Transnational Law for Transnational Communities

The Emergence of a Lex Mercatoria (or Lex Informatica) for International Creative Communities.

by **Axel Metzger,** Dr. iur. (Munich and Paris), LL.M. (Harvard), Professor of Law at the Leibniz University of Hannover, Institute for Legal Informatics, Germany.

Abstract: Open Source Communities and content-oriented projects (Creative Commons etc.) have reached a new level of economic and cultural significance in some areas of the Internet ecosystem. These communities have developed their own set of legal rules covering licensing issues, intellectual property management, project governance rules etc. Typical Open Source licenses and project rules are written without any reference to national law. This paper considers the question whether these license contracts and other legal rules are to be qualified as a lex mercatoria (or lex informatica) of these communities.

Keywords: Open Source Software, Creative Commons, Private International Law, Choice of Law, Lex Mercatoria

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Recommended citation: Axel Metzger, Transnational Law for Transnational Communities The Emergence of a Lex Mercatoria (or Lex Informatica) for International Creative Communities, 3 (2012) JIPITEC 3, 361.

A. Free and Open Source, Creative Commons: An alternative model for innovation and creativity

1 Free and open source communities (the terms are used synonymously in this paper) have their historical roots in the 1980s when software began to be marketed as an independent commercial good on the IT markets. Before that time, software was mostly given away for free to hardware customers as an add-on and accompanied by the source codes. The source codes enabled customers to debug and modify the software according to their needs. With the advent of mass-market personal computers in the 1980s, IT companies started to sell or license software as a product independent from the hardware and to provide their customers only with closed source versions of their programs. During this time, today's leading software industry players, such as Microsoft, SAP, Oracle and Adobe, developed the business model of standardized closed source software products.[1]

2 For programmers interested in analysing and modifying software – 'hackers' as they were called at the time[2] – this new era of closed software was felt as a threat to their way of working with software. Therefore, some first small projects, the most prominent being Richard Stallman's GNU project founded in the US, started to create free software programs that would be available for everybody interested in object and source code form.[3] The GNU project developed faster than anybody could have expected. The most important step in the development of the project was the contribution of an operating system kernel called 'Linux' provided by the Finnish student Linus Torvalds in 1991.[4]

Together with the already existing GNU modules, the GNU/Linux operating system has been stable since the early 1990s. Today Linux is used on a worldwide basis, especially in the markets for smart phones ('Android' is a Linux derivative), on servers and in the embedded sector, e.g. as a control systems for machines etc.

3 Linux undoubtedly is the most prominent free software. However, there are many more comparable projects. Some evolved (like GNU/Linux) as bottom-up projects of hobby programmers or freelancers that started with a few lines of code. Samba is another example of this type of project.[5] Others projects are driven by commercial software companies that earn their money by services and customizing. The database program MySQL is an important project of this type.[6] Still other projects use pre-existing commercial software, which was no longer competitive in the classical development model, as the basis of an open source project. The most prominent example is the web browser Mozilla Firefox.[7] Another type of open source project is represented by the web server Apache, which was originally built on publicly funded code provided by the National Center for Supercomputing Applications at the University of Illinois. Since the 1990s, the Apache project has completely replaced the NCSA code.[8]

4 Despite the differences in the origins and goals of these and other open source projects, all projects use free or open source licenses for the organization of their communities. According to these licenses – the most prominent of which is the GNU General Public License[9] used for GNU/Linux and many other free software projects – users may acquire the right to use, copy, modify and distribute the licensed software. However, these rights are linked to licensee obligations. All open source licenses oblige the licensee to give a copy of the license text to the recipients of the program. Also, all notices in the source code that refer to the applicable open source license, all copyright notices, and disclaimers of warranty and liability most be duplicated when the programs are copied. These common features of open source licenses have been compiled in widely accepted definitions of 'open source' or 'free software' licenses that provide lists of more or less identical criteria.[10] Community organizations like the Free Software Foundation and the Open Source Initiative 'officially' recognize licenses as being 'free' or 'open source'. Therefore the delimitation of the license model is clearer than it may appear at first glance.

