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Open-source licence checklist

1. Choosing a suitable open-source model

The following **criteria** in particular should be borne in mind when choosing a suitable licence type to distribute software under an open-source model:

- **Compatibility** with third-party software licences
- **Acceptance** of the licence in the target community
- **Workload** for ensuring compliance with the licence chosen
- Existence of a legal enforcement authority

2. Copyleft avoidance strategies

The following **strategies** are examples of how to avoid the copyleft effect:

- Instead of making **changes** yourself, get the **end users** to make them. Instead of modified code, they can be supplied with instructions on how to make changes to the program.
- **Distribute** programs **separately**: If your own software does not contain any protected code from open-source programs, it can in principle be distributed on its own.
- **Develop technical distancing strategies**: A special module might be created, for example, that sits between the open-source software and the new program.

The copyleft effect only applies to the module. However, GPL v3 contains a protective clause designed to prevent technical circumvention of copyleft.¹

- Obtain **parallel licences** from the rights owners. In this context, however, it must be noted that the program creator and the rights owner are not always the same (e.g. when software is developed under the terms of an employment or works contract).
- Obtain an **exception** from the Free Software Foundation (FSF). This presupposes, however, that the FSF has the power of disposal over the rights to the software in question. This is only the case if the rights owner has at least granted it such power in a fiduciary capacity.

3. Open-source compliance

When using open-source software in development projects, the following points in particular must be clarified and documented:²

- Draw up an **open-source strategy**: in which areas and under which conditions is open-source software to be used?
- **Which software** is to be used? Which building instructions, installation scripts, compilers etc. are to be used? Specifically, everything an expert needs to produce a workable program independently must be documented. All versions of the relevant open-source software must be documented as part of systematic release management.³
- **Which licences** apply to the software components used? Are these compatible with each other? How can any compatibility conflicts be avoided?

More checklists on software protection and open source software are available in German in: STRAUB WOLFGANG, Softwareschutz – Urheberrecht, Patentrecht, Open Source (Dike Verlag Zurich/St. Gallen 2011) and in a new edition of the book that will be published soon. See also the checklists under it-recht.ch.

¹ Section 5 para. 2 GPL v3.

² See also KUHN BRADLEY M. / WILLIAMSON AARON / SANDLER KAREN M., A Practical Guide to GPL Compliance, New York 2008, available online at www.softwarefreedom.org

³ The Fossology system, for example, can be used for this purpose. See www.fossology.org.

- Use of **open-source software in the supply chain**, e.g. certifications⁴
- In which form is open-source software to be **linked** to proprietary programs or third-party products and **conveyed**?
- Which software components are subject to the **copyleft effect**?
- **Publish** the source code correctly and ensure the availability of all versions (including building instructions etc.) for the minimum period stipulated by the licence in question.⁵
- **Display proactive efforts to ensure compliance** when accused of violations.⁶

⁴ See also <https://www.openchainproject.org>

⁵ Under the GPL, the entire source code must be available for at least three years after the last conveyance. If the software is subject to GPL v2, there may be a requirement to make physical data media available.

⁶ If the party committing the violation has received a first warning from the rights holder or no notice of termination is given within 60 days, the licence is permanently reinstated (section 8 para. 2 and section 3 GPL v3). Adopting a cooperative attitude can therefore make sense beyond the desire to avoid claims for damages.