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Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC)

JIPITEC, the "Journal of Intellectual Property, Information Technology and Electronic Commerce Law" is a new online-journal for current issues of intellectual property, information technology and E-commerce law. The main focus of JIPITEC is on European law - both on the Union and on the member states level. Most articles are in English language, but the journal is also open for articles in other European languages, especially German and French.

JIPITEC is an Open Access Journal. Articles are available according to the terms and conditions of the Digital Peer Publishing Licenses (http://www.dipp.nrw.de/lizenzen/). In addition, authors may allow to use their articles under a Creative Commons (http://creativecommons.org/about/licenses/) or other license.

JIPITEC implements the concept of an open access journal, already successfully used in natural sciences, also for a legal sub-discipline. The aim is to create an easily accessible platform for contributions on mainly European and national law regulating the information society, which in view of their breadth and scientific depth do not find space in traditional and mostly commercially oriented analog law journals. In addition, JIPTEC makes use of the easy distribution via the Internet. Thus, JIPITC conforms to the "Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities" (http://oa.mpg.de/openaccess-berlin/berlindeclaration.html)

JIPITEC aims at developing an information platform that allows authors and users to work closer together than this is the case in classical law reviews. The journal will constantly revise its social media functions for this purpose. However, elements from classical law reviews, especially book reviews, bundling of articles in 2- 4 issues per year etc. will be retained.

In order to guarantee the level of scientific quality, JIPITEC is a peer-reviewed journal.

JIPITEC is financially supported by Deutsche Forschungsgemeinschaft (http://www.dfg.de/en/index.jsp).

The editors very much hope that the concept underlying JIPITEC will be successfully used by authors and readers alike.

Thomas DREIER
Axel METZGER
Gerald SPINDLER

Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC)

Das „Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC)" ist eine neue Open Access-Zeitschrift für aktuelle Fragen des Rechts des Geistigen Eigentums, der Informationstechnologie und des E-Commerce. Der Schwerpunkt von JIPITEC liegt auf dem Europäischen Recht, sowohl dem Recht der Europäischen Union als auch dem nationalen Recht der Mitgliedstaaten. Die meisten der Aufsätze erscheinen in englischer Sprache, die Zeitschrift ist jedoch auch offen für andere europäische Sprachen, insbesondere Deutsch und Französisch.

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Mit JIPITEC wird das in anderen, vor allem naturwissenschaftlichen Disziplinen bereits erfolgreich praktizierte Konzept einer Open Access-Zeitschrift auch für ein Teilgebiet der Rechtswissenschaften etabliert. Damit ist eine weithin sichtbare, leicht und kostenlos zugängliche Plattform für Beiträge vornehmlich zum europäischen und nationalen Recht der Informationsgesellschaft geschaffen, deren wissenschaftliche Tiefe und thematische Breite in den meisten der kommerziell ausgerichteten juristischen Zeitschriften keinen Platz findet. Darüber hinaus nutzt JIPITEC die inzwischen vorhandenen Möglichkeiten einer originären Verbreitung über das Internet. Damit entspricht JIPITEC der „Berliner Erklärung über offenen Zugang zu wissenschaftlichem Wissen" (http://oa.mpg.de/openaccess-berlin/Berliner_Erklaerung_dt_Version_07-2006.pdf).

Auf diese Weise soll eine Diskussionsplattform geschaffen werden, die es Autoren und Nutzern ermöglicht, in einen engeren Gedanken- und Informationsaustausch miteinander zu treten, als dies bei herkömmlichen juristischen Zeitschriften der Fall ist. Zu diesem Zweck ist geplant, die dem interaktiven Austausch dienenden medialen Funktionen der Webseite sukzessive auszubauen. Dennoch soll die klassische Einteilung juristischer Fachzeitschriften beibehalten bleiben. Auch JIPITEC wird daher Aufsätze und Buchbesprechungen enthalten, die in 2 - 4 Ausgaben pro Jahr zusammengefasst werden sollen.

Um einem hohen wissenschaftlichen Anspruch zu genügen, ist JPITEC zugleich dem Grundsatz des Peer-Reviewing verpflichtet.

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Die Herausgeber hoffen, dass dieses Konzept von Autoren wie Lesern erfolgreich genutzt werden wird.

Thomas DREIER
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Creative Commons International

The International License Porting Project – Origins, Experiences, and Challenges

by **Catharina Maracke**, Berlin / Tokyo

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Director, Creative Commons International, 2006 – 2009

Abstract: When Creative Commons (CC) was founded in 2001, the core Creative Commons licenses were drafted according to United States Copyright Law. Since their first introduction in December 2002, Creative Commons licenses have been enthusiastically adopted by many creators, authors, and other content producers – not only in the United States, but in many other jurisdictions as well.

Global interest in the CC licenses prompted a discussion about the need for national versions of the CC licenses. To best address this need, the international license porting project ("Creative Commons International" – formerly known as "International Commons") was launched in 2003. Creative Commons International works to port the core Creative Commons licenses to different copyright legislations around the world. The porting process includes both linguistically translating the licenses and legally adapting the licenses to a particular jurisdiction such that they are comprehensible in the local jurisdiction and legally enforceable but concurrently retain the same key elements.

Since its inception, Creative Commons International has found many supporters all over the world. With Finland, Brazil, and Japan as the first completed jurisdiction projects, experts around the globe have followed their lead and joined the international collaboration with Creative Commons to adapt the licenses to their local copyright. This article aims to present an overview of the international porting process, explain and clarify the international license architecture, its legal and promotional aspects, as well as its most recent challenges.

Keywords: Creative Commons, Creative Commons licenses, Creative Commons International, Moral Rights, Private International Law, Case Studies, Interoperability

Recommended citation: Maracke, Catharina, Creative Commons International: The International License Porting Project – Origins, Experiences, and Challenges, 1 (2010) JIPITEC 4, para. 1

A. Introduction: Creative Commons – a global project to foster culture and innovation

1 Over the past decade, we have seen an enormous change in the way we disseminate and exchange information. The advent of the widespread adoption of digital technologies has enabled a new generation of content creation and exchange. Technical advances have made it possible to distribute works in a variety of formats and of a high, often professional quality. It has become much easier and cheaper to work collaboratively across contexts and different media and to create new, derivative or collective works on a global level.

2 The downside of these new technical developments is that they can more easily facilitate a contradiction of law. Most of the digital content being accessed through the Internet is subject to copyright and owned by a particular person or company. But because of how digital technologies function, most of these uses necessarily make a "copy"[2] of the original work and/or require distribution, which can cause friction under the default terms of copyright: By enabling temporary and permanent copies, copyright's right is exercised and, from these copies, interpretive reuse is possible, which in turn implicates another copyright rule, the derivative works right.[3]

3 Current copyright regulation maintains the absurdity that while on the one hand, digital technology can provide a much bigger scope of access and distribution, such access will be unlawful unless either the law allows that specific access or the respective copyright owner gives permission.[4] However, it is unquestioned that the flow and exchange of information is key for a well functioning society, be it on a cultural or economic level. This dilemma has prompted a discussion about making the law more suitable for the digital age in many different national jurisdictions around the world. Since debating and reforming law naturally takes time, many users realized that a much more valuable and immediate solution would be to work with new types of voluntary mechanisms that would operate within the currently existing copyright framework. Creative Commons aims to provide such voluntary mechanisms by offering creators and licensors a simple way to say what freedoms they want their creative content to carry. Through its free copyright licenses,[5] Creative Commons offers creators and other authors a legal way to structure their rights. Content and information can be set free for certain uses, consistent with the author's specific intent, opening the stage for a more flexible flow of content and information.[6]

4 While the origins of Creative Commons, including the project's founder, lie in the United States,[7] many people around the world have entered the discussion and joined the initiative to make Creative Commons a truly global project, one that builds a distributed, international information "commons" by encouraging copyright owners to make their material available through open content licensing protocols and thereby promote better identification, negotiation, and reutilization of content for the purposes of creativity and innovation.[8]

B. Creative Commons licensing infrastructure

5 The Creative Commons licensing suite consists of public standardized licenses that allow authors to decide whether others may make commercial use of their work, whether to make derivative works, and if derivative works are allowed, whether these derivative works must be made available under the same licensing terms.[9] All licenses require attribution.[10] Attribution is a key element - not only regarding some of the legal questions, but also in terms of cultural norms and acceptance.[11]

6 A license, once selected, is expressed in three different ways: 1) the "human readable" format (Deed), 2) the lawyer readable format (Legal Code), and 3) the machine readable format (Resource Description Format, metadata). The latter enables online content and information, licensed under a Creative Commons license, to be searched for and identified based on the work's licensing terms.[12] The "Deed" is drafted to be understood by anyone without any legal background, and the "Legal Code" is the actual "license", a legal document drafted to be read by lawyers, courts, and those with a particular interest or involvement in the legal details. These three different layers of the Creative Commons li-

censes are often described as one distinction between Creative Commons licenses and other Open Content licenses such as the GNU Free Documentation License[13] or the Free Art License.[14] Another important distinguishing feature of Creative Commons licenses is its internationalization.

C. Creative Commons International – the global porting project

7 Global interest in Creative Commons soared as did license usage worldwide. Because of this and – most importantly – because of the international structure of the Internet per se, it became clear that Creative Commons could not remain a US project alone. Building on the work initiated in the United States, Creative Commons International was founded to coordinate and support the growth of an international network responsible for porting the original US licenses and other tools to local jurisdictions. The goal of this international porting project is to create a multilingual model of the licensing suite that is legally enforceable in jurisdictions around the world.

