Software Licensing: EULA vs. GPL, OSI, Open Source, and Free Software

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Overview

The release of Visual FoxPro 8.0 had developers studying, not the "What's New" documentation, but unfortunately, the End User Licensing Agreement. The "click-through" license with VFP 8.0 introduced some new burdens upon the developer. Upon further study, the VFP 7.0 EULA did, too!

Some claim that Open Source licensing will free the developer from the burden of having to be an armchair lawyer. Others claim that Open Source Software is "viral" and will "infect" software it comes in touch with. What's the real scoop here? Attendees will learn how to understand the changes in requirements that came with the Visual FoxPro 7.0 and 8.0 licenses, distinguish Open Source from closed-source proprietary licenses, distinguish the different varieties of Open Source licenses and their implication for development and distribution of Visual FoxPro solutions that include or work with software under those licenses, present rational and factual arguments to investors, employers and customers on the benefits and liabilities of Open and closed source solutions, and understand how "Free as in speech, not free as in beer" principles allow many practical solutions, such as dual-licensed software, where money can be made in the development, support and customization of Open Source software.

But First, a Disclaimer:

I am not a lawyer, and this document is not legal advice. I am reporting on changes to documents of interest to the Visual FoxPro community and referring to online discussion and resources of interest. It is the reader's responsibility to ensure that this information applies to them. Legal advice should only be obtained in an attorney-client relationship where you have retained an attorney with expertise in the desired field and one admitted to practice in the jurisdiction in question. Before making any decisions based on the material presented here, consult your attorney.

The world of Intellectual Property (IP), particularly as it applies to digital rights, is a constantly moving target. For instance, using the Digital Millennium Copyright Act (DMCA), Lexmark obtained a preliminary injunction, defending its chip design against a manufacturer that wanted to sell replacement toner cartridges for Lexmark's laser printer (http://www.eff.org/Cases/Lexmark_v_Static_Controls/). On the flip side, the Chamberlain garage door manufacturer's lost a DMCA suit against a manufacturer of replacement garage door openers (http://www.eff.org/news/breaking/archives/2003_09.php#000460). The subtleties of these distinctions are lost on many of us. The message is clear; get an expert to guide you.

What's changed?

As business people, we are constantly asked to enter into legally binding agreements. It seems like every time we turn on the computer, we need to click "I Agree" to small edit box with an enormous scrollable document in it. What are we agreeing to? In this document, I extract some of the interesting phrases within the United States version of the VFP 8.0 End User Licensing Agreement (EULA) and compare them to similar phrases in earlier versions of this document. Again, I cannot claim to know the enforceability or applicability of these phrases to you; as I mention above, consult your lawyer.

What's New in VFP 8, the EULA?

The release of Visual FoxPro 8.0 was met with the usual enthusiasm from the FoxPro community, but there was an undercurrent of concern: what were these strange new phrases in the license, and what do they mean to me. Here are three issues that elicited a lot of discussion.

Benchmarking

In Visual FoxPro 7, the EULA stated;

> 4. NO PERFORMANCE OR BENCHMARK TESTING. You may not disclose the results of any benchmark test of any Server Software or Client Software that comes with the SOFTWARE PRODUCT to any third party without Microsoft's prior written approval

In Visual FoxPro 8, the EULA states:

> 3.4 Benchmark Testing. The Software may contain the Microsoft .NET Framework. You may not disclose the results of any benchmark test of the .NET Framework component of the Software to any third party without Microsoft's prior written approval.

3.1.(ii): Redistributables and "in conjunction"

A recent article in FoxTalk magazine suggests that Visual FoxPro can run under Linux, with some limitations of functionality (see references). However, it is unclear what the licensing situation is with this. Section 3.1 (a) (ii) states:

> (ii) that the Redistributables only operate in conjunction with Microsoft Windows platforms;

This is obviously taken from a much larger context. Section 3.1 explains the requirements to redistribute the software, and it must be read carefully. The "Redistributables" referred to are defined in Section 2, and further reference the REDIST.TXT file, installed in the root of the Visual FoxPro 8 installation. Ensure that you provide your attorney with all of the associated documents to get the best advice.

Questions you might consider asking include:

Does this mean that I can install and run the development environment on a Linux machine?

Can I distribute my application on Linux if each machine has the development environment installed?

What does the "in conjunction with… platforms" phrase really mean, in a practical sense? Can that requirement be satisfied through licensing, through dual booting, or through other mechanisms?

Whil Hentzen attempted to get answers to these questions, as he documents in his September 2003 FoxTalk editorial and on his http://www.linuxtransfer.com web site.

