2 Disclaimer (liability exoneration clause)	No Licensor is declared responsible except for: 1) damages resulting from inexecution of licensee, 2) damages resulting from use by professional 3) indirect damages resulting from the use of the software	Yes (to what applicable law permits)	Yes (to what applicable law permits)	Yes (to what applicable law permits)	Yes	Yes (to what applicable law permits)
4. CONTRACT LAW **4.1 Acceptance of the contract**	Acceptance inferred from the use of the software	nothing but the licence grants the permission to modify and distribute : the occurrence of such acts	nothing but the licence grants the permission to modify and distribute : the	Nothing provided	Nothing provided	Click wrap / browse wrap licenses (reference or hyperlink)

		= acceptation	occurrence of such acts = acceptation			
4.2 Enforceability 4.2.1 Severability clause	Yes	Yes	Yes	Yes	No	Yes
4.2.2 Enforceable (in general)	Yes	Yes	Yes	Yes	Yes	Yes
4.3 Duration 4.3.1 Defined Period	"the copyright protection period"	No	"perpetual" (automatic reduction to the copyright protection period by courts and tribunals)	No	No	"the copyright protection period"
4.3.2 Termination clause	Yes Termination in case of violation of the licence, after a 30 days period subsequent to a contract breach notice	Yes Immediate termination in case of violation of the licence	Yes Immediate termination in case of violation of the licence	Yes Termination in case of violation of the licence, after a 30 days period subsequent to a contract breach notice	No	Yes Immediate termination in case of violation of the licence
5. NEW VERSIONS **5.1 New version clause**	Licensee may redistribute the program under: - the same version, - a subsequent	If GPL number specified, licensee may choose between this version and any subsequent version.	Nothing provided	License may redistribute the program under - the same version, or	Nothing provided	A clause concerning possible new versions could be provided.

	version, or - the GPL	If GPL number unspecified, licensee may choose any version.		- a subsequent version.		
5.2 Modifications / Translation	Clause : the licence may only be modified with permission of the authors of the licence (CEA-CNRS-INRIA)	Clause : only the FSF has the right to create new versions of the GPL	Clause : the licence may only be modified with permission of the author of the licence (L. Rosen)	Clause : the Netscape company reserves the right to modify the terms applicable by MPL covered code Nothing about the licence *in abstracto*: Common copyright principle: the licence is protected by copyright law – authorisation from the author is required	NO CLAUSE Common copyright principle: the licence is protected by copyright law – authorisation from the author is required	Clause : the license may only be modified with permission of the author of the licence

c) Economic Analysis

1. Opportunity considerations

Strategy may be considered from several point of views:

The perenniality of the open source character

The specification received from the Commission (OSS License – Specs v3 (2) received on 10. October 2004) mentions (page 4) that a number of operational considerations should be taken into account, namely … "*protection against appropriation of application by third parties*".

As a consequence, the choice of a non-copyleft, permissive license allowing BOTH the proprietary software industry AND open source communities of developers to improve and fork their respective modified versions of CIRCA under various sub-licenses (proprietary, GPL or others) is not recommended. There is indeed a risk that, in consideration to the CIRCA existing and future market opportunities, a private organisation could make use of its CIRCA knowledge to present rapidly seducing enhancements making the proprietary version more attractive. The risk must be appreciated in consideration of the still uncertain issue of software patents – currently in discussion in EU legislative, judicial and specialised bodies.

The protection against appropriation excludes the BSD, the Artistic, the Apache, MIT, Python, Zope and similar licenses, and leads to a choice between the existing copyleft licenses (for example, the GPL, the CeCILL, the OSL and the MPL licenses analysed here are all copyleft) or to create a new copyleft license.

One-shot or generic purpose

The Commission could choose to consider only the need of licensing CIRCA, without any idea of generalising this to other EU software or to produce a model that other public sector administration could use. The advantages of this option is the relative freedom regarding the selection (that should consider only the needs of CIRCA), and the low political commitment it will require.

Another approach, that appears to be the preferred one (according to the advise specifications and the fact that the Commission, and even IDA, has ownership in other softwares to promote

and license), is to choose an existing license or to create a new license that could be easily extended to further usages later. This impose the careful selection or redaction of the license in generic terms, convenient for other software and for other public sector (or even private) bodies located or having their main activity inside the Union. The advantages of this option is to use the CIRCA distribution as a test for gaining a progressive endorsement of the selected license by European developers. According to this preferred approach, the Commission can either choose an existing general purpose license (for example the GPL) or to create a new general purpose copyleft license (an "European Union Open Source Licence" or EU–OSL v 1.0) with the declared ambition to propose it as best practice for all EU software open source licensing and to promote and make interoperable Member States public sector licensing policies in general. In addition to the careful selection or redaction of the license in generic terms, the promotion of a new license will require a long term investment, commitment and constant support, sometimes political and controversial, from a strong organisation.

An existing text (as the GPL) or a New EU-OSL license ?

A new license should be introduced only if it presents substantial advantages above all existing ones (e.g. a variant with better conformity to European laws), especially if there is a strong and clear policy to generalise the use of this license to many software (and not to use it only in the specific case).

For many developers or policy makers familiar with open source, the selection of a copyleft license is quasi equivalent to the selection of the GPL. Any other choice, and in particular the creation of a new license will generate hostile comments coming mainly from the FSF "catholic"[10] advocates:

- Why such EU-OSL as the GNU GPL already exists?
- Is your motivation not just guided by the desire to have 'your own' open-source licence?
- Aren't you promoting (European) nationalism rather than internationalism? (Attempts at writing national licenses have a strong tendency at nationalisation of Free Software, creating incompatible islands that will not be able to cooperate

[10] In the old etymologic sense of Catholic: claiming for universal establishment of a unique orthodoxy.

with each other, eliminating one of the most important advantages of Free Software).

To address such arguments, the Commission will have to provide information:

- Intention is to widely engage European and Member States bodies to pool open source software according to the licensing model which is the best adapted to their culture.
- The elaboration of an European text will remove barriers that impeached so far a number of administrations to ground their licensing policy on an American text, using typical American concepts and legal background (this, although a limited number of European administrations have already experienced the GPL by having no better solution).
- The European diversity requires to establish, to provide legal authority to a license conform to European law and to produce it in European / Member States courts if needed in – ultimately – all European official languages, while this facility does not exist and is even refused with the GPL.
- The establishment of an European license should at the contrary contribute to limit the current phenomenon of creation of national licences, this phenomenon being consecutive of the poor satisfaction of European public administrations regarding the available licenses.

