

MEMORANDUM

To: Clients and Friends of the Firm
Date: January 24, 2011
From: Technology & Transactional IP Group, Yigal Arnon & Co.
Re: **Open Source Software and Recent Israeli Case Law**

A. Introduction

This memo provides a general introduction to open source software, addressing some terms in open source licenses¹ that commercial entities may find problematic, recent case law in Israel enforcing an open-source license, and the issues raised by open source licenses in investment and other corporate transactions.

B. Object Code, Source Code and Open-Source Software

Computer software is comprised of two versions: the “source” version and the “object” version, also known as source code and object code, respectively. Source code and object code can be understood as the “before” and “after” versions of a computer program that is compiled before it is ready to run in a computer. Source code consists of the programming statements that are created by a programmer and saved in a file, and which, in theory, can be read, understood and modified by an appropriately trained software engineer. Once the programming is complete, the source code is compiled with a compiler² which generates object code. This object code contains sequences of instructions that computers can understand but that are difficult for humans to read or modify. For this reason, should a user desire to modify, enhance or debug software, it is essential to have access to the source code of the program.

When a consumer purchases or receives operating system or application software, it is usually in the form of object code that is already compiled and the source code is not included. In many cases, proprietary software vendors do not want to grant third parties (especially competitors) access to their source code as it often contains the working logic and underlying implementation of the software, and thus is a valuable asset of the company which they want to protect. In addition, they are wary of users attempting to modify or improve their code since this may create multiple versions of their software which could result in additional service costs for them and may create other concerns. For these and other reasons, proprietary

¹ In the interests of avoiding jargon, we use the term “open source license” in a broad sense to refer to a large family of licenses pursuant to which software or other content may be made available. Other terms used to describe such licenses (or a subset thereof) include “copyleft”, “viral”, “hereditary” or “open content”.

² A compiler is a special program that processes statements written in a particular programming language and turns them into machine language or “code” that a computer’s processor uses.

software vendors who sell licenses to their software may also restrict users from attempting to reverse-engineer, decompile or otherwise attempt to derive the source code of the software.³

In contrast to the proprietary software industry, there are those within the software development community who aim to develop and license software that is open to further improvement by anyone who wants to improve it. In order to accomplish this goal, it is necessary to make the underlying source code available. When software is licensed in this manner and the program source code is made openly available, it is known as “open source” or “free” software.

Open-source or free software is not a matter of price. According to the Free Software Foundation, free software is a matter of a user’s freedom to run, copy, distribute, study, change and improve the software, including the source code. As discussed in more detail below, the freedoms granted by open sources licenses may conflict with the aims of commercial licensors.

C. Proprietary Software and the General Public License

Open-source software is licensed pursuant to a variety of open-source licenses, of which one of the most widely used is the GNU General Public License (“**GPL**”). The first version of the GNU General Public License was originally written in 1989. Updated versions of the GPL have been released over the years, with GPL Version 3.0 being released in 2007. While there are important differences between the several versions of the GPL, certain of the core concerns regarding the use of GPL-licensed software are common to all versions of the license.

A basic principle of the GPL is that users have the right to use, modify and distribute GPL software so long as the resulting software (including all modifications) is made available on the same GPL terms. The GPL further provides that these freedoms cannot be restricted by another licensor of the GPL-covered software. Thus, a programmer has the ability to use software licensed pursuant to the GPL as a basis for a modified program, on the condition that the resulting work is also made available on GPL terms.⁴ These provisions of the GPL may be enforced by the original copyright holder of the GPL-licensed software, as well as by non-profit entities that are dedicated to preserving the freedoms granted by open-source licenses.

These provisions may become problematic when GPL code is linked to or incorporated into proprietary software code, as such use may have a “contagious” effect whereby the source code of the proprietary software would itself also need to be disclosed under the terms of the GPL. This can occur when a licensee (a software development company, for example) uses the GPL-licensed software together with its proprietary software in a manner that, according to the GPL, would require such disclosure. Similarly, in a chaotic or undisciplined software

³ Certain jurisdictions grant rights to access source code for the purpose of achieving inter-operability.

⁴ The GPL contains other requirements to which commercial entities may be sensitive, such as notice requirements, a grant of patent licenses with respect to GPL-licensed software, and provisions regarding digital rights management. In addition, provisions of the GPL may restrict the incorporation of GPL code with other open source or proprietary code. A complete discussion of the GPL is beyond the scope of this memorandum.

development environment, for instance, a company may find that its software development engineers have incorporated GPL-licensed software in order to save development time or effort, and have thereby inadvertently created a situation whereby the source code of the company's proprietary software may become subject to a disclosure obligation. The line demarcating such uses of GPL-licensed software, however, may be hard to define, and determining whether proprietary software has been affected by the GPL in the manner described above often involves an in-depth technical as well as legal analysis of the interaction between the GPL-licensed software and the proprietary code.

