



A Practical Guide to WordPress and the GPL

Understand the GPL, know what you can and can't do
and get answers to your business-related questions.

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“You type something and hit
‘blog this’ and in the next second
it’s on your page(s).”

Michel Valdrighi on b2, circa 2003

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Introduction: conception, birth and forking

Conception

“WordPress was born out of a desire for an elegant, well-architected personal publishing system built on PHP and MySQL and licensed under the GPLv2 (or later)”



WordPress was conceived in the software pool of the GPL, the well-known acronym for the “[GNU General Public License](#)”. (It also, no doubt, absorbed a good deal of jazz while being coded up given Matt Mullenweg’s passion for jazz and his consequent naming of WordPress releases after well-known jazz greats. But I digress... .) Significantly, WordPress was the official successor of b2/cafeblog, so let’s start there.

b2/cafeblog

b2/cafeblog was launched in 2001 by Michel Valdrighi. It was [described](#) as a “classy news/weblog tool (aka logware)” that worked like this:

“You type something and hit ‘blog this’ and in the next second it’s on your page(s). You can write extended entries, or even entries that span multiple pages. You can also use BloggerAPI clients to post to your b2 weblog.

What’s original in b2? Pages are generated dynamically from the MySQL database, so no clumsy ‘rebuilding’ is involved. It also means faster search/display capabilities, and the ability to serve your news in different ‘templates’ without any hassle.”

Sounds familiar right?

Birth through a fork



In 2003 Matt and Mike Little forked b2 and created WordPress: the beginning of a beautiful thing that in time would come to power up to [23% of the world's top 10 million websites](#). As explained on WordPress.org, “WordPress was born out of a desire for an elegant, well-architected personal publishing system built on PHP and MySQL and licensed under the GPLv2 (or later)”.

Since 2003, we have seen (among many other things) introduction of the WordPress plugin architecture (2004), introduction of the theme system and static pages (2005), widgets, tagging and pretty URLs (2007), several new and improved user interfaces (2007-2014), custom post types and multisite (2010), post formats (2011), the theme customiser and previewer (2012), built-in audio and video support as well as improved security measures (2013) and live widget and header previews (2014). In a nutshell, WordPress just keeps getting better and better. And let's not forget about the WordPress codex: it contains an incredible amount of useful support documentation across all manner of topics.

When b2/cafeblog was forked, it was licensed under version 2 of the GPL. For this reason, WordPress was likewise (and had to be) licensed under the GPL.

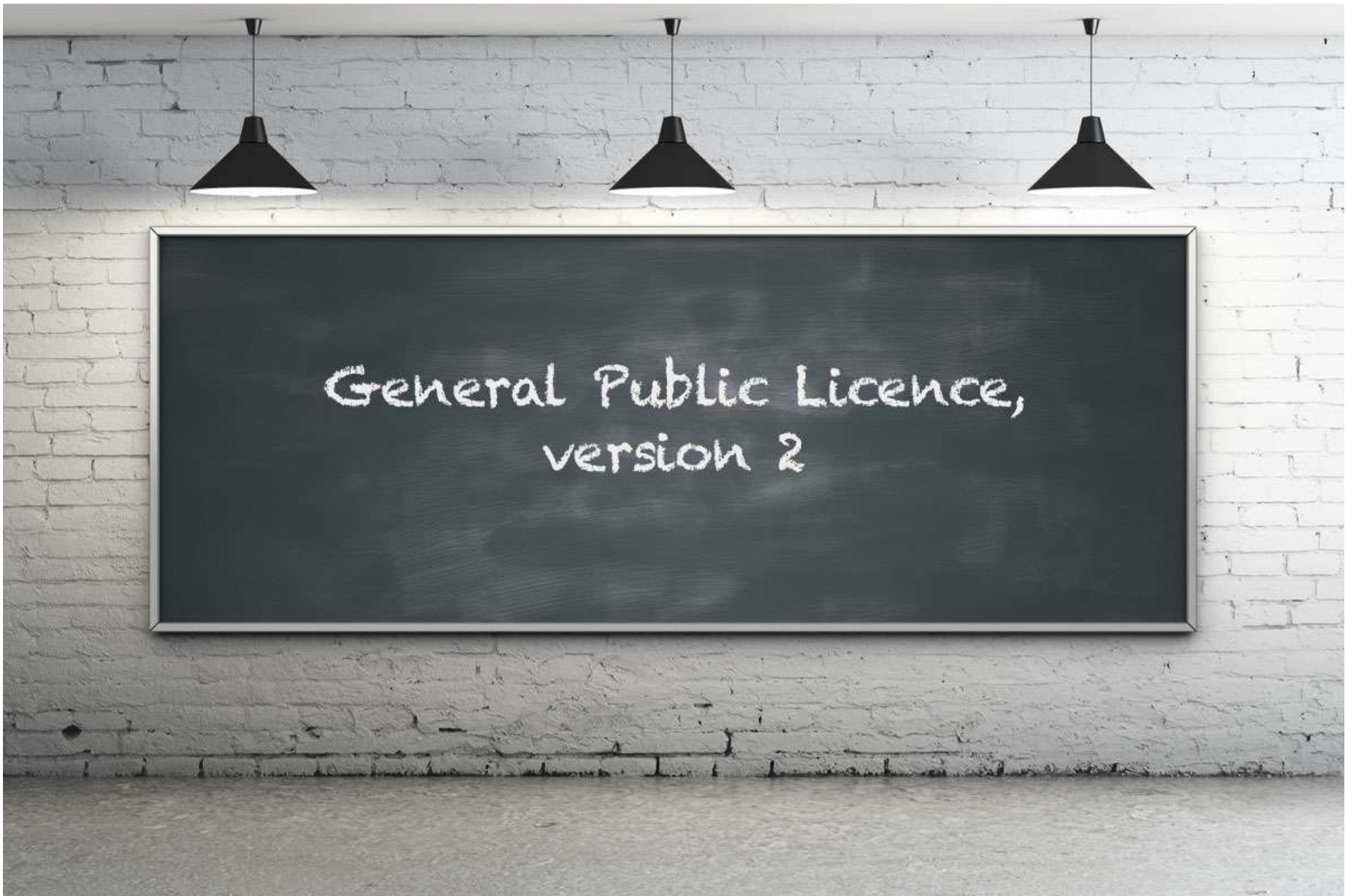
(Thanks to Tom Marcello for [his image](#) of Dexter Gordon and Benny Bailey from 1977, licensed under a [Creative Commons Attribution-ShareAlike 2.0 Generic licence](#).)

"In the free/libre software movement, we develop software that respects users' freedom, so we and you can escape from software that doesn't."

Richard Stallman, GPL author

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Understanding the GPL licensing of WordPress



The GPL is an open-source software licence that is designed to protect four fundamental freedoms that are considered to underpin “free software”

Licensing

As noted earlier, WordPress is licensed under [version 2 of the GPL](#). The text version of the GPL has accompanied every release of WordPress since its inception, in the license.txt file included in each download.

Originally, and until version 3.2 of WordPress, the license.txt file was a verbatim reproduction of the GPL, with no reference to b2 or the WordPress contributors. Matt and his co-developers had, instead, included full attribution to b2 and Michel Valdrighi in the readme.html file included with each download. For example, in the open source spirit that pervades the WordPress community and which Matt has championed from the outset, the readme.html file in version .71 of WordPress said this:

“WordPress is built from b2, which comes from Michel V. We wouldn’t be here without him, so why don’t you grab him something from his wishlist?”

Nice.

As WordPress matured, each download continued to include a license.txt file and a readme.html file but, with the release of version 3.2 of WordPress, Matt and his co-developers added to the wording of the license.txt file. From that point forward, the license.txt file has commenced with this wording (the only change in subsequent versions being the year of copyright):

“WordPress – Web publishing software

Copyright 2011 by the contributors

This program is free software; you can redistribute it and/or modify it under the terms of the GNU General Public License as published by the Free Software Foundation; either version 2 of the License, or (at your option) any later version.

...

This program incorporates work covered by the following copyright and permission notices:

b2 is (c) 2001, 2002 Michel Valdrighi – m@tidakada.com – <http://tidakada.com>

Wherever third party code has been used, credit has been given in the code's comments.

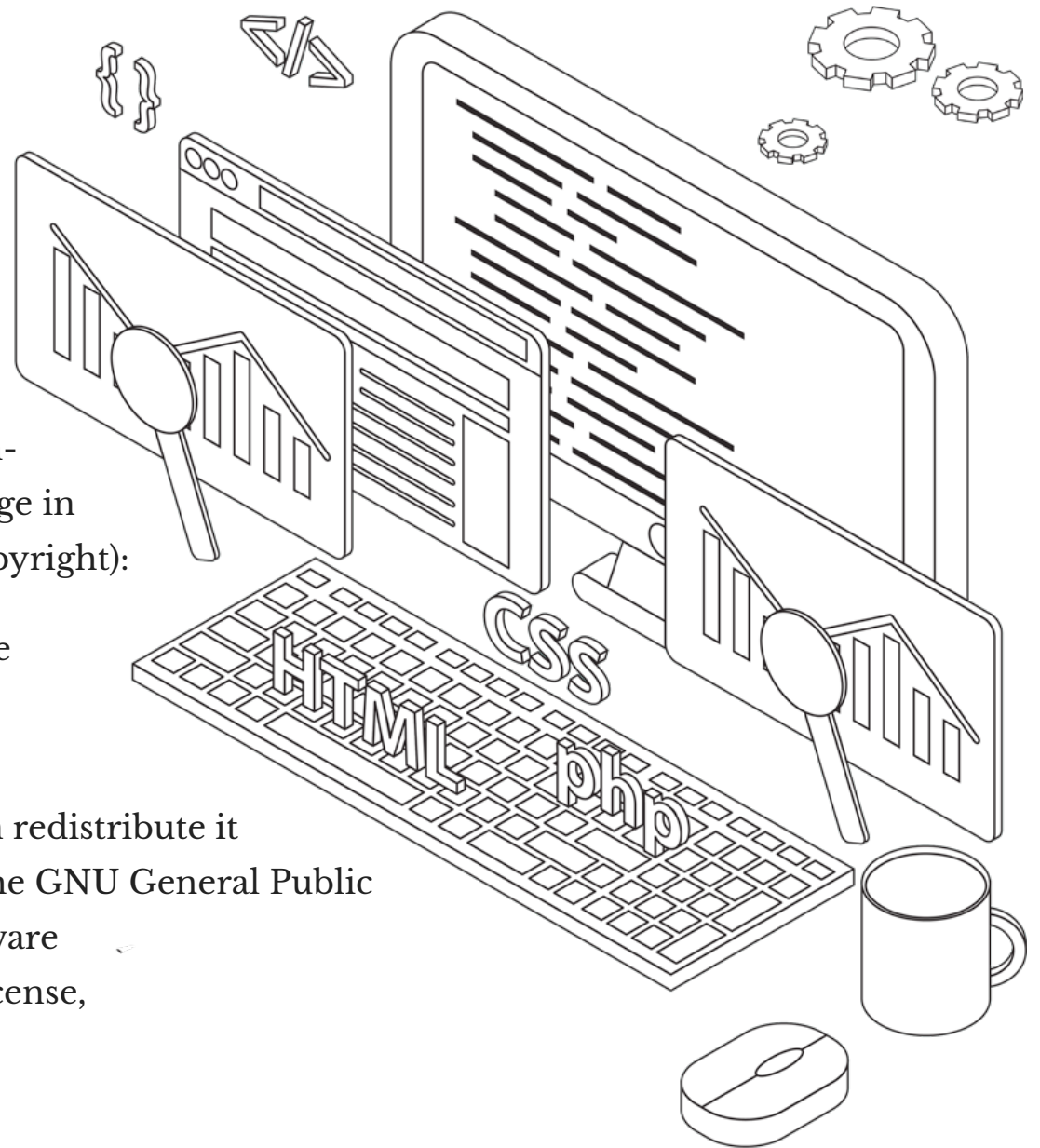
b2 is released under the GPL

and

WordPress – Web publishing software

Copyright 2003-2010 by the contributors

WordPress is released under the GPL”



Understanding the GPL

Freedoms

The GPL is an open-source software licence that is designed to protect four fundamental freedoms that are considered to underpin “free software”, namely, the freedom to:

- run the software for any purpose;
- study how the software works through access to source code and to freely adapt it;
- redistribute copies of the software to anyone; and
- improve the software, and redistribute those improvements to anyone.

Versions

First written by Richard Stallman and the Free Software Foundation (FSF) in 1989, the GPL has continued to evolve through successive versions. Version 2 was released in 1991 and version 3 was released in 2007. Version 3 is the latest version.

Whilst WordPress is released under version 2 of the GPL, the introductory section in the licence now states that “you can redistribute it and/or modify it under the terms of the GNU General Public License as published by the Free Software Foundation; either version 2 of the License, or (at your option) any later version”. Clauses or paragraphs in the GPL are called “sections”.

Summarising the GPL

From the perspective of opening up software for use by others, the GPL was and remains a well-crafted open source licence. At the same time, it uses legally-oriented language with which many WordPress users may be unfamiliar. In addition, and unlike the Creative Commons licences for other forms of copyright works, the GPL doesn’t have a simplified “human readable deed” (as Creative Commons calls the summary of its licences). For these reasons, the true meaning and impact of the GPL might not be immediately apparent to some WordPress developers, designers and users.

To boil things down, the following table summarises key aspects of version 2 of the GPL. It doesn’t summarise all clauses. Rather, it summarises those that are most relevant to WordPress users on a day-to-day basis.

A summary of the GPL

 **Copying and distribution:** You may copy and distribute the program as long as you comply with some copyright notice and disclaimer requirements. Those requirements are that you publish on each copy an appropriate copyright notice and disclaimer of warranty, keep intact all notices that refer to the GPL and the absence of any warranty, and give recipients a copy of the GPL along with the program. (Section 1)

 **Fees:** You may, if you wish, charge a fee for transferring a copy of the Program and/or for warranty protection. (Section 1 as well)

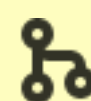
 **Modifications / derivative works:** You may modify the Program or any part of it and distribute the modifications or new work as long as modified files contain notices regarding the existence and date of changes and any work that you distribute or publish that contains or is derived from the Program or any part of it is licensed as a whole at no charge to all third parties under the GPL. (Section 2)

 **Distributing non-source forms:** You may copy and distribute the program or a work based on it in object code or executable form, on the terms of sections 1 and 2, as long as you accompany it with either:

- the complete corresponding machine-readable source code; or

- a written offer (valid for at least 3 years) to give any third party the source code, for a charge that is no more than the cost of distribution; or
- information you received as to such offer (this option is allowed only for noncommercial distribution and if you received the non-source form(s) with such an offer. (Section 3)

 **Termination:** If you copy, modify, sublicense or distribute the Program other than as permitted, your rights under the GPL will terminate automatically. (Section 4)

 **Downstream licensing:** Downstream recipients of the Program or any work based on it automatically receive a licence from the original licensor to copy, distribute and modify the Program on the terms of the GPL. As a distributing licensee, you are not allowed to impose any further restrictions on the recipients' exercise of the rights under the GPL. (Section 6)

The GPL in a small nutshell

 A super-condensed summary would be along these lines: you can copy and distribute the program, you can charge a fee for transferring the program or providing warranty protection, and you can modify the program and distribute your resulting derivative work. But, if you distribute your derivative work, you need to license it under the GPL, otherwise your licence to use the program will terminate (and you'll be infringing copyright in the program).

Qualifications

Whilst many parts of the GPL are abundantly clear, certain aspects are, unfortunately, more complicated than the above summary might suggest. In particular, one needs to be aware of some important qualifications as to how the requirements relating to modifications / derivative works are intended to apply. The full text of section 2 should be consulted for the detail but key points are these:

- the intent is to control the distribution of derivative or collective works based on the Program, not to “contest your rights to work written entirely by you”;
- if identifiable sections of the modified work are not derived from the Program, and can be reasonably considered independent and separate works in themselves, then the GPL does not apply to them when distributed as separate works;
- however, when you distribute the same sections as part of a whole which is a work based on the Program, the distribution of the whole must be on the terms of the GPL; and
- “mere aggregation of another work not based on the Program with the Program (or with a work based on the Program) on a volume of a storage or distribution medium does not bring the other work under the scope of [the GPL]”.

As we’ll see in a later chapter, the intended meaning and scope of the modifications / derivative works provisions have been the subject of considerable debate for many, many years, including within the WordPress community.

“What we’ve discovered, in my opinion, is that software is repaired, advanced, and extended faster and better when it’s open.”

Chris Lema, 2014

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Common GPL-related questions



It's fairly easy to summarise most key aspects of the GPL but the rubber hits the road when people come to apply it in practice

Introduction

It's fairly easy to summarise most key aspects of the GPL but the rubber hits the road when people come to apply it in practice. For this reason, I've set out below a range of GPL/WordPress questions that do or may arise in practice and have sought to answer them. Note that I've deliberately not addressed the question of the extent to which commercial themes may need to be licensed under the GPL (given the complexity of that topic, I address it in a later chapter). When I use a term like "GPL'd theme", I'm saying that the theme has been licensed under the GPL.

The questions and some answers

If I modify the core WordPress software or a GPL'd theme or plugin, must I release the source code of the modified versions(s) to the public?

If you are using the modified version privately without distribution, then you do not have to release the source code of the modified version to the public. However, as the Free Software Foundation puts it, "if you release the modified version to the public in some way, the GPL requires you to make the modified source code available to the program's users, under the GPL."

If I know that someone has developed a WordPress theme or plugin for private use, can I require that person to give me a copy of the theme or plugin?