11.1 Upgrades

The VFP 7 EULA states:

> 7.   UPGRADES. If the SOFTWARE PRODUCT is labeled as an upgrade, you must be properly licensed to use a product identified by Microsoft as being eligible for the upgrade in order to use the SOFTWARE PRODUCT. A SOFTWARE PRODUCT labeled as an upgrade replaces and/or supplements the product that formed the basis for your eligibility for the upgrade. You may use the resulting upgraded product only in accordance with the terms of this EULA. If the SOFTWARE PRODUCT is an upgrade of a component of a package of software programs that you licensed as a single product, the SOFTWARE PRODUCT may be used and transferred only as part of that single product package and may not be separated for use on more than one computer.

In contrast, the VFP 8 EULA states:

> 11.1   Upgrades. To use a version of the Software identified as an upgrade, you must first be licensed for the software identified by Microsoft as eligible for the upgrade. After upgrading, you may no longer use the software that formed the basis for your upgrade eligibility.

There is also a curious phrase in the ReadMe.htm file, located in the "C:\Program Files\Microsoft Visual FoxPro 8\Visual FoxPro 8.0 Professional – English" of a typical installation, and readable during the installation process.

You can safely install or uninstall using Visual FoxPro 8.0 Setup. If you are upgrading to Visual FoxPro 8.0, you must first uninstall Visual FoxPro 7.0. Though Visual FoxPro 8.0 and Visual FoxPro 7.0 can exist on the same computer, you cannot install Visual FoxPro 8.0 in the same directory as Visual FoxPro 7.0.

Your questions for your lawyer on this section might be whether or not you are eligible for the upgrade discount, based on your situation. Many developers must retain multiple versions of Visual FoxPro to support clients who cannot or will not upgrade their runtime installations. A question for the marketing team might be to ask who the upgrade is for, if loyal FoxPro developers will applications in the field are not eligible.

Is Open Source the Answer?

In *Free as in Freedom,* Sam Williams described the incident that leads Richard Stallman to start the GNU project, and the GNU General Public License, often referred to as the GPL for short. The purpose is simple: let programmers have the source code to do their jobs.

Obviously, there is a lot of opposition to the free exchange of all source code, and there have to be reasonable compromises between the interests of individuals, governments and businesses. But there is a legitimate viewpoint that proposes that all source code should be freely and openly distributable, and the money made in the software business is made on consulting, implementation and support. Naturally, the closed-source commercial software interests are opposed to this at all costs.

There are an infinite number of compromise positions between the absolutes. Nearly all businesses are Dependant on some open source software at this point: many routers and consumer electronics are based on open source software, and much of the infrastructure of the Internet runs on it as well.

The question of whether some or all of your software needs can be met by open source software is a good question. There are an enormous number of packages out there, so it's usually not the variety that's the issue. Just as with closed-source commercial packages, you must examine and review the license in detail. (Have I mentioned your lawyer? He/she ought to be in on the evaluation as well, of course). There are many, many software licenses, some requiring as little as a postcard, other with carefully crafted terms that differentiate amateur and home use from profession, commercial or money-making uses. Ensure you are in compliance.

And then there's the "viral" issue. Some licenses require that all software that works with their software carry a similar or identical license. Again, the exact terms vary by license, and their applicability to you can truly only be determined in a court of law, so examine them carefully. A key element in some of these licenses is the method by which your application interacts with the licensed code. For example, if your code actually compiles in their code, you are very tightly bound and their license terms may apply, whereas if you only access their application via a documented API, you may be free to license your code using the terms of your choice.

There have been many efforts to standardize open source licensing. One of the most successful to date is the Open Source Initiative, at http://www.opensource.org, which lists dozens of licenses that meet its criteria of "OSI Certified Open Source Software."

The Creative Commons

An interesting spin-off of the Open Source movement is a similar movement for other types of intellectual property, such as writing and music. The "public domain" may or may not be a status in which you can place writings and expect them to remain "free" forever. It is unclear if it is legitimate for a commercial interest to take materials you have "released into the public domain" and restrict them with copyright, patent or licensing restrictions. For that reason, a project was started to define a "Creative Commons" set of licenses that freed works for most uses, but retained a copyright as a means of insuring the works could stay free.

Details of the Creative Commons group and their licenses can be found at http://www.creativecommons.org/

Further Information

Creative Commons, http://www.creativecommons.org

GNU, http://www.fsf.org

Open Source Initiative, http://www.opensource.org

References

Hentzen, Whil, *The Great Linux EULA Controversy,* FoxTalk magazine, September 2003

Hentzen, Whil, http://www.linuxtransfer.com

McNett, Paul, *Running Visual FoxPro on Linux* and *Running Visual FoxPro on Linux, Part 2,* FoxTalk magazine, March 2003 and August 2003, respectively.