8 To achieve this aim, Creative Commons International works with local experts in the intellectual property and technology fields to evaluate national copyright legislations and how these national legislations would potentially interact with Creative Commons licenses. This evaluation is a prerequisite to producing high quality localized versions of the Creative Commons licenses. To guarantee such high quality, Creative Commons International has developed a set of guidelines for the porting process, a detailed ten-step program through which each participating jurisdiction project works firstly to identify local Project Leads and Affiliate Institutions, followed by the license drafting, public discussion, license revision, technical arrangements and translation, and launch event.[15] Once a local host institution and a national legal expert are identified and appointed to act as "Project Lead" for the respective national CC project, the actual work begins with a first draft of a localized Creative Commons license, literally translated into the national language and legally adapted to the national copyright law. An English retranslation and a detailed explanation of all substantial legal changes describe what revisions have been made to fit the Creative Commons licenses into the local legislation and allow for a fruitful and efficient discussion with the Creative Commons International team.[16] After that, a public discussion of the national license draft is called, in which the license draft and supporting documents are used to gather input from potential local stakeholders and user groups. After careful review and approval by the Creative Commons International team, the Creative Commons *jurisdiction licenses* are officially made available and can be accessed through the Creative Commons license chooser.[17]

9 To date, 52 different national Creative Commons projects have successfully launched national versions of the original Creative Commons licenses.[18] With Thailand and the Czech Republic being the most recent to join the global project and with Armenia, Azerbaijan, Georgia, Russia as well as Indonesia, Vietnam, and several other countries in progress, Creative Commons International has been able to expand its projects beyond the better known traditional copyright jurisdictions and into Asia Pacific, Eastern Europe, and the Post Soviet states. Whereas the legal framework forms an important component of the international porting project, there have also been significant educational and promotional efforts undertaken as part of the internationalization strategy. In the following, some of the legal aspects will be highlighted, followed by a short outline of the project's "promotional" efforts.

1. Legal aspects

10 The most important reason for developing an international licensing model is to address the differences and particularities in understanding "copyright" according to national legislations around the globe. Differences in the legislation and licensing practices among jurisdictions reveal several legal issues that do not appear in the US context and vice versa. Some problems arising under local law, e.g. German law can only be addressed by a German version of the core Creative Commons licenses, namely a version that is translated into the German language and adapted to German law. Only such a localized version

of the CC licenses will assure enforceability in local courts.[19]

11 *Moral Rights:* One of the most significant legal issues addressed in porting the Creative Commons licenses is moral rights. Moral rights, to describe them briefly, are distinct from any economic rights tied to copyright. Even if an author has assigned his or her rights to a third party, he still maintains the moral rights to his work. Moral rights recognize an author's personal attachment to their work and seek to protect that connection. The concept of the author's moral rights goes back to the early days of copyright in the Continental European regimes.[20] The theory behind moral rights according to European Continental law is that authors of copyrightable works have inalienable rights[21] in their works that protect their moral or personal interest and that complement the author's economic rights. In this way, the moral rights serve to protect the inherent link between the author and his intellectual and mental creative work.[22] While there can be many different moral rights depending on the jurisdiction, all member states of the Berne Convention[23] are required to provide legal protection for at least two specific moral rights, which subsequently are the main rights currently present in most countries around the globe: the moral right of *attribution* and the moral right of *integrity*.[24] As stated in Art. 6bis of the Berne Convention, these two moral rights give the author of a copyright-protected work the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[25]

12 Since all Creative Commons licenses require attribution,[26] there is less of an issue regarding the author's moral right of attribution. However, the author's right to object to any derogatory treatment of his work has the potential to impact the freedom to modify the work and exercise the right to make derivatives. A derivative work will likely always qualify as an alteration of the original work, and there may be some instances where it is arguable that it is prejudicial to the original author's reputation or honor.[27] While this has not been much of a problem in the US and when drafting the US Creative Commons licenses, the freedom to modify the work has provoked many legal issues in traditional "droit d'auteur" jurisdictions like France and Germany.

13 It might sound contradictory that the freedom to modify the work poses legal problems in European jurisdictions like Germany or France but not in the US even though all three of those jurisdictions are signatories of the Berne Convention. There is, however, a feasible explanation. The Berne Convention only assures that moral rights exist, but it does not address the question of a potential waiver of moral rights. Each individual member state has to determine in its own legislation to which extent – if any – an author is able to waive such rights.[28]

14 The possibility of waiving moral rights, plus its legal effectiveness and the potential scope of a waiver, is one of the most pressing questions for Creative Commons licenses. This is especially true with regard to the Continental European copyright regimes, such as France, which is considered to be the birthplace of the moral rights doctrine.[29] Traditionally, France and other "droit d'auteur" jurisdictions have provided a much stronger and broader protection of moral rights than most of the copyright regimes based on common law. French legislation currently states that moral rights are "inalienable", and although upon the author's death they may be transmitted to his or her legal successors, they may not be otherwise transferred or assigned. Consequently, French courts have determined that "1) authors cannot legally relinquish or abandon the rights of attribution or integrity altogether, 2) advance blanket waivers are unenforceable, and 3) narrowly tailored waivers that involve reasonably foreseeable encroachments on the author's moral rights are generally valid."[30]

15 Most other Continental European copyright jurisdictions follow the French tradition in their own regulation of moral rights. Despite the current debate in Germany about whether it might be possible to partially waive copyright including moral rights,[31] there has not yet been room for any different understanding of moral rights. German courts and most scholars still accept assignments only under the condition that the changes are specified, meaning that the author must have a realistic chance to foresee any changes that will be

made.[32] This option is rather unlikely, if not impossible, within the context of standardized open content licenses such as the Creative Commons licenses.[33] France and Germany are only two examples of how moral rights are conceived as "inalienable" and thereby proscribe any assignment or waiver of such rights, many other jurisdictions can be found that follow the French approach.[34]

16 On the other hand, most common law countries have traditionally favored the protection of economic rights within the copyright regimes, although moral rights have found their way into the copyright laws by other means.[35] In the past decades, countries like the United Kingdom and Australia have developed a moral rights concept in their national legislation but simultaneously allowed a waiver of such rights.[36] Between these two different approaches to moral rights there are some jurisdictions such as the Netherlands, which traditionally follow the Continental European "droit d'auteur" approach but allow a partial waiver under certain circumstances.[37] Under Canadian copyright law, which is heavily influenced by the civil law tradition of Quebec, moral rights may not be assigned but may be waived in whole or in part.[38] However, the act of assigning a copyright in Canada does not in itself constitute a waiver of any moral rights. Therefore, any act or omission contrary to one of the author's moral rights is, without the author's consent, an infringement of his or her moral rights.[39]

17 Finally, Japan deserves a separate analysis. Under Japanese law, any modification "against the author's will" could be a violation of the moral right of integrity.[40] If the modification is made in a way "where it is possible to directly perceive the essential characteristics of the original work" such a modification can be a violation of the moral right of integrity if the author's consent is missing.[41] Even though it can be argued that allowing derivative works through a Creative Commons license implies that the author gave his consent and that at least part of the moral right of integrity is "licensed", there remains a risk of violating the moral right of integrity if the resulting derivative work is outside the scope of what the author thought he was licensing.[42]

18 Different regulations and interpretations of moral rights make their adaptation in various jurisdictions one of the most important legal issues when working with Creative Commons licenses. One approach could be to not mention moral rights in Creative Commons licenses at all.[43] Not addressing moral rights in the legal code could be argued as leaving the legal code open for interpretation by the respective court in the case of an infringement. But what would be the consequence if Creative Commons licenses did not provide for any regulation regarding moral rights? Would the court simply recognize moral rights as they are implemented and executed in the respective national law? And what impact could this have for the existence of the license, especially for the section allowing derivative works?

19 Taking again the German situation as an illustrative example, the whole section of the Creative Commons license that allows for derivative works would most likely be considered invalid under the German law of standard terms.[44] Creating and distributing derivative works would be impossible. To avoid such a risk of invalidity, moral rights have to be dealt with in Creative Commons licenses if these licenses are to be used whenever German law is applicable. Similarly, most other Continental European jurisdiction's licenses have to deal with the specific and mostly very restrictive moral rights regulation in their respective national legislation.

20 Because of this uncertainty and especially because of the fact that interpretation by local courts cannot be clearly foreseen, it was discussed and decided amongst the global Creative Commons International Network to address moral rights in the Creative Commons licenses. Instead of not mentioning moral rights at all, in the hope that local courts would implement it adequately, moral rights are now dealt with in the Creative Commons licenses. To provide clarity regarding the treatment of moral rights, it was agreed to explicitly retain the moral right of integrity in those jurisdiction licenses that have to deal with a strong level of protection for the moral right of integrity, considering the risk that local courts could take a dim view of a license that does not expressly include moral rights.[45]

21 Consequently, the next question when evaluating the Creative Commons licenses in terms of moral rights is whether those rights should be waived or not. Since most jurisdictions throughout the world grant moral rights to authors, but only some of them allow for a waiver, the issue of a potential waiver presents a challenge for Creative Commons licenses. Many users within the community are in favor of a license that permits creators to "completely" waive moral rights, because only such a license would ensure that the freedom to create derivatives and build upon another's work can be exercised to the fullest extent possible. On the other hand, it has again been argued that the Creative Commons licenses would face the risk of being vulnerable to judicial validity should the respective national copyright legislation conceive moral rights as "inalienable" and therefore proscribe any assignment or waiver of such rights. Thus, the policy question to be evaluated is which uncertainty is more tolerable: the one brought about by the possibility of claims against (downstream) users for integrity rights violation or the uncertainty brought about by having the licenses per se vulnerable to attack for providing moral rights waiver.[46]

22 To make it even more complicated, not only does this question have to be discussed on a national level for each respective jurisdiction license; it also has an impact on an international level, since all Creative Commons licenses have to work globally as well. When drafting the moral rights wording for a national version of the Creative Commons licenses while at the same time looking at the different regulations for moral rights in different jurisdictions, the question of applicable law becomes relevant. Will the respective national copyright legislation necessarily always provide the basis for discussions and interpretation of the moral rights section of that particular associated Creative Commons license? Hence, the issue about moral rights proves perfectly how almost every legal question regarding Creative Commons licenses coincides with rules of Private International Law. In the case of moral rights, after careful consideration and consultation with the international legal network, it was agreed that most jurisdictions should implement a simple wording stating that moral rights remain untouched by the respective Creative Commons license so as to ensure validity of the license but allow for the exercise of the rights provided by the license to the fullest extent permitted by applicable law in order to respect the freedom to modify the work as broadly as possible. For most of the national jurisdiction licenses, the following simple wording served as a basis for discussion during the porting process: "*Moral Rights remain unaffected to the extent they are recognized and not waivable by applicable law.*"

23 This approach[47] allows the user to exercise the rights under the license to the fullest extent possible, while also protecting the license from any challenge and potential risk of invalidity based on an improper or void waiver. It also leaves enough room for interpretation at the respective national level and at the same time fits perfectly into the overall international harmonization efforts of the global porting project.