No, the GPL does not require this.

I take a GPL'd theme or plugin from the WordPress theme or plugin repository, or I purchase a GPL'd theme or plugin from a commercial provider, and then I modify the theme or plugin for my own purposes. Am I obliged to release my modified version to others?

No, you are not obliged to release your modified version to others.

Can I sell the core WordPress software for a fee if I want to?

Yes. Doing so is consistent with the freedoms in the GPL. However, trying to do so would be pointless and unlikely to earn you any money, as everyone knows or could easily find out that WordPress is freely available at wordpress.org.

I'm a theme/plugin developer. I've put huge effort into writing my theme/plugin and I'm going to release it under the GPL but I want to make sure that everyone who receives my theme or plugin, even if from someone else, is obliged to pay me a licensing fee or notify me that they have it. Can I do that?

No. As the Free Software Foundation puts it, the "GPL is a free software license, and therefore it permits people to use and even redistribute the software without being required to pay anyone a fee for doing so." Similarly, if someone receives a copy of GPL'd software, that person does not have to inform the developer that s/he has it. You are entitled to charge a fee for access to support and later versions, but this is quite different to requiring recipients to pay a licensing fee for merely using the software.

I'm a commercial theme or plugin developer. I sell my GPL'd theme or plugin online, behind a pay wall. People can only access the theme or plugin files after paying my prescribed fee. Does the GPL allow me to do this?

Yes. You are entitled to charge a fee for distributing copies of GPL'd software. Note, however, that anyone who obtains a copy is entitled to release it to anyone else, with or without charge; the GPL allows this to occur.

I'm the same commercial theme or plugin developer mentioned above, selling my GPL'd theme or plugin online behind a pay wall. As a commercial operator distributing a GPL'd program, am I obliged (e.g., if someone asks) to make my theme or plugin available to a member of the public for free?

No. However, as noted above, anyone who obtains a copy is entitled to release it to anyone else, with or without charge.

I've purchased some fully GPL'd themes or plugins from a commercial theme or plugin provider. May I sell those themes or plugins from my own website for my own benefit or publish those themes or plugins on my own website and give them away for free?

The short answer is: Yes, under the GPL, you may do either of these things (or both on separate sites if you were so inclined). Bear in mind, however, that some in the WordPress community are likely to frown on such activity and that you are unlikely to be able to provide (or may not wish to provide) the support that the developers/owners can provide. You'd also need to be careful not to infringe other rights that the commercial theme or plugin provider may have. This important question is discussed in more detail in Chapter 7 (Selling ThemeForest themes outside of ThemeForest; see the discussion of the third and fourth scenarios) and Chapter 8 (Reselling commercial plugins). See also Chapter 9 (The GPL and trademarks).

I'm happy for other people to use my themes and plugins for free. Indeed, that's why I released them under the GPL and put them in the WordPress theme or plugin repository. I would, however, like to be acknowledged as the author of the theme or plugin in cases where users share the theme or plugin with others or modify the theme or plugin. Can I require that?

Yes. As the Free Software Foundation puts it, you “can certainly get credit for the work. Part of releasing a program under the GPL is writing a copyright notice in your own name (assuming you are the copyright holder). The GPL requires all copies to carry an appropriate copyright notice.”

What practical steps can I take if I believe a theme or plugin developer is violating the GPL?

You could try to raise the matter with:

- the developer/owner in question (with a view to explaining what you consider to be a GPL violation);
- the [core developers](#) of WordPress (to see whether they, as the principal copyright holders, are interested in getting involved); and/or
- the wider WordPress community (with a view to evoking community support).

I suggest that raising it with the developer/owner in the first instance is preferable to going straight to the WordPress core developers or the wider community, as sometimes an individual developer/owner may not appreciate what the GPL requires in a particular situation or may have an explanation that meets your concerns. All this said, if your concern relates to not licensing a theme or plugin under the GPL, I suggest it's important to note that the extent to which themes and plugins *must* be licensed under the GPL is a thorny and controversial issue (that I'll be addressing, in relation to themes, in a later chapter). There is unlikely to be a single definitive answer to this question which applies to every single theme and plugin.

"Licensing is a complex issue. ...
The reason it's important that we
stick to ... our principles around
[the GPL] is that WordPress itself
wouldn't exist if it weren't for the
freedoms afforded by licences
like the GPL."

Matt Mullenweg, 2009

4 WordPress themes, the GPL and the conundrum of derivative works

Meet ‘theme’

In the beginning (of WordPress that is) there was no separate theming system as we know it today. Rather, the theming system that we now know and love was added in version 1.5 (“Strayhorn”), in February 2005, and has been enhanced numerous times since then.

Today, the humble theme – responsible for the layout, look and feel of a site – is a key and swappable component of virtually every WordPress installation and, as most WordPress users know, for those who don’t wish to develop their own theme there is a dazzling array of readily available themes to choose from.

Evolution of commercial themes and their licensing

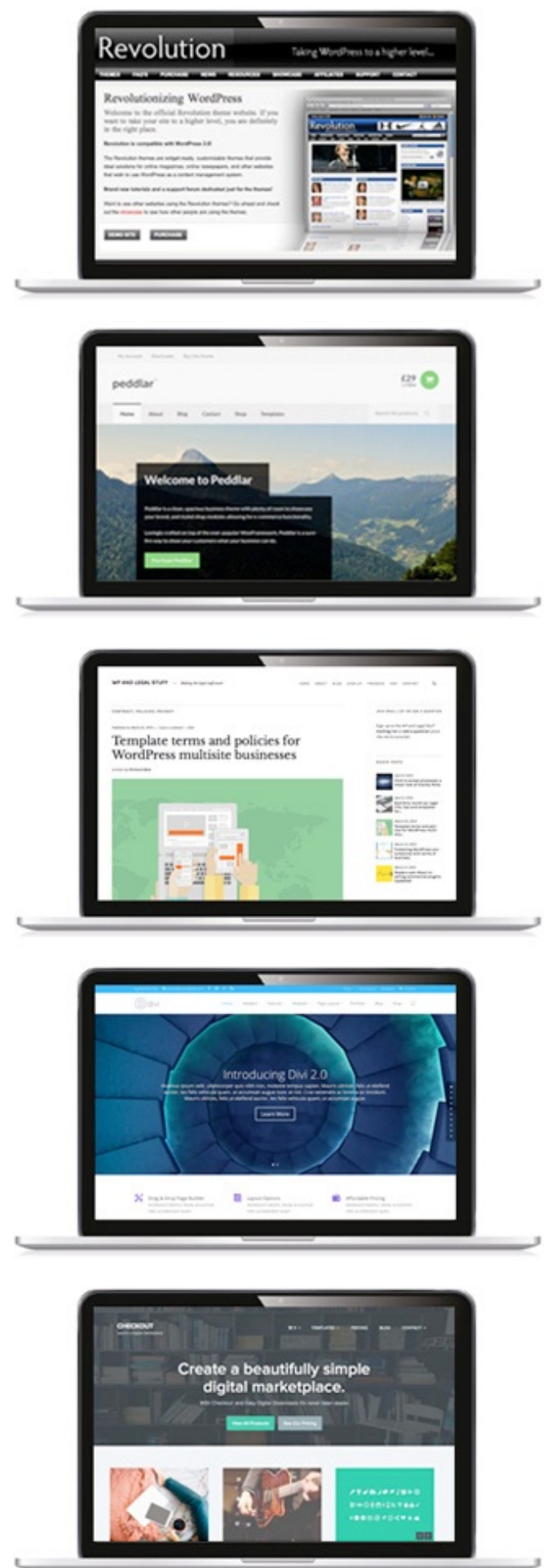
As WordPress became more and more popular and as people began to see and leverage its value, it was inevitable that new business models would emerge. One such business model was the development and sale of premium/commercial themes.

Turning to the topic of licensing (and putting what the GPL may require to one side for now), the owners of such businesses could license their themes:

- in their entirety under the GPL;
- partly under the GPL and partly under an alternative licence; or
- in their entirety under an alternative licence.

Early adopters of full GPL model

In the early days, commercial themes were not licensed under the GPL. That began to change in 2008 when Brian Gardner adopted the full GPL model for his Revolution themes (a good number of which I purchased). I distinctly remember his change in approach. It was a big deal at the time.



Many others followed suit, including well-known commercial theme providers like WooThemes, Graph-PaperPress and Elegant Themes. At the date of writing this chapter, the commercial section in the WordPress.org themes directory listed 71 commercial theme providers (a number which does not seem to include all of them) who provide themes that are licensed under the GPL.

Controversy and “GPL non-compliant” models

Not all commercial theme providers applied the GPL to their themes. Some applied their own proprietary licences. This ultimately resulted in an eruption of controversy in certain parts of the WordPress community as to the application of the GPL to WordPress themes. Perhaps the most publicised and memorable instance of this was DIY Themes’ initial proprietary licensing of its Thesis theme. The developer of Thesis disagreed strongly that the GPL required Thesis to be GPL-licensed while Matt Mullenweg and others argued strongly (yet, for the most part, calmly) that the GPL required just that.



The title of a post on TheNextWeb sums up just how heated the debate became: “[WordPress and Thesis Go to Battle: Mullenweg May Sue](#)”. Matt even [tweeted](#) that he would buy people a GPL’d premium theme instead of their buying Thesis. Chris Pearson and Matt debated the issue on Mixergy, with Mixergy’s owner Andrew Warner doing his best to play the role of mediator. The video of that debate is still available today (the day I write this at least) on TheNextWeb at the link above. Listen-

ing to it reveals deeply held views as to which position was correct. Matt’s earlier (and consistently held) positions can also be heard in a video on this topic on WordPress.tv: [Matt Mullenweg: WordPress and the GPL](#).

On an expansive view of the GPL, which of the three models are considered to be GPL-compliant?

I’ve mentioned three possible licensing models above. Listening to the Pearson/Mullenweg debate might make you think there is only one option: that a WordPress theme, when distributed, needs to be licensed in its entirety under the GPL or will be non-compliant with the GPL conditions applying to WordPress itself. But even on what some would say is an expansive view of the GPL’s requirements, that doesn’t seem to be the case. Enter the Software Freedom Law Center.

Software Freedom Law Center opinion

In 2009 Matt sought a legal opinion on the GPL/theme issue from the [Software Freedom Law Center](#) (SFLC). You can find it in his post of 2 July 2009, [Themes are GPL, too](#). Matt summarised the SFLC opinion in one sentence: “PHP in WordPress themes must be GPL, artwork and CSS may be but are not required.”

For me, the essence of the opinion is found in these two paragraphs:

“On the basis of that version of WordPress, and considering those themes [that is, the classic and default themes] as if they had been added to WordPress by a third party, it is our opinion that the themes presented, and any that are substantially similar, contain elements that are derivative works of the WordPress software as well as elements that are potentially separate works. Specifically, the CSS files and material contained in the images directory of the “default” theme are works separate from the WordPress code. On the other hand, the PHP and HTML code that is intermingled with and operated on by PHP the code [sic] derives from the WordPress code.

...

In conclusion, the WordPress themes supplied contain elements that are derivative of WordPress’s copyrighted code. These themes, being collections of distinct works (images, CSS files, PHP files), need not be GPL-licensed as a whole. Rather, the PHP files are subject to the requirements of the GPL while the images and CSS are not. Third-party developers of such themes may apply restrictive copyrights to these elements if they wish.”

So, if one accepts the SFLC opinion, there are two GPL-compliant licensing models for distributed WordPress themes:

- licensing a theme in its entirety under the GPL; or
- applying so-called “split licensing” or “dual licensing” to the theme (under this approach, the PHP code and integrated HTML are covered by the GPL with the rest of the author-created components (such as the CSS and images) being covered by alternative and usually proprietary terms; different licensing rights, or licences, apply to different parts of the overall theme contents).

The corollary is that commercial themes that are licensed on an alternative basis are GPL non-compliant.

(The split/dual licensing model is the approach that has been adopted for the vast majority of WordPress themes on ThemeForest (which, for most practical purposes, usually limits use of the theme to one site), despite the fact that it’s now possible for a ThemeForest theme author to apply the GPL to a theme in its entirety. It has also been adopted by a number of other commercial theme providers.)

The million dollar question

But the million dollar question remains: was the SFLC’s conclusion regarding application of the GPL to WordPress themes correct? How did the SFLC come to the conclusion it did and is it necessarily correct that a premium theme must be at least split/dual-licensed, with the GPL applying to the PHP and any intermingled HTML? This is a significant question as it seems that, for many, the SFLC opinion has become something akin to ‘GPL/theme gospel’.

The SFLC’s opinion has been written in fairly approachable and succinct terms that make it easy to read. The cost of such brevity is that it does not address key aspects of applicable copyright law in any detail. Rather, a particular version of applicable law appears to be assumed. This has not been lost on certain sections of the WordPress community. There have been some vocal disagreements with the SFLC opinion.

In discussing this broad question, I’m going to try to unpack things a little so as to put the debate in what I consider to be its correct legal context.

Cart before horse

If we stand back for a moment from the SFLC opinion and consider the debate more broadly, we can see that many discussions and views as to why WordPress themes need to be GPL-licensed (either completely or in part) have launched straight into the question of whether a theme is “derivative of WordPress” or “derived from WordPress” and why, technically, that is believed to be so, without any real discussion of the applicable copyright law and what it means in legal terms for something to be a derivative work (or, in other words, what the legal test for a derivative work is). This, with respect, is to put the cart before the horse. The discussion can become technical, philosophical and/or emotional but without proper appreciation and application of the governing legal principles.

Correct approach

To analyse the situation correctly, I think one needs to identify the relevant area of law, explain the applicable aspects of that law and how they relate to the terms of the GPL, and then apply that law and the terms of the GPL to the issue in question. (Please note that I’m not saying that the SFLC didn’t do this. Their opinion will, in all likelihood, be the output of a longer and more involved analysis behind the scenes.)

Relevant area of law

The relevant area of law is copyright law. Some have argued that the GPL is (also) contractual but that is unlikely to be the case, at least in common law jurisdictions (see, for example, P Jones [The GPL is a Li-](#)

[cense, not a Contract](#), 3 December 2003; [Software Freedom Law Center Guide to GPL Compliance](#), 2nd Edition, 31 October 2014, pp. 16-17).

So, we're focusing now on questions of copyright. WordPress, as an overall software program consisting of a set of files (including in my view its default themes which come bundled with it), is a copyright work, either as a complete set of code or as a compilation of component files. The owners of the copy-



right are numerous. Ownership does not lie with a single person or entity. It lies with its contributors. (The [WordPress Core Contributor Handbook](#) states that, “[a]s a contributor, you retain the copyright to your code, however by submitting it to trac you are releasing it under the GPLv2”.)

Simple summary of applicable aspects of copyright law

It is because WordPress is a copyright work that people need permission to copy it or modify it or distribute it. In many if not most legal systems, these acts are restricted acts that can only be exercised by the copyright owner(s) unless permission is granted allowing these acts to occur (or unless there is a statutory defence to infringement). This is where the GPL comes in. It is the means by which all the component parts of the WordPress software can be licensed under a common licence that allows copying, modification and distribution. In other words, the GPL is the means of granting permission for acts which would otherwise be prohibited as a matter of copyright law.

On a copyright analysis, it is vitally important to appreciate that the freedoms granted by the GPL are only required by people building something that will work as part of, with, or on top of WordPress (such as a theme or plugin) when, in copyright law terms, they are doing a restricted act. The most relevant restricted acts are copying the licensed program or a substantial part of it, modifying it (i.e., creating a derivative work) and distributing it. If a person's actions do not constitute a restricted act, the person is not constrained by copyright and – significantly – is not bound by the terms of the GPL that require downstream GPL licensing upon distribution or publication of a work that “contains or is derived from the Program or any part of it”.

Copyright-related issues

It follows that the broad copyright-related issues that arise when a person develops a WordPress theme for distribution are (or at least include) these:

1. Does the creation and distribution of the particular WordPress theme involve what copyright law would characterise (by reference to the copyright and GPL'd WordPress software) as one or more restricted acts?
2. If the answer is no, the copyright analysis ceases. But if the answer is yes, is there any defence to what would be an actionable copyright infringement where the theme is developed and distributed without permission from the copyright owners?
3. If the creation and distribution of the WordPress theme does involve a restricted act and there is no defence, permission to undertake the relevant act(s) is required. This, in turn, requires adherence to the GPL and that, in turn, raises the question as to what the GPL requires, in the particular circumstances, as to downstream licensing.

WordPress theme development and restricted acts

As noted above, in many if not most legal systems, restricted acts include copying a substantial part of a work or making a derivative work (a work based on the original work). In the context of WordPress themes and the GPL, most of the argument usually centres on whether a derivative work has been made. This is because the GPL share-alike requirements turn (for the most part) on the existence of a distributed modification/derivative work. (We can put mere copying (of all or a part) of WordPress, without distribution, to one side as the GPL expressly allows this without limitation.)

The derivative work question

Before I get into the guts of this issue, I should note that there is a preliminary question as to whether the GPL's downstream licensing obligation only applies to “derivative works” in orthodox legal terms as opposed to potentially broader wording in the GPL itself. If a broader test applies, the propagation requirements of the GPL would kick in more easily (making it easier to argue that themes are caught by



the GPL), but many commentators consider it reasonably clear (and I tend to agree) that the GPL's authors were focusing on derivative works in orthodox legal terms. (For a far more erudite discussion of this point, see L Determann's [Dangerous Liaisons – Software Combinations as Derivative Works? – Distribution, Installation, and Execution of Linked Programs under Copyright Law, Commercial Licenses, and the GPL](#) (2006) 21 Berkeley Tech LJ 1421. See also L Rosen [Open Source Licensing: Software Freedoms and Intellectual Property Law](#) (2004), chapter 6, page 120.)

