Copyright issues when using Software in the Cloud

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Starting Point for this Lecture

- How to deal with FOSS licenses in the cloud and other web based usages?

- Do FOSS licenses require license obligations to be complied when used in a SaaS, web service or cloud service?

- How to deal with FOSS licenses that date back to the time when SaaS, web services and cloud services were unknown?

Distribution and Communication to the public

- Most FOSS licenses impose license obligations on the **distribution** of the software.

- Pre-Internet times: distribution is transfer of a copy with copyrighted material to a third party

- § 106 US Copyright Act:

  „ the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

  (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;"

Distribution and Communication to the public

- Art. 4 Directive 2009/24/EC (identical to Directive 91/250/EEC):

  "Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2 shall include the right to do or to authorise:

  (c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof."

- Art. 6 World Copyright Treaty (1996):

  Right of distribution

  Authors of literary and artistic works shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their works through sale or other transfer of ownership.

Distribution and Communication to the public

- Art. 8 World Copyright Treaty (1996):

  Right of communication to the public

  ...authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the **making available to the public** *of their works in such a way that members of the public may access these works from a place and at time individually chosen by them.*

- Introduction of a new right to the benefit of the copyright owner to cover internet use

Distribution and Communication to the public

- No update of the US Copyright Act

- Update of sec. 69c German Copyright Act:

  „ Rightholders have the exclusive right to perform or authorise the following acts:

  4. communication to the public of a computer program, either by wire or wireless means, including making the work available to the public in such a way that it is available to members of the public from places and at times individually chosen by them."

SaaS, Cloud Services and Download Offer

- SaaS: the right to communicate to the public

- Which software on the server is „communicated to the public"?

- Proposed interpretation: such software whose functionality is used by third parties (ECJ Case C-393/09, ECLI:EU:C:2010:816, BSA v. Ministry of Culture)

- Operating system on the server and other "infrastructure software" cannot be interactively used by third parties and is therefore not "communicated to the public"

SaaS, Cloud Services and Download Offer

- Cloud service: private cloud or public cloud? Public cloud: the right to communicate to the public

- Private cloud of a company – no communication to the public (employees are no public)

- Download offer: the right to communicate to the public (EU – no distribution because there is no transfer of ownership, user creates copy)

SaaS, Cloud Services and Download Offer

- US: unclear situation (?)

- Heather Meeker: SaaS is no distribution – „GPL-2.0 has an ASP loophole"

- SaaS is just copying?

How deal FOSS Licenses with SaaS?

- GPL-3.0: license obligations triggered by „conveying"

   To "convey" a work means any kind of propagation that enables other parties to make or receive copies. Mere interaction with a user through a computer network, with no transfer of a copy, is not conveying.

- AGPL-3.0:

   Notwithstanding any other provision of this License, if you modify the Program, your modified version must prominently offer all users interacting with it remotely through a computer network (if your version supports such interaction) an opportunity to receive the Corresponding Source of your version by providing access to the Corresponding Source from a network server at no charge, through some standard or customary means of facilitating copying of software.

How deal FOSS Licenses with SaaS?

- MPL-2.0 refers in the provision for the grant of rights to „distribute" and „make available" – license obligations are triggered by distribution only

- EPL-2.0:

  "Distribute" means the acts of a) distributing or b) making available in any manner that enables the transfer of a copy.

- Apache-2.0:

  You may reproduce and distribute copies of the Work ..., provided that You meet the following conditions:

How deal FOSS Licenses with SaaS?

- Older licenses do not provide any interpretation how to deal with SaaS: MIT, BSD-3-Clause, GPL-2.0, LGPL-2.1

- Purpose of license conditions: informing third parties who are using the software about their rights

- Good arguments for also complying with licensing obligations for SaaS but open question – risk management

Concrete Use Cases

- Javascript: transfer of a copy – equivalent to distribution

- SaaS: application is communicated to the public

    - Newer FOSS licenses are explicit about license obligations

    - Older FOSS license: grey area, in case of doubt, comply with licensing obligations

- SaaS: underlying software without interactive use is not communicated to the public

- Download offer: equivalent to distribution

Thank you for your attention!

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