24 *Neighboring Rights and especially the European Database Directive*: In addition to the traditional protection of "copyrightable works", most European copyright systems[48] also provide protection for "related rights" ("neighboring rights") and through the European Database Directive[49] for databases ("sui generis database protection").[50] Similar to the argumentation for the protection of neighboring rights, the Database Directive allows for the special protection of a database "which shows that there has been qualitatively and/or quantitatively a substantial *investment* in either obtaining, verification or presentation of the contents to prevent extraction and/reutilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database."[51] Obviously, the rationale behind protection is not the personal intellectual creation, as it is the prerequisite for copyright protection in most European jurisdictions,[52] but rather the *investment* shown by the maker of a database.[53]

25 In the past, some of the European localized and translated versions of Creative Commons licenses (see Belgium, France, Germany and the Netherlands) contained a reference to the respective national legislation passed pursuant to the Database Directive by defining a "work" to include databases protected

by these laws.[54] However, most other European licenses did not mention the database rights at all, even if the Database Directive had already been implemented in their national legislation. Neighboring rights and in particular the database right turned out to be one of the most controversial and the most inconsistently treated aspects in the European licenses.

26 The main argument for addressing these rights in the European licenses is that these rights are defined so broadly that, without addressing them, the national versions of the Creative Commons licenses are neither complete nor exercisable in practical applications, particularly in Internet collections.[55] The main argument follows that without the neighboring rights and database right included, the licensor would still hold some exclusive rights in the work that was intended to be licensed. To resolve this problem, it was suggested to explicitly incorporate the neighboring rights as well as the database right in the license text by extending the definition of "work" so that neighboring rights are listed concurrently with the definition of work, namely as being the "copyrightable work of authorship".

27 On the other hand, there have been significant concerns regarding the inclusion of database rights in the Creative Commons licenses. It was argued that Creative Commons licenses, when including the sui generis database right via the definition of "work", can become especially problematic as they pose the danger that, through the use of a Creative Commons license, protection of the sui generis database right can be "imported" to a jurisdiction without any sui generis database right protection. In other words, by using a national version of the Creative Commons licenses for a jurisdiction which both a) has implemented the European Database Directive and b) where the national Creative Commons licenses reflect the legislation through an amendment of the definition of work and an inclusion of the database right as an exclusive right, the use of such a license could actually lead to the assumption and confusion that these rights are intended to be respected even if they are not protected by national law.

28 As a result of the debate between the advantages and disadvantages of implementing neighboring rights and the very specific problem of the European database rights, it was agreed to include these rights in the Creative Commons licenses where they are recognized by the national legislation. But at the same time, a "geographic boundary" assures that those Creative Commons licenses that define the term "work" to include neighboring rights as well as databases protected by the national implementation of the Database Directive, should have territorial limitations regarding these rights by stating that these are only included in the definition of work "to the extent they are recognized and protected by applicable law."[56] Additionally, for the database right, an unconditional waiver will ensure that these rights are disqualified in the scientific context. Concretely, this means that those national Creative Commons jurisdiction licenses that have included the database protected by the national implementation of the European Database Directive as a consequence of following a harmonized treatment of neighboring rights must waive these specific database rights obtained under the sui generis right. A simple sentence at the end of the license grant ensures the resolution for European licenses: "*Where the Licensor is the owner of the sui generis database rights under the national law implementing the European Database Directive, the Licensor will waive this right.*"

2. Language: Spreading the word and promotional aspects

29 As indicated above, license internationalization also has tremendous impact on the worldwide usage of Creative Commons licenses and by extension, on the growth of the global "commons" as a pool of pre-cleared content that can be mixed and shared on an international level. Linguistically translating the licenses into a jurisdiction's national language encourages license acceptance and usage beyond the English-speaking world. In addition, officially recognized license translations lead to increased global adoption by institutions and public organizations, including governments.[57] Not only can we find an enormous number of Creative Commons licensed content via popular search engines such as Google, Yahoo or others,[58] some concrete examples[59] of Creative Commons

license usage qualitatively demonstrates the global impact of Creative Commons over the past years. These examples provide evidence of how Creative Commons licensed content fits into other projects and helps build a system of networked informational exchange in the Internet.

30 In December 2008 the German Federal Archives[60] donated a significant amount of historical German images to the Wikimedia Commons project.[61] These images are now licensed under the German Creative Commons Attribution Share Alike 3.0 license. Their availability to the public through the Wikimedia Commons is part of a cooperation between Wikimedia Germany and the Federal Archives, whose collaboration also developed a tool to link the images to their respective German Wikipedia article and file in the German National Library. Another significant boost for Creative Commons emphasizes that Creative Commons licenses are not only important to private users and amateurs. Shortly after the publication of this news from Germany, the Australian (Queensland) government launched a new website for their Government Information Licensing Framework project (GILF) under the Australian Creative Commons Attribution 2.5 license.[62] Through this website, the GILF project is working to further promote the benefits of using and re-using of Public Sector Information. These benefits can be measured for the Australian community in terms of innovation, creativity, and economic growth: "*The GILF makes it easy for people who use public sector information to understand the rights of use associated with PSI material. GILF comprises a simple open content licensing framework, designed to assist in the management of government intellectual property, and encourage the use of public sector information through increased availability and accessibility... .*"[63] Encouraged by the preceding national debate in which it was argued that "*owing to Creative Commons' status as an international movement, and its recognition as a standard for flexible copyright licensing, the government can gain significant leverage from adopting Creative Commons. No point in needlessly re-inventing the wheel...*"[64] the Australian GILF can be seen as one of the most innovative governmental projects in the world.

31 The list of case studies can be extended and seen as the best proof that developing the international porting project and working with local Project Leads and Affiliate Institutions in different jurisdictions on national versions of the core CC licenses becomes, automatically, the best promotional tool for Creative Commons. It remains the key factor for the international adoption of Creative Commons licenses.

32 When porting the licenses to different national jurisdictions around the world, Creative Commons International has simultaneously established an international network of IP and IT experts. With the patronage and enormous support of this network, the idea of Creative Commons as a new type of voluntary mechanism for legal questions within the digital age has entered the local debate about copyright law on a national legislative level. The greatest success of Creative Commons is its unshakable presence in the discussion of a pragmatic legal system that deals with questions arising with the advent of the Internet.

D. Challenges for Creative Commons and its international licensing model

33 *Private International Law*: The previous examples as well as the legal evaluation of only two potential issues for Creative Commons licenses demonstrates that there is a need for the international porting project and that the licenses have to be adapted in many different ways to prevent misunderstandings and invalidity. We cannot ignore the fact that some provisions of a US license would be invalid insofar as European law is applicable. However, at the same time, this perception opens the discussion about the applicable law and a potential choice of law clause in the Creative Commons licenses. In other words, a "multi–jurisdictional" approach raises an array of private international law issues. The key question to be investigated arises when Licensor A, a resident of Germany, is licensing his picture on his German website under the German Creative Commons licenses Attribution (BY) and Licensee B, a resident of New Zealand is using the picture on his New Zealand website without giving attribution at all. In the case that Licensor A wants to sue

Licensee B alleging that B's activities infringe the terms of the German Creative Commons license, which court would be competent to hear the claim and – more importantly – which law would be applicable? And finally, how can the ruling be enforced elsewhere?

34 Not all of these questions can be covered in this article, whose purpose it is to raise these issues rather than solve them. In terms of the applicable law, and according to the rules of private international law, two different issues have to be considered. The first one is how to deal with questions regarding copyright, the second relates to other parts of the law, such as contract law.