If we turn now to the SFLC opinion, how does it deal with the derivative work question? It states in strong terms that at least the PHP components of a theme “are derivative of WordPress” but the analysis appears to be based primarily on a technical linking/interdependence or communication analysis, on the assumption that that is the accepted legal test in this context. This is the point that lies at the heart of the debate, as the legal correctness of this approach to ascertaining whether there is a derivative work (i.e., as a matter of copyright law) is not universally accepted. It has, for example, been strongly debated in both the US and the UK (see, for example, L Rosen's 2003 article [When is one program a “derivative work” of another?](#) and A Katz's 2007 article GPL – The Linking Debate (available to members of [The Society for Computers and Law](#))).

Those who argue that the above approach doesn't reflect current (US) copyright law note the statutory definition of “derivative work” and what some courts have said must exist for a work to be derivative of another. 17 USC 106(2) defines “derivative work” as follows:

“‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a ‘derivative work.’”

Commentators have observed that “courts have determined that to be derivative, a computer program must be substantially similar and in some form include a portion of the copyrighted work” (M Valimaki’s [GNU General Public License and the Distribution of Derivative Works](#) [2005] JILT 6 (2005) at para 3.1).

This “test for derivative work” issue is perhaps the most complex and controversial aspect of the GPL in practice. Developers, affected businesses, their lawyers and interested academics all have and are entitled to their opinions, but there are almost as many opinions as there are theme shops because a range of different arguments can be made (see and compare, for example, Valimaki (cited above), T Gue’s [Triggering Infection: Distribution and Derivative Works under the GNU General Public License](#) (2012) (1) *Journal of Law, Technology & Policy* 95, C Bennett’s [WordPress Themes, GPL, and Copyright Case Law](#) post from 2010, and P Enrique’s 2014 piece [WordPress is GPL, must your plugin be as well?](#)).

Who is right?

So who is right? Well, I like the words of Van Lindberg in his book *Intellectual Property and Open Source: A Practical Guide to Protecting Code* (O’Reilly, 2008), a book that Professor Lawrence Lessig has described as “clear, correct and deep”. Van Lindberg says this (I like the honesty of the bit I’ve emphasised):

“... there is a persistent issue that won’t go away – whether linking programs together creates a derivative work. If linking creates a derivative work, the GPL applies to the linked program; otherwise, the GPL doesn’t apply.

...

In legal practice, this arises as a common concern of clients just getting into open source. This question is usually phrased as either, ‘Can I load and use a GPL-licensed library without applying the GPL to my application?’ or, ‘Do I have to apply the GPL to my plug-in for a particular program if that program is licensed under the GPL?’

...

I won’t keep you in suspense; the short answer is that we don’t know. For a longer, perhaps more satisfying answer you can skip to the end of the chapter [where he expresses some opinions], but this is a very complicated question.”

Gue makes a similar comment:

“Commentators diverge widely as to whether dynamic linking creates a derivative work. The inconsistency is so great that one commentator has lamented that ‘there appear to be no definitive answers to the question of what constitutes a derivative work under the GPL, not even from the holders of the license in question.’”

The reason we don't truly know the answer is that the courts haven't decided a case that is squarely on point (there are potentially analogous cases, of course, but – as far as I'm aware – no GPL or similar case directly on point). It is only the courts (in the absence of legislative intervention) that can finally determine the matter. Courts might apply what some might say are orthodox notions of what it means for something to be a derivative work or they might incrementally (some might say dangerously) develop the law on this point but we just don't know. And even if the courts of one country made a definitive ruling on the point, courts in other countries – where other lawsuits might be commenced – could decide differently. As a result, uncertainty remains.

Don't assume equivalence

I should make another point, and that is that not all themes (or plugins) are made equal. So far as themes are concerned, we might need to consider different kinds of scenarios, such as:

- a Thesis-style scenario where, [apparently](#), lines of code were copied directly from WordPress (something I can't personally confirm);
- another scenario where someone takes the latest default theme bundled with WordPress (which must be under the GPL) and then modifies it and distributes it; and
- a more complicated scenario where there is no copying of the GPL'd WordPress code at all (assuming, in practical terms, that that's possible).

The legal conclusions across these three scenarios could be different. I think we need to recognise that.

To what extent does it really matter?

All the above said, and whilst having reasonable certainty as to the application of the GPL to premium themes is desirable, I suggest that, for practical purposes, it is not by itself decisive as to whether a theme owner may wish to GPL-license (or at least split/dual license) its theme. In other words, the relevant considerations are not only legal ones. Let me explain.

The core WordPress team confers practical benefits on the providers of full-GPL'd premium themes (e.g., promotional blog posts and a listing in the commercial section of the themes repository) while (at least historically) showing a perhaps surprising level of 'displeasure', shall we say, not only towards those who do not release premium themes under a GPL licence at all but also (at one time) to those who only apply split/dual licensing (despite this being consistent with the SFLC opinion). Admittedly some years ago now, that displeasure took the form of, for example, online criticism and rejection of ThemeForest members from a WordCamp (see J Caputo's [Automatically Blackballed](#) and [Un-Blackballed](#)).



I think the GPL/theme debate has reached the stage where it's fair to say that a significant proportion of the WordPress community now frowns upon premium theme providers who either don't GPL-license at all or (probably to a lesser extent) split/dual-license their themes. That mightn't be good for business and that, for some, may be the bottom line. For some people, this frowning may be caused by a particular view of what the GPL requires *but* for others – and I think this is a particularly important point – it may be caused by a recognition of the enormous opportunities that WordPress makes possible and the open source spirit and generosity that pervades much of the WordPress community. I think we've reached the stage where, for some people, this is more about a community norm than it is about a strict reading of the GPL (not to mention the tedium of listening to more and more competing GPL arguments when, ultimately, only a court can decide).

The counter-argument to my point above, that not applying the GPL could be bad for business, is that GPL-licensing will encourage on-selling of themes by those who didn't design them to the detriment of the theme designers. This counter-argument doesn't appear to carry much weight. It's true that such activity does occur but, generally, on-sellers cannot provide the support and upgrades that the premium theme developers provide. That is often what people pay for. This is a point that Matt has made repeatedly. At least in my own experience as a purchaser of many premium themes and plugins, I think he's right.

One last thing...

The GPL/WordPress theme debate has fueled all sorts of comment, discussion and, at times, acrimony. After much of the 2009/2010 debate had aired, Mark Jaquith (a lead WordPress developer) stepped in on 17 July 2010 with [Why WordPress Themes are Derivative of WordPress](#), a post that, at least from a technical perspective, sounded compelling. It certainly made me think and probably resulted in the loss of further brain cells as I tried to assimilate his helpful and well-crafted words into the morass of competing arguments. Mark's firm view was that themes were derivative of WordPress:

“It is the position of the WordPress core developers that themes cannot be considered wholly original creations even when they don't copy large sections of code in from WordPress. Theme code necessarily derives from WordPress and thus must be licensed under the GPL if it is distributed.”

I almost fell off my seat, then, when I discovered Enrique's January 2014 piece [WordPress is GPL, must your plugin be as well?](#) In this post, Enrique strongly contests the view that plugins must be GPL'd as well. The only comment made on the post appears to have been made by Mark Jaquith himself. Assuming the comment is genuine, this is what he said:

“Very well argued. My thinking on this matter has evolved since I wrote my post, 3+ years ago. The thing about the GPL is that it is a legal hack. For it to work, it relies on legal concepts like what constitutes a derivative work. And while some plugins could unambiguously be derivative works, I no longer think they must necessarily be so, and I suspect the majority would not be considered derivative works (by a US court, at least). Same goes with themes with the caveat that themes are more likely to contain code lifted from WordPress, so they might veer towards derivation more often than plugins do.”

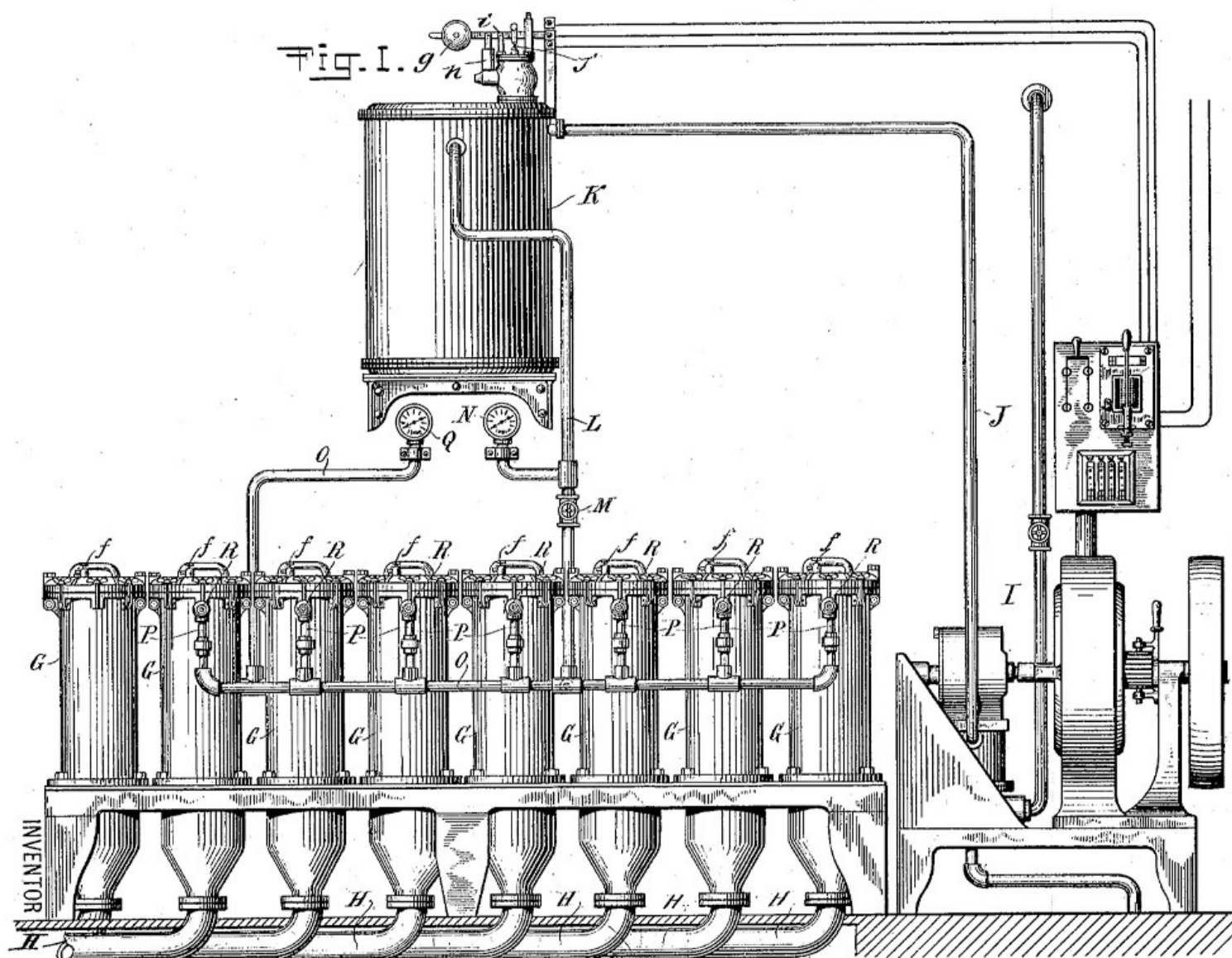
I was surprised to read this and it doesn't mean the issue has gone away but, to me, it speaks of pure honesty and integrity. It recognises that not all themes are created equal. And it recognises the important role that the courts have to play. That's all I have to say.

“Your assumptions are your windows on the world. Scrub them off every once in a while, or the light won't come in.”

Isaac Asimov, date unknown

5

The GPL and assumptions of automatic inheritance



Here's the thing

The bottom line is this: GPL inheritance – the obligation to license distributed derivative works with the GPL – is not automatic.

Downstream licensing is required but to put it in place the distributing derivative author has to do something.

There's a smallish matter relating to the interpretation and application of the GPL that it might help to clear up. It concerns the topic of the GPL and inheritance. References in this chapter to the GPL are to version 2 of the GPL.

What we read on the web

When reading various articles on WordPress and the GPL, as well as articles on the GPL in other contexts (such as the Drupal context), it is fairly common to find references to 'inheritance', to the effect that 'a derivative work inherits the GPL'. Here are some examples I've come across on the web:

- “a derivative work inherits the benefits of the GPL”;
- “[d]erivatives of WordPress code inherit the GPL license”;

- “[i]f a plugin or theme makes a call to any WP function then that plugin or theme technically falls under GPL. Which pretty much means, any distributing theme or plugin inherits the the GPL regardless if it’s being sold or freely released”;
- “if you make a derivative work of GPL licensed code, your derivative will also be licensed under the GPL”;
- “[a]ccording to the GPL, code written to interface directly with Drupal (like modules, PHP code in themes, etc.) is ‘derivative work’ and automatically inherits Drupal’s GPL license”;
- “GPL requires that any derivative work you release or distribute should be licensed under GPL as well. So while you may have the copyright to do anything you like, your derivative work automatically inherits the GPL license so others are free to use, modify, and redistribute your code in any way they choose”;
- “[a]ny logic (PHP code, etc) built on top of WordPress automatically inherits the GPL, as it relies on WordPress. :)”; and
- “the reason why plugins are GPL is because they hook into the core WordPress hooks and filters and functions...; by linking core WordPress GPL code, they inherit some of the, what’s called the virality of the GNU public licence”.

Many of these statements seem to assume or imply that a derivative work *automatically* inherits the GPL while others state explicitly that inheritance is automatic. Whilst these statements are understandable, strictly speaking they are not correct.

What the GPL says

The GPL is a copyright licence and, in essence, it works like this:

- you can do whatever you like with the licensed program;
- that includes making a work based on the licensed program (i.e., a derivative work);
- but any derivative work that you distribute needs to be licensed at no charge to all third parties under the GPL.

The actual wording that the GPL uses is this:

“2. You may modify your copy or copies of the Program or any portion of it, thus forming a work based on the Program, and copy and distribute such modifications or work under the terms of Section 1 above, provided that you also meet all of these conditions:

- a) You must cause the modified files to carry prominent notices stating that you changed the files and the date of any change.
- b) You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License.”

Difference between downstream licensing of the original Program and subsequent licensing of a derivative work by its creator

The GPL does not say anything about the *entirety* of a derivative work *automatically* inheriting the GPL, and for good reason. A copyright licence between A and B cannot have the effect of actually licensing a derivative work by B under the same (or any other) licence. That is something that B does, not A. What the copyright licence between A and B does – what the GPL does – is require/oblige B to license distributed derivative works under the same licence, i.e., the GPL. Version 2 of the GPL says the licensee “must cause” any distributed derivative work “to be licensed... under the terms of this License”.

Now, it’s important to note that section 6 of the GPL says this:

“6. Each time you redistribute the Program (or any work based on the Program), the recipient automatically receives a license from the original licensor to copy, distribute or modify the Program subject to these terms and conditions. You may not impose any further restrictions on the recipients’ exercise of the rights granted herein. You are not responsible for enforcing compliance by third parties to this License.”

What I’ve said above is not inconsistent with section 6 of the GPL. What section 6 is saying is that the original licensor is granting a licence over *its Program* not only to immediate recipients/licensees, but also to anyone who subsequently obtains a copy of the Program or a derivative work based on the Program. This is how the freedoms in the GPL are spread through multiple chains of recipients (the same thing occurs under the ShareAlike variants of the Creative Commons licences). If any downstream recipient makes a derivative work and distributes it, then that recipient is likewise obliged to license the derivative work to everyone under the GPL and, if s/he doesn’t, s/he is infringing the upstream copyright licensors’ copyright.

Note here that a derivative work consists of property owned by the original licensor(s) (let’s call them A) plus new and separate property over the new original parts of the derivative work that are created by B. The derivative work is a distinct copyright work in its own right but B doesn’t obtain property rights that are greater than B’s own contribution. As a US court put it, “[t]he aspects of a derivative work added by the derivative author are that author’s property, but the element drawn from the pre-existing work remains on grant from the owner of the pre-existing work” (*Stewart v Abend* 495 U.S. 207, 223 (1990)).

There are, therefore, at least two property right components comprising the derivative work. Upstream licensors can grant a licence over the component they own. However, where someone else makes a derivative work with permission (as is the case under the GPL), there is a new separate component owned by the creator of the derivative work. The upstream licensors do not own that new component and, therefore, they cannot license it. This is why a subsequent act of licensing by the person that creates the derivative work is necessary. Everyone already has the permission of the upstream licensors in relation to the upstream licensors' component because those licensors have already applied the GPL to their copyright work(s), but that alone is not sufficient to license the derivative work *as a whole*. The GPL ensures that the requirement to license falls upon the creator/owner of the derivative work, but only that creator/owner can actually license the new component that s/he owns.