The above reasons will have to be analysed, published, explained, and politically long-term supported by the Commission and other Public sector authorities in an significant number of meetings and publications before the new license will demonstrate its utility based on legal, cultural and linguistic evidences, and establish its compatibility with the global F/OSS world. This will make the creation of a community a more time consuming and challenging task, and has an economic impact.

Creating a Community

In addition of the issues specifically related to the choice of the license (above section) the necessity and the methodology of creating a developers community around CIRCA (or any further OSS licensed application) may be inspired from the advise report "guideline for public administrations on partnering with free software developers"[11]. This presents a long term investment (an initial 3 year is a minimum). Let's remember the main principles:

[11] Unisys/Merit – IDA GPOSS report of October 2004

When a software has not been developed originally inside an open source community, the original author has to present the core of the application as the seed around which a community of developers can form.

Attracting a community on a fully developed application of common interest is planting a tree rather than a seed. It may be more successful provide the original author maintain both initial leadership and progressive respect for the contributions of new-comers.

A series of incentives should be implemented as follows:

- Support / finance a scientific or users committee to identify and motivate contributors, to monitor progresses (at least 4 meetings a year);
- Support / finance appropriate information service, Web development and distribution site organisation;
- Public recognition or "CIRCA expert label" awarded by the committee to significant volunteers contributions (published on Web site);
- Bounties or funding for "winning" selected volunteers contributions, awarded quarterly by the committee;
- Interesting job or service opportunities in the emerging "CIRCA Market" (e. g. though support service contracts or call for tender).

2. Meeting the IDA Objectives

The table below illustrate how and why the adoption of a specific F/OSS licence answers to the IDA business objectives and is proportional to the needs

Business objective	Justification
1. The main business objective of IDA is to promotes the use of common tools (like CIRCA) and of generic telematic services by the Member States Administrations	Any use of software copyrighted by the Commission requires a license (otherwise is illegal or may be cause of unlimited liability) As the Commission has no ambition to become a proprietary software house and to deploy costly marketing activities to promote CIRCA (or any future solution), a general, free licensing policy has proven to be the most efficient way of wide and cost-effective promotion
2. Following article 5 of Decision 1720/1999/EC, , *the Community shall … encourage the development and use of such common tools … by sectoral networks; in particular, the spread of suitable solutions which are developed within a sectoral network shall be ensured."*	An Open Source License responds to the condition to encourage development of common tools. Indeed, applications such as CIRCA may require adaptations (linguistic, legal, …) to local requirements. In addition, an application like CIRCA will always interact with the specific "environment" of the sectoral network where it is implemented and may therefore request to be improved with specific APIs (application programming interfaces) for interoperability purpose. Developing and embedding such interfaces requests access to internal software formats and therefore to the source code in order to ensure interoperability
3. Make the development and maintenance of CIRCA (and further licensed applications) more sustainable and independent of public sector financing (e.g. IDA financing. Under the IDABC decision, applicable from the 1st January 2005 onwards)	Open Source Licensing reinforces chances to achieve sustainability of applications because, provided initial impulsions and incentives are given, it allows the maintenance and evolution of CIRCA to be taken in charge by independent software communities of volunteers, thus ensuring that it would evolve with technological change and remain available also for use by the public sector.
4. Developing CIRCA Code or adapting it should not be reserved anymore to public administration, but should be given to all, without discrimination	A general, non discriminatory licensing policy is the condition to create the wide community requested to facilitate maintenance, support and development. When public authorities have little in-house skills or resources to carry CIRCA adaptations or to secure application support, they will need to acquire such

	services from the market. An OSS licence allows the world wide service market to provide services to the commission and to other public administrations. With a common access to the source code, all potential bidders are able to fully understand the way the application has been programmed. None is advantaged thanks to exclusive access to the source code.
5. Security is highly important, as CIRCA may support sensitive information.	Opening the code to public examination provides in general more security. Despite some arguments that the flaws of the application will be revealed to potential hackers (the "security by obscurity"), most experts says today that "security by transparency" provides a better guarantee: Peer review is a proven approach to identifying and remedying weaknesses and bugs in software. A growing number of Public sector managers are requiring full transparency and screening possibilities for applications facilitating the participation of citizens and businesses in "e-democracy"
6. In addition to non-discrimination, the Commission requires protection against appropriation of application by third parties	This is another justification for an open source license, with a precision: it should grant that, in case of re-distribution, the CIRCA application, even modified or improved, does not become the property of any third party. The safest way to obtain such result is to adopt "copyleft" license, which mandates to reuse the SAME license in the case of re-distribution. On the other hand, non-discrimination means that everyone, including the industry, should be able to link CIRCA with other applications (even proprietary application) without aggressive viral effect. This implies a license with moderate virality: only the CIRCA part is and will stay concerned, and not any linked software
7. It is important to facilitate the integration of existing OSS component or applications within CIRCA Using pre-existing software modules through the modularisation of applications is facilitated if these components that are freely available are issued under one of the open source licenses	If, in consideration to the above principle, the Commission do not want to adopt a strong virality license (= the GPL) and prefers a "OSL type license", this will restrict the choice of components. An alternative is to request, if needed, dual licensing from the original author or from the component's copyright owner. Indeed the original author may authorise the Commission (or any another user) to redistribute the work under the license used by the Commission.
8. CIRCA Licensing is not a "one shot"	This point means that the license text must be generic,

operation. The Commission request a general purpose license, adapted to the EU legal framework, that could be used for other applications, and by other institutions (also from Member States)	it must inspire confidence to other public authorities that are in general at the early beginning of open source licensing and are looking for guidelines in that matter. The Commission's license must open a new best practice area in open source licensing.
9. The Commission, as a Public authority should keep the freedom (or the privilege) to adapt not only the software (CIRCA in this first case), but also the license itself (e.g. to better correspond to the EU legal and linguistic framework)	This means that, even if an OSL type license is recommended, it should be reworked, adapted to the EU framework / vocabulary and restructured so as to become a new text originated from the EC. Therefore, the text itself of License, as a text whose copyright is owned by the Commission, could be licensed by the Commission to other bodies wanting to use it. This is the only way to preserve the freedom of the Commission, of IDA, or any independent European organisation put in charge, to adapt the license if needed in the future, and not to depend from any foreign (US in this case) organisation .