5 Simple open source licenses – for example, the so-called BSD licenses[11] – are liberal in the sense that they do not provide more extensive obligations for the licensees. Other licenses, like the GNU General Public License, provide the additional duty for licensees to distribute modified versions of the program only under the terms of the applicable open source license. These so-called 'copyleft' provisions limit the licensee's freedom to commercialize derivate versions of pre-existing free software.[12] However, the concept of 'copyleft' guarantees that those who have profited from the free software community must pay back to a certain extent.

6 The success of the open source development and distribution model has triggered the development of comparable communities in other sectors of media and culture. The most prominent initiative is Creative Commons, which was founded in 2001 mainly by US law professors.[13] Creative Commons provides standardized license contracts that may be used by authors of copyright-protected works to disseminate their contents under a liberal license regime which allows users to redistribute the contents. Some of the licenses allow for commercial use and modifications, while others are more restrictive.[14] With an open source software license, the users are under the obligation to duplicate the license terms and disclaimers. Some creative commons licenses contain a 'share-alike' clause comparable to the 'copyleft' provisions of open source software licenses. A second well-known 'open content' initiative is Wikipedia, an online encyclopaedia written by a worldwide community of authors who distribute and modify the articles of the encyclopaedia in accordance with the GNU Free Documentation License and a Creative Commons share-alike license.[15]

B. The specific issues of creative communities in private international law

7 The interesting issue of open source and open content licenses for international lawyers is the international composition of the projects. Many of the communities are literally spread around the world with programmers (or authors) situated in the US, Europe, East Asia and other regions of the world.[16] Typically, the exclusive rights in the works (or parts of the works) remain with the authors contributing to the project (or with the employer).[17] As a consequence, each user of an open source program who is interested in redistributing the software (and therefore is in need of a license) must conclude a license contract, according to the terms of the applicable open source license, with a number of licensors situated in a number of different jurisdictions.[18] In fact, having concluded 'a' license contract to use a free software program technically means that the licensee has concluded a multitude of license contracts. This raises the question of which law shall be applicable to these license contracts.

8 For a court situated in the European Union, Article 4 Rome I Regulation[19] would govern the question of which law shall apply to a license contract if the parties have not chosen the applicable law. Article 4(1) provides specific rules for a variety of contracts but not for contracts concerning intellectual property rights. For contracts not covered by Article 4(1), Article 4(2) refers to the characteristic performance test, i.e. 'the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence'. Courts may deviate from 4(1) and 4(2) if the contract is 'manifestly more closely connected' with another country (see 4(3)). A court may also apply the closest connection test if the applicable law cannot be determined under 4(1) and 4(2) (see 4(4)). The ECJ has not yet decided on the applicable law to license contracts. There is also no reported national case law of the EU Member States' Supreme Courts, since the Regulation applies only to contracts concluded after 17 December 2009. Following the 'pre-Rome I' rules of some EU jurisdictions and the current Swiss law, the law of the licensor would govern a license contract. This solution was applied in a patent case by the German Bundesgerichtshof in a decision of 2009 ('*Sektionaltor*').[20] It was also supported in a copyright case by the Austrian Oberster Gerichtshof of 2009 ('*F.-Privatstiftung*')[21] and in a trademark decision by the Swiss Bundesgericht of 1975 (*Togal/Togal*).[22] The Swiss legislator adopted the same approach as a general rule in Article 122 Bundesgesetz über das internationale Privatrecht of 1987 (Federal Act on Private International Law). According to Article 122, all intellectual property contracts shall be governed by the law of the state of habitual residence of the right holder. However, Article 122 is not without exceptions. If the contract has a closer connection to another state, in particular to the state of residence of the transferee or licensee, the law of that state shall apply.[23] The application of the law of the licensor is also suggested as a basic presumption or fall-back provision by the currently discussed international collections of soft law principles and reform proposals on the subject (see § 315 para. 2 ALI Principles,[24] Art. 3:502 para. 3 CLIP Principles[25] and Art. 306 para. 2 Transparency Proposal[26]). As a result of this solution, the laws of different jurisdictions would be applicable for a piece of software that appears for the licensee as one homogeneous product.[27]

Illustration:

A produces printing machines for large-scale printing industries. The machines are controlled by an embedded GNU/Linux operating system. A produces 100 of these machines with the embedded software per year. A wants to know whether the authors of the software may be held liable for bugs. Under the assumption that the law of the licensor is applicable for all contractual issues, A must apply for each portion of the code the law of the habitual residence of the respective author.