35 For all questions regarding copyright, such as questions about the existence, duration of copyright, moral rights or even questions regarding fair dealing or limitations and exceptions of the exclusive copyright, the rule of territoriality will have to be applied. According to Art. 8 of the recently adopted Rome II regulation, at least for the European Union, it is stated that "*The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.*"[65] On an international scale, many scholars consider Art. 5 II of the Berne Convention as mirroring this approach.[66] However, especially for copyright issues, the rule of territoriality is still controversial.[67]

36 Irrespective of how to interpret the wording of the Berne Convention, and without a detailed analysis of all arguments, the current tendency is to stick with the rule of territoriality on questions of copyright, especially regarding the existence and duration of copyright and neighboring rights, moral rights or even questions about fair dealing or limitations and exceptions of the exclusive copyright.[68] Consequently, all these copyright questions are governed by the respective national legal order. Instead of "*one global* copyright", the copyright holder has a "bundle of different national copyrights", which can be seen as some kind of "mosaic-like" approach.[69]

37 For contractual issues, the answer is even more complicated. According to Article 4 of the Rome I Convention of 2008 on the law applicable to contractual obligations,[70] the applicable law is considered to be the national law of the jurisdiction "where the party required to effect the characteristic performance of the contract has his habitual residence" – unless the parties have agreed on a different choice of law in the contract. To the extent Creative Commons licenses are deemed to be a contract, a choice of law clause could be helpful to complete the picture of a nationally adapted license. By making sure that the German version of the Creative Commons licenses will be governed by German law, some level of legal certainty can be reached. However, as mentioned above, the potential choice of law clause can only help for contractual issues of the Creative Commons licenses and only if the Creative Commons licenses themselves are considered to be a contract. For questions regarding copyright, the rule of territoriality is internationally mandatory and cannot be eluded by any additional choice of law clause in the license.[71]

38 To summarize, these questions regarding private international law are probably the most crucial and most difficult to be investigated when working with Creative Commons licenses in the digital age, since any use on the Internet tends to cross borders. One potential starting point for further research and discussion could be the relationship between different national versions of the Creative Commons licenses. Because of how Creative Commons licenses are functioning and especially because they are *non-exclusive*, the licensor is free to choose more than one license and also combine different license versions, which can be used in parallel. Once different licenses are used in parallel, the only missing point will be a mechanism to ensure that each license is used in the correct and adequate context, e.g., the German license should be binding if German law is applicable. For contractual issues, this result can be reached by implementing a choice of law clause (see above), and for copyright issues this can be assured by adding some kind of restriction to the respective jurisdiction.[72] Whether and how the same effect can be reached or at least be supported by technical advancement needs to be investigated and further discussed.

39 *Interoperability*: The idea of open content licenses is not new, and Creative Commons

did not invent the first free public licenses for digital content. Following the Free Software Foundation's initiative to build a public license for software, there were many others to follow and to release free licenses designed for creative content instead of software. The Art Libre License[73] and the Free Software Foundation's GNU Free Documentation License (GNU FDL)[74] are probably the most famous, but others can be found for different types of works and content.[75]

40 All these open content licenses share a common goal, which is to give authors, creators, and other rights holders the ability to offer important freedoms and share with others. However, there remains an issue when remixing content that has been licensed under different open content licenses.[76] Generally speaking, the copyleft or ShareAlike element of any open content license requires derivatives to be licensed under the same license only. Consequently, content available under an open content license that includes a ShareAlike element cannot be used together and remixed with content that has been licensed under another open content license, even if this license also includes a ShareAlike or copyleft element.

41 In the past, this was a major issue for the Wikipedia project. Before the most recent change in license adoption for Wikipedia articles,[77] if someone wanted to put together a movie based on a Wikipedia entry, supplemented with images licensed under a Creative Commons license on Flickr, this was not legally permitted even if it was technically possible.[78] The same was true for pictures, music or other content licensed under Creative Commons license BY-SA. If licensed under CC BY-SA, these materials could not legally be remixed with other creative content that was licensed under another open content license, even another copyleft license.[79] Obviously, the idea of building a common pool of easily accessible and pre-cleared, freely available content would fail if this problem were not addressed in the near future. One of the most important features of digital technologies, namely the possibility to take images, music and other content, remix it, and produce something new at relatively low cost yet often of high quality, would be diminished if the content were restricted to the respective license terms. Instead, without interoperability, many different but not overlapping pools of creative content would be established.

42 In terms of the Wikipedia project, this issue has just recently been addressed by a new version of the CC BY-SA as well as a new version of the GNU FDL. Creative Commons licenses at version 3.0 allow for a new Share Alike structure in their CC BY-SA, which enables Creative Commons to certify particular licenses as being compatible with the CC BY-SA.[80] Once certified as being compatible, licensees of both the CC BY-SA version 3.0 and the certified "CC compatible license" will be able to relicense derivatives under either license.[81] Similarly, the Free Software Foundation released an update of the GNU FDL.[82] This new version was drafted specifically to allow Wikipedia and other projects in a similar position to make licensing changes.[83] Interoperability between GNU FDL and CC BY-SA, and especially the move from GNU FDL to the CC BY-SA as the primary content license for all Wikimedia Foundation projects, will foster a broader usage of Wikimedia project content including Wikipedia articles as they will be more interoperable with existing CC BY-SA content and easier to re-use.[84] Assuring this interoperability certainly means "*a critical step towards making this freedom work,*" as Lessig commented on the announcement of the licensing decision.[85] There is no doubt of the significance and meaningfulness of this huge step within the free culture movement, which will hopefully serve as a template for others. But the general dilemma remains: copyleft licenses automatically restrict the respective content. This sounds particularly absurd since the motivation behind copyleft licenses is to keep the content "open" and within the pool of freely licensed material, while at the same time these licenses restrict the ability to reuse and remix.

E. Conclusion and perspectives

43 Creative Commons' licenses and other tools provide an additional option for copyright creators and right holders to structure their rights in a more flexible way. In this way, the "best-of both-worlds" is offered: a way to protect creative works while encouraging certain uses of them, tailored to each creators individual preference. Creative Commons' global porting project ensures that

this new way of balancing copyright can be exercised on an international level and at the same time helps to increase the global commons of easily accessible content. Concurrently, a network of international legal and technical experts has been built to collaborate on the internationalization of the core Creative Commons licensing suite, license maintenance and legal commentary on new license versions.

44 Although with the support of the international network the Creative Commons licensing suite has been successfully ported to more than 50 jurisdictions, there are still some interesting legal questions to be discussed and researched. In particular, questions of Private International Law and how Creative Commons licensing can best interact with and become compatible with other open content licensing models are two topics that need to be addressed in order to complete the international project and achieve an internationally functioning structure. There is no doubt that there are still many problems to be solved, but there is also no doubt that many of these issues can be resolved by the international network and the global Creative Commons community itself.

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1 http://creativecommons.org/international/.

2 The World Intellectual Property Organization has described the Internet as the world's biggest copying machine. For details, see World Intellectual Property Organization, Intellectual Property on the Internet: A survey of issues (2002), available at http://www.wipo.int/export/sites/www/copyright/en/ecommerce/pdf/survey.pdf.

3 See also *Garlick*, Creative Commons Licensing – Another Option to enable online Business Models, available at http://www.hm-treasury.gov.uk/d/creative_commons_418_p2_218kb.pdf.

4 In short, every information flow in the digital environment has the potential for copyright infringement – a reproduction or a communication to the public (see the general overview *Fitzgerald/Olwan*, Copyright and Innovation in the Digital Age: The United Arab Emirates (UAE) available at http://slconf.uaeu.ac.ae/papers/PDF%201%20English/e9.pdf. For a detailed analysis about the balancing of interests in the European context, see *Peukert*, Der Schutzbereich des Urheberrechts und das Werk als öffentliches Gut - Insbesondere: Die urheberrechtliche Relevanz des privaten Werkgenusses in Reto M. Hilty/Alexander Peukert (eds.) Interessenausgleich im Urheberrecht, 2004, pp. 11 – 46 (pp. 25 et seq.).

5 Creative Commons has made available free legal and technical tools to enable authors and other creators to publish their content more easily, to have their creative works found by others more rapidly, and most importantly, to have their creative works used on more flexible terms than the traditional „all rights reserved" approach of default copyright protection (for a general overview see *Garlick*, A Review of Creative Commons and Science Commons, Educause Review, vol.40, no.5 (September/October 2005), available at http://www.educause.edu/EDUCAUSE+Review/EDUCAUSEReviewMagazineVolume40/AReviewofCreativeCommonsandSci/158002.

6 For details about Creative Commons' mission see http://creativecommons.org/about/what-is-cc as well as *Garlick*, Creative Commons Licensing – Another Option to enable online Business Models, available at http://www.hm-treasury.gov.uk/d/creative_commons_418_p2_218kb.pdf.

7 Creative Commons was founded in 2001 by Stanford Law Professor Lawrence Lessig and other Cyberlaw and Intellectual Property experts. For details, see http://creativecommons.org/about/history/.

8 As an example for the widespread impact around the globe, see also *Fitzgerald/Olwan*, Copyright and Innovation in the Digital Age: The United Arab Emirates (UAE), available at http://slconf.uaeu.ac.ae/papers/PDF%201%20English/e9.pdf.

9 In this way, the licenses are designed to provide creators with the ability to clearly signal their approval of certain uses of their work whilst reserving some rights – in other words „some rights reserved" as opposed to the default „all rights reserved" level of copyright protection. For further reading, see http://creativecommons.org/about/what-is-cc.

10 The „Attribution" element can then be mixed and matched with the other terms of the core Creative Commons licensing suite into the following 6 licenses: Attribution (BY), Attribution ShareAlike (BY-SA), Attribution NonCommercial (BY-NC), Attribution NoDerivatives (BY-ND), Attribution NonCommercial ShareAlike (BY-NC-SA), Attribution NonCommercial NoDerivatives (BY-NC-ND). For details see http://creativecommons.org/about/licenses/.

[11] The first version of the original Creative Commons licenses allowed for a license without the attribution element (for details see the original legal code of the CC SA license version 1.0, available at http://creativecommons.org/licenses/sa/1.0/legalcode). However, most of the users opted for a license requiring attribution, which resulted in a new version of the Creative Commons licensing suite. Since then, Attribution became standard and the number of licenses was reduced from a possible eleven to six, making the license selection user interface much simpler. For details see http://creativecommons.org/weblog/entry/4216.

[12] See advanced search options at Google, Yahoo, etc. (e.g. http://www.google.com/advanced_search?hl=en).