It results from the above table that all points are in favour of licensing CIRCA under an open source license. While point 7 is clearly in favour of adopting the GPL, many other points (6, 8 and 9) contradict this, making the redaction of a new and original text the only solution that may correspond, long term, to the requirements and business objectives of the Commission.

4. Conclusions

The three options

None of the considered existing licenses is perfect, and each of them present considerable problems on a legal point of view.The BSD license should be put aside given the absence of copyleft clause. This is however a fundamental feature in order to avoid the appropriation of the program by third parties.

The GPL's major problem is that the right of communication to the public is not provided explicitly amongst the granted rights, and that a clause limits furthermore the granted rights to what is explicitly provided by the license. Moreover, the GPL is known for being the most viral license ever, whereas massive spreading through dynamic linkage is not the aim of the European Commission.

The MPL's main problems reside in its applicable law and forum clause, referring to California.

Whereas the CeCILL could be deemed the best license given that it is the only one to be drafted according to EU terminology, its liability clause is really insecure and could jeopardize its compatibility with any other F/OSS license. Furthermore, its clause concerning its compatibility with the GPL is likely to turn rapidly the CIRCA license into a GPL license and therefore attract the drawbacks of this latter.

The OSL does not present any major problems, but is drafted using US legal terminology.

All the considered licenses can only be modified by their authors, what leaves the Commission three solutions:

1. To chose a license and apply it "as is" (in that case, the OSL seems the best choice, but it exists in English only)
2. To contact the author of one of those licenses in order to ask him modify/translate/adapt it himself, for European Union purpose.This choice applied to the OSL could be seen as the most promising in terms of feasibility and recognition by the OSS community. The OSL seems indeed to be a good working base and this license is promoted by one of the two major F/OSS organisations, namely the OSI.

   However this choice does not left to the Commission much freedom regarding the further version of the licence (if the author agrees for a first modification, will he agree for a later one?

   This option is also to analyse in regard of the translations required by a real European licence: to be produced in courts, the license should have – medium term - an equal value in all the EU official languages, and collaboration with the OSI has to prove efficiency regarding such diversity
3. To create a specific OSS license (what implies more work, more commitment and the risk of non-acceptance by the OSS community)

Proposition of a license

The Commission specifications (task 2) require to (2. xii) … establish the proposal of a license agreement in English and French language.

The fact the proposed license must be in French and English implies the creation of new text, as no analysed licence is official/valid in these two original languages (the CeCILL license has a

draft translation, but mentions (11.5) that only the French version has authority for interpretation)

It was also required to consider all legal issues in order to be in conformity to the European Union legal framework, including the choice of jurisdiction, applicable law, limitation of warranty and liability.

According to these guidelines, as none of the existing OSS licences answers to the requirements and as the OSL v 2.1 was the closest to these requirements, the present study proposes two alternative versions of the licenses that could serve as a basis for the elaboration, by the European Commission, of a definitive license.

The first one is to use the OSL v 2.1. as a basis and to adapt it, with the prior authorisation of its author, Lawrence Rosen, to the EU regulatory framework. Annex 1 of the present study indicates what modifications should be made to the OSL v 2.1. license.

The second alternative is to draft a completely new F/OSS License, that would be specifically drafted taking into consideration the requirements of the European Commission. Annex 2 of the present study proposes a skeleton to such a license (in English and in French) for further discussion and elaboration. Such a skeleton provides the key provisions that should be included in the license, the text of some provisions and underlines the choices that should be made on other points.

In order to keep the spirit of open source licensing, the process of drafting an European F/OSS License could usefully be open to public comments.

Annex 1 – Possible adaptation of the OSL v.2.1. License

Open Software License v. 2.1 This Open Software License (the "License") applies to any original work of authorship (the "Original Work") whose owner (the "Licensor") has placed the following notice immediately following the copyright notice for the Original Work: Licensed under the Open Software License version 2.1	**Modifications**
1) **Grant of Copyright License.** Licensor hereby grants You a world-wide, royalty-free, non-exclusive, perpetual, sublicenseable license to do the following: a. to reproduce the Original Work in copies; b. to prepare derivative works ("Derivative Works") based upon the Original Work; c. to distribute copies of the Original Work and Derivative Works to the public, with the proviso that copies of Original Work or Derivative Works that You distribute shall be licensed under the Open Software License; d. to perform the Original Work publicly; and e. to display the Original Work publicly.	for the duration of the copyright protection period a. To use the Original Work in any circumstance and for all usage; b. To reproduce... c. To modify the Original Work to prepare derivative works ("Derivative Works") ... d. To distribute copies... e. To communicate the Original Work and Derivative Works to the public, with the proviso that copies of Original Work or Derivative Works that You communicate shall be licensed under the Open Software License;
2) **Grant of Patent License.** Licensor hereby grants You a world-wide, royalty-free, non-exclusive, perpetual, sublicenseable license, under patent claims owned or controlled by the Licensor that are embodied in the Original Work as furnished by the Licensor, to make, use, sell and offer for sale the Original Work and	for the duration of the patent protection period

Derivative Works.	
3) **Grant of Source Code License.** The term "Source Code" means the preferred form of the Original Work for making modifications to it and all available documentation describing how to modify the Original Work. Licensor hereby agrees to provide a machine-readable copy of the Source Code of the Original Work along with each copy of the Original Work that Licensor distributes. Licensor reserves the right to satisfy this obligation by placing a machine-readable copy of the Source Code in an information repository reasonably calculated to permit inexpensive and convenient access by You for as long as Licensor continues to distribute the Original Work, and by publishing the address of that information repository in a notice immediately following the copyright notice that applies to the Original Work.	
4) **Exclusions From License Grant.** Neither the names of Licensor, nor the names of any contributors to the Original Work, nor any of their trademarks or service marks, may be used to endorse or promote products derived from this Original Work without express prior written permission of the Licensor. Nothing in this License shall be deemed to grant any rights to trademarks, copyrights, patents, trade secrets or any other intellectual property of Licensor except as expressly stated herein. No patent license is granted to make, use, sell or offer to sell embodiments of any patent claims other than the licensed claims defined in Section 2. No right is granted to the trademarks of Licensor even if such marks are included in the Original Work. Nothing in this License shall be interpreted to prohibit Licensor from licensing under different terms from this License any Original Work that Licensor otherwise would have a right to license.	

