# Case law report: A look at *EDU 4 v. AFPA*, also known as the "Paris GPL case"

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**Abstract**

On 22nd September 2009 many Internet news sources noted a decision by the Appeal Court of Paris[1]. The coverage generally described the decision as "an important case on GPL license enforceability". This brief article examines the decision[2] and discusses its relationship to GPL license enforcement specifically and open source licensing in general. The account is based on review of the eight-page decision only and some legal conclusions are offered by considering the judgement in relation to the current situation in other jurisdictions, such as Finland.

**Keywords**

Law; GNU General Public Licence (GPL); Paris; France; Europe; Licensing; Free and Open Source Software; Contract

**Info**

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## Introduction

The decision concerns a contract dispute regarding an IT project. In 2000 EDU 4 won a contract and agreed to deliver software to AFPA. From the Appeal Court decision, it is not entirely clear which party was the original claimant in the case, but the court of first instance had already ruled on substantive claims of both parties in 2004, even though the claims by AFPA may have been presented only for defence. In a series of many turns the parties presented their latest claims to the appeal court in April 2009. In essence, EDU 4 claimed not to have breached the IT project contract and that it was entitled to all payments, while AFPA claimed breach of contract and that the vendor was not entitled to any further payments and that early termination of the contract was justified. I will not look into the details of the contractual claims, since these claims are outside the scope of this article.

1 Ryan Paul, "Big GPL copyright enforcement win in Paris Court of Appeals", Ars Technica, 22 September 2009, http://arstechnica.com/open-source/news/2009/09/big-gpl-copyright-enforcement-win-in-paris-court-of-appeals.ars (retrieved 14 October 2009); FSF France, "Paris Court of Appeals condemns Edu4 for violating the GNU General Public License", 22 September 2009, http://fsffrance.org/news/article2009-09-22.en.html (retrieved 14 October 2009).

2 Cour d'Appel de Paris, Pôle 5, Chambre 10, no: 294, issued on 16 September 2009, available at http://fsffrance.org/news/arret-ca-paris-16.09.2009.pdf (retrieved 14 October 2009).

## No GPL License Enforcement

Not a single claim (by either party), as cited in the court's decision, is based on (i) the GPL, (ii) any interpretation of the GPL or any of its terms as a contract, or (iii) any right established by law, such as the French Code on Intellectual Property (*Code de la propriété intellectuelle*), which contains the provisions establishing copyright, or the right of the author, in France.

The decision cites the GPL a number of times, mostly to describe VNC software which was included in the delivery. The decision also discusses whether the contract permitted inclusion of free software in the deliverables of the project.

The following argument is probably most relevant to the question of GPL enforcement (page 8):

> "Considérant qu'il résulte de l'ensamble de ces éléments que la société EDU 4 a manqué à ses obligations contractuelles en livrant en décembre 2001, date à laquelle devait s'apprécier sa conformité, un produit, d'une part qui présentait pour les utilisateurs des EOF des risques d'atteinte à la vie privée, d'autre part qui ne satisfait pas aux termes de la licence GNU GPL puisque la société EDU 4 avait fait disparaître les copyrights d'origine de VNC sur les propriétés de deux fichiers en les remplaçant par les siens et avait supprimé le texte de la license;"

A translation of the above citation into English follows:

> "[The court] considers that it follows from all of these elements that the entity EDU 4 had not fulfilled its contractual obligations with its delivery in December 2001, the date on which the performance of EDU 4 was to be assessed, that on the one hand posed privacy risks to the users of EOF and on the other hand did not satisfy the terms of the GNU GPL license, since the entity EDU 4 had removed the original copyright notices of VNC from two files, replacing them with its own copyright notices, and since it had deleted the text of the license;"

One can conclude that the above paragraph does not concern enforcement of the GPL, but rather appreciation of fulfilment of the contract between EDU 4 and AFPA. To the extent that the decision relates to the terms of the GPL, it is very limited in reach. It may be noted that the removal of copyright and similar notices could be considered violations of law, and not merely violation of GPL license requirements.

## User Claim Based on Non-GPL Contract

News coverage of the case made much of the fact that a software user had presented claims, rather than the copyright holder (as it is generally assumed that the GPL is enforceable by upstream licensors). However, these claims were not based on the GPL, but on a separate contract between the user and the distributor. Furthermore, the claims brought by AFPA had no relevance to GPL license requirements. Those claims were related to an IT project, i.e., whether the early termination of the project was justified or not.