[13] http://www.gnu.org/copyleft/fdl.html. (http://en.wikipedia.org/wiki/GNU_Free_Documentation_License).

[14] http://artlibre.org/licence/lal/en/ (http://en.wikipedia.org/wiki/Free_Art_license).

[15] http://wiki.creativecommons.org/International_Overview.

[16] See archives for each national Creative Commons project, available at http://creativecommons.org/international, e.g. details for the Serbian project at http://creativecommons.org/international/rs/.

[17] http://creativecommons.org/license/.

[18] http://creativecommons.org/international/.

[19] For details especially regarding the German Creative Commons licenses see *Metzger*, Free Content licenses under German Law. Talk at the Wissenschaftskolleg, Berlin, 17 June 2004 available at http://lists.ibiblio.org/pipermail/cc-de/2004-July/000015.html.

[20] For details regarding the theory and history of the droit d'auteur approach and copyright in Continental European droit d'auteur jurisdictions, see *Wandtke* in Wandtke/Bullinger (Eds), Urheberrecht, 3rd edition 2008, Einleitung/Introduction marginal number 25 as well as *Pessach*, The Author's Moral Right of Integrity in Cyberspace – A Preliminary Normative Framework, IIC 2003, pp. 250 – 270 (p. 255).

[21] In most European jurisdictions, this is often referred to as an „unbreakable bond" between author and work.

[22] See *Pessach*, The Author's Moral Right of Integrity in Cyberspace, IIC 2003, pp. 250 – 270 (p. 255).

[23] Berne Convention for the Protection of Literary and Artistic Works, as amended on September 28, 1979: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

[24] See *Garlick*, Creative Commons Version 3.0 licenses – A brief explanation, available at http://wiki.creativecommons.org/Version_3#Further_Internationalization.

[25] Article 6bis of the Berne Convention: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."

[26] See footnote 11: Attribution became standard in version 2.0 of the Creative Commons licenses (http://creativecommons.org/weblog/entry/4216).

[27] See *Garlick*, Creative Commons Version 3.0 licenses – A brief explanation, available at http://wiki.creativecommons.org/Version_3#Further_Internationalization

[28] For further reading about how a potential waiver has been handled in different jurisdictions, see the detailed report „Moral Rights in Puerto Rico and the Creative Commons 3.0 licenses" –available at http://mirrors.creativecommons.org/international/pr/moral-rights.pdf.

[29] For details regarding the theory and origin of moral rights in France see *Schmidt-Szalewski*, Die theoretischen Grundlagen des französischen Urheberrecht im 19. Und 20. Jahrhundert, GRUR Int. 1992, pp. 187 – 194 (pp. 187 et seq.) as well as *Pessach*, The Author's Moral Right of Integrity in Cyberspace, IIC 2003, pp. 250 – 270 (pp. 250 et seq.).

[30] See *Rigamonti*, Deconstructing Moral Rights, 47 Harv. Int'l L. J. 353 (2006).

[31] For further reading about the discussion in Germany and France, see *Metzger,* Rechtsgeschäfte über das Urheberpersönlichkeitsrecht nach dem neuen Urhebertragsrecht unter besonderer Berücksichtigung der französischen Rechtslage, GRUR Int. 2003, page 9 – 23.

[32] *Metzger,* Rechtsgeschäfte über das Urheberpersönlichkeitsrecht nach dem neuen Urhebertragsrecht unter besonderer Berücksichtigung der französischen Rechtslage, in GRUR Int. 2003, pp. 9 - 23 (pp. 9 et seq.).

[33] *Metzger* Rechtsgeschäfte über das Urheberpersönlichkeitsrecht nach dem neuen Urhebertragsrecht unter besonderer Berücksichtigung der französischen Rechtslage, GRUR Int. 2003, pp. 9 - 23 (pp. 9 et seq.).

[34] See the detailed examination about the situation in Spain, Mexico, and other jurisdictions in the report „Moral Rights in Puerto Rico and the Creative Commons 3.0 licenses" –available at http://mirrors.creativecommons.org/international/pr/moral-rights.pdf.

[35] *Dietz* in Schricker (Ed), Urheberrecht, 3rd edition 2006, Vor §§ 12 ff., marginal number. 21. See also report „Moral Rights in Puerto Rico and the Creative Commons 3.0 licenses" –available at http://mirrors.creativecommons.org/international/pr/moral-rights.pdf.

[36] The possibility of a waiver has lead some scholars to question the level of compliance to their international obligations – for details, see *Dworkin*, The Moral Right of the Author: Moral Rights and the Commons Law Countries, 19 Columbia VLA J.L. & Arts 229 (1995).

[37] „Section 25(3) of the Dutch Copyright Act allows authors to waive some of their moral rights (the right to attribution and to oppose slight changes made to the work). However, the moral right (Section 25(1) under d. to oppose ‚any distortion, mutilation or other impairment of the work that could be prejudicial to the name or reputation of the author or to his/her dignity as such' cannot be waived." For details, see *Hendriks*, Developing CC Licenses fur Dutch Creatives, available at http://fr.creativecommons.org/articles/netherlands.htm as well as the detailed report „Moral Rights in Puerto Rico and the Creative Commons 3.0 licenses" –available at http://mirrors.creativecommons.org/international/pr/moral-rights.pdf.

[38] http://creativecommons.ca/index.php?p=moralrights and http://mirrors.creativecommons.org/international/ca/english-changes.pdf.

[39] See the report „Moral Rights in Puerto Rico and the Creative Commons 3.0 licenses" –available at http://mirrors.creativecommons.org/international/pr/moral-rights.pdf.

[40] Article 20 Japanese Copyright Act available at http://www.cric.or.jp/cric_e/clj/clj.html.

[41] Supreme Court of Japan, 28 March 1980: http://www.courts.go.jp/english/judgments/text/1980.03.28-1976.-O-.No.923.html.

[42] Tokyo High Court, 21 September 1999, 平成一一年(ネ)第一一五四号 (Heisei 11 (ne) 1154).

[43] Creative Commons licenses version 1.0 did not address moral rights at all. For details see the overview of different license versions available at http://wiki.creativecommons.org/License_versions.

[44] See Article 306 of the German Civil Code which states that „To the extent that the terms have not become part of the contract or are ineffective, the contents of the contract are determined by the statutory provisions (Verbot der geltungserhaltenden Reduktion)".

[45] *Garlick*, Creative Commons Version 3.0 licenses – A brief explanation, available at http://wiki.creativecommons.org/Version_3#Further_Internationalization.

[46] This question had to be evaluated and answered for many different jurisdiction licenses. As an example, please see the detailed report for the porting process in Puerto Rico „Moral Rights in Puerto Rico and the Creative Commons 3.0 licenses" –available at http://mirrors.creativecommons.org/international/pr/moral-rights.pdf.

[47] It has to be emphasized that this approach is only used as a starting point for discussion for each national CC project. Based on this approach, a specific wording for the respective national jurisdiction license needs to be elaborated and implemented to best match the situation given by the national legislation, which can end up to be the same wording or end up in something more specific, such as the Dutch solution available at http://mirrors.creativecommons.org/international/nl/english-retranslation.pdf, or the wording in the CC licenses for New Zealand, available at http://creativecommons.org/licenses/by/3.0/nz/legalcode.

[48] See Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, which harmonizes the situation regarding rental right, lending right and certain related rights as to provide a greater level of protection for literary and artistic property in Europe. Similarly to the European situation, most Latin American jurisdictions recognize "neighboring rights" or "related rights" as well. As an example, see the situation in Guatemala explained in the summary of substantial legal changes for the Guatemalan Creative Commons licenses available at http://mirrors.creativecommons.org/international/gt/english-changes.pdf.

[49] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

[50] Whereas the US concept of copyright may protect all creative expressions, including the performing rights, such rights are separately qualified as „related rights" in EU jurisdictions. For details see *Hendriks*, Developing CC licenses for Dutch Creatives, available at http://fr.creativecommons.org/articles/netherlands.htm.

[51] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

[52] See definition of copyrightable work in Section 2 of the German Copyright Act.

[53] For details regarding the US and Dutch use of the term "copyright" and the addition of related rights and database rights see *Hendriks*, Developing CC licenses for Dutch Creatives, available at http://fr.creativecommons.org/articles/netherlands.htm.

[54] See the Dutch Creative Commons licenses version 1.0 and the explanation of the substantial legal changes available at http://mirrors.creativecommons.org/international/nl/english-changes.pdf as well as the German Creative Commons licenses version 2.0 (http://creativecommons.org/licenses/by/2.0/de/legalcode).

[55] See also *Hendriks*, Developing CC licenses for Dutch Creatives, available at http://fr.creativecommons.org/articles/netherlands.htm.

[56] See e.g. the solution in the Dutch Creative Commons licenses version 3.0: http://mirrors.creativecommons.org/international/nl/english-retranslation.pdf.

[57] http://wiki.creativecommons.org/Government_use_of_CC_licenses.

[58] http://search.yahoo.com/web/advanced?ei=UTF-8&fr=yfp-t-501 and http://www.google.com/advanced_search?hl=en&output=unclesam&restrict=unclesam.

[59] For a detailed report about how Creative Commons licenses have been used by creators and institutions along with an explanation of their motivations please see "Building and Australasian Commons" available at http://creativecommons.org.au/materials/Building_an_Australasian_Commons_book.pdf.

[60] http://www.bundesarchiv.de/.

[61] http://commons.wikimedia.org/wiki/Commons:Bundesarchiv.

[62] http://www.creativecommons.org.au/node/229 and http://www.gilf.gov.au/.

[63] For details see http://www.gilf.gov.au/.

[64] http://wiki.creativecommons.org/Government_Information_Licensing_Framework and http://www.creativecommons.org.au/node/229.

