FIWARE Opinion Summary

Malcolm Bain, Across Legal, June 2020

FIWARE has set up several procedures for managing intellectual property rights for FIWARE projects and products, based on open source project best practices. These are set out in the FIWARE GitHub repository (https://github.com/FIWARE/contribution-requirements) and the FIWARE Requirements page (https://fiware-requirements.readthedocs.io/en/latest/GE_Requirements/). In addition, FIWARE Association has established in its By-laws that FIWARE product licenses should "*not impose on licensees that applications developed using FIWARE technologies have to be released as open source"*[1].

We have been asked to comment on the validity, interpretation and impact of the inclusion of the following Note ("**FIWARE Note**") which is required by FIWARE for copyleft licensed projects in its "*GE Requirements*" for contributions, and is a "MUST" condition of FIWARE accepting a project for distribution as part of the FIWARE ecosystem. This FIWARE Note must be added within the standard "License" section of the README file associated to the GitHub repository where the code is located.

Licensing and IPR Management Requirements

The source code of the product MUST be licensed under one of the well-recognized open source licenses approved by the Open Source Initiative. The open source license under which source code of the product is licensed MUST be clearly mentioned in a first-level section of the README.md file included in the main GitHub repository. When using a copyleft open source license, the following paragraph MUST be added in the section where the open source license is mentioned:

> *Please note that software derived as a result of modifying the source code of the software in order to fix a bug or incorporate enhancements IS considered a derivative work of the product. Software that merely uses or aggregates (i.e. links to) an otherwise unmodified version of existing software IS NOT considered a derivative work.*

We also note that FIWARE projects also include an express contribution agreement, whereby the contributor assigning or licensing all the rights in the code to the project "owner", so that this "owner" may exercise all the IPRs on the whole software. Under the terms of the contribution agreement we have analysed, the contributors of a project assign all rights in their contribution to the project owner (initial contributor).

The following paragraphs summarise our conclusions on this matter[2]:

Validity: Provided that an initial or subsequent contribution does not constitute derivative works of third-party strong copyleft licensed work, the FIWARE Note may be validly added by the FIWARE project for licensing its code and there is no incompatibility in adding the FIWARE Note to a copyleft licensed FIWARE product. The owner of the copyrights of software code may license its code under the terms of its choice and may include expressions of its intent with regard to that licensing. In addition, for example, the AGPL-3.0 license (most commonly used copyleft license in FIWARE) expressly mentions the ability to include "added permissions" as exceptions to one or more conditions. The FIWARE Project owner may also add this to the licensing of third party contributions in the product, provided they are not derivative works themselves of strong copyleft code or dependencies (something that should be checked as part of the contribution

---

[1] Article III of the FIWARE FOUNDATION e.V Association Code, online at https://www.fiware.org/wp-content/uploads/2018/12/FF_AssociationCode_2018.pdf.

[2] This document is just a summary, and only the full opinion is authoritative.

process), because (a) the contribution copyrights are assigned to the product owner under the contribution agreement and, even lacking that, (b) contributions are only accepted if the contributor accepts the FIWARE IPR policy which includes this statement (so is also specifically making this statement).

Nature: We consider that the primary or most likely view is that the FIWARE Note is an interpretative statement made by the FIWARE project owner and distributor (and upstream, by all contributors contributing to the this FIWARE product under the FIWARE IPR Policy and GE Requirements). This reading is supported by our understanding of (a) the way that the Note is presented (not as part of the license or source code header) and (b) how it is expressed: it is not stated as an additional permission[3] or restriction but the words "is considered" and "is not considered" are stating the intent of the rightsholder and licensor of the code, and the project does not incorporate this consideration as part of the license as a whole. However, there are arguments that the FIWARE Note could be seen as a term of the license, and thus is expressly binding on all downstream licensees too. Indeed, the AGPL-3.0 license indicate in Clause 7 that: "*Additional permissions that are applicable to the entire Program shall be treated as though they were included in this License, to the extent that they are valid under applicable law.*" Similar to the Linux Syscall Exception, we believe that it would be considered as an "additional permission" because it limits what might be seen as the scope of the copyleft provisions of the AGPL-3.0.

Impact on FIWARE users. The binding nature of such a statement will depend on the law applicable to the license in a particular case and how the court would interpret this. However we believe that in most jurisdictions this statement would be held binding on the person making the statement (FIWARE project owner), who would be prevented (estopped) from going back on its statement.

Impact on FIWARE downstream redistribution. The practical impact of the FIWARE Note on downstream applications will be case specific, depending on the architecture of the software code and the type of interactions with other programs using that code, and how that architecture is considered in each case (e.g. whether as a derivative, collective or composed work, depending on jurisdictions). Generally speaking, we believe that most courts would give effect to the Note's consideration of how to treat works that "use" the FIWARE product in question (i.e. not as "derivative works" of the FIWARE product), and thus not extend the terms of the copyleft license to the distribution of such works. In any case:

- If the Note is considered merely an interpretative statement of the FIWARE project members, then downstream licensees of the code who make and distribute a derivative work of the product may remove this statement for its own code (provided it is not upstreamed and contributed into the project, in which case the owner of the derivative work would be agreeing to make the statement). This actually provides greater flexibility and legal security for users who take the code directly from the FIWARE repositories, as they will benefit form the FIWARE Note.
- If it is considered as a term of the license (and if this is the objective of FIWARE, then to give greater legal certainty, we recommend embedding it in the code headers as "AGPL-3.0+Statement"), then the statement will be clearly binding as against FIWARE project owner, and also on all downstream licensees. On its correct wording, it cannot be removed.

A way to avoid the that the Note is considered merely an interpretative statement would be to embed the permission in the code (e.g., as Linux kernel have now done, embedding the GPL+Statement in each of the headers of relevant source code).

---

[3] Contrast with the Classpath and other well known exceptions.