What is a derivative work under European Copyright Law?

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Scope of Copyleft

“Scenarios between those two extremes will require you to seek the advice of your own legal counsel in deciding whether your program constitutes a derivative work.“

(http://www.eclipse.org/legal/eplfaq.php#EXAMPLE)

Q: What is a derivative work?

A: I don't know (and probably nobody else)!

The Premise: “Copyleft“

Copyleft licenses: GPLv2, GPLv3, AGPLv3, EPL, CPL – 46 % share of free software

Derivative works in their entirety have to be licensed under the relevant Copyleft-license

The problem: drawing the line between whatever that must be further licensed under the Copyleft principle, and whatever that is not.

The Premise: “Copyleft“

Mostly a problem of copyright law: how to license modifications of a work?

Relevant for:

- Licensing your own developments/modifications
- Compatibility with other FOSS-components

Currently no case law or disputes in Europe that involve GPL interpretation or concerning the concept of adaptation of software

The Premise: “Copyleft“

In the closed source world there was no need to know what has to be considered a „derivative work“

Agreements about what is allowed to modify

Impact of free software licenses on copyright law

Courts and statutory laws are not prepared to answer this question

The Concept of Adaptation in European Copyright Law

The baseline: the software directive 2009/24/EC (replacing the directive of 1991, 91/250/EEC)

Directive relevant for the interpretation of copyright law in all EU countries

No definition of „adaptation“ hence „derivative work“

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The directive is stressing the specific character and value of interoperability

Recital 10: "*The function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function.*"

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Interoperability – an aspect which is irrelevant for other types of works (e.g. piece of music, literature etc)

Recital 15: *“The unauthorised reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes an infringement of the exclusive rights of the author. Nevertheless, circumstances may exist when such a reproduction of the code and translation of its form are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs.“*

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Recital 10: „interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged“.

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Article 6 allows decompilation of a computer program without authorization of the copyright holder if indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs

Recital 10:

„The parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as "interfaces". This functional interconnection and interaction is generally known as "interoperability"; such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged.“

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Conclusion:

- Exchange of data does not make two pieces of software a derivative work
- Interoperabilty is typical for independet computer programs
- Interoperabilty is strongly connected to the term „interface“
- Interfacing as a criteria to distinguish independent works?

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Communication over interfaces usually does not create a derivative work

But: what is an interface?

- Inter-process communication (IPC) – pipes, sockets
- Application Binary Interface (ABI) – system calls
- Interfaces for components – plugins, modules, JAVA class libraries

Unclear scope – object-orientated systems didn't matter in 1991

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Questions to discuss:

- How is the more modular software development relevant for the term „derivative work“?
- Is the programming architecture the (only) relevant criteria for the determination of what a derivative work is?
- What about shifting software changes in a „new program“?
- What about modifications from both sides of the interface?
- How ist the situation for libraries?

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Disclaimer:

- The situation in Europe may be different from the situation in other countries
- Interpretation of copyleft licenses may come to a different understanding of the term „derivative work“
- Decisions of courts are unforseeable

Further Information

ifrOSS: www.ifross.org (commentary on section 2 of the GPLv2)

Free Software Foundation: www.fsf.org

License compatibility: www.gnu.org/licenses/license-list.html# SoftwareLicenses

T. Jaeger, Kommerzielle Applikationen für Open Source Software und deutsches Urheberrecht, in: Hoffmann, Mathis/ Leible, Stefan (Hrsg.), Vernetztes Rechnen - Softwarepatente - Web 2.0, Stuttgart 2008, Boorberg Verlag, S. 61