9 Another solution would be to apply the law of the licensee. The Austrian Bundesgesetz über das internationale Privatrecht of 1978 (Federal Act on Private International Law), before the enactment of the Rome I Regulation, pointed in Article 43 to the law of the habitual residence of the licensee for all multi-state license contracts irrespective of the rights and duties of the parties. A similar rule was provided for in section 25(c) of the former Hungarian Act on Private International Law of 1979. German and French courts also applied the law of the licensee to publishing contracts.[28] The application of the law of the licensee has also been suggested as a basic presumption by Article 307 para. 2 of the recent joint Japanese-Korean proposal for law reform.[29] Under this solution, the user of an open source program could rely on the applicability of one single law when using the program. However, this approach would shift the uncertainty to the side of the licensor because it would now be the licensor's burden to apply a multitude of applicable laws if the user community is international.

10 A third solution would be to apply the law of the protecting country as *lex contractus*. This solution was applied by the Oberlandesgericht Düsseldorf in 1961 in the case of an exclusive patent license granted by a French right holder to a German licensee as part of a cross-license agreement.[30] Applying the *lex loci protections* was also supported by Article 43 of the former Austrian Bundesgesetz über das internationale Privatrecht of 1978 (Federal Act on Private International Law) for single-state licenses. Article 306 of the Transparency Proposal follows the same approach. The law of the protecting country is used as the primary fall-back provision in Article 3:502(3) CLIP Principles for single-state licenses. It also has some support in scholarly writing.[31] This approach would foster legal certainty for users because they could rely on their national law when making use of the software or contents. Also, this approach would prevent dépeçage between the contractual issues of the license contracts and the intellectual property aspects. But the approach has the disadvantage inherent to all 'mosaic' theories in private international law. Applying multiple territorial laws to ubiquitous legal relationships significantly raises the complexity for the right holder. Applying a territorial approach to internationally used licensed contracts may also have the effect of a race to the top with regard to the legal restrictions on freedom of contract: If, for example, a licensor wants to exclude the liability for mistakes in an open source program, the licensor will have the choice of either using the most restrictive contract law regime or taking the risk that the waiver will be unenforceable in certain jurisdictions.

11 Some open source licenses try to evade this problem by explicit choice-of-law clauses. An example of such a clause may be found in Section 11 Mozilla Public License Version 1.1 ('This License shall be governed by California law provisions (except to the extent applicable law, if any, provides otherwise), excluding its conflict-of-law provisions.').[32] Such clauses are acceptable for an open source community if all or at least most contributors are residents of one jurisdiction. However, for a truly international community of programmers it will hardly be acceptable to regulate their legal relationships in accordance with the law of the habitual residence of one part of their community. Also, it may well be the case that both the licensor and the licensee are not residents of the state of the chosen law but are both residents of another state. Here, it may be that the conflict-of-law rules of their home jurisdictions will not accept their choice or, as is the case for Article 3(3) Rome I Regulation, apply the internally mandatory provisions of the jurisdiction of their common residence state. Against this background it is not surprising that open source licenses rarely contain classical choice-of-law clauses referring to the law of one country. The recently published revised Mozilla Public License Version 2.0[33] refers to the law of the state of the defendant's principal place of business.