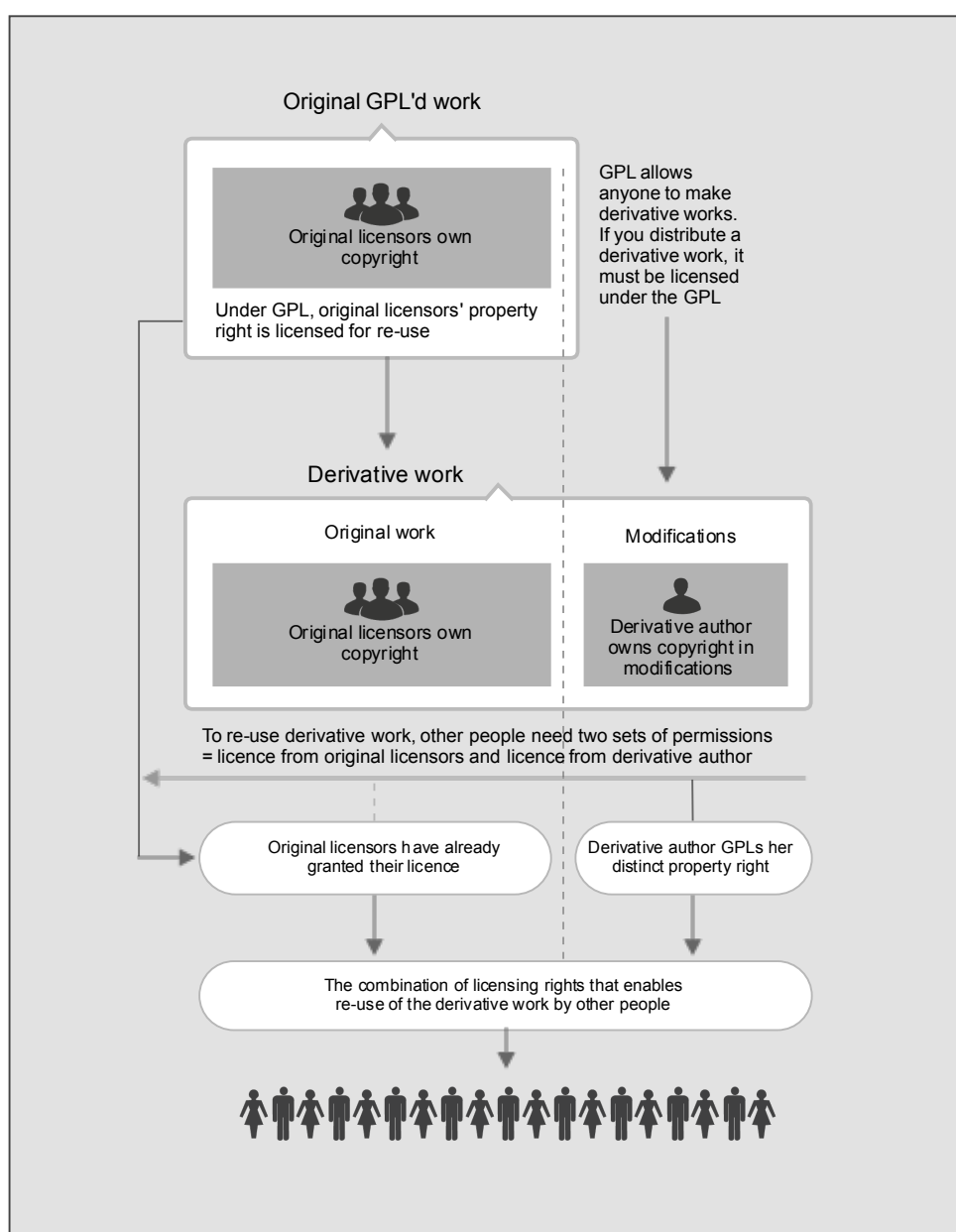
Because that was a bit of a legal mouthful, I thought it might help to provide the summary diagram to the right.

Implications

The absence of automatic downstream licensing of the derivative work in its entirety (distinct from the automatic downstream licensing of the original GPL'd work) — the requirement for GPL licensees to *actually do something* — is important for two reasons.

- First, people who wish to comply with the GPL but assume that inheritance of the GPL is automatic may not actually do what is required, when distributing their derivative works, to comply with the GPL. To comply, they need to retain the original notices that came with the Program as they received it *and*, as the GPL puts it, “cause the modified files to carry prominent notices stating that you changed the files and the date of any change” and “cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License” (clause 2(a) and (b)).

GPL licensing of a derivative work



- Second, if a distributed derivative work does not include a notice stating that it is licensed under the GPL (either within the program itself or in a readme file or perhaps at the point of release on a website), whether accidentally or deliberately, then the derivative work is not actually licensed under the GPL. If it's truly a derivative work then it should be, but it isn't.

In this kind of situation, the person who has made and distributed the derivative work has breached the GPL's requirements. This has the effect of terminating the licence that the GPL granted to that person, with the consequence that the act of distributing the derivative work is an infringement of copyright.

You can imagine this happening fairly easily in a case where a theme or plugin, for whatever reason, is truly a derivative work and is not distributed via either the WordPress.org theme or plugin repositories or a commercial theme or plugin repository that has similar standards to those of WordPress.org. The distributing developer may not be aware of the GPL's notice requirements or may choose, for whatever reason, to ignore them.

(There won't be any problem for themes and plugins hosted on WordPress.org. In the case of themes, the [Theme Review Handbook](#) makes it clear that themes must be 100% GPL licensed. Similarly, the plugin submission process requires a plugin's zip file to include a completed readme.txt file that adheres to the WordPress plugin [readme file standard](#); that standard requires the readme file to state that the plugin is licensed under the GPLv2 or later.)

Things can get messy where a derivative work should be GPL'd but isn't. People who should be able to use the derivative work under the terms of the GPL are not actually GPL licensed and, therefore, don't have the legal certainty to do so. To ensure that the derivative work is properly licensed under the GPL, the distributing party needs to be asked to license it with the requisite notice and he or she must actu-



ally do so for the derivative work to be GPL-licensed. Sometimes the distributing party will do exactly that; indeed, in some cases non-compliance with the GPL may have been entirely innocent. But in other cases the distributing party may disagree that the GPL needs to be applied (given, for example, legal uncertainty as to application of the GPL at the margins) or believe that it needs to be applied but re-

fuse to do so for commercial or other reasons (I'm not suggesting this is commonplace). If, for whatever reason, he or she refuses to do so, and someone wants to force the issue, pressure would need to be added to the mix, either through community involvement or court proceedings.

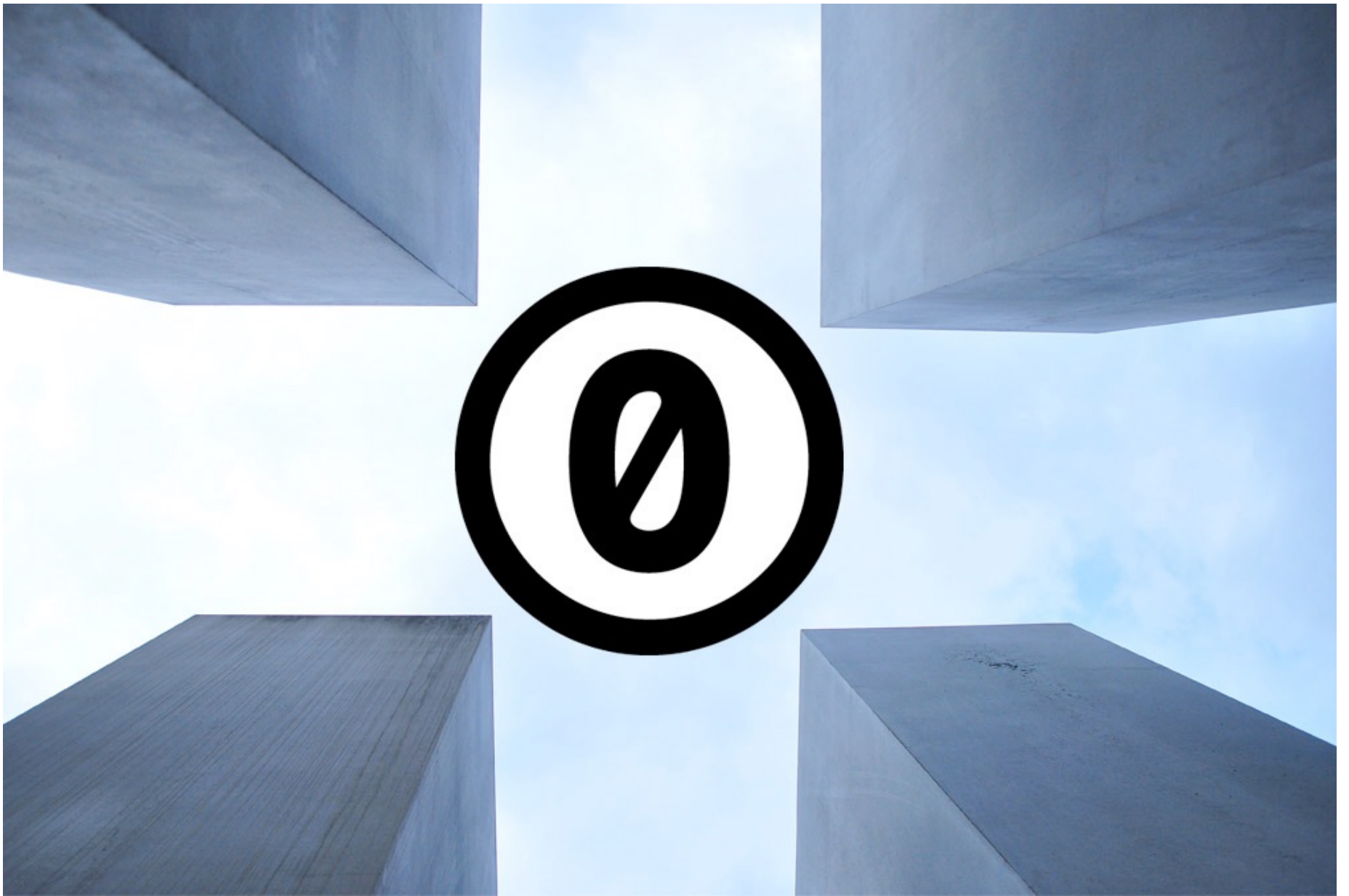
Bottom line

The bottom line is this: GPL inheritance – the obligation to license distributed derivative works with the GPL – is not automatic. Downstream licensing is required but to put it in place the distributing derivative author has to do something, namely, include a notice with the distributed derivative work stating that the work is licensed under the GPL (as described in more detail above).

“If the Internet teaches us anything, it is that great value comes from leaving core resources in a commons, where they're free for people to build upon as they see fit.”

Lawrence Lessig, date unknown

6 Theme reviews, CC0, model releases and GPL-compatibility



Questions

When I started writing WP and Legal Stuff, I encouraged readers (and still encourage them) to ask me WordPress-related legal questions as I was conscious that some people will have questions I've not thought about before or questions that I know about but may not think to write about.

I'm pleased to have received a number of questions to date. One of the first batch concerned theme reviews, CC0, model releases and GPL-compatibility. The reader asked this:

“I do theme reviews for the theme repository on WordPress.org. All the code and assets in the theme need to be GPL compatible. I have a few questions about how GPL compatible images work with model releases. The popular GPL compatible image licence is CC0.

- Can an image be released under CC0 even if there is no model release?
- Is a CC0 image without a model release GPL compatible?

- Who is responsible for getting the model release? The photographer, theme author, website owner?
- Who is liable if a theme with a CC0 image without a model release is used on a pornographic site?”

I address this overall topic in this ebook given that the GPL features in it quite heavily.

Outline and summary

Outline

Before I jump into the specific questions raised, I think it may be helpful for some people if we step back from those questions and:

- sketch out what WordPress.org and the Theme Review Handbook have to say about GPL-compatibility;
- describe CC0;
- analyse what is meant by “GPL-compatibility”; and
- explain why, in my view, CC0 is considered to be GPL-compatible.

After that, I’ll address the specific questions. I’ll also make some (potentially controversial) comments on CC-BY / CC-BY-SA and GPL compatibility.

Summary

This is fairly long chapter as it covers quite a bit of ground. Bearing in mind that some people might just want some quick answers, here’s a quick summary:

- **Repository themes and GPL-compatibility:** WordPress.org and the Theme Review Handbook say that a theme submitted to the WordPress.org repository must be 100% GPL-licensed or use a GPL-compatible licence. However, what this means in the context of theme submission and review is not entirely clear from WordPress.org and the Theme Review Handbook themselves.
- **CC0:** CC0 is a Creative Commons tool which enables a copyright owner to waive copyright in a work and, if that’s not effective in a given country, it falls back to a very broad and obligation-free licence.
- **WordPress theme reviews and GPL-compatibility:** In my view, when referring to “GPL-compatibility”, the WordPress theme review pages can be taken to be referring to the Free Software Foundation’s meaning of that term.

- **Free Software Foundation's approach to GPL-compatibility:** The Free Software Foundation (FSF) explains that, if two programs' licences permit the programs to be combined into a larger work, they are compatible. If there is no way to satisfy both licenses at once, they are incompatible. The FSF also explains that another (non-GPL) licence is compatible with the GPL if it permits the combination of programs (derivative work) to be released under the GPL. On my understanding of the FSF's approach, it doesn't matter that there is no obligation in the non-GPL licence or mechanism, that applies to the component(s) being added to the GPL'd work, to license a derivative work based on that or those component(s) on the same (or any) terms. The key question is whether the GPL can be applied to the combination or end product. CCo is considered to be GPL-compatible because it meets this requirement.
- **Releasing CC0'd images without a model release:** An image can be released under CC0 even if there is no model release. However, care may still be required in relation to third party rights that are not (and cannot be) waived or licensed under CC0, particularly where an identifiable person appears in the image or the image is of copyright protected property such as another photo or artwork. This is because the totality of rights involved is greater than copyright alone.
- **CC0'd image without model release and GPL-compatibility:** Whether a CC0'd image without a model release is compatible with the freedoms under the GPL depends, in my view, on (a) the nature of the image; and, if the image is of an identifiable person or separate copyright protected property (such as an artwork), (b) whether any uses could infringe the person or copyright owner's rights. If the answer to (b) is yes, it would be challenging to say the CC0'd image is compatible with the GPL's freedoms because there will likely be significant constraints on its re-use.
- **Who should get the release?** Where a model or property release is required, the most obvious party to obtain the release is the photographer. In many cases it may be difficult for theme authors or website owners to obtain a release because they might not know who to contact. This doesn't mean, however, that the only 'legal responsibility' is on the photographer. A theme author or website owner who uses a CC0'd image in circumstances where a model or property release is required, but where one hasn't been obtained, may still be on the hook.
- **The pornographic site question:** Turning to the pornographic site question, the short answer is that the person responsible for using the image on the pornographic site, usually the site owner, will be the one directly in the firing line because that person will have published the image on the site.
- **CC0 and model releases:** There is an interesting question about the nature of the model release that would be required for an image of an identifiable person that is released to the public domain under CC0. The release would need to be very broad. The standard kind of release one finds on a range of photography and other websites wouldn't cut it. Given the popularity of Unsplash, I discuss this and related issues in the context of that (super helpful) site.

- **CC-BY and CC-BY-SA images for themes:** The potentially controversial bit I mentioned above is this: assuming that the rationale of WordPress.org’s focus on GPL-compatible licensing is on ensuring that the GPL is complied with and that people’s use of themes is not constrained, arguably certain other open licences could be used for image files included with a theme for the WordPress.org repository, such as CC-BY and CC-BY-SA. There is obvious value in this given the wealth of CC-BY and CC-BY-SA licensed images. (This one takes a bit of explaining; please read the explanation below before jumping to conclusions and shooting me down.)
- **Decision is one for the theme review team:** Whether the WordPress.org theme review team wishes to open up the option of allowing CC-BY and CC-BY-SA images to be included in themes is a question for it. Additional guidance would be needed in the Theme Review Handbook, so as to help theme authors go about things correctly and help theme reviewers with what they should be looking for, but that wouldn’t be too challenging.

The remainder of this chapter explores these points in more detail.

Theme reviews and GPL compatibility

 Theme Review Team

[About](#)
[Review](#)
[Trac](#)
[Become a reviewer](#)

Welcome to the Theme Review team.

We are a group of volunteers who review and approve themes submitted to be included in [the official WordPress Theme directory](#).

The Theme Review team maintains the official [Theme Review Guidelines](#), the [Theme Unit Test Data](#), and the [Theme Check Plugin](#).

We also engage and educate the WordPress Theme community regarding best practices for themes.

Interested in joining the Theme Review team?

Great! The team is open to anyone who wants to help out, and the process is simple. To find out more just visit the [Join The Team page](#).

Want to know more? There is a more information in the [Theme Review Team's Handbook](#) and the [Review itself](#).

Once you get a theme to review, you will also get a mentor to help you on the road to becoming a theme reviewer.

Weekly meetings

We use [Slack](#) for real-time communication. As contributors live all over the world, there are discussions happening at all hours of the day.

We have a project meeting every [Wednesday, April 08, 2015 06:00 UTC+12](#) in the [#themereview](#) channel on [Slack](#).

There are also weekly mentor meeting hours every [Friday, April 10, 2015 06:00 UTC+12](#) in [#themereview](#)

A [‘required items’ page](#) in the Theme Review Handbook on WordPress.org has this to say about licensing:

“Licensing

- Be 100% GPL and/or 100% GPL-compatible licensed.
- Declare copyright and license explicitly. Use the license and license uri header slugs to style.css.

- Declare licenses of any resources included such as fonts or images.
- All code and design should be your own or legally yours. Cloning of designs is not acceptable.”