5) **External Deployment.** The term "External Deployment" means the use or distribution of the Original Work or Derivative Works in any way such that the Original Work or Derivative Works may be used by anyone other than You, whether the Original Work or Derivative Works are distributed to those persons or made available as an application intended for use over a computer network. As an express condition for the grants of license hereunder, You agree that any External Deployment by You of a Derivative Work shall be deemed a distribution and shall be licensed to all under the terms of this License, as prescribed in section 1(c) herein.	use, distribution, reproduction or communication of... distributed or communicated distribution or communication to the public,... 1 (d) and (e)
6) **Attribution Rights.** You must retain, in the Source Code of any Derivative Works that You create, all copyright, patent or trademark notices from the Source Code of the Original Work, as well as any notices of licensing and any descriptive text identified therein as an "Attribution Notice." You must cause the Source Code for any Derivative Works that You create to carry a prominent Attribution Notice reasonably calculated to inform recipients that You have modified the Original Work.	
7) **Warranty of Provenance and Disclaimer of Warranty.** Licensor warrants that the copyright in and to the Original Work and the patent rights granted herein by Licensor are owned by the Licensor or are sublicensed to You under the terms of this License with the permission of the contributor(s) of those copyrights and patent rights. Except as expressly stated in the immediately proceeding sentence, the Original Work is provided under this License on an "AS IS" BASIS and WITHOUT WARRANTY, either express or implied, including, without limitation, the warranties of NON-INFRINGEMENT, MERCHANTABILITY or FITNESS	

FOR A PARTICULAR PURPOSE. THE ENTIRE RISK AS TO THE QUALITY OF THE ORIGINAL WORK IS WITH YOU. This DISCLAIMER OF WARRANTY constitutes an essential part of this License. No license to Original Work is granted hereunder except under this disclaimer.	
8) **Limitation of Liability.** Under no circumstances and under no legal theory, whether in tort (including negligence), contract, or otherwise, shall the Licensor be liable to any person for any direct, indirect, special, incidental, or consequential damages of any character arising as a result of this License or the use of the Original Work including, without limitation, damages for loss of goodwill, work stoppage, computer failure or malfunction, or any and all other commercial damages or losses. This limitation of liability shall not apply to liability for death or personal injury resulting from Licensor's negligence to the extent applicable law prohibits such limitation. Some jurisdictions do not allow the exclusion or limitation of incidental or consequential damages, so this exclusion and limitation may not apply to You.	This limitation of liability shall not apply to the extent applicable law prohibits such limitation.
9) **Acceptance and Termination.** If You distribute copies of the Original Work or a Derivative Work, You must make a reasonable effort under the circumstances to obtain the express assent of recipients to the terms of this License. Nothing else but this License (or another written agreement between Licensor and You) grants You permission to create Derivative Works based upon the Original Work or to exercise any of the rights granted in Section 1 herein, and any attempt to do so except under the terms of this License (or another written agreement between Licensor and You) is expressly prohibited by U.S. copyright law, the equivalent laws of other	

countries, and by international treaty. Therefore, by exercising any of the rights granted to You in Section 1 herein, You indicate Your acceptance of this License and all of its terms and conditions. This License shall terminate immediately and you may no longer exercise any of the rights granted to You by this License upon Your failure to honor the proviso in Section 1(c) herein.	Add: If you accessed the Original Work or a Derivative work by clicking on an Icon "I agree" placed under the bottom of a window displaying the text of the present licence, clicking on that Icon indicates your clear and unrevokable acceptance of this licence and all of its terms and conditions.
10) **Termination for Patent Action.** This License shall terminate automatically and You may no longer exercise any of the rights granted to You by this License as of the date You commence an action, including a cross-claim or counterclaim, against Licensor or any licensee alleging that the Original Work infringes a patent. This termination provision shall not apply for an action alleging patent infringement by combinations of the Original Work with other software or hardware.	
11) **Jurisdiction, Venue and Governing Law.** Any action or suit relating to this License may be brought only in the courts of a jurisdiction wherein the Licensor resides or in which Licensor conducts its primary business, and under the laws of that jurisdiction excluding its conflict-of-law provisions. The application of the United Nations Convention on Contracts for the International Sale of Goods is expressly excluded. Any use of the Original Work outside the scope of this License or after its termination shall be subject to the requirements and penalties of the U.S. Copyright Act, 17	*Jurisdiction and Venue* If the Licence contract is concluded by the European Community (/Union /the Commission) or any person acting on its behalf, any action or suit relating to this Licence may be brought only in the European Court of Justice. In other case, any action or suit relating to this License may be brought only: - in the courts of the jurisdiction wherein the

U.S.C. Â§ 101 et seq., the equivalent laws of other countries, and international treaty. This section shall survive the termination of this License.	Licensor resides or conducts its primary business, if Licensor resides or conducts its primary business inside the EU; - in the courts of the jurisdiction wherein the Licensee resides or conducts its primary business if Licensor resides or conducts its primary business outside the EU. - in the courts of the jurisdiction wherein the Licensor resides or conducts its primary business, if both the Licensor and the Licensee reside or conduct their primary business outside the EU. *Governing law* This Licence shall be governed : - by (belgian) law if the jurisdiction is the European Court of Justice, - by the law of the jurisdiction determined according to what precedes if this jurisdiction is not the European Court of Justice and is located inside the EU, - by Belgian law in any other case.
12) **Attorneys Fees.** In any action to enforce the terms of this License or seeking damages relating thereto, the prevailing party shall be entitled to recover its costs and expenses, including, without limitation, reasonable attorneys' fees and costs incurred in connection with such action, including any appeal of such action. This section shall survive the termination of this License.	
13) **Miscellaneous.** This License represents the complete agreement concerning the subject matter hereof. If any	

provision of this License is held to be unenforceable, such provision shall be reformed only to the extent necessary to make it enforceable.	
14) **Definition of "You" in This License.** "You" throughout this License, whether in upper or lower case, means an individual or a legal entity exercising rights under, and complying with all of the terms of, this License. For legal entities, "You" includes any entity that controls, is controlled by, or is under common control with you. For purposes of this definition, "control" means (i) the power, direct or indirect, to cause the direction or management of such entity, whether by contract or otherwise, or (ii) ownership of fifty percent (50%) or more of the outstanding shares, or (iii) beneficial ownership of such entity.	
15) **Right to Use.** You may use the Original Work in all ways not otherwise restricted or conditioned by this License or by law, and Licensor promises not to interfere with or be responsible for such uses by You.	
This license is Copyright (C) 2003-2004 Lawrence E. Rosen. All rights reserved. Permission is hereby granted to copy and distribute this license without modification. This license may not be modified without the express written permission of its copyright owner.	The European version of the License has been made by the European Community (/Union /the Commission), with the approval of Lawrence E. Rosen

Annex 2 – Draft for a specific EU License

This proposal is only a skeleton to be used for discussion and elaboration, by the European Commission, of a more definitive text.