## Source Code to Modifications

The court notes at one point that EDU 4 did not deliver the source code to the modifications it had made to the software, although EDU 4 had committed to do so in one of its letters. It is not clear from the decision text whether EDU 4 explicitly mentioned delivery of the source code in its letter

or merely referred to a delivery satisfying the terms of the GPL. In the latter case, the court would have concluded that satisfying the GPL upon redistribution required delivery of the source of the modifications to the software. This is probably not so, since the conclusion, as such, would be slightly inaccurate. The license requirements of GPL version 2 can be satisfied without delivering the source code, for example by providing an offer to deliver the source code.

## Open Source License Enforcement

As to the relevance of this decision to enforcement, the decision shows that the court considered the software to be licensed under the terms of the GPL and attached legal significance to the terms. On the other hand, the GPL and its terms play a very limited role in this decision, and thus I would hesitate to attach almost any legal significance to this decision as regards enforceability of the GPL. However, this view is based on my understanding that open source licenses are generally enforceable by their copyright holders.

Under Finnish law and other Nordic laws (Swedish, Danish and Norwegian), open source licenses can generally be considered enforceable. Under these laws the analysis is based on national Copyright Acts and the fact that nothing else, except the license, allows deviation from the monopoly granted to the author by the Acts. Since, for example, the right to modify the work and the right to distribute the work to the public are exclusively reserved to the author under applicable law, it is in the freedom of the author to decide on the manner of granting broader or narrower license rights to the work regarding modifications and distribution. In addition, there are no additional requirements set by law to dealings of private nature, such as a granting of a copyright license or entering into a contract, in order for them to attain enforceability.

There are differences in enforcement options, but that is beyond the scope of this article. My assertion that open source licenses are, in general, enforceable under Nordic laws does not mean that, in a particular case, each element of all licenses could be enforced. But this question might arise solely from the differences in expectations of the parties, as there are ambiguities in the formulations of some licenses, in which case it is no longer a pure question of eligibility for enforcement.

However, even a casual reader of open source-related legal writings on the Internet will encounter the question of whether open source licenses are enforceable and, if so, under what legal theory and through what practical means of enforcement. This discussion will persist, since my understanding is that some jurisdictions do impose requirements for legal transactions in order for them to become enforceable at all. This is probably most evidently the case for common-law jurisdictions, such as England and Wales[3] and the federal and local jurisdictions within the United States[4], in which some type of consideration seems to have a role in defining the legal nature of such transactions. The role and practical significance seems to vary by jurisdiction.

It might be due to the relatively frequent discussion of this common-law related question that commentators from other jurisdictions have begun to ask similar questions, even if they are not relevant to enforcement as such[5].

3 See Mark Henley (2009) 'Jacobsen v Katzer and Kamind Associates – an English legal perspective', IFOSS L. Rev., 1(1), pp 41 – 44. Available at: http://www.ifosslr.org/ifosslr/article/view/4

4 See Lawrence Rosen, (2009) 'Bad facts make good law: the Jacobsen case and Open Source', IFOSS L. Rev., 1(1), pp 27 – 32. Available at: http://www.ifosslr.org/ifosslr/article/view/5

5 The relevance might not be purely enforcement-related, such as questions concerning license interpretation, or it might not be strictly open source or free software-related, such as questions concerning the enforcement of a very general provision on liability limitation.

## Other Lessons

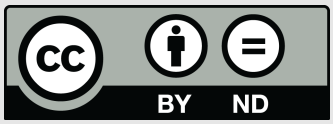
Open source or free software has gained significant ground during recent years. It should be noted that many open source projects have been widely used for a very long period of time, while there are open source projects that will never become mainstream due, e.g., to the limited scope of the projects or other issues. It is important to understand that it is not open source that makes good or bad software; it is the individual projects that are good or bad. The same is true of closed source projects: some are better, some are worse. But open source, as a licensing model, is becoming a mainstream model.

This licensing model should be handled like any other legal phenomenon: with a professional and unbiased approach.

Open source as a concept or phenomenon is already well known; what it means in practice and how it can be benefited from is less well understood. There are many incorrect beliefs that open source software is solely an area for hobbyists and amateurs. Although there are open source projects created by hobbyists and nonprofessionals, there are also many professional open source projects. The same applies to closed source projects.

This article has demonstrated that the news reported on the Internet concerning *EDU 4 v. AFPA* was, from a legal point of view, misleading[6]. It may be that the reporting suffered from erroneous understanding of the decision or was motivated by the desire for quick publicity and by an interest in the open source phenomenon. Some writers who reported this story undoubtedly strive to support the open source or free software phenomenon. But such support cannot be achieved by an unprofessional journalistic approach to matters of legal analysis. Unprofessionalism in such an area tends to reinforce the false belief that open source is solely a matter of non-professional software development. As a licensing model, open source should be treated like any other area of human life; legal analysis of open source issues should be guided by professionals.






6 Of course, one might say that it is not at all unusual that legal questions raised on the internet are handled in a misleading, incorrect or even false way, whether they relate to open source or something else.