There is a separate page on WordPress.org, also in the Theme Review Handbook, titled [License, Theme Name, Credit Links, Up-Sell Themes](#). That page has this to say on licensing (the page is said to be deprecated but, when I wrote this, the [new page](#) to which it links was virtually empty):

“Licensing #

Theme License: #

- Themes are **required** to be 100% GPL-licensed, or use a GPL-compatible license. This includes all PHP, HTML, CSS, images, fonts, icons, and everything else. The **complete** theme must be GPL-Compatible.
- Themes may **optionally** include a full-text license, referenced as license.txt, or else link to a reasonably permanent URL that contains the full-text license.
- Themes are **required** to declare their license explicitly, using the License and License URI header slugs to style.css:

License: GNU General Public License v2.0

License URI: <http://www.gnu.org/licenses/gpl-2.0.html>

Copyright #

- Themes are **required** to declare copyright and license information as specified by the applicable license, e.g.:

Twenty Fourteen WordPress Theme, Copyright 2014 WordPress.org

Twenty Fourteen is distributed under the terms of the GNU GPL

- Derivative Themes are **required** to retain/declare the copyright information of the original work

Bundled Resources #

- Themes are **required** to state the copyright and license information for any bundled resources (e.g. PHP, CSS, JS, fonts and images) not covered by the Theme’s license statement.
- Themes are **required** to state the copyright and license information for any bundled resources not covered by the Theme’s license statement [this duplication is in the original]. Themes are **recommended** to state this information in the Theme’s README documentation.”

The key passages for present purposes are these:

“Themes are required to be 100% GPL-licensed, or use a GPL-compatible license. This includes all PHP, HTML, CSS, images, fonts, icons, and everything else. The complete theme must be GPL-Compatible.

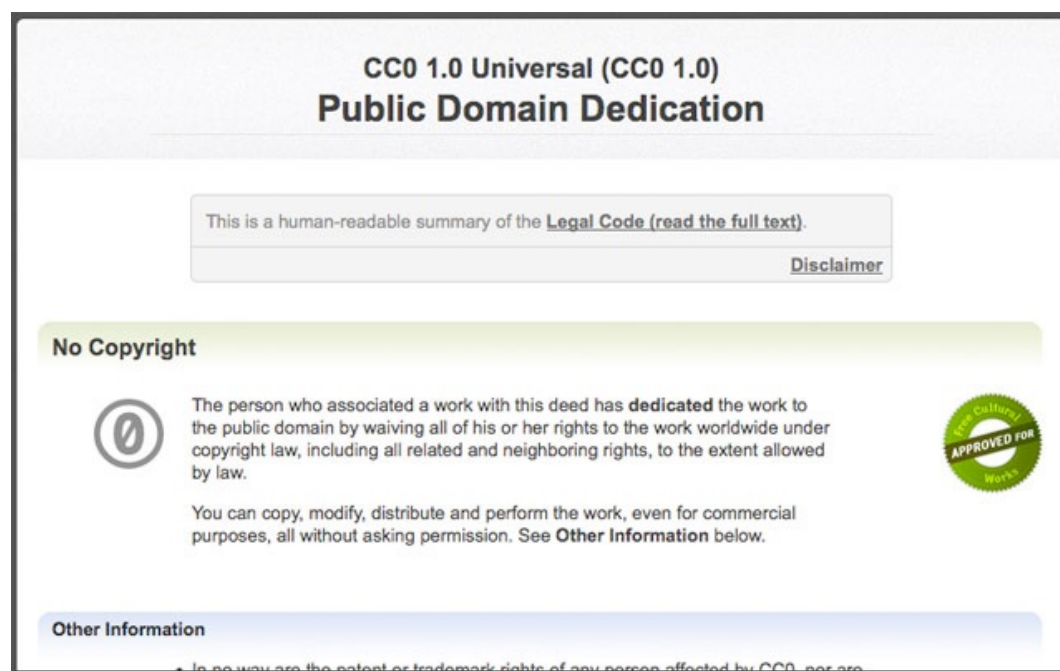
...

Themes are required to state the copyright and license information for any bundled resources (e.g. PHP, CSS, JS, fonts and images) not covered by the Theme’s license statement.”

I’m told that the popular GPL compatible image licence is CC0. It’s worth making a few comments about CC0 and asking the question: what makes a licence GPL-compatible and why is CC0 considered to be GPL-compatible? I think this is worthwhile because there has been a quite a bit of debate on these issues in WordPress theme review circles.

CC0

CC0 is not primarily a licence. It’s a tool that seeks to enable an owner of copyright in a work to waive the copyright in that work, thereby freeing it of copyright-related restrictions on re-use and releasing it into the public domain. It also states that, if or to the extent that the waiver is legally ineffective in a given country, an extremely broad and obligation-free licence is granted instead; this is generally known as the ‘licence-fallback’. So the tool, in essence, is a waiver + licence fallback.



GPL-compatibility

Now, what makes CC0 GPL-compatible? Well, it depends on what one means by “GPL-compatible”.

GPL-compatibility not based on existence of share-alike obligation in non-GPL licence

As you’ll know, if you distribute a derivative work based on GPL’d code, the GPL requires you to license your derivative work under the GPL. The CC0 waiver/licence does not require any such thing. If the waiver part is effective in the country where it’s used for a copyright image (which is believed to be the

case in the United States but perhaps not in countries like the United Kingdom, Australia and New Zealand), copyright in the image is completely waived and the work is essentially thrust into the public domain. In the absence of copyright in the image, anyone that gets their hands on the work can – from a copyright perspective – do whatever they want with the image (there might be other restrictions based on other areas of law, but we’ll park that for now). For example, they can adapt it to their heart’s content without any obligation to license it on any terms at all if they distribute it. For most practical purposes, the same position prevails if the waiver is ineffective and the licence fallback kicks in.

We can see, then, that CC0 is not a copyleft device like the GPL because CC0 contains no ‘downstream licensing of derivative work’ requirement.

What meaning is the WordPress theme review crew applying?

So, what’s going on here? If, by GPL-compatible, one means freedoms *and obligations* equivalent to those in the GPL, then CC0 is clearly not compatible. However, that can’t be the intended meaning in the Theme Review Handbook because CC0 is considered to be GPL-compatible. So how do we find the *actual* meaning, particularly when the Theme Review Handbook doesn’t define what it means by “GPL-compatible”? I think that the intended meaning is that which the Free Software Foundation (the guardian of the GPL) gives to the term. (I see that, after publishing the post on which this chapter is based, the Theme Review Handbook was amended to link to the second place referred to below.)

There are at least two places to look on the GNU website where the GPL lives. First, an [FAQ page](#) answers two questions relating to licensing compatibility, one in general terms and the other relating to GPL-compatibility:

“What does it mean to say that two licenses are “compatible”?”

In order to combine two programs (or substantial parts of them) into a larger work, you need to have permission to use both programs in this way. If the two programs’ licenses permit this, they are compatible. If there is no way to satisfy both licenses at once, they are incompatible.

For some licenses, the way in which the combination is made may affect whether they are compatible—for instance, they may allow linking two modules together, but not allow merging their code into one module.

Just to install two separate programs in the same system, it is not necessary that their licenses be compatible, because this does not combine them into a larger work.

What does it mean to say a license is “compatible with the GPL?”

It means that the other license and the GNU GPL are compatible; you can combine code released under the other license with code released under the GNU GPL in one larger program.

The GPL permits such a combination provided it is released under the GNU GPL. The other license is compatible with the GPL if it permits this too.”

The second place to look is the GNU website’s list of [Various Licenses and Comments about Them](#). This is what it says about CC0:

“CC0 (#CC0)

CC0 is a public domain dedication from Creative Commons. A work released under CC0 is dedicated to the public domain to the fullest extent permitted by law. If that is not possible for any reason, CC0 also provides a lax, permissive license as a fallback. Both public domain works and the lax license provided by CC0 are compatible with the GNU GPL.

If you want to release your work to the public domain, we recommend you use CC0.”

From all this it is fairly clear what the FSF has in mind when referring to GPL compatibility. The key question in its mind is whether the GPL can be applied to the combination of GPL-licensed code and non-GPL licensed code. The non-GPL licence must allow this and it must not impose restrictions that are inconsistent with the GPL’s freedoms. It doesn’t matter that there is no obligation in the *other*, non-GPL licence or mechanism, that applies to the component(s) being added to the GPL’d work, to license a derivative work based on *that or those* component(s) on the same terms of the non-GPL licence (or indeed under any licence). The key question is whether the GPL can be applied to the end product.

CC0 (at least in its waiver form) ticks these boxes and this is why, in my view, the Free Software Foundation considers it to be compatible with the GPL. In particular:

- the rights CC0 confers are broader than those in the GPL;
- CC0 is less onerous than the GPL (there are no copyright-related obligations at all if the waiver is effective); and
- looking at it from a code perspective for now, where GPL’d and CC0’d code are combined to form a derivative work, that derivative work as a whole can be licensed under the GPL. Note that doing this doesn’t bring copyright in the CC0’d portions back from the dead (in cases where the waiver was effective). Rather, the GPL comes to apply to any new original element comprised in the derivative work. (This is not the same as saying the originally granted GPL licence is *extended*; rather, the new component is likewise but separately GPL-licensed such that all copyright parts of the resulting code are GPL-licensed.)

I suggest that the above meaning of “GPL-compatibility” be recognised in the Theme Review Handbook so as to avoid further debate as to what this otherwise ambiguous term means. (This isn’t legal advice, of course. It’s just a suggestion and one people might want to stress test, whether with the commu-

nity and/or other lawyers. As noted above, since writing my original post on this topic, the Theme Review Handbook has been amended to link to the second place referred to above but that doesn't provide the punchy kind of summary I've suggested above.) I'm going to make a qualification to this further below that suggests a distinction might be drawn between code and images but, before doing that, I'm going to answer the specific questions set out at the beginning of this chapter.

Can an image be released under CCO if even there is no model release?

To understand this question and its answer one needs to understand what a "model release" is and why one may be required in some circumstances. It's actually easier to start with the second question first.

A potentially broad range of rights

You might think that a photographer who owns the copyright in an image (which they often will do under their contracts with customers) could do whatever he or she likes with it. In many cases that will be true but the position needs to be qualified where an identifiable person appears in the photo, particularly if that person commissioned the photo or the photo is somehow private in nature. This is because, in such circumstances, the totality of rights involved may be greater than just copyright.

Depending on the circumstances and the country's laws that apply, the person in the photo may have privacy rights, the right to be shown in the photo in a particular manner, contractual rights in his or contract with the photographer (if there is one), character merchandising rights, publicity rights and/or other rights to control one's own image or personality (this last one being more common in civil law jurisdictions).

For example, photos taken in a person's home or on some other private property may be private in nature and, in some countries, even photos taken of a person in a public place have the potential to be private in nature if, for example, the photos were obviously private or their publication could be offensive in some other way. And particular care needs to be taken with photographs of children (on this point see the United Kingdom Court of Appeal's decision in a case involving the taking of JK Rowling's child when the family was out for a walk in the street: [*Murray v Big Pictures \(UK\) Ltd*](#) [2008] EWCA Civ 446). It is important to emphasise too that the relevant rights and the circumstances in which consent is required differ from jurisdiction to jurisdiction.

The kinds of rights referred to above will, when they exist, often limit the circumstances in which a photo of a person can be used, even where in a given country the photographer is the copyright owner.

Model releases

This is the main reason for so-called “model releases”, or “image releases” as they are also known. They serve two main purposes: obtaining the relevant permissions from the subject of the photo and protecting the photographer (and potentially other users depending on the breadth of the release) from liability in relation to any use that falls within the scope of the release. In essence, a model release allows certain specified uses and releases the authorised person(s) from liability in relation to those uses. You can find some examples of model releases [here](#) and [here](#).

Property releases

It is also important to note that there is a separate category of release called a “property release”. This serves the same kind of purposes as a model release but is used where a photo is taken of an item of property that itself is protected by copyright (or a similar or related right) where the taking of the photo either does or could amount to infringing copyright (or the similar or related right) in the subject of the photo. The most obvious examples are where someone takes a photo of a copyright photo, artwork or business logo. You can find some examples of property releases [here](#) and [here](#).

Back to the question

With all that in mind, let’s now return to the first question: Can an image be released under CC0 even if there is no model release? The short answer is yes but it’s important to understand why. The answer is yes because CC0 is only dealing with the “Affirmer’s” “Copyright and Related Rights”. The “Affirmer” is the person who is who associating CC0 with the work. “Copyright and Related Rights” is defined to include “publicity and privacy rights pertaining to a person’s image or likeness depicted in a Work” but the Affirmer is only waiving (or licensing under the fallback) his or her or its own “Copyright and Related Rights”. Third party rights that may exist are beyond the scope of CC0. CC0 states in clause 4(c):

“Affirmer disclaims responsibility for clearing rights of other persons that may apply to the Work or any use thereof, including without limitation any person’s Copyright and Related Rights in the Work. Further, Affirmer disclaims responsibility for obtaining any necessary consents, permissions or other rights required for any use of the Work.”

So, while the answer to this question is yes, it’s not the fully story. The full story is: yes, but care may still be required in relation to third party rights that are not (and cannot be) waived or licensed under CC0, particularly where an identifiable person appears in the image or the image is of copyright or similarly protected property such as another photo or artwork.

Is a CC0'd image without a model release GPL compatible?

In my view the answer to this is: it depends. If the image is of, for example, nature scenes, groups of people whose faces can't be seen and who can't otherwise be identified, general everyday objects and anything else in which there is no separate copyright or other third party rights, then the answer will probably be yes. In these circumstances it is unlikely that there'll be any restraints or prohibitions that conflict with the freedoms conferred by the GPL.

By contrast, if the image is of a person or copyright property (e.g., an artwork) for which no release has been obtained when one should have been obtained, then the answer is probably no. The answer is no because the absence of the relevant release either may or will mean that a component of the theme files (some or all of an images folder) cannot be used to the same extent that the other components can under the GPL.

Who is responsible for getting the model release? The photographer, theme author, website owner?

Where a model or property release is required, the most obvious party to obtain the release is the photographer. All major stock photo suppliers, like iStock, Shutterstock and Bigstock, require this of their contributing image suppliers. In some cases it may be difficult for theme authors or website owners to obtain a release because they might not know who to contact.

This doesn't mean, however, that the only 'legal responsibility' is on the photographer. If a theme author or website owner uses a CC0'd image in circumstances where a model or property release is required but the photographer didn't obtain one (and the theme author or website owner didn't obtain one), the subject of the photo (if a person) or the owner of the infringed copyright (e.g., an artwork) may still have legal rights against the theme author or website owner.

Who is liable if a theme with a CC0'd image without a model release is used on a pornographic site?

This question (I think) is really focusing on CC0'd images of *people* for which a model release has not been obtained. It also raises an interesting issue about the breadth of release that would be required.

The short answer is that the person responsible for using the image on the pornographic site, usually the site owner, will be the one directly in the firing line because that person will have published the image. If the subject of the photo finds out that his or her image was bundled with the theme, then he or she might also have a crack at the theme author or photographer but what rights he or she might have would depend on the circumstances.

If the theme author or photographer had said the widest possible release was obtained (that would allow such use) when no such release was obtained, then the theme author or photographer might be the subject of complaint from the pornographic website owner if that person suffers loss as a result, but I suspect the likelihood of that fact scenario will usually be low.

CC0 and model releases | Unsplash as a case study

The “interesting issue” I’ve mentioned above is worth discussing and it may help to explore it by reference to a live site where photos are available under CC0.

Broad release required

Where a photographer takes a photo of a person and wishes to obtain a model release that’s commensurate with CC0, the model release would need to be on the broadest of terms. Given the unrestrained uses that CC0 appears to grant users (who will have no idea whether all relevant releases have been obtained and who may put an image to any conceivable use), the photographer may well wish to obtain such a release so as to protect itself and/or ensure the photo subject is comfortable with the broad range of potential uses. Alternatively, the photographer may need to obtain such a release under the laws of the photographer’s country or a contract or other arrangement the photographer has with the subject may expressly or impliedly limit publication rights.

Informed consent required

The person who’s the subject of the photo would need to understand that the photo will be released into the public domain (or licensed on the widest of terms if the licence fallback kicks in) and that, once that occurs, anyone who obtains it may well and understandably think they can do more or less whatever they want with it, including – for example – selling it on t-shirts and using it on less-than-salubrious websites. In such cases the photo subject would, as a minimum, need to understand and consent to that.

Do all photographers know all this?

I don’t know whether all photographers who upload photos to CC0-oriented sites know all this but I suspect some don’t (some may be focusing on helpful exposure of their photographic skills, without considering the potential implications of CC0-release). Certainly the standard types of model releases one commonly finds on the Internet would not suffice. Not only that, but sometimes the terms of use of such sites that contributing photographers need to agree to before contributing photos are fairly vague on this point.

Unsplash as an example

I'll take [Unsplash](#) as an example but I'm really not meaning to put any particular spotlight on it. I'm only choosing that site because it has been referred to in WordPress theme review discussions and because, in my view, it's an awesome and hugely popular site. Some of the photographic talent on there is mind-blowing, I love the service it provides and its operators appear to take copyright and related rights seriously.

Anyway, its terms of use say this:

“... you represent and warrant that: (i) you either are the sole and exclusive owner of all Pictures that you make available through the Website or you have all rights, licenses, consents and releases that are necessary to grant to Company the rights in such Pictures, as contemplated under this Agreement; and (ii) neither the Pictures nor your posting [etc of them]... will infringe [among many other things]... a third party's ... *rights of publicity or privacy*...”

A photographer that doesn't yet know much about copyright law and model releases may not understand the full meaning of this clause. Its reference to “releases” exists among a number of similar terms, its reference to “rights of publicity or privacy” may not be understood and, as far as I can see, there are no FAQs on the site. At the same time, site users are told:

“Free (do whatever you want) high-resolution photos.”

That's a potentially risky mix.