[65] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF.

[66] Art. 5 II of the Berne Convention: *"The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed."* For an interpretation as conflicts rule see *Goldstein,* International Copyright: Principles, Law and Practice, 2001, page 103-104; *Katzenberger* in Schricker (Ed), Urheberecht 3rd edition Vor §§ 120ff, marginal number 120; *Ulmer,* Die Immaterialgüterrechte im IPR, 1975, marginal number 1, 16.

[67] See, e.g., *Schack*, Urheber- und Urhebervertragsrecht, 4th edition 2007, pp. 458 et seq.; *Boschiero*, Infringement of Intellectual Property Rights, A Commentary on Article 8 of the Rome II Regulation, IX Yearbook of Private International Law 87, 94 et sequ. (2007).

[68] See § 301 of American Law Institute, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes, 2007 and Articles 3:102, 3:201, 3:301, 3:601 of European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), Principles for Conflict of Laws in Intellectual Property, Second Preliminary Draft (6 June 2009), available at http://www.cl-ip.eu.

[69] *Jaeger/Metzger*, Open Source Software, 2nd edition 2006, marginal number 356

[70] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF.

[71] *Jaeger /Metzger*, Open Source Software, 2nd edition 2006, marginal number 356.

[72] One possible wording for such a clause could be: „This licenses shall apply only if German copyright law is applicable. German copyright law is to be applied if you copy or distribute the work or make it available on German territory. In this case, the license shall also be governed by German law." For details, see *Metzger*, Free Content licenses under German Law. Talk at the Wissenschaftskolleg, Berlin, June 17, 2004 available at http://lists.ibiblio.org/pipermail/cc-de/2004-July/000015.html.

[73] http://artlibre.org/licence/lal/en/.

[74] For details please see http://www.fsf.org/licensing/licenses/fdl.html.

[75] See *Liang*, Guide to Open Content Licenses - available at http://pzwart.wdka.hro.nl/mdr/pubsfolder/opencontent/.

[76] For details, see *Lessig*, CC in Review: Lawrence Lessig on Compatibility, available at: http://creativecommons.org/weblog/entry/5709.

[77] Just recently, the Wikipedia community and the Wikimedia Foundation board approved the adoption of the Creative Commons Attribution ShareAlike license as the main content license for Wikipedia and other Wikimedia sites. For details and background see http://creativecommons.org/weblog/entry/15411.

[78] See Lessig's example at http://creativecommons.org/weblog/entry/5709.

[79] The old version 2.5 of the CC BY-SA similarly required derivatives to be licensed under "*the terms of this license, a later version of this license with the same license elements as this license, or a Creative Commons jurisdiction license that contains the same elements as this license*."

[80] *Garlick*, Creative Commons Version 3.0 licenses – A brief explanation, available at http://wiki.creativecommons.org/Version_3#Further_Internationalization.

[81] E.g., under either the CC BY-SA license or the certified CC compatible license. See *Garlick*, Creative Commons Version 3.0 licenses – A brief explanation, available at http://wiki.creativecommons.org/Version_3#Further_Internationalization.

[82] http://creativecommons.org/weblog/entry/10443 - details available at http://www.gnu.org/licenses/fdl-1-.3.html http://meta.wikimedia.org/wiki/Licensing_update/Questions_and_Answers.

[83] http://arstechnica.com/open-source/news/2009/04/wikipedians-to-vote-on-creative-commons-license-adoption.ars.

[84] See press release on dual licensing (21 May 2009) available at http://wikimediafoundation.org/wiki/Press_releases/Dual_license_vote_May_2009.

[85] http://wikimediafoundation.org/wiki/Press_releases/Dual_license_vote_May_2009.

Open Source und Kartellrecht:

Die Gültigkeit der Copyleft- und Lizenzgebührverbots-Klauseln angesichts des Art. 101 AEU (sowie der §§ 1 f. GWB)

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Abstract: „Open source and European antitrust laws: An analysis of copyleft and the prohibition of software license fees on the basis of art. 101 TFEU and the block exemptions"

Open source software and open source licenses (like the GNU GPL) are not only relevant for computer nerds or activists – they are already business. They are for example the fundament of LINUX, the only real rival of MICROSOFT's WINDOWS-line in the field of operating systems for IBM PC compatibles.

Art. 101 TFEU (like the identical predecessor art. 81 TEC) as part of the EU antitrust laws prohibits contract terms like price fixing and some forms of technology control. Are copyleft – the „viral effect", the „cancer" – and the interdiction of software license fees in the cross hairs of this legal rule? On the other side the European Union has since 2004 a new Technology Transfer Block Exemption with software license agreements for the first time in its scope: a safe harbour and a dry place under a umbrella for open source software?

After the introduction (A) with a description of open source software the following text analyses the system of the European Unions competition law respectivley antitrust law and the requirements of the block exemptions (B). Starting point of antitrust analysis are undertakings – but who are the untertakings (C) in the field of widespread, independent developers as part of the „bazar organization"? To see how much open source has to fear from the law of the European Union, at the end the anti competitive and pro competitive effects of open source are totalized within the legal framework (D). The conclusion (E) shows: not nothing, but not much.

Keywords: Open Source Software; Software License; European Antitrust Law; European Competition Law; Copyleft; Viral Effect; Technology Transfer Block Exemption; Art. 101 TFEU (ex Art. 81 TEC); GNU GPL; Free Software

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1 Open Source (OS) ist längst nicht mehr bloßes ideologisches Credo einer geringen Anzahl *nerds*,[1] sondern etablierte Grundlage von zahlreichen Programmen. Programmen, die großen Softwarehäusern Konkurrenz bereiten: Nicht zuletzt ist LINUX, die wohl bekannteste Open Source-Software (OSS), das einzig relevante Konkurrenzprodukt für Microsofts WINDOWS im Bereich der Einzelplatz-Computer.[2]

2 Rechtlich wird dieses Modell überwiegend auf die Anforderungen des Urheberrechts überprüft, kartellrechtliche Überlegungen sind zwar vorhanden, liegen tlw. aber zeitlich bereits soweit zurück,[3] dass sie noch nicht die neueste Gruppenfreistellungsverordnung für Technologietransfer (TT-GVO des Jahres 2004) berücksichtigen.[4] Außerdem wird oftmals vergessen, vor der Diskussion der Freistellungsmöglichkeit jene der Kartellrechtswidrigkeit zu führen. Dieser Beitrag setzt sich deswegen mit methodischen Überlegungen zum Kartellverbot und System der bestehenden Gruppenfreistellungsverordnungen auseinander und untersucht, welche Klausen in OS-Lizenzmodellen wie der GNU GPL gegen kartellrechtliche Verbote verstoßen können und ob und worüber sie ggf. freigestellt sein[5] können.

3 Dazu wird zunächst OSS unter besonderer Berücksichtigung relevanter Klauseln vorgestellt (A). Im Anschluss erfolgen methodische Vorüberlegungen bzgl. des kartellrechtlichen Untersuchungsrahmens (B). Den Besonderheiten des Open Source-Phänomens ist die folgende Untersuchung der kartellrechtlichen Akteure (C) geschuldet. Die kritischen Klauseln selbst werden sodann unter Berücksichtigung positiver und nachteiliger Wettbewerbseffekte im zuvor dargestellten rechtlichen Rahmen untersucht (D). Den Abschluss bildet eine Zusammenfassung (E).

A. Open Source-Software und Open Source-Lizenzmodelle

I. Definitionsannäherung

4 Eine eindeutige, abschließende Definition für das Phänomen des Open Source ist nicht getroffen oder zu treffen. Gleichwohl ist Open Source-Software (OSS) zumindest – auch nach der Open Source Definition (OSD)[6] – notwendig durch die Bedingung geprägt, dass der Quellcode frei[7] verfügbar und verwendbar ist. An der Entwicklung solcher Software können daher beliebige Personen(gruppen) teilhaben, bzw. basierend auf dem zur Verfügung gestellten Quellcode eigene Entwicklungen durchführen. Als Gegenmodell wird überwiegend die proprietäre Software mit „closed source“[8] verstanden.[9]

II. Copyleft, viraler Effekt und Lizenzgebührenverbot

5 OSS ist jedoch nicht nur mannigfach bezüglich der „offenen“ Programme und Programmversionen, sondern auch hinsichtlich der verwendeten Lizenzmodelle[10] – also Überlassungsbedingungen –, zu welchen etwa maßgeblich die GNU GPL in der mittlerweile dritten Version (v 3)[11] zählt. Typisch, aber nicht unbedingt notwendig für die Qualifikation als OSS solcher Modelle ist ein zuweilen stark ausgeprägter[12] Copyleft-Effekt:[13] Eine Klausel, welche erreichen soll, dass auf OS-Code basierende Programme wiederum als OS zur Verfügung gestellt werden müssen,[14] zumindest dann, wenn diese neue Software nicht lediglich intern genutzt wird.[15] Diese Auswirkung wird auch als „viral“[16] oder „krebsartig“[17] beschrieben. Sofern ein Programm von der Open Source-Hand berührt wird und ebenfalls zu OS werden muss, ist dadurch jedenfalls die Dispositionsfreiheit des (bearbeitenden) Entwicklers hinsichtlich dieses Folgeprogrammes stark eingeschränkt. Allerdings wirkt sich dieser Effekt in aller Regel nicht auf abtrennbare bzw. eigenständige Programmentwicklungen aus. Dabei ist die Frage nach einer solchen Abtrennbarkeit gleichwohl schwierig zu beantworten:[18] Ist das neue Programm ohne vorherige Programme lauffähig, kann die Abtrennbarkeit angenommen werden, ist jedoch code inkorporiert, ist dies hingegen ausgeschlossen. Besonders diffizil ist diese Frage ausgeprägt, wenn das basierende Programm fremde Programmteile – etwa Softwarebibliotheken – aufruft. Der Entwicklungsumfang jedenfalls ist kein Abgrenzungskriterium, denn es kann sehr viel Aufwand in die Fortentwicklung bestehenden codes investiert werden, wie auch wenig Mühe in ein eigenständiges Programm investiert werden kann.

