Introduction :
I was asked to make a presentation about permissive versus restrictive OSS licenses. I would like to express two points :
- first : a proprietary license can be more permissive than an OSS license,
- then : OSS licenses are on my point of view an original way to use copyright. In my presentation, I will use the word "Copyright" for "Droit d'auteur".

To explain these points, my presentation will be as follows :
- I will give key points about software protection,
- I will explain my vision of what is a license,
- I will present shortly 3 licenses, namely GNU GPL; CECILL, NewBSD

And before feed-backs and conclusion, I will briefly explain the notion of counterfeiting.

Slide 1 : Software, legal aspects of its protection
As I don't know exactly how high is the legal knowledge of the audience, it appears to me very important to set up the scene of our discussions. What we can say about the legal protection aspects of a software.
First, it's an IP tool protected by copyright. I will not deliberately enter the polemic whether software programs are to be protected or not.
Because of its nature, the legal protection of a software is divided between moral rights and economic rights (what we call in French "droits patrimoniaux").
Moral rights with regards to software is essentially the fact to claim for paternity of a work or to make an opposition when modification of a work is harmful to the honor or the reputation of the author.
Economic rights are exploitation rights such as reproducing, translating, modifying and so on.
Two other points have to be underlined :
- the duration of the monopoly is very long : almost 70 years after the first display,
- the protection can be obtained without formality.

My purposes are very sight and details can be found in the following texts :
- France : Intellectual Property Code
- United States : Copyright Act and DMCA
- Worldwide : Berne Convention and its revisions

Slide 2 : License, a regulation tool

Regulation, because it maintains forces in balance.
A license is a contract in which an author, while preserving, the whole property of his work, confers more or less possibilities to a licensee for implementing his rights.
I insists on the expression "more or less" because some people may consider that a license is permissive when the possibilities offered are the highest and vice versa.
The distinction has to be considered with the common ideas around OSS (Open Source Software).
I was told recently that this approach (restrictive / permissive) could be expressed in another more positive way. The idea is that the rights granted by a license has to be implemented with more or less reciprocity.
A license is a charter of what you are allowed to do and in which conditions. It implies confidence.

Two categories are frequently identified ; the proprietary and the OSS licenses. I will not distinguish the Open Source Initiative definition from the Free Software one. But, what I want to say is that theses definitions have something in common : they don't deny the copyright, they use it in an original way to produce the effects they want. A it's important to have in mind that copyleft is not the antithesis of copyright. Proof of this : if these licenses were not based on copyright, the authors would only have dedicated their works to the public domain. For more precision, when a work is in the public domain whether because it is no longer protected or because the author has deliberately dedicated his work to the public domain, therefore no one can reserve any property rights on this work.

To conclude about license, I would say that the more freedom you have, the more you must feel.

Slide 3 : Copyright infringement, counterfeiting

Just for your information, it is not possible to discuss about copyright and licenses without discussing of the "natural" legal risk concerning IPRs (Intellectual Property Rights).

First a definition. I just explained what are the rights of the author. Counterfeiting can be defined as the violation of at least one of the rights attributed to a software.

There are several criteria (territorial point of view) : sovereign appreciation of the judge who bases himself on the resemblances and not on the differences. Examples of elements taken into account: structure of the program, slavish copy of source code, sequence of the screens, order and logical organization of the functions and structures of control, numbers characters, weight, format, names of the files, functionalities…

The sanction can be : prison and money compensation.

Slide 4 : OSS Licenses : GNU GPL/CeCILL/BSD

I will briefly present 3 OSS license.

- GNU GPL because it is one of the most used and the most criticized (not only because of its content but also because its frequent use makes it visible),
- the CECILL license because it is inspired by the GPL but it tries to perform its validity conditions on a legal point of view,
- the NewBSD license, because it is very often presented as far as possible from the GPL, qualified as permissive and underlined for its shortness.

GNU GPL license authorizes to use, modify, distribute a program (source code). The compensation is to leave the copyright notices, possibility to get the source code. It offers no warranties, no responsibility. It implies to distribute the program modified or not with the same license, that's why it is considered as "viral".

CeCILL is a recent license and it was produced by CEA, CNRS and INRIA in order to contribute to a better legal safety for OSS license and especially GPL. CeCILL license is GPL based and offers the same rights and compensation but it proposes different approach for liability and warranties. It makes it more valid with regards to French law

NewBSD license authorizes to distribute, use, modify, with or without source code, modified or not. In compensation, copyright notices and terms of the license are to be kept. It is the classical example for a non copyleft license.

It is important to note that there is a proliferation of licenses (almost 50 exists), to such a point that it is in the air to reduce their numbers. This point divides the community.

Slide 5 : OSS Feed back (1)

First important point : the legal framework has not been tested yet. There are few cases and what appears clearly is that there is a move of the natural risk (counterfeiting) towards the compliance to contract. A German known case for example did not have the purpose to declare whether GPL was valid or not but it showed how not complying with an OSS license could have consequences.

What illustrates this general trend is the famous insurance company Lloyd's is studying the possibility to offer an insurance which will cover up to $10 million in damages, including profit losses related to non compliance with an open source software license. The policy could, in some cases, cover the cost of repairing code that was found to infringe on open source licenses such as the GPL.

We could also ask ourselves why this situation occurs. I don't have in mind fixed reasons but my opinion is the following :

- no one has a real interest to invalid an OSS license because consequences of such a decision could be harmful that the initial problem,
- with regards to numbers of IPRs circulating, we note that conflicts brought to courts are not so numerous. Lots of them are solve by arbitration or transaction and kept secret,
- a way to test the reaction of courts concerning OSS licenses. It is a legal ground complicated due to the multiple nationalities in presence and the numerous problems of interpretation.

Slide 6 : OSS Feed back (2)

We explained that there are lots of licenses and consequently a problem of compatibility of the different licenses. BSD is compatible with GPL but GPL is not compatible with any other license. This question is a crucial point, especially if OSS business models want to be safe and to develop peacefully.

Therefore, news concepts appears such as OSS management, tests of the source code infringement… It creates a new business.

An other example : INRIA is creating a prototype, a tool in order to make a diagnosis of the legal status of a source code. It is divided in modules. One of these modules allow to follow the legal status of the code. It defines also a journal of the IP events which could impact the final legal status of the whole source code. An other module allows someone to audit/analyse its source code. This analysis can later be used to correct the problems if any, in order to choose an appropriate license to distribute the program.

I would like to draw your attention on another positive feed back. One of the most important force of the OSS world is the force of its community. It is the force of this community which permits that most of the bugs are corrected within a 24 hours delay.

An this force could be useful to organize the defence of the rights of authors. For example, the web site gnu-violations.org. Here again, the defence is based on the compliance to the license.

Slide 7 : Conclusion

To choose a license, the question is not to consider whether it is permissive or not, but to ask relevant questions such as :

- Your intentions for the developments : who will make the developments, what will be the status of the contributions …,
- Your intentions for the distribution : to whom and why ?
- To keep in mind that your intentions may change : use a flexible model.