

OSS in Europe: the wider picture

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Introduction – Overview

- ▼ Combining Open Source (OS) and proprietary software
 - "Viral effect" as the main risk of software combinations
- ▼ Separate licensing terms
 - ▼ Combining GPLv2/GPLv3/other free licenses
 - ▼ Combining proprietary and free licenses
 - ▼ Statutory warranties and liabilities vs. §§ 11, 12 GPLv2
 - ▼ Legal issues regarding T&Cs
- ▼ German Case law on GPLv2
 - ▼ Basic findings of German courts
 - ▼ Who may sue for infringement?
- ▼ Spotlight on GPLv3



Main risk: "Viral Effect" (1)

- ▼ Viral Effect – to be considered beforehand whenever OS is embedded into or otherwise combined with proprietary software
- ▼ Only when distributing or publishing a work
 - ⇒ Combinations for merely internal use are not at risk of being entirely "GPL-infected"
- ▼ Wording leaves room for interpretation:
 - ▼ When does a work "contain" GPL-licensed software?
 - ▼ When is a work "derived from" GPL-licensed software?
 - ▼ Wording still unclear under GPL v3 (criterion: "modification")
 - ⇒ To "*modify*" under GPL v3 means to "*copy from or adapt all or part of the work in a fashion requiring copyright permission, other than the making of an exact copy*".



Main risk: "Viral Effect" (2)

- ▼ No case law on scope and enforceability of viral effect
- ▼ Scholars may uphold their views under GPLv3, e.g.:
 - ▼ Viral effect applies in case "new" code can only be loaded together with GPL-licensed code.
 - ▼ Viral effect does not apply to compiled program created with a GPL-licensed compiler (unless the compiled program contains elements of the compiler code).
- ▼ Key message: Technical interplay between OS software and proprietary software to be thoroughly examined
 - ⇒ Contractual structure do be determined accordingly.



Separate licensing terms (1)

- ▼ Separate licensing terms for different elements of one software product (≠ "dual licensing")
 - ▼ How can this work?
- ▼ Compatibility of GPLv2 and GPLv3?
 - ▼ Not compatible "per se"
 - ▼ Compatible only where GPLv2-licensed code is licensed under GPLv2 "or later"
 - ⇒ Where code is "only" GPLv2-licensed, original code or modifications cannot be "upgraded" to GPLv3 without the developers' consent.
- ▼ Compatibility of GPL with other free licenses improved through release of GPLv3:
 - ▼ GPLv3 is compatible with more other free licenses than GPL v2 – <http://www.fsf.org/licensing/licenses/quick-guide-gplv3.html>



Separate licensing terms (2)

Statutory warranties and liabilities vs. §§ 11,12 GPLv2

- ▼ §11 GPLv2 / §15 GPLv3:
 - ▼ Disclaimer of warranties for defects and functionalities
 - ▼ Provision of code “As-is”

- ▼ §12 GPLv2 / § 16 GPL v3:
 - ▼ Exclusion of liabilities for damages

- ▼ Comparable "US-style" provisions in other OS licenses

- ▼ Are these compatible with statutory warranties and liabilities in civil law jurisdictions?



Separate licensing terms (3)

Statutory warranties for defects vs. §§ 11, 12 GPLv2

- ▼ Proprietary elements licensed under sale or lease concept?
 - ▼ Sale: (exclusive or non-exclusive) perpetual licence against a one-time licence fee
 - ▼ Lease: (exclusive or non-exclusive) licence limited in time against recurrent licence fees – indefinite, but terminable licences (even if with 1 upfront-payment)

- ▼ Statutory regime of warranties for defects
 - ▼ For both sale and lease:
 - ▼ Re-establish the contractually agreed functionalities / perform error correction; and
 - ▼ Cure defects in title (third party rights to software)

- ▼ Warranty period (e.g. German law):
 - ▼ 2 years for sale
 - ▼ Term of contract for lease



Separate licensing terms (4)

Statutory warranties for defects vs. §§ 11, 12 GPLv2

Statutory remedies for breach of warranties

- ▼ Sale: failure to correct in a (reasonable cure) period, after preceding notice by licensee:
 - ▼ Reduction of the purchase price or rescind the agreement; and
 - ▼ Compensation for damages resulting from the error (including indirect and consequential damages, loss of profit etc.)
- ▼ Lease:
 - ▼ Automatic reduction of the lease to the extent the error reduces the operability/value of the leased software; and
 - ▼ Failure to repair within a (reasonable) period, right to terminate the lease; and
 - ▼ Compensation for damages resulting from the error (including indirect and consequential damages, loss of profit etc.)