Risks if a contributing photographer gets it wrong

If a contributing photographer gets this wrong and the company behind Unsplash were to take a hit from a claim against it by a third party, the contributing photographer would be liable to meet the company's costs and pay its loss, because clause 10 of the terms contains a very broad indemnity in favour of, among others, the company. (When you indemnify a party, you generally agree to meet all costs and expenses it may suffer arising from events specified in the indemnity clause such as your breaching the terms of use.) The company would need to invoke the indemnity (which means liability wouldn't be automatic) but it'd be entitled to do so.

Similarly, users who publish the image on their own sites might find themselves on the end of, at least, a “please remove immediately...” request.

I should emphasise that I'm only talking about model releases here (i.e., in relation to photos with identifiable individuals) as that's the subject of this post. You don't need either a model release or a property release for the vast, vast (did I say vast?) majority of photos on Unsplash. In that vast majority of cases,

there should be no issue as long as the contributing photographer owned the copyright or was authorised by the copyright owner and acted on its behalf in releasing the image under CC0.

Unsplash and model releases

Turning to whether model releases are relevant to Unsplash, I've seen some people suggest that there aren't many headshots on Unsplash but that's just not the case. You need to dig a little to find them (as very few appear when you scroll down the homepage) but they are certainly there. Do a search, for example, for the many beautiful people photos taken by David Olkarny. There are many others on Unsplash by a range of photographers.

Would the subjects of any of them mind if their images were to appear on t-shirts, mugs, prints, in magazines, newspapers, advertisements or less-than-salubrious websites? And if they did mind, would they have legal rights enforceable against the photographer and/or anyone that publishes them or at least uses them in certain ways? There's no way I can know, of course, but I'd be pleasantly surprised if every photographer contributing such photos obtained a model release, when they needed to, that is as broad as the rights available when CC0 is applied to an image.

Unsplash appears to be vigilant

It may well be that Unsplash is extremely vigilant about these things. Again, I don't know, although it does seem from WordPress theme review discussions in which an Unsplash founder has participated that they do take photo rights verification seriously.

What we do know, as I've noted above, is that site users are told:

“Free (do whatever you want) high-resolution photos.”

(As an aside, Unsplash certainly appears to be more vigilant than Pixabay, whose terms of service state that “Pixabay does not require a written Model Release for each Image that has identifiable people on it”.)

Bringing it back to CC0'd images of people in themes for WordPress.org

Placing this in the context of themes submitted to WordPress.org that contain CC0 images and considering now all potential sources of such images, one cannot discount the risk that, where the image files include photos of identifiable people (or property for which a property release may be required), not all required model (or property) releases have been obtained. If they haven't been obtained, and sometimes depending on the nature of the photos and the circumstances in which they were taken, users of the themes may be at risk if they too publish the photos.

(A cynic might say that this is really no different to the risk that the user of any open source CMS takes by installing and running the open source codebase, the argument being that it too could contain third party copyright code that shouldn't have been incorporated into the CMS. In a sense, that's true, but it's much easier to spot an image of a person on an unscrupulous site, for example, than it is to spot a few lines of code among thousands and thousands of lines.)

CC-BY / CC-BY-SA and GPL compatibility

A potential qualification

Earlier in this chapter I set out what I think “GPL-compatibility” means and I suggested that that meaning be recognised in the Theme Review Handbook so as to avoid further debate as to what this otherwise ambiguous term means. I also said I was going to make a qualification to this further below that suggests a distinction might be drawn between code and images. I'm now going to make that qualification.

The suggested meaning for the GPL-compatibility test is all well and good as far as it goes, but it doesn't address the situation:

- where different types of files (e.g., code and images) can be combined without creating a derivative work; and, in that situation
- where the rationale for WordPress.org requiring GPL-compatible image files is not put in jeopardy if an alternative open licence is used for the images.

In other words, it doesn't address the situation where the GPL-compatibility test is not met – in relation to images – but where, arguably, this doesn't matter.

This is the situation I'd now like to explore. But first, a health warning: given what I've read in the theme review discussions, what I'm about to say may be controversial and it might give you a headache. Here we go... .

Themes and the status of images

In its opinion on [WordPress themes and the GPL](#), the Software Freedom Law Center appears to have treated image files (among others) as independent works that are, to paraphrase GPL v2, merely aggregated with the software on a volume of storage or distribution medium; for this reason, they do not need to be licensed under the GPL if their owners/contributors prefer not to.

If they are separate, independent files (they are really a form of data), one might argue that they are beyond the rationale and scope of what I consider to be the Free Software Foundation's GPL-compatibility test (on which I think the theme review team relies) because they would not need to be

part of a “derivative work” based on either the WordPress core’s or a theme’s software. Rather, they would be (or could be in the right conditions) part of a compilation that would comprise the derivative work, the image files and any other independent copyright files. The significance of this is that, if they are not part of a derivative work, then they are not caught by the GPL’s viral/propagation requirement and GPL-compatibility is not required of them. To put it another way, if someone were to make a derivative work of the GPL’d *software* in a theme file on WordPress.org, the ‘downstream GPL licensing of derivative works’ requirement would not apply to the images (unless they’d been separately and expressly licensed under the GPL in their own right). They could be included in the new theme files under their original licences (assuming those licences were broad enough to allow re-use by others).

Using CC-BY and CC-BY-SA images in themes

On this line of argument, and assuming that the focus of WordPress.org’s licensing concern is on ensuring that people’s use of themes is not constrained, other licences could be used for image files included with a theme for the WordPress.org repository, such as CC-BY and CC-BY-SA. There is obvious value in this given the wealth of CC-BY and CC-BY-SA licensed images. In my view this wouldn’t be inconsistent with the open sharing community norm I’ve referred to in an earlier post. To the contrary, it would be entirely consistent with it. (Some might say only CC-BY-SA would be consistent, given its share-alike requirement but, in the case of images, I really don’t think that matters.)

One might object that it would be difficult for theme users to comply with the attribution requirements in these licences but I don’t think this is fatal because guidance could be provided in a readme file as to the various ways in which this could be done (e.g., in image captions or in the site footer or in a separate credits page linked to from the site footer). It would be the user’s responsibility to comply with the relevant CC licence. Bear in mind, also, that a licensor of a Creative Commons-licensed image can waive the attribution requirements if it wishes.

Another objection I’ve seen in discussions on WordPress.org about image compatibility is that licences like CC-BY and CC-BY-SA do not confer a right on licensees to sublicense the licensed work. The argument is that this is fatal to GPL-compatibility because, to license the images under the GPL, the Creative Commons licences would need to authorise that form of sub-licensing (because it’s distinct from the Creative Commons licensing). This sublicensing point may give rise to some tricky questions in some countries but, on my line of argument above, it would fall away as there’d be no need for a right to sub-license under the GPL.

Turning now to the real world of theme reviews, there is no legal requirement to take the broader approach to images in themes for the WordPress.org theme repository that I’ve sketched out above. It ultimately boils down to a policy call on the part of those who control the theme submission process for WordPress.org. If they wish to stipulate that all images must be provided under a GPL-compatible licence in terms of the test above (or be in the public domain), that’s their choice (even though people

may scratch their heads about the suitability of the GPL for images). All I'm saying is that arguably they are not forced into that choice by the requirements of the GPL itself. There may be other options. Some of those options might provide greater latitude for theme authors and without creating a significant additional burden for theme reviewers.

Additional guidance would be needed in the Theme Review Handbook, so as to help theme authors go about things correctly and help theme reviewers with what they should be looking for, but that wouldn't be too challenging. You'd probably have three paths for images: one path for images that are released, expressly, under the GPL in their own right (which would require some explanation as you don't really distinguish between object code and source code when dealing with images); a second path for images released under CC0; and a third path for images released under CC-BY or CC-BY-SA (there are other Creative Commons licence variants but I don't think any of the other ones are appropriate as they impose 'NonCommercial' and/or 'NoDerivatives' restrictions). Each path should, I suggest, cover the issue of model and property releases in relation to images that show identifiable individuals or copyright protected property.

Final remarks

I hope this chapter answers the questions put to me in sufficient detail. Turning to the GPL/CC-BY and CC-BY-SA compatibility point (in relation to images), it would be great to know what the community thinks about my suggested approach. And if any lawyers out there are reading this, please feel free to chime in. The more the merrier. I don't expect everyone to agree with me. After all, discussing these sorts of GPL questions can be a bit like skipping into a cosmic black hole. If you'd like to comment, you can do so at [WP and Legal Stuff](#).

“The thing is, ThemeForest dominates when it comes to market share. With all of the various avenues we tried, none came close to the reach or revenue that ThemeForest has provided in years past.”

Mike McAlister, Array, 2015

7

Selling ThemeForest themes outside of ThemeForest

Questions

A reader of WP and Legal Stuff asked these questions (I've amended them slightly):

“I have come across sites that are charging to download ThemeForest WordPress themes and are adding a note stating they are licensed under the GPL. I looked a number of those themes up on ThemeForest and they were not licensed under the GPL or were only partially licensed under the GPL.

I am planning to sell WordPress themes and would appreciate a clarification as to the licensing that ThemeForest is purporting to use. (As of this writing, very few businesses on ThemeForest have opted to use GPL, so where does that actually place a theme sold on ThemeForest?)

A few theme authors have adopted the 100% GPL licensing but the majority have not. With that stated, could someone (such as myself) resell the theme in question, [Hypothetical Theme], by attaching the GPL license? I understand that ThemeForest is claiming they have a totally different license in effect. That seems to be where the confusion is.”

These questions could span a number of different scenarios:

- a theme author who sells her theme on ThemeForest, under a split/dual licensing model, decides to sell the same theme independently under the GPL on her own theme site;
- a theme author who sells her theme on ThemeForest, 100% under the GPL, decides to sell the same theme independently under the GPL on her own theme site;
- a customer buys a licence to a theme on ThemeForest, under a split/dual licensing model, and then decides to make some cash off it by selling it on his own site under the GPL; or
- a customer buys a licence to a theme on ThemeForest, licensed 100% under the GPL, and then decides to make some cash off it by selling it on his own site under the GPL.

There is nothing legally wrong with what Envato is doing with WordPress themes on ThemeForest. Its terms are clear and understandable and its business model is now consistent with the requirements of the GPL

In addition to considering these scenarios, it's important – I think – to cure some of the potential misperceptions as to what Envato is doing. Envato Pty Ltd is the company behind ThemeForest and other Envato Market marketplaces. That's why I often refer to Envato in this chapter.

The answers to these questions are fairly straight-forward but, to understand them fully, you need to be familiar with relevant provisions of the Envato Market Terms as well as the Author Terms that apply to theme authors who sell their themes on ThemeForest.

Elephant

Before I get into all this, though, it may help to get an [elephant out of the room](#) by saying this:

There is nothing at all legally wrong with what Envato is doing with WordPress themes on ThemeForest. To the contrary, in my view, its terms are clear and understandable (at least in relation to themes) and its business model is now consistent with the requirements of the GPL. Envato is not taking GPL'd themes and unilaterally applying a more restrictive licence to them. Rather, it provides a marketplace through which theme authors can sell licences or access to their themes and, as part of that, the theme authors can choose whether to license their themes under a split/dual licensing model (part GPL, part proprietary) or 100% under the GPL.



I say this simply as a lawyer looking through a window at the legalities of the situation. (I have no relationship with Envato of any sort other than as a purchaser of themes from ThemeForest and plugins from CodeCanyon.)

I'm well aware of past controversy around ThemeForest's approach to licensing but, at the end of the day, it's a business making commercial decisions and, in my view, what it's doing with WordPress themes is legally all above board. And it clearly has a huge number of happy customers. Just [take a look](#) at its [statistics](#).

Envato/ThemeForest has been judged in the past for whether it complies with the GPL or with what some might say are broader WordPress community norms but, as I'll discuss further below:

- Envato’s current approach to dual licensing is consistent with the Software Freedom Law Center’s opinion on WordPress themes; and
- its enabling WordPress theme authors to choose a 100% GPL licensing option is consistent with community norms.

Whether an individual theme author chooses the 100% GPL option when using ThemeForest is now a decision for it, just as it would be if it were selling themes on its own website.

(I’m aware of the tensions that preceded the current state of licensing on ThemeForest but there’s no need to dredge that up here. Since drafting this post, I also see there’s an interesting post on [WP Tavern](#) about Envato and ThemeForest. I don’t get into the issues addressed in that post but some of the hostile remarks people are leaving in the comments sound a bit extreme to me. Sure there are some suboptimal themes on ThemeForest (I’ve suffered from one in the past) and sure there are probably some people just trying to make a quick buck without much thought for standards and customers but that’s the same in many markets; quality and service differ. High quality theme vendors like WooThemes, Orman Clark and Mike McAlister have sold or still do sell their themes on ThemeForest. In my view you can’t tar them and many others with the same negative brush. And I bet those who are making big dollars from ThemeForest are pretty happy about it... .)

Now let’s take a look at Envato’s terms.

The Envato Market Terms and Envato’s Author Terms

When you create an account with and sign into ThemeForest, you need to click a box stating that you have read and agree to the Envato Market’s Terms and Conditions (and Privacy Policy). The Terms and Conditions link takes you to a page that contains various sets of terms: the Envato Market Terms, Author Terms, Affiliate Program Terms, Privacy Policy and Envato API Service Terms and Conditions.

The terms that are relevant for present purposes are the Envato Market Terms and the Author Terms.

Under clauses 28 and 30 of the Envato Market Terms:

- you’re told that, if you wish to become an author, the Envato Market Terms will continue to apply along with the Author Terms you’ll sign up to as an author; and
- authors own the items they sell licences for on Envato Market (in other words, there is no transfer of copyright or any other form of property ownership to Envato). This is further explained in Envato’s [Author Guide](#).

Under clause 9 of the Author Terms you are told that, when you become an author, “you can choose to make your items available exclusively on the Envato Market or have the option of selling your items

Envato Market Terms

Envato Market Terms

Author Terms

Affiliate Program Terms

Privacy Policy

Envato API Service Terms and Conditions

- Welcome
- How browsing and membership works
- How buying items works
- Becoming an Author
- Intellectual Property
- Use of Information
- Playing fair
- Linking; apps made by others
- Legal Housekeeping
- Definitions

Welcome to Envato Market

1. Hi, we're **Envato** and welcome! We're happy to have you here and we hope you enjoy your stay. When we say 'we', 'us' or 'Envato' it's because that's who we are, and we own and run the **Envato Market** site.

elsewhere". You're told that "the percentage of revenue you receive from each sale of your item will vary depending on your choice" and that you "can change your exclusivity status which will affect the percentage of revenue you get after you change your status". In essence, if you take the exclusive path, you're paid more for each sale of your item. Envato explains the differences in clauses 10 and 11, as well as on its [Become an author](#) page and in its [Rates schedule](#).

Under clause 23(a) of the Author Terms, theme authors promise to Envato and each buyer of their items that the authors own or have rights to use the intellectual property rights in the items and that the items do not infringe the intellectual property rights of third parties.

The Author Guide sets out 6 additional rules, including these two:

- 1. The items you upload for sale must be your own creation. Do not submit works based on tutorials or other people's designs.
- 2. You must have the rights to license the items you upload, either because they are your own original content, or because you have a license that grants you permission to resell any third-party assets included with your item.

With these provisions in mind, we can move to the different scenarios described above.

Theme author who sells theme on ThemeForest, under a split/dual licensing model, decides to sell same theme independently under the GPL

Before answering this question, it may help to describe the Envato split/dual licensing model. As noted above, theme authors can choose whether to apply this licence or to license their themes 100% under the GPL. Envato [explains the split licensing approach](#) as follows:

“Envato Market’s license for themes or plugins sold on the Envato Market sites covers all the components of these items, except for the specific components covered by the GPL. This is why it’s called a split license: because different license terms can cover individual components that make up a single item.

The PHP component and integrated HTML are covered by the GPL. The rest of the components created by the author (such as the CSS, images, graphics, design, photos, etc) are covered by the Envato Market license.”

(For the wording in the licence itself, see clause 13 of Envato’s [Regular Licence](#).)

This split essentially mirrors the same distinction drawn in the Software Freedom Law Center’s [opinion](#) on WordPress and themes. This is what, in part, that opinion said:

“On the basis of that version of WordPress, and considering those themes as if they had been added to WordPress by a third party, it is our opinion that the themes presented, and any that are substantially similar, contain elements that are derivative works of the WordPress software as well as elements that are potentially separate works. Specifically, the CSS files and material contained in the images directory of the “default” theme are works separate from the WordPress code. On the other hand, the PHP and HTML code that is intermingled with and operated on by PHP the code derives from the WordPress code.

...

In conclusion, the WordPress themes supplied contain elements that are derivative of WordPress’s copyrighted code. These themes, being collections of distinct works (images, CSS files, PHP files), need not be GPL-licensed as a whole. Rather, the PHP files are subject to the requirements of the GPL while the images and CSS are not. Third-party developers of such themes may apply restrictive copyrights to these elements if they wish.”

Note, also, that the split/dual licensing is from the theme author to the customer, not from Envato to the customer (see clause 18 of the [Regular Licence](#)).

Returning now to the question, a theme author who sells a theme on ThemeForest under a split/dual licensing model can sell the same theme elsewhere, independently of ThemeForest and 100% under the GPL if s/he wishes, *as long as the theme author has chosen the non-exclusive option for sale of the item on ThemeForest*. (The only qualification here is that if the theme author has used, say, third party images licensed under, for example, a Creative Commons licence, that licence continues to apply to those images.) The reason for this is that the theme author is the owner of the new copyright in the work and, subject to complying with any applicable GPL requirements, can license the work as s/he pleases.