In English:

Introductory clause :

An introductory clause should state to what type of Work it applies (any Original Work / Any Software / Only the CIRCA Software) and that: " *the Work (as defined below) is provided under the terms of this License. The Work is protected by copyright. Any use of the Work, other than as authorised under this license is prohibited (at least when such use is covered by a right of the copyright holder of the Work)".*

Definitions :

The license should include a list of definitions of the terms used therein. The following terms should be defined :

- *The Original Work or the Software*: depending on the openness of the License, the object of the license will by any software or only the CIRCA Software. That should be determined in the definition. If applying the License to any Software, the object of the License could be referred to as "Original Work", or the "Software", both terms meaning the Work originally distributed by the EU under this License.
- *Derivative Works*: i.e. the Works or Software that could be created, based upon the Original Work by the Licensee.
- *The Licensor*, meaning any physical or legal person that offers the Work under the License
- *The European Commission / European Union*: Some provisions of the License particularly refer to the European Union or the European Commission, as the original

rightholder of the software and original Licensor thereof. A definition of the EU / EC should be provided here.

- *The Licensee or "You"*
- *Source Code*

Scope of the rights granted by the license

This provision should determine the characteristics of the license granted and the scope of the rights granted to the licensee.

As to the characteristics, the license should be worldwide, royalty-free, non-exclusive, sublicenseable and should last the duration of copyright vested in the work/software.

As to the rights granted, the list should cover all the rights pertaining to a software under the EU regulatory framework, i.e.:

- The right to use the Original Work in any circumstance and for all usage
- the right to reproduce the Work
- the right to make derivative works based upon the Work, and to modify the Original Work
- the right to communicate to the public, including the right to make available to the public, the Original Work or Derivative Works or copies thereof
- the right to distribute the Original Work or Derivative Works or copies thereof
- the right to lend and rent the Original Work, derivative Works or copies thereof
- the right to sublicense rights in the Original Work, derivative Works or copies thereof

The license should provide that those rights can be exercised on any media, supports and formats, whether now known or hereafter devised, as far as the applicable law permits so.

The license should specify that, in the countries where moral rights apply, the Licensor waives his/her right to exercise his/her moral right to the extent necessary to make effective the license of the economic rights hereabove listed.

The License should expressly state that the Licensor provides a machine-readable copy of the Source Code of the original Work along with each copy of the Work that the Licensor distributes or indicates, in a notice following the copyright notice attached to the Work, a repository where the Source Code can be easily and freely accessible.

Limitations to copyright

The License could state that nothing in the license is intended to reduce or restrict the application of any exception or limitation to the exclusive rights of the rights owners in the software, exhaustion of those rights or other applicable limitations thereto.

Obligations of the Licensee

The grant of the rights hereabove mentioned is subject to some restrictions, i.e. to some obligations imposed on the Licensee. Those obligations are usually the following:

- Attribution right: "*the Licensee shall keep intact all copyright, patent or trademarks notices and all notices that refer to the license and to the disclaimer of warranties. The Licensee must include a copy of such notices and of the License with every copy of the Work and with every Derivative Work s/he distributes, communicate, rents, lends"*. That proviso could be followed by an obligation to mention the possible modifications that have been made to the Original Work, for instance by saying that *"You must cause any modified files to carry prominent notices stating that You changed the files"*.
- Copyleft clause: the License should impose to the Licensee that s/he distribute copies of the Original Works or Derivative Works based upon the Original Work under the same License. The Licensee can not offer or impose any terms on the Work or Derivative Work that alter or restrict the terms of the License.
- Provision of Source Code: Even though it is implicit in the copyleft clause, the License could expressly state that the Licensee, when distributing copies of the Original Works or Derivative Works, provides a machine-readable copy of the Source Code or indicates a website where this Source will be easily and freely available.

- To prevent licensees to use the trademark that can protect the name of the software distributed under the license or the names of the Licensors, including the European Commission, a provision restricting the use of such names or trademarks can be added, as follows: "*This License does not grant permission to use the trade names, trademarks, service marks, or names of the Licensor, except as required for reasonable and customary use in describing the origin of the Work and reproducing the content of the copyright notice"*.

Chain of Authorship

The License should contain a clause such as : "*Each time the Licensee distributes, communicates or makes available to the public the Work or a Derivative Work, the Licensor offers to the recipient a license to the Work or the Derivative Work on the same terms and conditions as the license granted to the Licensee under this License*."

Warranty

The License should contain a disclaimer of warranty as to the Original Work which aims at stating that "the *Original Work s provided under the License on an "AS IS" basis and without warranties of any kind concerning the work"*. The type of warranties (e.g. merchantability, fitness for a particular purpose, absence of defects or errors, accuracy, etc.) that this disclaimer covers could be listed while indicating that this list is not limited.

The License could derogate to that overall disclaimer of warranty by stating that "*the Licensor warrants that the copyright in the Original Work granted hereunder is owned by the Licensor*" (that would be the case if the license applies only to products originally owned and licensed by the European Commission).

It could also be said that "*the disclaimer of warranty is an essential part of the license and a condition for the grant of any rights to the Work"*.