12 Another strategy for the international usability of open source or open content licenses is the creation of national versions of the licenses that comply with the requirements of specific jurisdictions. The most advanced project following this policy is Creative Commons International.[34] Creative Commons has created national license versions for more than 50 jurisdictions. These 'ported licenses' are based on the international ('unported') license suite, but they differ in that they have been modified to reflect local legal requirements and to comply with the local language. Some of the ported license versions comprise a choice-of-law clause referring to the law of the given jurisdiction.[35] Besides these national license versions, Creative Commons provides an 'unported version' which may be used for jurisdictions without a 'ported' version. The 'unported' licenses are without a choice-of-law clause. Although it may look helpful at first sight to have locally adapted versions of the licenses, using these national license versions may even worsen the legal difficulties of creative communities (see the following illustration).[36] Also, the legal costs of such a solution are extremely high and may hardly be borne by typical non-profit communities.

Illustration:

A is a historian at the university of Bucharest. He has created a database of Jewish cemeteries in Central and East Europe consisting of some hundred entries with maps, photographs and descriptions in different languages. A wants to share the database with other interested researchers in Romania and abroad. After visiting www.creativecommons.org, he chooses the Creative Commons Attribution-ShareAlike Version 3 Romania. The license text is in the Romanian language. According to Section 8 lit. f) Romanian law is applicable. B from Berlin finds the database on the Internet. He makes a number of important entries on cemeteries in Germany and wants to make this modified version available on his private website. Unfortunately, B does not read Romanian. In this case, B would be worse off as compared to the use of the 'unported' license version because he would have to translate the license terms before reading them. It could even be that under German contract law, standard terms in languages which may not be expected to be understandable for contracting parties may be unenforceable, especially in the case of consumers.

13 The most important open source licenses, especially the GNU General Public License Version 2.0 which is used for more than 40% of all free software in the market,[37] do not contain choice-of-law clauses. The GPL and most other open source licenses follow a strategy of generic license terms. The idea behind this strategy is to use a terminology that is as close as possible to the international treaties in the field and, for subjects which are not covered by international treaties, as neutral as possible, i.e. to define the used terms and to avoid terminology that is clearly bound to a specific jurisdiction. This drafting technique aims to facilitate the worldwide acceptance of the licenses, irrespective of the applicable law in a given jurisdiction. The most advanced license following this strategy is the GNU General Public License Version 3, which was published in 2007.[38] The GPLv3 uses artificial terms and definitions instead of the commonly used terminology to avoid any hasty association with national categories; for example, it uses the term 'convey' instead of distribute or make available. A similar strategy has been chosen for the Creative Commons 'unported' licenses, which are not designed for one specific jurisdiction. Section 8 lit. f) of the Creative Commons Attribution-ShareAlike Unported 3.0 even explains the strategy explicitly: 'The rights granted under, and the subject matter referenced, in this License were drafted utilizing the terminology of the Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), the Rome Convention of 1961, the WIPO Copyright Treaty of 1996, the WIPO Performances and Phonograms Treaty of 1996 and the Universal Copyright Convention (as revised on July 24, 1971).'

C. Applying community principles as a lex mercatoria

14 Regular private international law principles are based on the idea that international legal relationships should be governed by the law of a state (or the law of several states) to which the parties involved and

the facts of the case have the closest connection. But this approach, as has been shown, leads to unsatisfactory results in the case of international open source or free content communities. A more tailor-made solution reflecting the specific needs of open source communities could be based on the theory of *lex mercatoria*. The traditional *lex mercatoria* theory is based on the idea that the international community of traders has developed over time a body of internationally customary rules independent from the law of specific states.[39] According to the classical narrative, the old *lex mercatoria* was unwritten law developed and applied by the medieval courts of admiralty. Modern theories of *lex mercatoria* refer to the UNIDROIT Principles for International Commercial Contracts, to the body of rules developed in international arbitration awards and to international contractual practice as sources for a new unwritten non-state law of international commerce.[40]