If, however, the theme author has chosen the exclusive option on ThemeForest, selling the theme elsewhere would be contrary to the agreement with Envato. This is not inconsistent with the GPL. The restriction on the theme author's ability to sell the theme elsewhere arises from his or her contractual obligations to Envato.

This is what Envato has to say about breaching one's exclusivity obligations:

“What happens if I don't meet exclusivity?

Depending on the extent of your breach of exclusivity, it may be decided that your rate is reduced to that of a non-exclusive author or if your breach is considered serious enough, you'll be disabled as an author completely and you may lose your ability to sell with us in the future.”

Theme authors selling on ThemeForest and elsewhere

As an aside, well-known theme authors who sell on both ThemeForest and elsewhere include:

- [Orman Clark/Themezilla](#) (Orman changed the licensing to all his themes [on ThemeForest](#) to 100% GPL when the opportunity arose);
- [Obox Themes](#) (who likewise have selected the 100% GPL option [on ThemeForest](#)); and
- [ThemesKingdom](#) (they too have gone for 100% GPL [on ThemeForest](#)).

Some other authors, like [Kriesi](#), sell on ThemeForest (he uses the split/dual licensing approach) and merely promote their themes elsewhere, with all sales going through ThemeForest. Others, like Mike McAlister and his crew, got going on ThemeForest and then moved to sell their themes independently. As many will know, Mike's OkayThemes morphed into [Array](#). (Mike has recently signalled an intention to return in some way to ThemeForest.)

Theme author who sells theme on ThemeForest, 100% under the GPL, decides to sell same theme independently under the GPL

The same answer applies in this scenario. The theme author can do this as long as the theme author has chosen the non-exclusive option for sale of the item on ThemeForest. If, however, the theme author has chosen the exclusive option on ThemeForest, selling the theme elsewhere would be contrary to the agreement with Envato. Again, this is not inconsistent with the GPL. The restriction on the theme author's ability to sell the theme elsewhere arises from his or her contractual obligations to Envato.

Customer buys licence to theme on ThemeForest, under a split/dual licensing model, then decides to sell it on his or her own site under the GPL

In this situation the customer would be infringing the author's copyright because the split/dual licensing model means the GPL would not cover all contents of the theme file. Whilst the GPL'd components could be copied, adapted and re-used in accordance with the GPL's freedoms and subject to its requirements (e.g., as to including the notices/licence statements in the theme files), the non-GPL'd components could not. They could only be used in accordance with the non-GPL, proprietary side of the Envato split/dual licensing. That side of the licensing limits use of an item to "create one single End Product for yourself or for one client" (clause 2 of the Regular License, which is explained in more detail in other terms of the licence).

The theme author could bring an action against the customer for copyright infringement. Envato could also have a crack against the customer because:

- under clause 18(f) of the Envato Market Terms, Envato has "the right to enforce against you the terms of the license that you have acquired from an author"; and
- under clause 34(f) each Envato customer promises that it will not "modify, reproduce, display, publish, distribute, copy, transmit, perform, license, create derivative works from, transfer, or sell or re-sell any information, content, software, or item obtained from or through the Envato Market, other than in accordance with these terms or the license for the item."

The bottom line, then, is that buying a theme on ThemeForest that is split/dual-licensed, and then selling it on your own site, is not a good idea.

Customer buys licence to a 100% GPL licensed theme on ThemeForest and then decides to sell it on his own site under the GPL

In this situation, the customer would be selling the GPL'd theme (that someone else has written) on his own site as a downloadable zip file. I'm not looking at the scenario where a web agency uses a commercial theme as a starting point for a client website (which of course is very common).

The customer's selling of the 100% GPL'd theme on his own website, as a downloadable zip file, would be permissible under the GPL. It is unlikely, however, that the enterprising chap here would be able to provide the same level of support and updates as the original theme author. He would also need to:

- include all original GPL-required notices with the theme files; and
- be careful not to infringe any trademark that the original theme author may have associated with the theme or to pass himself off as the theme author or as having any association with the true theme author if that weren't the case or to mislead customers in any other material way.

That's a wrap!

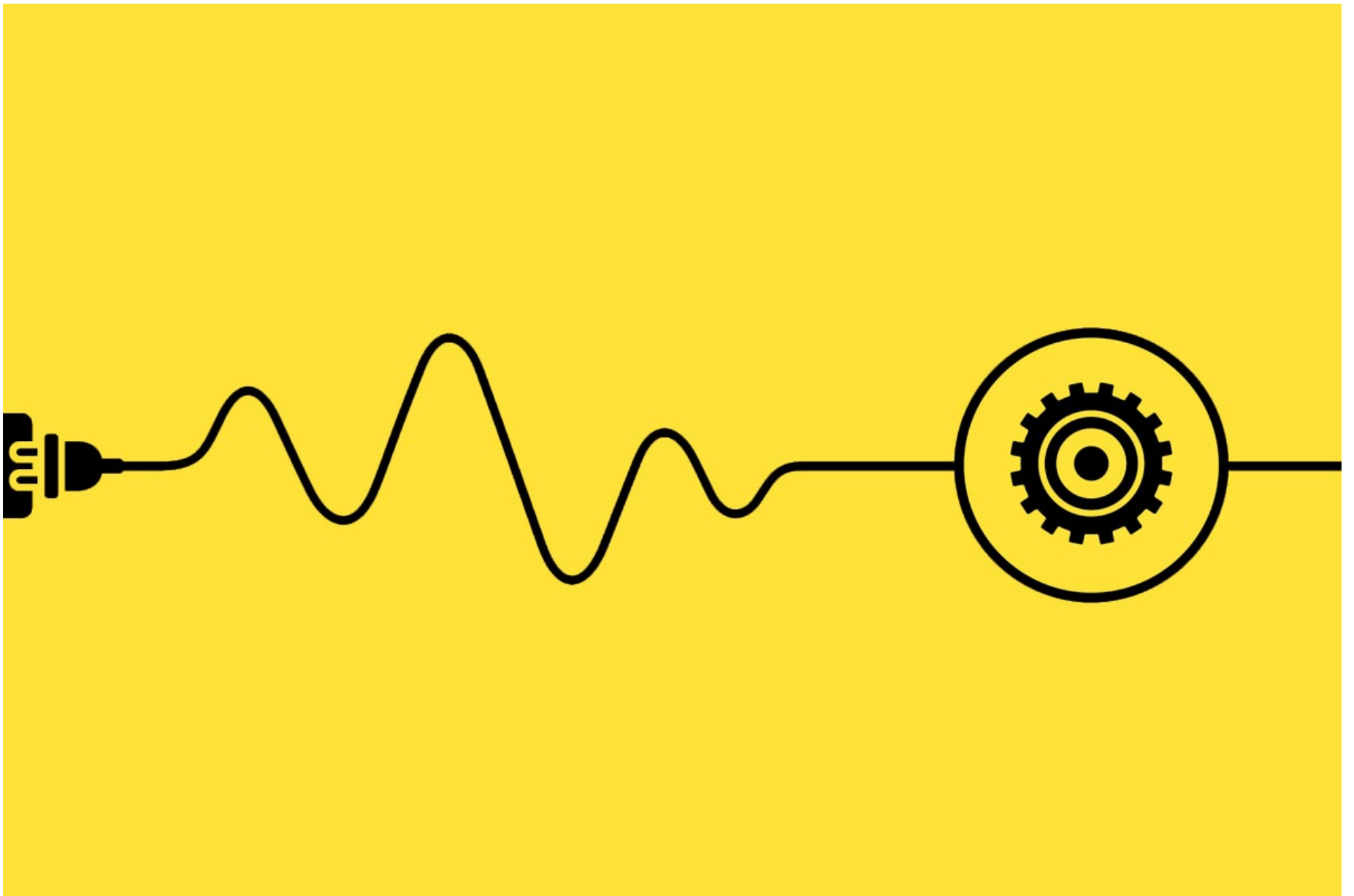
I hope this answers the questions set out at the beginning of this chapter. If you sell on ThemeForest, may you sell as much as Kriesi!

“By not supporting the real developers, the real companies, and going to the lazy crew (those just reselling without doing any real work) they run the risk of creating a future environment that is unsustainable for business.”

Timothy Bowers, WPMU DEV, 2015

8

Reselling commercial plugins



The questions

Two people from countries far apart have asked me similar questions (albeit possibly from opposite perspectives) regarding the reselling of GPL'd plugins.

The first person asked this (I'm paraphrasing):

'If someone purchases a plugin (or theme) from a commercial plugin (or theme) provider, and then translates it, changes the code and puts it in a marketplace to sell, would that be permissible under the GPL? I've seen outfits doing this and I'm not sure how they can do it.'

The second person asked this:

'As a plugin developer, how can I protect my plugins to prevent people from reselling them, bearing in mind that many plugins are largely PHP/HTML/javascript code with minimal CSS and graphical elements or, in any event, with CSS and graphical elements that might easily be replaced. In these circumstances, a ThemeForest-style split licence might not have much effect. In these circumstances, how can a plugin developer protect its position?'

Reselling commercial plugins

In substance, I've already given my thoughts on the first question in previous chapters. The short version is this: if the plugin in question is 100% GPL-licensed then, yes, that would be permissible under the GPL. This is one of the freedoms that the GPL confers on recipients of GPL'd software. However, the person who translates it, changes the code and sells it, would need to be careful:

- to comply with the GPL's notice and other requirements;
- not infringe any trademark (if one exists) or other branding rights;
- not pass off any relationship with the original plugin developer or its business that doesn't exist;
- not breach any fair trading laws that might apply in the person's country; and
- not infringe any copyright in non-code files that accompany the plugin that are not under the GPL (e.g., help files), if that is in fact the case.

As I've said in a previous chapter, though, I'm not sure how good a business model this would be, given:

- the likely absence of support, product activation keys and updates; and
- my view (which may not be shared by everyone) that many if not most people prefer to buy themes and plugins from those they trust and from whom they receive great service, which will usually be the original developers.

What do some of the plugin shops think about this?

When first writing this material, it occurred to me that it'd be great to get the views of some of the better known plugin shops (or, in some cases, theme and plugin shops). With that in mind, I approached five of them. I received substantive responses from three of them.

Elegant Themes

A helpful representative of Elegant Themes said this:

“All of our products are 100% GPL. We attribute much of our success to our yearly subscription model and our amazing support. We also require a current subscription to use our Updater plugin for themes and plugins.”

In response to a follow-up question as to whether the business had ever encountered people reselling its themes or plugins and, if so, whether that was a significant problem for the business, he said this:

“Yes, people reselling happens frequently. It is just not worth it for us to deal with. Our customers stick with us for our good service.”

WPMU DEV

Timothy Bowers, of WPMU DEV, said this (this is his personal opinion and I’ve shortened it in minor respects):

“Hey Richard,

Thanks for getting in touch.

Being GPL and being a business that needs to make profit can be tough for some to handle.

...

For years we didn’t really pursue people distributing our stuff, but then we had some issues, we found some copies being distributed were injected with malicious code, some more serious than others. One example that always comes to mind first was a copy of our PopUp Pro plugin, someone uploaded a free copy to WordPress.org. It had code that would send registered members account details from a WordPress site to a remote email address, luckily the guys and gals at WordPress.org are pretty good about simply ripping something off, and serious about security, they removed that pretty quickly. Another instance I’ve seen was when activated it would elevate accounts to an admin or super admin status (Multisite), then send home the address of the site so that they could then log in and do whatever they want on your site.

Distributing our stuff didn’t and still doesn’t damage our business, in fact it often brings new people to us that have found us by pirated copies that broke their site due to either having malicious code or simply being outdated. Many, many thousands of people sign up to us to ensure they have the latest, most secure version, and more importantly for the majority, our support. What was potentially damaging was people distributing our stuff with malicious code included, especially if they use that code on their clients websites and then later the client hired someone new that would claim our code has security issues when in fact it was due to a malicious redistributor. Without trying to label, it often seems to be prolific in the lower budget markets where people hire someone for a few hundred dollars to build a site that an experienced developer would charge triple or more for. I guess you get what you pay for sometimes.

We now actively pursue sites doing this, we do that on grounds of trademark/brand infringements ...

...

Whilst being GPL in code, our service is not. We encourage people to use our software to build their sites, to build their clients sites, and make great stuff with it. We don't however encourage lazy people to simply resell our stuff because they can't be bothered to do any real work, or get a real job.

... It's paramount we protect our users from dodgy downloads that could compromise their site, and most importantly the data of their customers. If they continued to try, we'd submit documents to their card issuer or Paypal to prevent them using our service, this could negatively affect their accounts with those third parties if they persisted.

One thing the consumer also needs to recognise is how sustainable they want their business or personal site to be. By not supporting the real developers, the real companies, and going to the lazy crew (those just reselling without doing any real work) they run the risk of creating a future environment that is unsustainable for business. This [is] especially true for the smaller development companies selling a plugin/theme or two. If those developers and companies can't turn a profit to pay wages and live life, they will stop creating the very products others rely upon. If that hurts too many companies, and WordPress starts hemorrhaging great creative people, it creates a worrying future for our platform."

WooThemes

Magnus Jepson, co-founder of WooThemes, said this:

"We have noticed more and more websites reselling our WooCommerce extensions in the last couple of years.

Both WooCommerce and WooThemes are registered trademarks, allowing us to protect our brand. Reselling GPL software may be within the rights of the GPL, but using our registered trademarks in doing so is not allowed. It seems this fact is being ignored by all re-sellers who think they are running a legal business.

Reselling unmodified GPL software for profit is not only hurting our revenue, but also our brand perception. It causes confusion amongst our customers, and we have several support tickets with customers asking for help with plugins they bought from other websites.

This leaves us with a confused customer, when we have to inform them that they didn't buy this from us, and therefore can't get automatic updates and support."

Magnus followed up his first message with positive comments about the GPL:

"I forgot to mention the positive sides of us adopting GPL.

Adopting the GPL has been an overall positive experience for WooThemes, allowing us to receive contributions from developers around the world, and building our product into more of a community project, along the same lines as WordPress.”

Thanks to Elegant Themes, WPMU DEV and WooThemes for taking the time to respond to my questions.

Protecting a plugin developer’s commercial position

Turning to the second person’s question, there are a number of things one can say.

Split/dual licensing insufficient?

First of all, the view that split/dual licensing wouldn’t provide sufficient protection is interesting. I imagine that might depend on the nature and complexity of the plugin but it’s interesting nevertheless. It would be useful to hear the views of other plugin developers on this point.

It’s also interesting because, from what I’ve seen so far, outfits that are buying plugins then selling them at steep discounts are only taking and selling fully-GPL’d plugins. I’m not aware of them doing the same with split/dual-licensed plugins. That said, I’ve not taken a deep look into the range of sites doing this. Perhaps they are doing this or perhaps there just aren’t that many split/dual-licensed plugins out there.

Proprietary licence?

If split/dual licensing wouldn’t provide enough protection and if the lack of access keys for updates, support etc wouldn’t suffice (perhaps because some users wouldn’t care), a plugin developer might wish to explore the feasibility of taking the position that its plugin is not a derivative work of WordPress (or any other GPL’d code) and, on that basis, to apply a more restrictive / proprietary licence to the plugin. One can’t say in the abstract whether this position would be legally defensible for a given plugin as so much would depend on the context and the plugin’s content. For this reason, one can’t say in the abstract whether the plugin developer would need to apply the GPL to at least certain portions of the plugin. As many readers will know, just as with themes, this issue is hotly debated in the WordPress community. See, for example, the last few paragraphs of [this post](#) and the [Enrique piece](#) to which it links (which is about plugins, not themes).

Damned if you do and damned if you don’t?

The challenge a plugin developer in this situation faces, I think, is that if s/he takes the non-GPL/proprietary path, s/he risks being criticised by those who think the GPL applies to the plugin or at least portions of it or, a separate point, that this approach violates WordPress community norms (which is not a legal point at all). That, in turn, might affect the developer’s sales (I don’t know whether it would, but it might). It is also possible that WordPress core contributors could take legal action against the

plugin developer for GPL violation. I think that's fairly if not highly unlikely though because it would be costly, the legal outcome would be uncertain (and thus such an action could backfire) and legal proceedings could generate unhelpful rifts in the WordPress community at a time when WordPress competitors appear to be demanding a bit of respect.

At the same time, not taking this path and applying the GPL 100% would expose the plugin developer to potential resale by people trying to make a quick buck. If the resellers are not doing anything along the lines listed in my comments on the first question (which might be a big "if"), there may be little the developer could do about it. Such are the freedoms of the GPL. And I haven't even got into the legal and logistical challenges that may exist where the reseller lives in some far flung country.

What I'm about to say will be controversial, I'm sure, but one option might be to apply split/dual licensing to the plugin (following the distinction drawn in the Software Freedom Law Center's opinion on WordPress themes and the GPL) and ensure it contains a good number of non-GPL'd components (assuming this is possible), to the extent that this can be done without doing anything that people might consider to be a breach of the GPL. This still runs the risk of violating what some if not many consider to be a WordPress community norm but, at that point, we're into the realm of opinion and normative behaviour, not law.

Note also that the proprietary side of the split/dual licensing could be drafted to be fairly liberal or permissive but to prevent the kind of reselling we're currently talking about. It wouldn't have to be as restrictive as the ThemeForest split/dual licensing.

At the end of the day, this is really a judgement call for the plugin developer (taking legal advice from a lawyer within his or her jurisdiction where required and bearing in mind GPL requirements if and when they apply).

I'm not advocating any particular approach here. I may have my own preference as a plugin purchaser but that's not relevant to this discussion.