Liability

The License should contain a disclaimer of liability, covering any type of liability and within the limits of what applicable law permits. Such a clause could state that : "*except to the extent required by applicable law, in no event the Licensor will be liable for any direct or indirect, material or moral, damages of any kind, arising out of the License or of the use of the Work, including without limitation, damages for loss of goodwill, work stoppage, computer failure or malfunction, loss of data or any commercial damage, even if the Licensor has been advised of the possibility of such damage".*

Additional provision of warranty / Liability

*The License could provide the possibility that the Licensor provides a specific warranty or Liability to the Licensees by concluding a separate contract with the Licensees. Such a clause is however not necessary. It could read as follows: "*While redistributing the Work or Derivative Works thereof, You may choose to offer, and charge a fee for, acceptance of support, warranty, indemnity, or other liability obligations and/or rights consistent with this License. However, in accepting such obligations, You may act only on Your own behalf and on Your sole responsibility, not on behalf of any other Contributor, and only if You agree to indemnify, defend, and hold each Contributor harmless for any liability incurred by, or claims asserted against, such Contributor by reason of your accepting any such warranty or additional liability.

Acceptance of the License

Firstly, the License should provide a clause that would fit in a "click-wrap" contract-conclusion system, such as "*If you accessed the Original Work or a Derivative work by clicking on an Icon "I agree" placed under the bottom of a window displaying the text of the present License, clicking on that Icon indicates your clear and unrevokable acceptance of this license and all of its terms and conditions*".

However, the Work or Derivative Work is likely to be accessed without passing through a "click-wrap" agreement. Therefore, another traditionnal clause, wich infers the acceptance of the Licensee from certain of its acts (creation of Derivative Works, distribution or reproduction of

the Work or a Derivative Work, communication of the Work or the Derivative Work to the public), should be added.

Additionally, on must bear in mind that, if the License is granted in the frame of information society services (offer to download the Work or Derivative Work on a website for exemple), the Licensor should take care that the ways to conclude the License provide the information required by the applicable legal texts, derived from the European directive on e-commerce of 12 June, 2000, such as :

a. the name of the Licensor, providing the software,
b. his/her geographic and electronic address,
c. where the Licensor is registered in a trade or similar public register, the trade register in which the Licensor is entered and his registration number,
d. the different technical steps to follow to conclude the License;
e. where the contract will be accessible
f. the languages offered for the conclusion of the License

The License terms provided to the Licensse must be made available in a way that allows him/her to store and reproduce them.

Termination of the license

A provision could indicate what will be the consequences of a breach of the License of any termination of the License that would be subsequent to such a breach. Such a clause could say that "*the License and the rights granted hereunder will terminate automatically upon any breach by the Licensee of the terms of the License*". It should be indicated further on that such a termination will not terminate the Licenses of any persons who have received the Work of the Derivative Work from the Licensee under the License, provided such persons remain in full compliance with the License.

Miscellaneous

The License could also provide that *"if any provision of the License is invalid or unenforceable under applicable law, that will not affect the validity or enforceability of the License as a whole"* and that "*such provision will be construed and/or reformed so as to make it valid and enforceable"*.

It would be useful to mention that "*the License represents the complete agreement between the Parties as to the Work licensed hereunder"*.

Jurisdiction

The License should indicate what the jurisdiction competent for any litigation arising out of the license will be. That provision should contain two sets of rules:

1. the provision should state that any litigation arising between the European Commission and any other party will be subject to the jurisdiction of the European Court of Justice, as laid down in article 238 of the Treaty.
2. the litigations arising between other parties than the European Commission will be subject to the jurisdiction:

- wherein the Licensor resides or conducts its primary business, if Licensor resides or conducts its primary business inside the EU;
- wherein the Licensee resides or conducts its primary business if Licensor resides or conducts its primary business outside the EU;
- wherein the Licensor resides or conducts its primary business, if both the Licensor and the Licensee reside or conduct their primary business outside the EU.

As to those litigations, the license can also refer to a chosen EU jurisdiction to make things easier. Nevertheless, such a choice can be declared invalid by the jurisdiction where the license will be brought, if no party to the license reside within the EU.

Applicable Law

To enhance legal security, the License should determine the Law that would apply to any litigation arising out of the License.

Such a provision could opt for the Law where the Licensor is resides or has his/her registered office. That would indicate the Belgian Law when the litigation arises between the European Commission, as a Licensor, and any Licensee. The License can also try to make all litigations subject to a unique applicable law, e.g. the Belgian Law. In any case, where the Licensee is a consumer, s/he will benefit from the imperative legal provisions from which s/he benefits, whatever the choice of law might have been in the License.

Version Française

Clause introductive :

Une clause introductive devrait prévoir à quel type d'œuvres la licence s'applique (toute Œuvre Originale/ tout Logiciel/ Uniquement le Logiciel CIRCA) et que: « *l'Œuvre (telle que ci-dessous définie) est fournis sous les termes et conditions de la présente licence. L'Œuvre est protégée par le droit d'auteur. Toute utilisation de l'Œuvre, autre que ce qui est autorisé par la présente Licence, est interdite (du moins, lorsque pareille utilisation est couverte par un droit du titulaire des droits d'auteur sur l'Œuvre)* ».

Définitions :

La Licence devrait inclure une liste de définitions des termes qui y sont utilisés. Les termes suivants devraient être définis :

- *L'Œuvre Originale ou Logiciel* : en fonction de ce à quoi la licence s'applique, son objet sera tout logiciel ou uniquement le logiciel CIRCA. Cela devrait être déterminé dans la définition. S'il est décidé que la licence s'applique à tout Logiciel, l'objet de la licence devrait être défini comme étant « l'Œuvre originale » ou « le Logiciel », chacun de ces termes faisant référence à l'Œuvre distribuée à l'origine par l'UE sous cette Licence.
- *L'Œuvre Dérivée*: désigne l'Œuvre ou le Logiciel qui peut être créé par le Licencié sur la base de l'Œuvre Originale.
- *Le Donneur de Licence*, désignant toute personne physique ou morale qui offre l'Œuvre sous la Licence.
- *La Commission Européenne / L'Union Européenne*: Certaines clauses de la Licence font spécifiquement référence à l'Union Européenne ou à la Commission Européenne, en tant que titulaire original des droits sur le Logiciel et Donneur de Licence original. Une définition de l'UE ou la CE devrait donc être fournie.
- *Le Licencié ou « Vous »*
- *Le Code Source*

Etendue des droits consentis par la licence

Cette clause devrait déterminer les caractéristiques de la licence et l'étendue des droits consentis au Licencié.