15 It is this last prong of *lex mercatoria*, the international contractual practice, which could serve as a theoretical link between open source communities and *lex mercatoria*. Developers working together in international programming communities are not just international by composition. They are also characterized by a high level of social homogeneity. Linux kernel programmers are freelancers or employed programmers interested in a high-quality software available for everybody. Some of these programmers are driven by commercial intentions, especially if it is their business model to provide services for industry Linux users. Others may contribute to the project for altruistic reasons. But these differences in motivations and strategic goals have not destroyed the common understanding of how open source or free software should be developed and distributed. This common understanding is expressed in the already-mentioned definitions of free or open source software which describe the basic principles of the communities. An even more concrete expression of these community-wide principles are the common features of the different open source licenses. Although there are more than 100 open source licenses currently used in the market,[41] the basic features of these licenses follow the same pattern. Against this background, one could argue that open source communities have developed a body of independent rules of law that are accepted in the community. These rules are not just social norms. They are enforced in practice, from time to time in state courts but more often in out-of-court settlements.[42]

16 What would be the practical consequence of detaching the legal rules of open source or free content communities from any state law? As a starting point, one should be very clear about the fact that any *lex mercatoria* approach may only be applicable in those areas of law where the parties are free to choose the applicable law. Therefore, the intellectual property issues of the license contracts – especially questions such as eligibility for copyright protection, scope of protection, limitations and exceptions under copyright law, and initial ownership – may not be subject to a *lex mercatoria* approach.[43] Also, internationally mandatory provisions could not be bypassed. However, there would still be an important list of legal issues of a contractual nature that could be governed by the autonomous community standards of open source or content communities, including formation and validity of license contracts (or unilateral instruments); language requirements under contract law, especially for standard terms and conditions; interpretation; warranty and liability; and breach of contract and remedies.

17 Allowing the choice of a specific *lex mercatoria* for open source or free content communities would raise the additional question of how explicit this choice must be or whether the community principles may also be applied in the absence of a choice of law. For arbitrators it may be a possible approach to apply community principles without an explicit or implicit choice made by the parties.[44] For state courts such an approach will hardly be acceptable, at least if private international law provisions like Article 4 Rome I Regulation ('the law of the state') are applied. One possible solution could be to interpret the drafting approach behind the generic license terms as an implied choice of the community principles. Such an approach would reflect the intention of the parties to avoid the application of the law of any specific jurisdiction.

18 Under the approach described, the yardstick for the interpretation, gap-filling and – even more problematic – the review of specific clauses of the license contracts would be the body of common principles followed by all open source or free content licenses. The arbitration tribunal or court would have the task of checking several licenses in the field and applying their common features as the 'golden mean' of the respective license model. One example for this approach could be the 'termination clause' which is used in the more comprehensive licenses. Under these provisions, the license grant to a specific licensee is automatically terminated in case of non-compliance with the license terms. Provisions of this type may be found in Section 8 GPL Version 3,[45] Section 8 Mozilla Public License Version 2.0,[46] Section 7 Common Public License[47] etc. The less elaborated and simpler licenses, such as the BSD licenses,[48] do not provide explicit rules on the consequences of a breach of the license terms by a licensee. Here, it would be an appropriate solution to apply the common features of the termination clauses in other open source licenses as a gap-filling tool.

19 As a matter of fact, open source license only regulate the core rights and duties of the parties involved and are inevitably incomplete bodies of contract rules. For general questions of contract law not addressed in open source licenses – such as authority of agents, third-party rights, calculation of damages etc. – the UNIDROIT Principles for International Commercial Contracts could be applied.[49] The UNIDROIT Principles are currently available in version 3 of 2010. Version 3 comprises 211 detailed articles on the main questions of contract law and the law of obligations. The Principles have been drafted under the auspices of the UNIDROIT Institute in Rome since the early 1980s by a group of academics from different jurisdictions.[50] According to the preamble, the UNDROIT Principles may be applied 'when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like'. If one agrees that the license contracts used by transnational creative communities should be governed by a specific type of *lex mercatoria*, the UNIDROIT Principles could serve as a subsidiary source of law for all questions not covered by the specific license in question and not covered by typical free software or content license.