It is important to note that if one is simply using GPL-licensed software (that is, for example, one does not modify or distribute such software), the "contagious" effect of the GPL does not generally arise. However, where a company distributes GPL-licensed software as part of its product offerings, the GPL may present concerns for businesses that desire to avoid disclosure of their proprietary code while also benefiting from GPL-licensed software.

D. Investments, Acquisitions and Other Corporate Transactions

As open source software has become more popular and widespread in recent years, especially for commercial software development, the issues raised by open source licenses have increasingly become important concerns for commercial entities seeking investment or looking to be acquired. As such, investment agreements and merger or acquisition agreements increasingly incorporate representations that the company's use of open source software does not violate the terms of the applicable open source licenses. Companies that cannot demonstrate that their proprietary code has not been affected by the "contagious" effect of open source license provisions may face the possibility of revaluation of the company's software or the prospect of developing a work-around for the functionality added by open source software. These issues are more easily addressed in the early stages of product development rather than in the rushed environment of a critical corporate transaction.

E. Recent Israeli Case Law

The GPL is perhaps the most prominent license of an extended family of open source/open content licenses. Open source software may also be made available, for example, pursuant to the Lesser General Public License, the Mozilla Public License or any number of other open source licenses, each of which imposes its own mix of freedoms and restrictions on licensed software. In addition, creative works other than software (such as texts, photographs, or other artistic and literary works) may be made available pursuant to licenses specifically tailored for that purpose, such as the Creative Commons family of licenses.

Until recently, it was not clear how open source licenses would be viewed and enforced by Israeli courts. Recently, the Jerusalem District Court in TA 3560/09 and TA 3561/09, *Reuveni v. Mapa – Mapping and Publishing, Ltd.* enforced the terms of an open source license against a commercial defendant for the first time in Israel. The plaintiffs, amateur photographers, had uploaded photographs to the Internet pursuant to the Creative Commons BY-NC-ND license, which prohibits the commercial use or modification of licensed works, as well as requiring attribution of the licensed work to the original copyright holder. The

defendant, a commercial publisher, published the pictures both in a book for commercial sale as well as on its website, violating the terms of the Creative Commons license. The Court found that, in violating the license, the defendant had infringed the plaintiffs' copyright and ordered the defendant to pay monetary damages.

Despite the fact that the decision focused primarily on issues not directly related to the Creative Commons license, the case presents an important precedent which shows that Israeli courts are willing to enforce the terms of open source licenses against commercial defendants. It should also be noted that given the dearth of jurisprudence in other jurisdictions regarding the validity and enforceability of open source licenses, the decision of the Israeli Court is a welcome development in illuminating how courts may enforce these licenses in the future.

While *Reuveni* only concerned a single license from the Creative Commons family of licenses, other Creative Commons licenses impose additional “share-alike”⁵ restrictions on licensed work. These “share-alike” provisions have similar effect to the provisions of the GPL discussed above. In addition, while the license at issue in *Reuveni* applied to artistic content rather than software, open source licenses for both types of works are based on similar principles. As such, it is likely that future decisions may use *Reuveni* as a precedent to enforce other more restrictive open source licenses, including in the context of software or other creative works.

F. Conclusion

Recent case law in Israel has shown that Israeli courts may be willing to enforce open source licenses against commercial defendants. As such, proprietary software vendors who do not wish to have their source code made generally available need to ensure that their use of open source licensed software is carefully monitored by both technical and legal experts in order to avoid running afoul of the “contagion” effect imposed by certain open-source licenses. Such monitoring is critical for companies seeking to attract investments or engage in other corporate transactions, since the use of open source software is attracting increased attention from potential investors and acquirers during the due diligence process.

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For more information on legal issues relating to open source licensing and related matters, please contact Daniel Green (danielg@arnon.co.il), Eli Greenbaum (elig@arnon.co.il) or Yoheved Novogroder-Shoshan (yohevedn@arnon.co.il)

⁵ The “share-alike” provisions contained in some Creative Commons licenses require modifications and derivative works of the original licensed work to also be licensed pursuant to the terms of the same Creative Commons license. Such licenses are similar to the GPL in that they impose restrictions on modifications of the original work, in addition to the restrictions imposed on the licensed work itself.