Williams, Sam, *Free as in Freedom, Richard Stallman's Crusade for Free Software,* O'Reilly, 2002, 0-596-00287-4, also available from the O'Reilly Open Book Project at http://www.oreilly.com/openbook/

A lively discussion took place on the FoxForum wiki on the upgrade topic:

http://fox.wikis.com/wc.dll?Wiki~VFP8_UpgradeLicense~VFP

If you really enjoy following the blow-by-blow of the EULA controversy (with coverage in The Register and SlashDot, among others, check out http://radio.weblogs.com/0117767/2003/04/ and http://radio.weblogs.com/0117767/2003/03/ and search for "EULA"

On April 26, 2003, VFP_Eula_Runtime.txt was posted (without link or attribution) at http://gotdotnet.com/team/vfp/vfp_eula_runtime.txt, a web site affiliated with Microsoft. It is included in the files for this session, and reproduced here:

> Visual FoxPro was designed and tested for use in creating applications that run on the Microsoft Windows platform; the same applies to the components that are provided to developers for redistribution with Visual FoxPro-based applications. If a developer wishes to distribute the Visual FoxPro runtime with an application, the runtime may only operate in conjunction with a Microsoft Windows platform. As with any contract, you should seek your own legal counsel's advice when interpreting your rights and obligations under the Visual FoxPro End User License Agreement.

Addendum

The following is an editorial essay I posted to my weblog on February 26, 2003. A link to the posting is http://radio.weblogs.com/0117767/2003/02/26.html#a157.

VFP 8.0 EULA Change: It's a Question of Trust

Without announcing it, Microsoft changed the licensing requirements for Visual FoxPro 8.0 so that older versions of Visual FoxPro must be removed. These requirements apparently only apply to the "upgrade" version of VFP 8.0.

PCConnection lists the VFP 7.0* (NOTE: not the new 8.0 product) Upgrade at $239.95, a bargain for the most powerful Windows development environment, richest IDE, fastest single-tier database engine and best development community of any package in WinTelLand. The full version is listed at $517.35, a $277.40 premium over the upgrade product. Looked at the other way, an existing owner gets a 53.6% discount off of the full price for buying an upgrade. In 7.0 and before, this was a reward for having purchased the earlier package. In 8.0, I'm not so sure.

Section 11.1 of the VFP 8.0 End-User Licensing Agreement (EULA) states:

"11.1 Upgrades. To use a version of the Software identified as an upgrade, you must first be licensed for the software identified by Microsoft as eligible for the upgrade. After upgrading, you may no longer use the software that formed the basis for your upgrade eligibility."

While that requirement may be appropriate for personal productivity packages, it is completely inappropriate for a development system. Applications developed with earlier versions must be supported with those earlier versions until it is practical and economically feasible, if ever, to upgrade to the latest runtime modules. In many cases, it is not feasible to upgrade tens, hundreds or thousands of machines to a later version. Older version of development environments must be maintained until all clients have been updated. For developers and consultants who are taking on new work, it is not at all unusual to come across a new client who is two or three versions behind in their systems.

The issue here is not a couple hundred bucks. It is a question of truthfulness and trustworthiness. A change this significant to the EULA cannot be buried in section 11.1 of a long and incomprehensible document. As significant change in licensing ought to be made public, explained to the community, debated, flamed, and eventually accepted. We VFP developer fans are almost always referred to as a "rabid" lot, and paying a couple of extra hours of billable time for the correct version, and to keep our product alive, is not an unreasonable price to pay for what I still consider one of the best products ever on the PC platform.

However, failing to be in licensing compliance can be an offense justifying termination for some employees. Failing to be in license compliance can result in a huge fine, possibly crippling a business, from the BSA. Changing the licensing terms without properly notifying their customer base is a violation of trust between customer and vendor.

Microsoft ought to be ashamed of trying to "sneak this in under the radar," and needs to make all efforts to clarify what their licensing policies are, what has changed from version to version, and what their customers need to do to stay in compliance.

I send money to vendors when they provide me with new and updated products that make my job the enjoyable profession that it is. I trust them to support me as I support them. Microsoft has failed to live up to this basic principle of commerce, and needs to make amends.

* (Prices for VFP 8.0 do not seem to be available on retail sites I've searched. A search of mySimon.com shows PC Mall listing VFP 8.0 for $607.99 and eCost.com for $563.92, but both appear to be the full product.)