Illustration:

X is distributing tax calculation programs for business customers. He uses the 'Randomfunc' system library for some of the basic functions of the programs. The library was written by programmers A, B and C who are residents of the US, Canada and Brazil. The library is licensed under the terms of the GNU GPL Version 2. Under Section 2 b) GPL 2, modified versions of licensed programs may only be distributed under the terms of the GPL. Under Section 3 b), any person distributing a licensed program must 'give any third party a complete machine-readable copy of the corresponding source code'. X modifies the library and adds some new functions, i.e. for the calculation of different currencies. He distributes the modified library as part of 'his' program without giving any notice of the use of GPL software to his customers. Also, the software is distributed on a binary-only basis without the source codes. Y, who is also in the business of tax calculation software, buys a copy of X's software. After reverse engineering the program, he believes that X has used a modified version of the 'Randomfunc' system library. He gives notice to A, B and C about the license violation. Unfortunately, A, B and C are reluctant to enforce the license terms against X because they cannot reach an agreement about the potential legal costs of such an attempt. Finally, Y contacts X directly and solicits the source codes of the modified library referring to Sections 2 b) and 3 b) GPL Version 2. X answers that the GPL Version 2 is not an enforceable contract due to the lack of 'consideration'. Also he rejects any third-party rights which Y may enforce directly against X with the argument that under the privity doctrine of his jurisdiction, third parties are excluded from any contractual claims. In this case, it would be a sensible approach to refer to Article 2.1.1, 3.1.2 UNIDROIT Principles, which reject any consideration requirement for the formation of a valid contract. The UNIDROIT Principles could also be useful to solve the question of third-party rights. Under Article 5.2.1 UNIDROIT Principles, the 'existence and content of the beneficiary's right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement'. Hence, the parties to a contract may allow for direct claims of third parties against the promisor. This intention must not be expressed explicitly.[51] However, it is a question of contract interpretation whether Section 3 b) may be construed as creating a right for third parties to claim directly for the disclosure of the sources of a GPL program.[52]

D. Conclusion

20 The question of whether a *lex mercatoria* approach is advisable for open source and other creative communities depends primarily on the evaluation of the practical difficulties caused by traditional private international law principles. It has been argued in this paper that the specific characteristics of open source communities require the elaboration of a novel and tailor-made regime of conflict rules. One possible solution could be to apply the free software community principles as governing contract law and to detach the formation, validity, warranty and liability, third-party rights and other contractual issues from any given state law. The theory of *lex mercatoria* could serve as a theoretical basis for such an approach. Interpretation, gap-filling and review of the contract could be effected by reference to the UNIDROIT Principles.

1 See *Grassmuck*, Freie Software zwischen Privat- und Gemeineigentum, Bonn 2002, p. 202-210.

2 See *Levy*, Hackers: Heroes of the Computer Revolution, New York 1994, passim.

3 See the initial announcement of *Richard Stallmann* of 27.9.1983, <http://www.gnu.org/gnu/initial-announcement.en.html>.

4 See *Torvalds*, Just for Fun: The Story of an Accidental Revolution, New York 2002.

5 See <http://www.samba.org>.

6 MySQL was originally developed by a Swedish software company and later acquired by SUN. Today, Oracle has the exclusive rights; see <http://en.wikipedia.org/wiki/MySQL>.

7 See <http://www.mozilla.org/about/history.html>.

8 See <http://httpd.apache.org/ABOUT_APACHE.html>.

9 See <http://www.gnu.org/licenses/gpl-3.0.en.html>.

10 See <http://www.opensource.org/osd.html>, <http://www.gnu.org/philosophy/free-sw.html>.

11 See <http://www.de.freebsd.org/copyright/license.html>.

12 See Section 5(c) GNU GPL Version 3.0.

13 See <http://creativecommons.org/about/history>.

14 See <http://creativecommons.org/licenses>.

15 See <http://wikimediafoundation.org/wiki/Terms_of_use>.

16 See e.g. the statistics for the Linux distribution Debian at <http://www.perrier.eu.org/weblog/2010/08/07#dev-el-countries-2010>. The statistic consists of a list of 873 active developers in 2011, originating from 53 jurisdictions.

