



Open Source Software

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Open source software is omnipresent in the software world and has gained great economic importance. Prominent examples of this are the Linux operating system or the MySQL database management system. Both open source projects have an economic value in the billions. In many cases, open source software serves as a foundation for commercial proprietary software projects. The economic field of activity for open source software is extensive and diverse. From fully automatic coffee machines to office software to autonomous driving, open source software is used everywhere. Progressive digitalisation is giving the open source segment a further boost; it is a growth market.

On the other hand, there are also projects that develop open source software for altruistic or explicitly non-commercial motives and finance themselves exclusively through donations. A current (tax-funded) example is the Corona warning app, which was developed by SAP and Deutsche Telekom.

The “open source” category

Contrary to what the wording might suggest, open source software is not a special type of software. Rather, the term describes a special form of software licensing. Although there is no generally applicable or

even legislative definition of what open source software is, certain features of licensing are considered to be characteristic.

What all open source software have in common is that the licensees can use it free of charge and distribute it freely. In addition, the source code of the software is openly transmitted (hence: open source), so that every licensee can edit and further develop the software and also redistribute his editing. Even if the licensor grants the licensees far-reaching rights of use, use remains subject to certain conditions. Licensing as open source software does not mean a waiver of copyright protection. This distinguishes open source software from public domain software, to which no copyrights or other intellectual property rights actually exist.

As different as the fields of application for open source software are, as different and varied are the licensing conditions. There is an unmanageable number of different licences, and yet they can be systematically divided into two categories.

Despite the economic and technical importance of open source software, the topic receives relatively little attention in the public discussion. This article is intended to provide a systemic overview.



The idea behind open source software

The term *open source* software is based on the idea of free software. According to this, software users should be able to adapt the software to their own needs and distribute their further developments. This understanding of software once arose as a reaction and countermovement to the otherwise usual proprietary use of software. Instead of having to obtain the consent of the rights holder to change the software, as is usually the case, with free software the editing of the source code should in principle be completely free of restrictions. In this way, the user of the software becomes a co-developer. The advantages are obvious: a large number of developers and users leads to accelerated development of the software, errors can be found and corrected more quickly. Both developers and users benefit from this, a classic win-win situation.

In order to implement this idea in practical application, basically only two prerequisites are necessary: firstly, the developer and rights holder must make the source code available and secondly, they must give their consent for the editing and distribution of the software.

Furthermore, the open source software itself is usually provided free of charge - contrary to a widespread misconception, however, this is not mandatory. Open source software is not anti-commercial, it is just based on a freer understanding of ownership that is detached from financial interests. According to the idea of open source software, property is to be thought of independently of its economic value. The preamble to the General Public Licence 3.0 (one of the most widely used open source licences worldwide) makes this understanding clear. It says: "*Our General Public Licenses are designed to make sure that you have the freedom to distribute copies of free software (and charge for them if you wish) [...]*".

As an antagonist to proprietary software, open source software thus stands for digital sovereignty.

Types of open source software

As confusing as the field of different open source licences is, a basic distinction can be made between two types of licensing. There are licences with copyleft and without copyleft, the latter being called non-copyleft licences.

The copyleft scheme

A copyleft is a protective clause in the licence conditions that forces the licensee to place every redistribution of the software itself - or an adaptation of it - under this licence condition. The original licence is thus passed on with each distribution, so-called viral effect. In this way, the licensor can ensure that his software and all works derived from it are under the same open source licence. The copyleft is therefore to be understood as a protective instrument of the licensor. With this clause, he can prevent the work he created from losing its open source character.

The copyleft protects not only the software as a whole, but also its individual components. As soon as the source code of an open source software protected by copyleft is used, the copyleft extends to the entire (new) software. This claim to validity must be observed in software development. Different copyleft licences are mutually exclusive, for example, if there is no compatibility clause.