6 Um solche Begrenzungen zu umgehen wird OSS-Entwicklern geraten, ihre eigenen Pro-

grammteile gesondert zu vertreiben. Erst der durch Beschaffung des übrigen Materials und zur Ausführung zusammenführende Endnutzer führt dann die Teile zu einer funktionsfähigen Einheit zusammen, wodurch der Entwickler selbst sein Programm nicht unter OS-Lizenz stellen müsse.[19] Solche Praktiken sind nicht nur aufwendig und kundenunfreundlich, sondern können auch als Umgehungsgeschäft[20] oder Verletzung vertraglicher Pflichten angesehen werden.[21]

7 Kostenlos[22] muss OSS ungeachtet des entsprechenden Vorurteils nicht sein,[23] jedoch darf nach den verbreiteten Lizenzmodellen bei Verbreitung solcher Software eben keine Lizenzgebühr oder eben ein Kaufpreis für die „Sache" Software selbst,[24] hingegen jedoch Entgelt für das Kopieren, Datenträger, Zusammenstellen von Sammlungen, Kundenservice[25] und jede andere vorstellbare (Dienst-)Leistung, welche über das unmittelbare Programm hinausgeht.[26] Diese Vorgabe kann dadurch umgangen werden, den – ohnehin nicht offen kalkulierten – Preis etwa für den Datenträger bzw. den Gesamtpreis hoch anzusetzen. Doch bloß für das Verbreiten einer allseits verfügbaren Software werden von der Nachfrageseite keine hohen Gebühren verlangt werden können.[27] Insoweit verliert diese Klausel bereits faktisch durch den Copyleft-Effekt an Relevanz bzw. erzielt ihre Wirkung letztlich erst in Zusammenwirkung mit dem viralen Effekt und der daraus resultierenden Veröffentlichung und Verbreitung.

III. Marktmacht und Bedeutung der OSS

8 Auf diesen Modellen basieren nicht nur die zahlreichen LINUX-Varianten, sondern auch das Server-Betriebssystem APACHE, Betriebssysteme für Geräte wie Mobiltelephone (etwa SYMBIAN oder ANDROID), DSL-Router oder DVB-Receiver bzw. Set-Top-Boxen, OPEN OFFICE, FIREFOX, zahlreiche Content Management Systeme, MySQL u.v.a.[28] Je nach angelegter Marktdefinition kommt bestimmter OSS dabei erhebliche Marktbedeutung zu.[29]

B. Kartellrechtliche Vorüberlegungen

I. Abwägung negativer und positiver Wettbewerbseffekte und System pauschaler Freistellung durch Gruppenfreistellungsverordnungen

9 Art. 101 Abs. 1 AEU (ehem. 81 Abs. 1 EGV) und § 1 GWB enthalten (identische) Vorgaben[30] von verbotenen Verhaltensweisen zwischen Marktteuren, etwa das Verbot von Preisabsprachen – ob nun bei Wurst, Heizgas, Röstkaffee oder eben Software. Solche Verbote sind nicht endgültig, sondern können nach Art. 101 Abs. 2 AEU (ehem. Art. 81 Abs. 3) oder § 2 GWB auch wiederum freigestellt sein – und zwar durch die EGV 1/2003[31] „self executing", also ipse iure (und) ohne behördliches Verfahren. Ein Freistellungsbedürfnis besteht ohnehin nicht bei wirtschaftlichen Bagatellfällen und sofern der Tatbestand aufgrund des sog. spezifischen Gehalts eines Immaterialgüterrechts zu begrenzen ist. Erstere Ausnahme ist dem more economic approach geschuldet, der sich auch in der Bagatell-Bekanntmachung[32] als Notwendigkeit der Betrachtung ökonomischer Parameter manifestiert. Die zweite Ausnahme, der „spezifische Gehalt" des Softwareurheber- oder -patentrechts und mithin die prinzipiell erlaubten immaterialgutimmanenten Wettbewerbsbeeinträchtigungen, bleibt trotz[33] europäischer Vorgaben[34] dieser Rechte unklar bzw. konkreten Abwägungen überlassen.[35]

10 Befremdend ist es, dass in der Literatur bei kartellrechtlichen Untersuchungen nur untersucht wird, ob eine Verhaltensweise freistellungsfähig ist, Aussagen über die Kartellrechtswidrigkeit oder zumindest -bedenklichkeit nach Abs. 1 hingegen kaum gewonnen werden. Die Unbedenklichkeit wird bereits behauptet, wenn nicht „schwarze" oder „graue"[36] Klauselverbote der Gruppenfreistellungsverordnungen (GVOen) entgegenstehen. Allgemein bedarf es jedoch der Feststellung der Wettbewerbsbeeinträchtigung in Ansehung negativer Effekte, welche zunächst zum Verbot nach Art. 101 Abs. 2 AEU führen. Häufiger werden solche angenommen, wenn abhängige Unternehmen betroffen sind, etwa Software nicht „gebraucht" weiterverkauft werden darf oder strikte CPU-Klauseln als Softwarever-

wendungsbeschränkungen die Investition in neue Hardware behindern.[37]

11 Rechtlich können Freistellungen, welche auch erst bei einem Verbot nötig wie möglich sind,[38] von solchen Verboten gemäß Art. 101 Abs. 3 AEU dergestalt erfolgen, dass sie „gruppenweise" in abstrakt-genereller Verordnungsgestalt – den bereits erwähnten Gruppenfreistellungsverordnungen (block exemptions) – erfolgen. Ist der Anwendungsbereich einer solchen eröffnet, bestehen als Freistellungsvoraussetzungen Klauselverbote (Kernbeschränkungen bzw. hardcore restrictions) und Marktanteilsschwellen (in aller Regel zwischen 20 und 30 % in Ansehung eines horizontalen oder vertikalen Verhältnisses). Werden die Marktanteilsschwellen nicht überschritten und liegen keine Klauseln der „schwarzen" Listen vor, ist von einer Freistellungsfähigkeit pauschal und ohne summierende Vor- und Nachteilsprüfung auszugehen.[39]

12 Gleichwohl wird diskutiert bzw. seitens der Kommission vorgegeben, auch bei Nicht-Anwendbarkeit[40] der GVOen oder (geringfügigem) Überschreiten der Marktanteilsschwellen Freistellungen anzunehmen, sofern nicht eine Kernbeschränkung entgegensteht.[41] Diese „Ausstrahlungswirkung" der GVOen ist jedoch äußerst zweifelhaft. Für die Befürwortung einer Analogie fehlt es in aller Regel bereits an der unbewussten Regelungslücke[42] und oftmals auch an den vergleichbaren Interessenlagen.[43] Es ist ferner keinesfalls zwingend, dass dann zumindest regelweise von einem Überwiegen positiver Effekte ausgegangen werden kann. Insbesondere im Softwarekontext können aus den GVOen nur selten spezifische Aussagen gewonnen werden, insbesondere die Software erstmals aufnehmende Technologietransfer-GVO (TT-GVO) als auch die zugehörigen Leitlinien schweigen weitgehend.[44] Nur aus Gründen des Gleichbehandlungsgebotes sollte deswegen ausnahmsweise eine gelassene Lücke geschlossen werden. Grundsätzlich hingegen sind gemäß Art. 101 Abs. 1 und 3 AEU die positiven und negativen Wettbewerbseffekte außerhalb des Anwendungs- bzw. Freistellungsbereichs einer GVO abzuwägen.

II. Die Anwendungsvoraussetzungen und -grenzen einzelner GVOen

1. Technologietransfer-GVO (TT-GVO)

13 Die TT-GVO greift bei maximal zwei Vertragsparteien[45] und setzt gem. Art. 2 einen Vertrag über eine Lizenz zur Erstellung eines Produktes in Folge der Lizenzierung voraus. Entsprechend ist zu verlangen, dass das lizensierte Programm in ein neues Programm einfließt, hingegen genügt es im Allgemeinen nicht, ein Programm – ob auf Datenträgern oder per Online-Abruf („download") – lediglich zu vervielfältigen.[46] Entsprechend spricht die Offenlegung und Nutzung von Quellcode[47] bei OSS zunächst für eine Anwendbarkeit der TT-GVO.[48] Fraglich bleibt dabei, ob neben der Offenlegung auch die typische weitergehende Verwendung des Quellcodes zu verlangen ist, geschieht doch bei OSS die Offenlegung aufgrund entsprechender Lizenzpflichten, welche die Vervielfältigung mitsamt des Objektcodes oftmals verlangen,[49] lediglich pflichtweise und wird bei Programmkompilationen von „normalen" Endnutzern typischerweise nicht für Entwicklungsarbeiten genutzt.[50] Nur wenn OSS tatsächlich zu Entwicklungszwecken verbreitet wird, kann hingegen von einem Technologietransfer-Sachverhalt ausgegangen werden. Ansonsten führte die bloße Beifügung des Quellcodes zu einer unsachgemäßen Privilegierung solcher Software gegenüber proprietärer bloß aufgrund einer ggf. äußerst selten genutzten Möglichkeit, die zudem oktroyiert ist.