En ce qui concerne les caractéristiques, la Licence devrait s'étendre au monde entier, être consentie gratuitement, être non exclusive, sous-licenciable et devrait valoir pour toute la durée des droits d'auteurs protégeant l'œuvre / le logiciel.

En ce qui concerne les droits consentis, la liste devrait couvrir tous les droits relatifs aux logiciels selon le cadre législatif de l'Union Européenne, c'est à dire :

- Le droit d'utiliser l'Œuvre Originale en toute circonstance et pour tout usage
- Le droit de reproduire l'Œuvre
- Le droit de faire des œuvres dérivées sur la base de l'Œuvre et de modifier l'Œuvre Originale
- Le droit de communiquer l'Œuvre Originale, les Œuvres Dérivées ou copies de ces dernières au public, en ce compris le droit de mettre celles-ci à la disposition du public
- Le droit de distribuer l'Œuvre Originale, des Œuvres Dérivées ou des copies de celles-ci
- Le droit de prêter et louer l'Œuvre Originale, des Œuvres Dérivées ou des copies de celles-ci
- Le droit de sous-licencier les droits concédés sur l' Œuvre Originale, des Œuvres Dérivées ou des copies de celles-ci

La Licence devrait également prévoir que ces droits peuvent être exercés sur tout média, support et format, connu ou inconnu à ce jour, dans la mesure où le droit applicable le permet.

La Licence devrait spécifier que, dans les pays où les droits moraux sont d'application, que le Donneur de Licence renonce à son droit d'exercer ses droits moraux dans la mesure nécessaire à ce que la licence des droits patrimoniaux ci-dessus explicités produise tous ses effets.

La Licence devrait prévoir explicitement que le Donneur de Licence fournit une copie en format digital standard des Codes Sources de l'Œuvre Originale avec chacune des copies de l'Œuvre que le Donneur de Licence distribue, ou indique, dans une notice suivant la notice de droits d'auteur apposée à l'Œuvre, l'adresse Internet (« repository ») où le Code Source peut être facilement et gratuitement accessible.

Limites aux droits d'auteur

La Licence devrait prévoir que rien dans la Licence n'a pour but de restreindre ou limiter l'application de toute exception ou limitation aux droits exclusifs des titulaires des droits sur le logiciel, l'épuisement de ces droits out toute autre limitation applicable.

Obligations du Licencié

Le Donneur de Licence concède les droits ci-dessus mentionnés à condition que le Licencié respecte certaines obligations qui lui sont imposées. Ces obligations sont généralement les suivantes:

- Droit d'attribution: "*le Licencié devra laisser toutes les notifications de droit d'auteur, brevet et/ou marque et toutes les notifications faisant référence à la Licence et à l'absence de toute garantie. Le Licencié doit inclure une copie de ces*

notifications et de la Licence à chaque copie de toute Œuvre Originale ou Œuvre Dérivée qu'il/elle distribuera, communiquera au public, mettra à disposition du public, louera, prêtera". Cette clause pourrait être suivie par une obligation de mentionner les possibles modifications qui ont été faites à l'Œuvre Originale, par exemple, en prévoyant que *"Vous devez apposer à tout fichier modifié une notification distincte annonçant que vous avez modifié le fichier"*.

- Clause Copyleft: la Licence devrait imposer au Licencié qu'il/elle distribue des copies des Œuvres Originales et Œuvres Dérivées sous la même licence. Le Licencié ne peut pas offrir ou imposer d'autres termes ou conditions sur l'Œuvre ou les Œuvres Dérivées, qui restreindraient ou altèreraient les termes de la Licence.
- Fournir le Code Source: Même si cela est implicite dans la clause Copyleft, la Licence devrait explicitement prévoir que le Licencié doit, lorsqu'il distribue des copies de l'Œuvre Originale ou d'Œuvres Dérivées, fournir une copie en format digital standard des Codes Sources ou indiquer l'adresse du site web ou ces Sources sont facilement et librement accessibles.
- Pour empêcher le Licencié d'utiliser la marque qui peut éventuellement protéger le nom du logiciel distribué sous la licence ou les noms des Donneurs de Licence, y compris la Commission Européenne, une clause interdisant l'utilisation de pareils noms ou marques pourrait être insérée, telle que : « *Cette Licence ne donne aucune permission d'utiliser les noms commerciaux, marques de produit ou de service ou les noms des Donneur de Licence, sauf ce qui est nécessaire à une utilisation raisonnable et dictée par les pratiques habituelles de décrire l'origine de l'Œuvre et de reproduire le contenu des notifications de droits d'auteur* ».

Chaîne d'auteurs

La licence devrait prévoir une clause telle que la suivante: "*Chaque fois que le Licencié distribue l'Œuvre ou des Œuvres Dérivées, les communique au public ou les met à disposition du public, le Donneur de Licence offre au destinataire une licence sur l'Œuvre ou des Œuvres Dérivées selon les mêmes termes et conditions que la licence concédée au Licencié sous cette Licence*."

Garantie

La Licence devrait contenir une clause de non-garantie quant à l'Œuvre Originale, qui aurait pour but de prévoir que "*l'Œuvre Originale est fournie sous la Licence telle quelle, sans aucune garantie d'aucune sorte"*. Les types de garanties (par ex. : commercialisation, aptitude à remplir une fonctionnalité déterminée, absence de défauts ou erreurs, efficacité, etc.) que cette clause de non-garantie couvre devraient être énumérés, en précisant que cette liste n'est pas exhaustive.

La Licence pourrait cependant déroger à cette clause de non-garantie globale en précisant que « *le Donneur de Licence garantit que les droits d'auteur protégeant l'Œuvre Originale et concédés par la présente Licence sont la propriété du Donneur de Licence* » (cela devrait être le cas si la licence s'applique uniquement à des produits appartenant à, et donnés en licence par, la Commission Européenne).

Il pourrait également être prévu que « *la clause de non-garantie est une partie essentielle de la présente Licence et une condition à la concession de tout droit sur l'Œuvre* ».

Responsabilité

La licence devrait contenir une clause d'exonération de responsabilité, couvrant tout type de responsabilité dans les limites de ce que la loi applicable permet. Pareille clause pourrait prévoir que : "*à l'exception de ce que la loi applicable impose, le Donneur de Licence ne sera à aucun moment responsable pour aucun dommage, quelle qu'en soit la nature, direct ou indirect, matériel ou moral, qui surviendrait de la Licence ou de l'utilisation de l'Œuvre, y compris sans s'y limiter, des dommages causés par la perte de clientèle, arrêt de travail, mauvais fonctionnement ou arrêt de matériel informatique, perte de données, ou tout autre dommage commercial, même si le Donneur de Licence avait connaissance de la possibilité de pareils dommages"*.