Publicity

Sometimes legal rights or commercial positions are better enforced or protected by highlighting certain behaviours publicly than by taking someone to court. You need to be careful to use the right language and not to say anything that is defamatory of your target and, I suggest, you also need to respect the freedoms of the GPL, but, in appropriate cases, it can be effective, not to mention a hell of a lot cheaper.

Take, for example, a reseller who is injecting malicious code, pages of backlinks or something similar into a plugin it is reselling. In that kind of scenario, public condemnation may be quite appropriate, so as to protect users, the plugin's brand and the developer's commercial position.

GPL freedoms versus API or activation key restrictions

A potentially important point to note is the distinction between GPL freedoms and contractual restrictions a developer can legitimately impose on the use of activation or API keys that provide access to automatic updates and support. These keys don't prevent people from using distributed GPL'd code in accordance with the freedoms conferred by the GPL. Rather, as noted, they provide access to the likes of updates and support. This approach is not contrary to the GPL.

Many well-known plugin developers expressly prohibit a user from sharing his or her activation or API key. I mention this because, if a reseller were sharing an activation or API key when not permitted to do so, the developer would be able to pursue the reseller for breach of contract.

For example, the Gravity Forms Terms and Conditions say this:

“... You may not share or resell access to your support license key.”

And:

“Support is offered via a support license key. Purchasing a support license key gives you access to our support forums and documentation. Purchasing a developer support license gives you access to our Priority Support Ticket system.

...

License holders cannot distribute, freely giveaway, or resell their license key. The license key is only transferable by contacting us and requesting an official transfer of the license to a new owner. ...

...

Only the license holder is permitted to request support or access support resources.

License holders are not permitted to re-post support forum content or documentation on any external websites, social media outlets, etc. Posting screen captures of this content is also prohibited. Violation will be grounds for immediate termination of the support license and all access to support content and product updates will be discontinued.”

Similarly, the WPMU DEV Terms of Service say this:

“Some of our services such as Anti-Splog, WP Smush Pro, Integrated Video Tutorials and Auto-upgrades require the use of an assigned API key. You may only use your API key on sites that belong to you or those of your clients. You must maintain an active subscription with WPMU DEV to make use of API services. API based services may only be accessed by our plugins designed for that purpose. You may not resell, share, or publish your API key. Violation of any of these terms will result in the immediate termination of API access and/or your WPMU DEV membership. We also reserve the right to suspend API access to users that use an unusual amount of API requests or resources that we feel may impact the services to other members.”

I suggest it may be commercially important for commercial plugin developers that issue activation or API keys in connection with their plugins to include such provisions in their terms of use so as to prohibit – legitimately – behaviours that threaten their legitimate commercial interests.

Note that some resellers appear to be wary of these terms and take care not to breach them by not sharing their activation or API keys. Instead, they seem to maintain their own memberships or subscriptions with the plugin developers and then make the updates that they receive available to their customers.

Obfuscation?

One final point to note is that I have seen some theme and plugin shops being (in my view) deliberately vague or silent about what licence applies to their themes or plugins. They don't say the theme or plugin is GPL licensed but they don't say it's not, they don't specify any alternative licence either and they sometimes use ambiguous language as to what people are paying for. This could make it legally challenging for certain resellers to take the themes/plugins and resell them. Personally I think this is poor practice but it seems pretty clear, in my view, that some businesses are doing this strategically in an attempt to protect their commercial position. (To be clear, I'm not referring to any of the plugin or theme shops I approached when writing this post. I have certain smaller operators in mind.)

“The GPL governs only the copy-right aspects of the use of a computer program; provisions regarding the use of trade marks are not contained within this set of rules”

Higher Regional Court
of Düsseldorf, 2010

9

The GPL and trademarks



The freedoms granted under the GPL over the “Program” – usually the code – do not apply to any trademark that the owner has in relation to the Program.

Introduction

At one point a reader of WP and Legal Stuff encouraged me to say something about the distinction between the copyright permissions granted under the GPL and the rights that a trademark owner may have in the name or brand by which the GPL'd software is known. I suspect this is an important topic for some commercial plugin owners, and possibly the owners of commercial theme shops, so here we go.

GPL is designed to cover code

The freedoms granted under the GPL over the “Program” – usually the code – do not apply to any trademark that the owner has in relation to the Program. To put it another way, the use of a trademark in connection with GPL'd software, without more, does not mean the trademark owner has lost its trademark-related rights. To the contrary, in certain

circumstances, another person's use of the trademark without permission may amount to trademark infringement.

A real life example

Higher Regional Court of Düsseldorf

For example, in a German case (that has been helpfully summarised in English by [Anthonia Zimmermann](#) and in an [open source text](#) by Noam Shemtov), a company released ecommerce software under the GPL with a brand for which it owned a trademark. Another developer came along and developed (among other things) a module for the software, as it was entitled to do from a copyright perspective under the terms of the GPL. However, this developer used the distinctive element of the company's trademark as part of the name for its module. The company argued that this amounted to trademark infringement and sought an injunction to prevent the developer from using the trademark as part of the name for its module. After an unsuccessful effort in the first instance court, on appeal the Higher Regional Court of Düsseldorf granted injunctive relief for infringement of the company's trademark rights. As Zimmermann describes it:

“The court pointed out that under article 12 CTMR [Community Trademark Regulation], a distributor of services, accessories and spare parts is not permitted to create the misleading impression of a commercial relation between himself and the trademark owner. The defendant therefore should have emphasized that “xt:Commerce” [the company's brand for the software] is a third party trademark used by him merely for describing the intended purpose of his own offer.”

Shemtov explains how the company argued that “a permission to market software updates under the trade marked original name could not be derived from the GPL” and how the appellate court agreed with this assessment. Shemtov provides a translation of a key part of the court's judgment:

“The GPL governs only the copyright aspects of the use of a computer program; provisions regarding the use of trade marks are not contained within this set of rules. An (implied) right to use the trade mark does not arise The permission to use the copyright does not run empty [or, I'd say, 'is not negated'] without permitting the use of the trade mark: the beneficiary is able to market the legally produced program under a different (own) name.”

Takeaway

The moral of this particular story, then, is be careful how you describe:

- your extension of, plugin for, or fork of GPL'd software whose name is a trademark in your jurisdiction; or
- the services you may provide in relation to such software.

For example, if you were to get your hands on Gravity Forms (Rocketgenius Inc has a trademark in the name) and adapt it to support front-end custom post type submission out of the box (sorry, couldn't resist), you shouldn't really go and release and sell it as either "Gravity Forms" or "Gravity Forms +" (unless of course Carl and the crew were happy with that; I suspect you'd find out fairly promptly – and directly – that happiness is not the emotion they'd be feeling).

Selling others' commercial plugins in which trademarks exist

There is another broad scenario that a reader asked me about. The scenario – which I've adapted slightly – is this:

- a WordPress shop, SuperDuperWP, develops a commercial plugin, let's call it SuperDuperPlugin;
- SuperDuperWP applies for and is granted a trademark in the name "SuperDuperPlugin";
- an enterprising young chap comes along and either makes SuperDuperPlugin available on his site for free with the provision of free support, or sells it on his site (full stop and without suggesting he's the plugin author) or makes it available for free but provides paid support for it with a suggestion he's affiliated to SuperDuperWP; and
- let's also assume that, to get updates and support for the plugin from the genuine owner, you need a product registration number, Gravity Forms-style.

Now, I don't profess to be a multi-jurisdictional trademark expert but, from all the reading I've done, I feel fairly comfortable in saying the following:

- **Free download and free support:** Making the 100% GPL'd plugin available for free on a site with free support, where there is no element of trade and no confusion as to any association with the genuine owner, may not amount to trademark infringement, the main reason being that the person doing this is not in trade or commerce. Why the enterprising young chap would do this, though, is beyond me (doesn't seem very enterprising). Users might not be able get updates and the said young chap would have to both learn the codebase and be pretty altruistic. Probably unlikely in practice. Personally I like to buy plugins and themes from outfits I trust.

(There's a potential twist to this scenario. Let's say the plugin zip file that is uploaded to the 'free' site contains detailed help documentation crafted by the plugin author, as many themes and some plugins do these days. The GPL relates primarily to code, not documentation or other forms of works, and so the freedoms it gives people may not extend to the documentation. Copying that documentation without consent could amount to copyright infringement. So even if there's no trademark infringement, copyright infringement might have occurred. I've not overlooked the fact that the GPL can be

made to apply to documentation (among other things) but the real question is whether, in a given case, that has been done, either at all or effectively.)

- **Sale with no support etc:** Where the enterprising young chap merely sells SuperDuperPlugin on his site, with no product registration number, no support and no access to updates, people wouldn't be getting what they'd get if they were to purchase the plugin from SuperDuperWP. In other words, arguably what they'd get is materially different from what they'd get from SuperDuperWP. In these circumstances the trademark owner may be able to argue that this results in confusion to consumers and dilution of its trademark. If the version of SuperDuperPlugin released for sale were an old version (perhaps with bugs or security holes), that might strengthen the argument.

(Depending on his country, the enterprising young chap might argue that SuperDuperPlugin had already been 'sold' such that the first sale doctrine or exhaustion of rights defence applies. In a nutshell, this defence says that if you've sold a copy of a good whose name is a trademark, the purchaser may onsell the genuine article without infringing the trademark. The potential problem with this argument, though, is that the young chap might not in fact, for legal purposes, be selling the 'same genuine article'. Even if no change was made to the codebase, material differences might be found to exist in the differences relating to product registration, product support and access to updates. There are US cases that would appear to support this line of argument (see, for example, R Payne [Dealing with Unauthorized Online Dealers: Sales of "Genuine" Products](#) (2014); A Pai [IP Exhaustion: The Increasingly Important First Sale Doctrine](#) (2014); N Kilaru and M Sommers [Removal of UPC Labels Subverts Trademark Owner Quality Controls and Constitutes Material Difference](#) (2010); L D Prutzman and E Stenshoel [The Exhaustion Doctrine in the United States](#) (2013) and [Softman Products Go v Adobe Systems Inc.](#), 00- 04161, C.D. Cal. act. 22, 2001).)

- **Free download, paid support, suggested affiliation:** In the third scenario, our enterprising young chap makes the SuperDuperPlugin available for free but provides paid support for it with a suggestion he's affiliated to SuperDuperWP. In this scenario, the young chap will have gone too far. Trademark infringement is highly likely, he'll be committing the tort of passing off (in countries where that tort exists) and he could be breaching fair trading laws.

“All digital goods provided by Array are released under the GNU Public License version 2.0. Go create something beautiful and share it with us.”

Array Themes' Terms and Conditions at July 2015

10 Theme and plugin shop terms of use versus GPL freedoms



Theme and plugin shops deploy a range of approaches as to how they describe the GPL-licensing of their products, from good to not-so-good to bad.

Introduction

There are so many theme and plugin shops out there now that you probably couldn't count them all with even 20 hands. Perhaps not surprisingly, this multiplicity of WordPress businesses has resulted in a wide range of terms of use and licensing statements in relation to the themes and plugins they sell.

Of course, what these businesses say in their terms is constrained – or should be constrained – by the requirements of the GPL, at least in situations where they've created derivative works of WordPress or other GPL'd code or where they've otherwise *chosen* to apply the GPL to their themes or plugins.

In this chapter, I'm going to focus on theme and plugin shops that have expressly applied – or purport to have expressly applied – the GPL 100% to their themes or plugins.

I'm going to discuss four kinds businesses:

- businesses that clearly understand the GPL and get their licensing statements right;
- businesses whose licensing statements are difficult to understand;
- businesses that either don't understand the GPL or do understand it but cloud or misrepresent (either innocently or deliberately) the freedoms that the GPL confers on purchasers of their themes or plugins; and
- businesses who just get the GPL plain and unambiguously wrong.

I'll also comment on businesses whose terms purport to reserve a right to change the licensing of their themes at any time. Note that almost all of the theme shops I've reviewed are commercial theme providers with a listing on WordPress.org.

Before I get into things, I should note that I'm not talking in this post about access to support and upgrades being restricted to paying customers. That's all perfectly legitimate under the GPL. What I'm focusing on here is what businesses' terms of use or pricing pages say in relation to the GPL and what a customer is entitled to do with a theme or plugin it purchases when that theme or plugin is GPL-licensed.

Businesses that get it right



There are many businesses whose terms of use are clear in their GPL licensing and there are generally two variants of the terms used by such businesses. Under the first variant, the businesses keep things simple and say something like: "Our products are licensed under the GPL" or "[name of theme/plugin] is licensed under the GNU general public license" (e.g., WooThemes, Rocket Genius/Gravity Forms).

And within this variant there are those who inject some humanity into their terms. For example, [Array themes](#) says this:

"All digital goods provided by Array are released under the GNU Public License version 2.0. Go create something beautiful and share it with us."

Nice. Even within their minimalist terms they want to delight their customers.

Businesses that opt for the second variant go a bit further and say something like this:

"All [our] themes are licensed under the GPLv2. You can use our themes for personal and commercial projects and for as many websites as you like."

Many businesses' terms are along these lines. In my view, they provide helpful guidance to purchasers.

Businesses whose terms are difficult to understand



I've come across one theme shop that says, without more, that its 'theme code' is licensed under the GPL. But what does 'theme code' actually mean? Would theme code include non-code assets within a theme's zip file? Arguably not. This sort of licensing actually looks more like split/dual licensing to me than full GPL. The intended meaning is unclear.

Businesses whose terms cloud or misrepresent the GPL freedoms

Some businesses who say their themes are GPL-licensed offer basic versions of themes or plugins for free or a low cost as well as 'premium' versions of the themes or plugins which have more functionality. That's all fine. What's not so fine is when they draw a distinction – either expressly or implicitly – between what can be done with a basic or low cost version as against what can be done with the premium version. I'm not referring to the different levels of functionality. Rather, I'm referring to the number of sites on which the theme or plugin can be used. For example, some theme shops say very little or nothing about what can be done with the basic or low cost version but then say, for the premium version, that it can be 'used on unlimited websites' or that purchasing a premium version comes with 'the right to use the theme on an unlimited number of websites'.



To my mind, this may prompt some users to infer that the basic version cannot be used on unlimited websites. Logically, of course, the fact that 'unlimited websites' is stated for the premium version whilst nothing is said for the basic or low cost version doesn't necessarily mean that the basic or low cost version can only be used on a small number of websites or a single website. However, drawing the distinction I've mentioned isn't helpful and does nothing to explain to users of the basic or low cost version that, under the GPL, they too can use their version on unlimited websites. It seems that some theme or plugin businesses draw this distinction to encourage more customers to buy the premium version but I'd suggest that, in doing so, they're not being as transparent as one might expect in relation to what the GPL allows.

Another and perhaps worse variant of this is where a theme shop says that, if you buy one of its GPL'd themes, you can use it 'on any websites you own'. To my mind this is misleading. You do not have to own a website to use the GPL'd theme for that website. You can use it on any website, regardless of whether you own it. Now, I'm not suggesting that this excellent theme shop that is listed on wordpress.org is intending to mislead anyone, but the wording is misleading as it implies that one cannot use the theme on a client's site. This is particularly so when the terms go on to say that, if you purchase a developer package, you can use the theme on an unlimited number of client sites.

Businesses whose terms get the GPL plain wrong

Sometimes businesses' terms of use just get things plain wrong. For example, one business that purports to license its themes under the GPL says that, with a single purchase, you can use the purchased theme 'for multiple sites of your own' but you can't redistribute or resell it to any of your customers or clients. This just isn't right. If I obtain a 100% GPL-licensed theme, I can use it for my own sites, I can use it for client sites, I can give it to my friends, I can give it to clients, I can sell it to clients and I can otherwise redistribute it as I please, as long as I comply with the GPL's terms.



Another business that licenses its themes under the GPL (and it makes it clear that the GPL applies to the PHP, javascript, CSS and images) says its customers are not permitted to reproduce, duplicate, copy, sell, trade or resell its themes. Again, this is wrong. A recipient of a fully GPL'd theme is actually entitled to do all these things.

Purported rights to alter licence terms

Sometimes a business will include a term in its terms of use by which it "retains the right to change... the licensing of ... our themes at any time". On one interpretation, this is contrary to the generally accepted proposition that the GPL is irrevocable (GPL version 3 is much clearer than version 2 on this issue but even version 2 is generally regarded as being irrevocable). A licensor of all the copy-right in a work that it GPL licenses may stop distributing the work under that licence and/or license it under a different licence to others, but it is generally considered that people who already have the GPL'd software can continue to use it and that a purported revocation of those people's rights under the GPL would be ineffective. Similarly, where a GPL'd work consists of a chain of copyright components, all successively licensed by various people under the GPL, one licensor cannot take the whole and purport to apply a more restrictive licence as it won't have the right to do so from the upstream licensors.



The short point is that a theme shop that purports to retain the right to change the licensing of its themes, when those themes have already been licensed under the GPL, should not be read as restricting those who already have the themes from exercising the freedoms that the GPL gives them.

Conclusions

Theme and plugin shops deploy a range of approaches as to how they describe the GPL-licensing of their products, from good to not-so-good to bad. I'm not suggesting that all theme and plugin shops whose terms fall in the not-so-good or bad camps are deliberately misleading customers. I suspect the reality is that some are doing this, for economic reasons, while others or their lawyers have either misunderstood the GPL or used language which just isn't quite right, if not quite wrong.

“Copying all or parts of a program is as natural to a programmer as breathing, and as productive. It ought to be as free.”

Richard Stallman, date unknown

A

Appendix: GPL, version 2

GNU GENERAL PUBLIC LICENSE

Version 2, June 1991

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