Separate licensing terms (5)

Statutory liability regime vs. §§ 11, 12 GPLv2

Statutory liabilities

Starting point under German statutory law:

- ▼ Unlimited liability for any kind of damages resulting from willful or negligent conduct
- ▼ No exclusion or limitation for willfulness, death, bodily injury, product liability – needs to be expressly carved out from any kind of limitation clause
- ▼ Regular statute of limitation: 3 years from time of knowledge of damage occurrence (2 years for damages inherent to/directly resulting from defective software)



Separate licensing terms (6)

Statutory liability regime vs. §§ 11, 12 GPLv2

German law: Very strict judicial control of standard T&Cs:

It is not possible to

- ▼ Limit liability for gross negligence – needs to be expressly carved out from any kind of limitation clause
- ▼ Limit liability for regular/slight negligence further than to the *typically foreseeable damage* for a negligent breach of a *substantial* contractual duty
- ▼ Exclude liability for regular/slight negligence other than for breach of non-substantial contractual duties
- ▼ Generally exclude liability for indirect or consequential damages (including loss of profit) or insert specific liability caps (amounts or percentage-relations)



Separate licensing terms (7)

Extension of statutory warranties/liabilities to OS?

- ▼ Exclusion of warranties and liabilities under §§ 11, 12 of GPLv2 (or comparable section of other license) are incompatible with (German) law on standard T&Cs
- ▼ How to mitigate the risk of being held liable for OS elements
 - ▼ Starting point under (German) legislation on standard T&Cs: Intransparent clauses are unenforceable!
 - ⇒ Clear and transparent reference to applicable OS licenses
- ▼ Conclusion for drafting issues:
 - ▼ Distinct warranties and liability disclaimer for OS in the same contractual documentation?
 - ▼ “Side-letter licensing“?



German case law on GPLv2 (1)

Introduction

- ▼ German courts the first courts worldwide to rule on GPLv2
- ▼ No case law on GPLv3
- ▼ Underlying cases/alleged infringements:
 - ▼ Distribution of devices (W-LAN router, mobile phone) run by OS code
 - ▼ Without providing a copy of GPLv2-license terms
 - ▼ Without making available the source code
 - ▼ 3 injunctive proceedings; 1 main proceeding
- ▼ Findings not yet confirmed by German Federal Supreme Court



German case law on GPLv2 (2)

Basic findings

- ▼ Provisions of GPLv2 effectively agreed as a contract between licensor(s) and each individual licensee as standard Ts&Cs
- ▼ Duties to provide copy of GPLv2 and to make source code available held enforceable with regard to original code
- ▼ No case law on “viral effect“ so far



German case law on GPLv2 (3)

Basic findings (continued)

- ▼ Automatic termination of license upon breach of GPLv2 held enforceable as a conditional license grant
 - ▼ Not inappropriately burdensome:
 - ▼ Third party licenses remain unaffected
 - ▼ Licensee can always re-acquire a “new” license under terms of GPLv2
 - ▼ Concept slightly amended under GPLv3: Opportunity to cure breaches



German case law on GPLv2 (4)

Who may sue for infringement?

- ▼ OS software is typically the result of joint development work by a community of software developers
 - ⇒ Who may sue infringements?
- ▼ German cases initiated by German individual *Harald Welte*, founder of organisation aiming at enforcement of the GPL license terms (www.gpl-violations.org)
 - ▼ Harald Welte's suits based on **fiduciary exclusive licences** granted to Harald Welte by developers of the core parts of certain open source software
 - ▼ German courts held this exclusive license grant to build a sufficient legitimate interest



German case law on GPLv2 (5)

▼ Extension of liability to distribution platform?

In latest case (*Welte./Skype*), mere distribution platform held liable for infringement by manufacturers of VoIP-telephones – court decision not yet final and binding

▼ Relevant court decisions:

- ▼ LG München I, Az. 21 O 6123/04 – *Welte./Sitecom Deutschland GmbH* (injunction)
- ▼ LG Berlin, Az. 16 O 134/06 – *WLAN-Router* (injunction)
- ▼ LG Frankfurt a.M., Az. 2-6 O 224/06 – *Welte./D-Link Deutschland GmbH* (main proceeding)
- ▼ LG München I, Az. 7 O 5245/07 – *Welte./Skype Technologies SA* – (injunction – not final and binding)



Spotlight on GPLv3 (1)

- ▼ Published on June 29, 2007
- ▼ Applies where expressly stated by licensor or (at licensee's choice) where a programme has been licensed globally under "GPL" or under "GPLv2 and *any later version*"
- ▼ Maintains basic concept and character of GPLv3:
 - ▼ "Copyleft" character (viral effect)
 - ▼ Obligation to provide copy of license terms
 - ▼ Obligation to make source code available



Spotlight on GPLv3 (2)

- ▼ Introduction of new terms (as a reaction on attempts to undermine the GPLv2-terms), in particular:
- ▼ Prohibition of “**tivoisation**”
 - ⇒ reaction on scenarios where programs are licensed under OS license, but where hardware prevents users from running modified versions
- ▼ Prohibition of “**discriminatory patent license deals**”
 - ⇒ reaction on GPL-adverse patent license deals, e.g. regarding the grant of patent licenses which only work in favour of users having obtained the OS code from specific distributors, thus preventing free-onward licensing



Final comments and conclusions

- ▼ Structure and design of contract must follow and reflect the technical facts of individual software combination
- ▼ Detrimental consequences of “viral effect“ make careful assessment of technical facts a valuable time investment
- ▼ Further case law to be observed:
 - ▼ Existing case law has not dealt with viral effect
 - ▼ Existing case law has not been confirmed by German Federal Supreme Court
 - ▼ No case law on GPLv3 so far



Your Questions?

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Thank you for your attention!

