The Fiduciary Licence Agreement: Appointing legal guardians for Free Software Projects

Ywein van den Brande[a]

(a) Ywein Van den Brande is partner at De Bandt Keustermans & Van den Brande, a Brussels (Belgium) based law practice.

Abstract
The new version of the FSFE Fiduciary Licence Agreement (FLA) is a short and clear document that allows developers of Free Software Projects to assign their copyright to a single person or organization. The FLA is a useful tool to ensure the legal maintainability of Free Software Projects, addressing important issues such as preserving the ability to relicense code and the need to have sufficient rights to enforce licences in court. However, its international approach might not suit the requirements of all jurisdictions. It is advised to use it in connection with local legal advice.

Keywords
Fiduciary Licence Agreement, license, Free Software, Open Source, trustee, copyright consolidation

I. Introduction

On February 1, 2007, the Free Software Foundation Europe (FSFE) released a new version of its Fiduciary Licence Agreement (FLA). With this agreement, developers of Free Software Projects can assign their copyright to a single person or organization. The goal of the agreement is to ensure the legal maintainability of Free Software Projects, including important issues such as preserving the ability to re-license and the certainty of having sufficient rights to enforce licences in court[1].

Assigning or licensing copyright to a fiduciary is not a new technique. It was probably first used in the late 18th century by French play writers who sought to bargain collectively[2]. The technique is already being applied in the Free Software community, for example by the Free Software Foundation (FSF) in the United States with respect to the rights on the GNU project[3]. What is unique about the FLA is that it seeks to cover multiple jurisdictions under a single concise agreement[4].

1 See FSFE press release dated 1st February 2007 (http://mail.fsfeurope.org/pipermail/press-release/2007q1/000168.html).
2 French theatre authors saw their plays performed in Parisian bars and theatres without receiving compensation. In 1777 Beaumarchais urged these writers to manage their rights collectively (A. Berenboom (2008), *Le nouveau droit d'auteur* (Brussel, BelgiumGroupe De Boeck s.a. / Larcier) nr. 271, p. 425, ISBN 9782804414399).
3 http://www.gnu.org/licenses/why-assign.html.
4 The FLA will become available in German, French, Italian, Swedish, Serbian, Polish, Dutch, Spanish and Portuguese - see FSFE press release dated September 26, 2008 http://mail.fsfeurope.org/pipermail/press-release/2008q3/000217.html.

While FSFE should be applauded for its efforts to make this international agreement, the FLA's generic approach does not always result in a solution that is perfect in each jurisdiction. In some jurisdictions the wording of the FLA may, for example, be incompatible with the requirements for the transfer of copyrights on existing works or future works. The FLA is undoubtedly a great starting point, but will be even better for use in consultation with a local legal expert.

II. The assignment of rights under the FLA

The European Software Directive[5] stipulates that the author of a computer program is the natural person or group of natural persons who has created the program[6]. If the computer program is created jointly by a group of natural persons, the exclusive rights are owned jointly by the authors[7]. This means that the permission of all the authors needs to be obtained to undertake any exploitation of the work.

Thanks to the specific nature of Free Software licences and the freedoms they provide, this rule of joint ownership seems to work quite well for Free Software Projects. Copyleft licences such as the GNU General Public License (GPL) are broad enough to allow collaboration between the different developers. Many Free Software Projects function without any further copyright arrangements.

But the success of Free Software projects raises questions that go beyond collaboration and software development. A simple example is the question for Free Software projects using the GNU General Public License version 2 (GPLv2) whether or not to switch to the newer GNU General Public License version 3 (GPLv3). Such decisions are difficult to take when not all copyright holders can be tracked or when they don't agree. Another example is the matter of enforcing licence compliance. This can prove to be quite difficult when the copyrights are scattered. The bundling of copyrights in a single decision taking authority is an attractive and powerful solution to such issues, and the Fiduciary Licence Agreement endeavours to achieve exactly that.