Clause additionnelle de garantie ou responsabilité

La licence pourrait prévoir la possibilité que le Donneur de Licence puisse fournir au Licencié une certaine garantie ou reconnaisse une certaine responsabilité par la conclusion d'un contrat spécifique et séparé avec le Licencié. Pareille clause n'est cependant pas nécessaire. Elle pourrait s'énoncer de la sorte : *« Lors de la redistribution de l'Œuvre ou d'Œuvres Dérivées, Vous pouvez choisir d'offrir, contre rémunération, une garantie, une aide, des indemnités, ou d'autres obligations de responsabilité, et/ou d'autres droits supplémentaires à cette Licence. Cependant, en acceptant pareilles obligations, Vous ne pouvez engager que votre seule responsabilité et en votre nom propre et non au nom de tout autre Contributeur, et seulement si vous acceptez d'indemniser, défendre et décharger tout Contributeur de toute responsabilité, au cas où ces Contributeurs étaient inquiétés d'une manière quelconque par le fait que Vous ayez accepté pareilles obligations de garantie ou reconnaissances de responsabilité additionnelles ».*

Acceptation de la Licence

Tout d'abord, la licence devrait prévoir une clause qui intègrerait un système de conclusion de contrat « click-wrap », telle que « *Si Vous avez accédé à l'Œuvre Originale ou une Œuvre Dérivée en cliquant sur une Icône « j'accepte » placée au bas d'une fenêtre faisant apparaître le contenu de la présente Licence, le fait de cliquer sur cette Icône indique votre acceptation claire et irrévocable de cette Licence et de tous ses termes et conditions* ».

Cependant, l'Œuvre ou l'Œuvre Dérivée est susceptible d'être accessible sans passer par un système de « Click-Wrap ». Dès lors, une autre clause traditionnelle, déduisant l'acceptation du Licencié de certains de ses actes, (création d'œuvres dérivées, distribution ou reproduction de l'œuvre ou d'œuvres dérivées, communication de l'œuvre ou d'œuvres dérivées au public) devrait être ajoutée.

De plus, il faut également tenir compte du fait que si la Licence est concédée dans le cadre de services de la société de l'information, (par exemple, l'offre de « downloader » sur un site Internet l'œuvre ou une œuvre dérivée), le Donneur de Licence devrait les moyens de conclure la

licence fournissent l'information requise par les lois applicables, qui auront transposé la directive E-commerce du 12 juin 2000, tels que :

a. Le nom du Donneur de Licence fournissant le logiciel
b. Son adresse électronique et géographique,
c. Où le Licencié est inscrit sur un registre de commerce ou registre public similaire, le nom dudit registre et son numéro d'enregistrement,
d. Les différentes étapes techniques à suivre afin de conclure la licence;
e. Où le contrat est accessible
f. Les langues offertes pour la conclusion du contrat de licence

Les termes de la Licence fournie au Licencié doivent pouvoir être disponibles de façon à ce qu'il puisse les conserver et y accéder.

Fin de la licence

Une clause pourrait indiquer quelles seront les conséquence du non respect des clauses de la licence ou de toute résiliation de la Licence qui serait la conséquence de pareil non-respect. Pareille clause pourrait prévoir que *« la Licence et les droits concédés par cette dernière prendront automatiquement fin dès que le Licencié n'aura pas respecté un des termes de cette Licence »*. Il pourrait également être prévu que pareille résolution du contrat ne mettra pourtant pas fin aux licences des personnes qui auraient reçu l'Œuvre ou l'Œuvres Dérivée du Licencié en vertu de cette licence, à condition que ces personnes aient respecté les termes de la Licence.

Divers

La licence pourrait également prévoir que *« si toute clause de la Licence était déclarée invalide ou inopposable selon le droit applicable, cela n'affectera pas l'entièreté de la validité ou de l'opposabilité de la Licence »* et que "*pareille clause sera interprétée et/ou modifiée pour qu'elle soit valide et opposable"*.

Il serait utile de mentionner que "*la Licence représente l'entièreté de l'accord entre les parties quant à l'Œuvre donnée en licence"*.

Clause d'attribution de For (tribunal compétent)

La licence devrait indiquer quel for est compétent en cas de litige concernant cette licence. Cette clause devrait contenir deux dispositifs de règles:

1. la clause devrait prévoir que tout litige qui opposerait la Commission Européenne à toute autre partie sera porté devant la Cour Européenne de Justice, tel que prévu à l'article 238 du Traité instituant les Communautés européennes.
2. Les litiges opposant d'autres parties que la Commission Européenne sont portés devant les juridictions:

- Du lieu où le Donneur de Licence réside ou a son siège social, si le Donneur de Licence réside ou a son siège social dans l'Union Européenne;
- Du lieu où le Licencié réside ou a son siège social, si le Donneur de Licence réside ou a son siège social hors de l'Union Européenne;
- Du lieu où le Donneur de Licence réside ou a son siège social, si aucun du Donneur de Licence ou du Licencié ne réside ou n'a son siège social dans l'Union Européenne;.

En ce qui concerne ces litiges, la licence peut aussi prévoir un for européen déterminé (par exemple, les tribunaux de Bruxelles), pour rendre les choses plus faciles. Cependant, pareil choix pourra être déclaré invalide par la juridiction où le litige sera porté si aucune des parties ne réside dans l'Union Européenne.

Loi Applicable

Pour améliorer la sécurité juridique, la Licence devrait déterminer la Loi qui devrait s'appliquer à tout litige qui porterait sur la Licence.

Pareille clause devrait opter pour la Loi où le Donneur de Licence réside ou a son siège social. Cela devrait dès lors désigner le droit Belge quand le litige implique la Commission Européenne en tant que Donneur de Licence. La Licence peut également essayer de soumettre tout litige à un seul droit applicable, le droit belge par exemple. En tout cas, quand le licencié est consommateur, il bénéficiera des lois impératives qui le protègent, peu importe le droit désigné par la Licence.

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