Non-copyleft licences grant the licensee significantly more freedom. He can redistribute the software and all derivatives of it under any licence. Even proprietary licensing is possible. In this way, the licensee can remove the open source character of a software. It is often smaller applications that are licensed under non-copyleft licences. When developing larger software projects, such as a smartphone app, these applications can then be integrated without any problems. The licensee can fall back on functioning systems and does not have to develop his software from scratch. As a rule, the licensee of non-copyleft licences only has to include copyright and copyright notices in the new source code. Corresponding licence conditions are therefore incomparably shorter than those with a copyleft clause.



The choice of licence

The distinction between copyleft and non-copyleft licences is the central factor for the software developer in his role as licensor when choosing a licence. The question of the choice of licence only does not arise if third-party source code, which is under a copyleft, has already been used for the development of one's own software. In this case, the licensor must also place the newly developed software under this copyleft licence. This is where the viral effect of copyleft becomes apparent.

For all other cases, the following considerations play an important role: the freer the licensee is to edit and redistribute, the more attractive the software is to him. Non-copyleft licences therefore increase the potential circle of licensees. However, the rights holder must be aware that he is relinquishing control over his software. Licensees of a non-copyleft licence can develop their software further and then distribute it themselves on a proprietary basis. If this is to be prevented, the only option is to include a copyleft clause in the licence.

However, purely practical considerations must also be taken into account when licensing. There are tried and tested licences that many licensees are familiar with and believe they know. A licensee is more likely to use open source software whose licence is established. An unfamiliar licence might discourage at least some licensees from redistributing the software. A software developer should take this into account. This is also the reason why, as a rule, one should refrain from creating one's own open source licence, because the following generally applies: the more well-known the licence, the greater the open source effect.

The choice of licence is also largely determined by the question of whether and how the open source software is to be commercialised, i.e. made economically fruitful.

Commercialisation

Most open source licences allow a fee to be charged for the act of making the software available. This may sound counterintuitive, but it does not contradict the

idea of free software at all. Free software or open source software are not counter-concepts to commercial software, but to proprietary software. Open source software and proprietary software differ only in the scope of the rights of use granted.

However, payment for the transfer of the software itself (e.g. a purchase price) does not limit the scope of use because the act of transferring the software precedes the use. At the same time, the purchase price is not a condition for the lawful exercise of the rights of use. Both are to be considered separately from each other. This means that the buyer and licensee of commercial open source software may reproduce and distribute it without limitation and free of charge. However, any other user of this software has the same right, regardless of whether he has paid a fee to the seller for the transfer. This is the reason why licensors often waive a fee for the transfer of the software in practice. There is simply no need for users to pay a fee if they can also obtain the software free of charge from third parties. If a fee is nevertheless demanded, it is usually linked to additional services by the seller that offer added value compared to free alternatives, e.g. installation instructions or manuals. However, the fee can also be a condition for later support services.

This shows the difference to inadmissible licence fees. This is understood to be a consideration for the granting of rights of use. Licence fees are therefore inadmissible because every act of using the software would require a consideration in return. In the above example, the buyer would have to pay a fee to the licensor for each reproduction. This would lead the open source idea ad absurdum.

Even if payment for the use of the software is possible, open source software is commercialised in many areas in other ways. A classic business model, for example, is (paid) support and maintenance for open source software. Since the source code is freely accessible and can be viewed, corresponding services can also be offered by third parties for any open source product. In addition, open source software is often used in management consultancy, and the consultancy service is remunerated as such. In general, it can be said that the commercialisation of open source software often takes place at the level of the service market.



Conclusion

Open source software offers many possibilities, especially for businesses. Although licensors grant far-reaching powers, the use is by no means limitless. When software developers use open source software, they should familiarise themselves with the rights and obligations of the licence. In particular, they should pay strict attention to whether they use components of copyleft-protected software, because this determines their own licensing. When choosing the licensing of one's own software, the main issue is whether or not to include a copyleft clause.

The use of open source software offers real advantages over traditional proprietary software. Licensees enjoy significantly more freedom and are less dependent on their licensors. This suggests that open source software will continue to gain in importance in the future.

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