The FLA is a short and clear document that excels in its simplicity: the developer assigns his/her copyrights world-wide to a single trusted person or organization[8] that returns a broad non-exclusive licence to the developer[9]. In countries where such an assignment is not possible[10], the developer grants an exclusive licence on the software[11], comprising:

1. the right to reproduce in original or modified form;
2. the right to redistribute in original or modified form;
3. the right of making available in data networks, in particular via the Internet, as well as by providing downloads, in original or modified form;
4. the right to authorize third parties to make derivative works of the software, or to work on and commit changes or perform this conduct themselves[12].

5 Directive 91/250/EEC.
6 The legislation of the Member States may designate legal persons as the rightholder.
7 Directive 91/250/EEC, Article 2.
8 FLA §1.
9 FLA §3 (2).
10 For example, and as cited in the FLA in footnote 1, Germany, Austria, Slovenia and Hungary are countries where assignments of the copyright in a work are impossible.
11 The assignment of copyrights to the fiduciary is not always necessary to achieve a similar result. The Apache Software Foundation Individual Contributor License Agreement, e.g., opts for a broad licence instead of the assignment of copyright (http://www.apache.org/licenses/icla.txt).
12 FLA §1.

The copyrights assigned (or exclusively licensed) under the FLA also include, where possible, rights on future developments, future corrections of errors or faults and other future modifications and derivative works of the software made by the developer assigning the copyrights. Modifications that are not derived from the software but that should be regarded as independent and original software are not affected by the assignment of future rights[13]. If the assignment of rights in future works is not possible in a country, like France, for example, these rights will not be assigned[14]. If future rights are not assigned, those rights will remain fragmented with their respective authors. In these situations, a periodical assignment of copyrights would be required to accomplish a full assignment over time[15].

It is evident that the authors of the FLA had to choose a generic wording that is valid in as many jurisdictions as possible, instead of addressing each country individually. But drafting such a catch all clause is a difficult exercise that might not result in a solution that is perfect in each jurisdiction. Under the Belgian jurisdiction, for example, the assignment of rights in future works is only valid for a limited period in time[16]. A transfer of copyrights in future works that is *temporally unlimited* is not valid. To achieve the same result under Belgian law, the wording *"for the entire term of copyright protection"* would be more effective than *"temporally unlimited"* as provided for in FLA article 3 (4). Another particularity under Belgian law for the transfer of rights in future works is the obligation to stipulate the genre of the work[17]. The term genre is ambiguous and often leads to confusion. Is it meant to serve in a peer-to-peer environment, strictly on a mobile device, or merely as documentation? All these exploitation methods and uses of the same work may qualify as different genres under Belgian law and should be named in the agreement. The transfer of rights with respect to still unknown exploitation methods is void under Belgian law[18]. That is why the FLA should be used in connection with local legal advice.

Article 6(b) of the Berne Convention[19] provides that the author of a literary work has the right to claim authorship and to object to certain modifications and other derogatory actions, even after the transfer of his economic copyrights on said work. These are the so-called inalienable moral rights of the author. As the European Software Directive provides that computer programs need to be protected by copyright as literary works within the meaning of the Berne Convention[20], the question of how these moral rights affect the transfer of the copyrights to the fiduciary under the FLA arises. The FLA stipulates that it leaves the moral and/or personal rights of the author unaffected[21]. This is a good decision on the part of the authors of the FLA, as the question of how the inalienable moral rights affect software is not unique to Free Software[22].