17 Some projects use contributory agreements to collect the copyrights in contributions for a centralized license and enforcement policy; see *Jaeger/Metzger*, Open Source Software[3] (2011),

N° 150; *Wielsch*, Governance of Massive Multiauthor Collaboration - Linux, Wikipedia, and Other Networks: Governed by Bilateral Contracts, Partnerships, or Something in Between?, 1 (2010) JIPITEC 96. See also the project 'Harmony Agreements' at <http://harmonyagreements.org/>.

18 There is some controversy among US legal scholars over whether the licenses should be interpreted as bilateral contracts or as unilateral license grants. For an interpretation as a contract under US law, see *Azzi*, 2010 U. Ill. L. Rev. 1271, 1283 seq.; *Gomulkiewicz*, How Copyleft Uses License Rights to Succeed in the Open Source Software Revolution and the Implications for Article 2b, 36 Houston L. Rev. 179, 189 seq. (1990); *McGowan*, Legal Implications of Open-Source Software, 2001 U. Ill. L. Rev, 241, 289 seq.; *Wacha*, Taking the Case: Is the GPL Enforceable?, 21 Santa Clara Computer & High Tech L.J. 451, 456, 473 seq. (2005). For a unilateral license, see *Moglen*, Enforcing the GPL I, <http://moglen.law.columbia.edu/publications/lu-12.html>; *Kumar*, Enforcing the GNU GPL, 2006 U. Ill. J.L. Tech. & Pol'y 1. In Germany, the majority opinion characterizes open source licenses as bilateral contracts; see *Jaeger/Metzger* (supra fn. 17), N° 171 seq. for further references.

19 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

20 German Bundesgerichtshof, 15 September 2009, X ZR 115/05 – '*Sektionaltor*', [2010] GRUR Int 334.

21 Austrian Oberster Gerichtshof, 8 September 2009, 4 Ob 90/09b – '*F.-Privatstiftung*', [2010] JBl 253.

22 Swiss Bundesgericht, 22 April 1975 – *Togal/Togal*, 110 II BGE 293.

23 *Vischer et al.*, Internationales Privatrecht (2000), 281-83.

24 American Law Institute's 'Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes' of 2007 (ALI Principles).

25 European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), Principles on Conflict of Laws in Intellectual Property of 2011, <http://www.cl-ip.eu/en/pub/home.cfm>.

26 Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property, October 2009, in Jürgen Basedow/Toshiyuki Kono/Axel Metzger (eds.), Intellectual Property in the Global Arena - Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US (2010), 394-402.

27 For the application of law of the licensor in the case of the GNU Free Documentation License see Rosenkranz, Open Contents – Eine Untersuchung der Rechtsfragen beim Einsatz „freier" Urheberrechtslizenzmodelle (2011), 212-216.

28 See German Bundesgerichtshof, 29 March 2001, I ZR 182/98 – '*Lepo Sumera*', [2001] GRUR 1134 and Cour d'Appel de Paris, 2 June 1999, [1/2000] RIDA 302.

29 Members of the Private International Law Association of Korea and Japan, Principles of Private International Law on Intellectual Property Rights, The (Waseda) Quarterly Review of Corporation and Law and Society 2011, 112, 141.

30 Oberlandesgericht Düsseldorf, 4 August 1961, 2 U 66/61 – 'Tubenverschluss', [1962] GRUR Ausl 256.

31 *Torremans,* Licenses and Assignments of Intellectual Property Rights under the Rome I Regulation, (2008) 4 Journal of Private International Law, 397, 412-15 (with further references to older literature).

32 <http://www.mozilla.org/MPL/1.1/>.

33 <http://www.mozilla.org/MPL/2.0/>.

34 See *Maracke*, Creative Commons International: The International License Porting Project – Origins, Experiences, and Challenges, 1 JIPITEC 4 (2010).