The copyright assignment under the FLA is world-wide, temporally unlimited and quasi-unconditional. Only in case that the fiduciary violates the principles of Free Software does the

13 FLA §2.
14 FLA, footnote 2.
15 The Apache Software Foundation Individual Contributor License Agreement contains an opening to such a periodical transfer by providing that only *intentionally submitted* modifications and additions will be covered under the Individual Contributor License Agreement.
16 Belgian Copyright law of 30 June 1994, article 3, §2 (available at http://www.juridat.be/cgi_loi/loi_a.pl?language=nl&caller=list&cn=1994063035&la=n&fromtab=wet&sql=dt='wet'&tri=dd+as+rank&rech=1&numero=1).
17 Belgian Copyright law of 30 June 1994, article 3, §1.
18 Belgian Copyright law of 30 June 1994, article 3, §1.
19 Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as last amended on September 28, 1979.
20 Directive 91/250/EEC, Article 1.1.
21 FLA §1 (2).
22 E. J. Louwers and C. E. J. Prins (2008), *International Computer Law* (San Francisco, CA, USA: Matthew Bender / LexisNexis) § 7.20, p. 7-86, ISBN 9780820513188.

copyright revert to its original owner(s)[23]. Thus, only persons and organisations held in great trust by the original copyright holders should be appointed as fiduciary. The FLA §3 (3) provides: *"In the event FSFE violates the principles of Free Software, all granted rights and licences shall automatically return to the Beneficiary and the licences granted hereunder shall be terminated and expire."* It might have been prudent to add that licences granted by the fiduciary to users that comply with the Free Software principles remain unaffected by a termination of the FLA.

III. The fiduciary

In theory, any person or organization can offer to act as fiduciary for a Free Software project using the FLA as a form. However, such responsibility should not be undertaken lightly as there may be a question of whether the fiduciary assumes liability for the software through the FLA and the subsequent licensing of the software to third parties in its own name[24]. Besides a guarantee regarding employer's rights[25], the FLA does not contain any contractual warranty or disclaimer with respect to the assigned software. What for instance if a third party not having accepted the GPL suffers damages or if a virus has been wilfully included in the code? Even though under normal circumstances an appeal on the exclusion of liability may be upheld in court, assuming liability is not always free of risk[26]. Of course, transferring the liability to an exploitation company or non-profit organization may also be utilized as a means to mitigate the liability of the authors.

Under its Fiduciary Programme the FSFE offers to act as fiduciary to whom the copyrights on a Free Software Project can be assigned via the FLA. In fact, the FSFE is the default fiduciary in the FLA. But FSFE only accepts a limited number of projects[27]. Projects that have been selected are Bacula.org and OpenSwarm[28].

The offer of FSFE to act as a legal guardian of Free Software Projects is a good initiative that will undoubtedly leverage a Free Software Project's strength to enforce third party compliance to the licence terms. However, whether FSFE is the optimal organisation to act as a guardian, and whether the objectives and actions of FSFE will be in line with the wishes of the developers, remains to be seen. It is up to FSFE to prove that it has the integrity and trustworthiness to fulfil this role. But even though its Fiduciary Licence Policy[29] is rather short, it clearly shows the willingness of FSFE to act as a neutral legal guardian that will not interfere with the project management, direction or administration. As Georg Greve, former President and founder of FSFE explains[30]: *"For us the most important issue is not whether projects assign their copyright to FSFE or any other organisation. We just want to do our part so projects do not neglect these issues"*.

Another significant legal question that arises with FSFE acting as guardian and manager of the copyrights on Free Software projects is whether so doing would cause FSFE to qualify as a collective management society in the field of copyright with all rights and obligations this entails. Collective management societies are bodies that group authors in order to more effectively manage their copyrights.

Since there is no uniform European definition of what the function is of collective management

23 The FLA remains silent as to how such a return of rights and licences will take place. If no amicable settlement can be negotiated, the author will need to refer the matter to the court.
24 FLA § 3 (1).
25 FLA § 1 (3).
26 E. J. Louwers and C. E. J. Prins (2008) § 17.04[B], p. 17-15.
27 FSFE has published its selection guidelines on http://www.fsfeurope.org/projects/ftf/guidelines.en.html.
28 http://mailman.fsfeurope.org/pipermail/press-release/2007q1/000168.html.
29 Available at http://www.fsfeurope.org/projects/ftf/fiduciary-policy.en.html.
30 See FSFE press release dated 1st February 2007 http://mail.fsfeurope.org/pipermail/press-release/2007q1/000168.html.

societies, this remains very much an open question. On the one hand, collective management societies are often referred to as collecting societies in European directives[31]. This might suggest that only societies that collect royalties and distribute them amongst their members qualify as collecting societies, what typically is not the case for FSFE. The denomination *collecting societies* seems however too narrow to cover the real function of collective management societies[32]. Directive 93/83/EEC e.g., defines a *collecting society* much more broadly *"as any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes"*[33]. The European Parliament resolution of January 15, 2004 on a Community framework for collective management societies in the field of copyright and neighbouring rights[34] applies the term *"collective management societies"*. Even though this resolution does not contain a definition, it is clear that the functions of a collective management society under this resolution exceed the mere collection and distribution of royalties[35].

Moreover, the answer to the question whether FSFE would qualify as a collective management society might vary amongst the European Member States. Collective management societies are governed by national legislation, and these various laws and provisions differ widely due to the fact that every country has its own traditions and specific historical, legal, cultural and economic characteristics[36].

The question whether the FSFE would qualify as a collective rights management body or not, is not without relevance as the recognition as a collective rights management body is conditioned to various obligations that differ widely amongst the Member States. These obligations range from transparency obligations to governmental control. Should FSFE qualify as a collective management body, it is paramount for FSFE to seek recognition, as collective rights management bodies must be regularly recognized in order to represent the holders of intellectual property rights in legal actions[37].

IV. Conclusion

Free Software communities must take their rights seriously if they expect third parties to comply with and respect their licences. This includes organizing and structuring these rights in a way that ensures the legal coherence of a project's rights in the future. The FLA is a useful tool to assist with this task and FSFE should be applauded for its efforts to draft this agreement. However, local laws often have particular requirements that may pose a risk when utilising generic international agreements. Therefore, while the FLA is undoubtedly a great starting point, it is prudent to consult with a local legal expert prior to putting it to use.

31 E.g. old Directive 92/100/EEC, article 4; Directive 93/83/EEC, article 1 and Directive 2001/84/EC, consideration 28.

32 Under Belgian law (Belgian Copyright law of 30 June 1994, article 65) societies for the management of rights are defined as all who collect or distribute rights for the account of the right holders. Where this legal definition stresses the collection and distribution, it would be wrong to reduce the role of management societies thereto (F., De Visscher and B., Michaux (2000), *Précis du droit d "auteur et des droits voisins*, (Brussels, Belgium: Bruylant) p. 399, ISBN 2802712799).

33 Directive 93/83/EEC, article 1 §4. Available at http://www.ebu.ch/CMSimages/en/leg_ref_ec_directive_copyright_satellite_cable_270993_tcm6-4289.pdf.

34 OJ C 92 E, 16.4.2004, p.425. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:092E:0425:0432:EN:PDF.

35 The resolution stresses e.g. the cultural and social aspects (nr. 13, 22 and 27).

36 Resolution, nr. 35. For a comparative study, see The Collective Management Of Rights In Europe, The Quest for Efficiency, KEA, July 2006, available at http://www.europarl.europa.eu/comparl/juri/study/rights_en.pdf.

37 Directive 2004/48/EC, article 4 (c). Available at: http://eur-lex.europa.eu/pri/en/oj/dat/2004/l_195/l_19520040602en00160025.pdf.

Licence and Attribution

This paper was published in the International Free and Open Source Software Law Review, Volume 1, Issue 1 (July 2009). It originally appeared online at http://www.ifosslr.org.

This article should be cited as follows:

Van den Brande, Ywein (2009) 'The Fiduciary Licence Agreement: appointing legal guardians for Free Software projects', *IFOSS L. Rev., 1(1), pp 9 – 14*