35 See e.g. the latest license versions for Austria, Germany, Romania, Switzerland and UK: England and Wales. By contrast, the license versions for France, Netherlands, Poland and Spain do not comprise a choice of law. For a positive evaluation of choice-of-law clauses in Creative Commons licenses, see *Rosenkranz* (supra note 27), 209-212 and 230 ('Mit der Rechtswahl in den Lizenzen wird somit weitgehende Rechtssicherheit gewährleistet.').

36 Creative Commons is currently preparing a new version of the license suite. One of the issues of discussion is internationalization and the future of the 'porting project'; see <http://wiki.creativecommons.org/4.0>.

37 See the statistics at <http://www.blackduck.com>.

38 See the GPL3 Process Definition of 15.1.2006, <http://gplv3.fsf.org/gpl3-process.pdf>, which formulates the goals behind the new license version, inter alia the goal to create a truly global license (p. 1).

39 On the medieval roots of *lex mercatoria*, see *Trakman*, The Law Merchant: The Evolution of Commercial Law (1983), 7 ff.; *Jansen/Michaels*, Private Law and the State, RabelsZ 71 (2007), 345, 368.

40 The 'new law merchant' has been discussed since the 1960s. See *Fouchard*, L'Arbitrage commercial international (1965), 423 ff.; *Fragistas*, Arbitrage étranger et arbitrage international en droit privé, RCDIP 1960, 1 ff.; *Goldman*, Frontières du droit et lex mercatoria, APD 9 (1964), 177 ff.; *Kahn*, La vente commerciale internationale (1964), 365 ff. From the more recent literature, see *Berger*, Formalisierte oder „schleichende" Kodifizierung des transnationalen Wirtschaftsrechts (1996); *de Ly*, De lex mercatoria (1989); *Osman*, Les principes généraux de la lex mercatoria (1992); *Fernández Rozas*, Ius Mercatorum (2003).

41 See the list of licenses at <http://www.ifross.org>.

42 For the US, see *Jacobsen/Katzer*, 535 F.3d 1373 (Fed. Circuit 2008); for Germany, see Landgericht München, 19.5.2004, MMR 2004, 693 – *Welte/Sitecom*; for France, see Cour d'Appel de Paris, 16.9.2009, N° 01/24298 – *AFPA/Edu4*, <http://fsf-france.org/news/arret-ca-paris-16.9.2009.pdf>. For the practice of out-of-court settlements, see *Jaeger,* Enforcement of the GNU GPL in Germany and Europe, 1 JIPITEC 34 (2010); *Moglen*, Enforcing the GPL I and II, <http://moglen.law.columbia.edu/publications/lu-12.html> and <http://moglen.law.columbia.edu/publications/lu-13.html>.

43 This restriction could be challenged if one accepts the emergence of a *lex mercatoria* in the area of intellectual property law. Compare *Dinwoodie*, A New Copyright Order: Why Courts Should Create Global Norms, 149 U. Pa. L. Rev. 469, 545 ff. (2000); *Fischer-Lescano/Teubner*, Regimekollisionen: Zur Fragmentierung des globalen Rechts (2006), 66 ff.

44 See Art. 28 UNCITRAL Model Law on International Commercial Arbitration 2006.

45 <http://www.gnu.org/copyleft/gpl.html>.

46 Supra fn. 33

47 <http://www.eclipse.org/legal/cpl-v10.html>.

48 <http://www.freebsd.org/copyright/freebsd-license.html>.

49 The Principles are available online at <http://www.unidroit.org/english/principles/contracts/main.htm>. A short commentary on the Principles was published by UNIDROIT in book form in 2010; see *International Institute for the Unification of Private Law* (ed.), UNIDROIT Principles for International Commercial Contracts (2010). Case law on the Principles is collected in a database at <http://www.unilex.info/>.

50 On the drafting history and background, see *Bonell*, An International Restatement of Law (2005), 27 et seq.

51 See UNIDROIT Principles (2010), Comment to Art. 5.2.1, p. 161.

52 The Cour d'Appel de Paris accepted such a claim under French contract law in a decision of 16.9.2009, N° 01/24298 – *AFPA/*

Edu4, <http://fsffrance.org/news/arret-ca-paris-16.9.2009.pdf>.