14 Ein nicht zu unterschätzendes Problem bzgl. der Anwendung der TT-GVO bei OSS wird durch ihre besagte Begrenzung auf maximal zwei beteiligten Parteien bzw. Unternehmen aufgeworfen (Art. 2 S. 1 TT-GVO). Rechte an einer OSS stehen, wie noch auszuführen sein wird, oftmals mehreren Urhebern und Bearbeitern als auch Unternehmen im kartellrechtlichen Sinne zu, deren „Mischwerk" diese OSS ist.[51] Entsprechend lizenzieren mehrere, zumindest bei Lizenzen ohne Recht zu Unterlizenzierungen,[52] parallel direkt an den Lizenz(en)nehmer, wodurch folglich in solchen Fällen bereits die Anwendbarkeit der TT-GVO ausgeschlossen ist.[53] Dabei handelt es sich auch keinesfalls um unabhängige, zufällige Parallellizenzierungen.

2. Forschungs- und Entwicklungs-GVO (FuE-GVO)

15 Die Forschungs- und Entwicklungs-GVO (FuE-GVO) setzt in ihrem Art. 1 Abs. 1 zuerst Vereinbarungen zur gemeinsamen Entwicklung voraus und eben nicht den zunächst einseitigen Transfer der TT-GVO.[54] Zwar ist OSS oftmals Gemeinschaftswerk und bestimmte Projektgruppen arbeiten auch gemeinsam, doch sofern jemand OSS oder -Material bezieht und eigenständig fortentwickelt, kann von gemeinsamer Entwicklung nicht ausgegangen werden. Anders ist hingegen die Konstituierung von Projektgruppen und deren fortgesetzte Kooperation zu bewerten.[55]

3. Die Vertikal-GVO (V-GVO)

16 Die Vertikal-GVO (V-GVO) hingegen ist grds. nach Art. 2 Abs. 5 subsidiär und nach Abs. 3 S. 1 auch nicht anwendbar, wenn das Immaterialgut im Vordergrund der Vereinbarung steht. Nach dem Willen der verordnenden Kommission[56] soll sie jedoch gelten, wenn die Lizenzvereinbarung lediglich direkt zwischen Softwareentwickler und Endabnehmer über shrink wrap und ähnliche (vermeintliche) Vertragsschlussmodelle zustande kommen sollte.[57] Bei OSS[58] ist zwar die Feststellung des bzw. der Urheber möglicherweise schwierig,[59] doch aufgrund der „Lizenz an jedermann" – zumindest bei der GNU GPL und vergleichbaren Lizenzmodellen – bedarf es oftmals keiner Lizenzierungskette[60] über Händler oder andere Mittler, weswegen diese Konstellationen als vergleichbar anzusehen sind. Dadurch begünstigt die V-GVO im Allgemeinen den Handel mit OSS-Datenträgern. Dass dabei ggf. mehrere an einen Lizenznehmer bzw. Datenträgererwerber lizenzieren, ist unbeachtlich.

17 Zwar wird die V-GVO gerade für den Internethandel reformiert, jedoch wird die Verbreitung digitaler Güter kaum in ihren Anwendungsbereich aufgenommen werden, weswegen sie voraussichtlich auch nach dem Mai 2010 nicht in solchen Konstellationen anwendbar sein wird.[61]

4. Zwischenergebnis

18 Die Anwendbarkeit der TT-GVO scheidet oftmals aus, nämlich dann, wenn der Quellcode nur der Pflicht wegen bekanntgegeben wird und nicht zur Fortentwicklung genutzt wird oder mehr als ein Lizenzgeber beteiligt ist. Hingegen greift die V-GVO oftmals – zumindest dann, wenn OSS auf Datenträgern vertrieben wird.

C. Kartellrechtliche Akteure und Adressaten bei Open Source

19 Ein Hauptanwendungsproblem der Kartellrechtskontrolle bei OSS ist zunächst die Feststellung der handelnden Unternehmen i.S.d. Art. 101 Abs. 1 AEU als Ansatzpunkte der kartellrechtlichen Untersuchung und im darauf folgenden Schritt als Adressaten etwaiger kartellrechtlicher Maßnahmen.[62]

20 Unproblematisch erscheint dies im Falle sog. Distributoren, welche Programm-Kompilationen und ggf. weitere Dienstleistungen anbieten, da diese firmiert sind.[63] Gleiches gilt, wenn etwa IBM oder SUN oder auch Stiftungen ihre Programme unter solchen – eigenen – Lizenzen feilbieten.[64] Jenseits dieser einfach gelagerten Fälle ergibt sich Erörterungsbedarf, weil OS-Projekten oftmals die Maxime der sog. Basar-Organisation[65] zugrunde liegt, also weltweit verteilte, unabhängige (Einzel-)Entwickler beteiligt sind.[66] Ferner ist nach der Rolle jener zu fragen, welche die Lizenzmodelle, wie etwa die GNU GPL[67], formulieren.

21 Letztere üben jedoch eine primär juristische geprägte Tätigkeit aus, welche erst von Entwicklern genutzt wird: Nutzt ein Entwickler etwa ein Formular aus einem entsprechenden Beratungsbuch,[68] wird auch nicht der Autor jenes Werkes als Softwareunternehmer gelten können. Entsprechend können diese nicht die gesuchten Unternehmen oder Teil dieser sein, sofern sie nicht selbst auch Software anbieten.[69]

22 Bei den zahlreichen Projektgruppen[70] muss – angesichts der variierenden Organisationsformen – festgestellt werden, wer an der Entwicklung beteiligt ist und wie hoch wessen Einfluss auf die Entwicklungs- und Veröffentlichungstätigkeit – die Auswahl verschiedener code-Varianten oder Programmteile – ist.[71] Eine Gewinnerzielungsabsicht ist jedenfalls nicht erforderlich, um als Unternehmen im kartellrechtlichen Sinn qualifiziert zu werden.[72] Unternehmen wird in dem Sinne funktional verstanden, somit

bedarf es ebenfalls keiner Eintragung oder eines Gesellschaftsvertrages. Somit kommt es auch nicht darauf an, inwieweit solche Gemeinschaften als Personengesellschaften oder Urhebergemeinschaften angesehen werden können. Jedoch kann dieses Indiz sein, ob die gesamte Gruppe als ein Unternehmen angesehen werden kann oder ob vielmehr bereits einzelne Entwickler jeweils als – unabhängige – Unternehmen angesehen werden müssen. Die Annahme einer Personengesellschaft der OSS-Gemeinschaften wird zu Recht in vielen Fällen abgelehnt, da es dafür nebst weiteren Voraussetzungen oftmals an den verpflichtenden Beiträgen fehlt.[73] Aus der Warte des Urheberrechts kann jedoch eine Miturhebergesellschaft angenommen werden, wenn Beiträge gemeinsam erarbeitet werden.[74] Erfolgen die Beiträge subsequent, sind die Verfasser als Bearbeiter zu qualifizieren,[75] jedoch die (nicht erschöpfenden) Regeln einer Miturhebergesellschaft analog heranzuziehen.[76]

23 Dem funktionalen Charakter dieses Tatbestandsmerkmals ist es zu schulden, aber zumindest diejenigen als (ein) Unternehmen zu erfassen, die die Veröffentlichung (offizielle „releases“, etwa bei APACHE[77] oder LINUX[78]) eines Programmes bzw. einer Programmversion zu verantworten haben; also mindestens jene Entscheidungsträger, die über die Aufnahme einzelner code- oder Programmteile in eine Veröffentlichungsversion entschieden haben. Somit ist nicht jeder Programmierer heranzuziehen, wenn er eher wie ein Freelancer agiert. Dies bleibt letztlich stets im Einzelfall in Kenntnis der jeweiligen „community“ zu entscheiden. Wird ein Programm von einer neuen bzw. anderen Gemeinschaft fortentwickelt, erscheint es sinnvoll, nur diese dann als das Unternehmen anzusehen, dass eben diese Fortentwicklung verantwortet, die vorherigen wiederum als eigenständige.

D. Kartellrechtliche Beurteilung gem. Art. 101 AEU (ex 81 EGV) und §§ 1 f. GWB

24 Die nachfolgende Klauselerörterung lässt ökonomische Rahmenparameter wie das Ausmaß der Wettbewerbsbeeinträchtigung aufgrund Marktmacht der Akteure, Wettbewerbsverhältnis der selben, Bagatellgrenzen, Beeinträchtigung des Gemeinsamen oder bloß des nationalen (oder außereuropäischen) Marktes usf. außer Acht, da diese der Auseinandersetzung mit einem konkreten Fall zu überlassen sind.

I. Beurteilung des Lizenzgebührverbotes

1. Negative Wettbewerbseffekte nach Art. 101 Abs. 1 AEU (ex Art. 81 EGV)

25 Wer etwa als Distributor OSS vervielfältigt und vertreibt,[79] darf – wie obig ausgeführt – zwar für das Kopieren und Datenträger sowie Handbücher, Anpassungen und sonstige Dienstleistungen Geld verlangen, jedoch nicht für eine Lizenz. Die weitläufige, allgemeine Verfügbarkeit solcher freien Software führt gleichwohl zu der Folge, dass nicht beliebige Einnahmen damit erzielt werden können.[80] Darin könnte eine Preisfestsetzung im Sinne des Art. 101 Abs. 1 a) AEU begründet sein, die auch gegen § 1 GWB verstieße; und zwar eine Preisfestsetzung auf Null.[81]

26 Distributoren, die allerdings lediglich kostenlos fremde Software zusammenstellen (kompilieren), dürfen zumindest für andere Dienstleistungen und auch für die Sammlung Geld verlangen. Erreicht und bezweckt ist dadurch keinesfalls eine Wettbewerbsbeeinträchtigung, sondern die Verbreitung der OSS zu nicht diskriminierenden Preisen. Sofern dennoch unberechtigt hohe Gebühren verlangt werden sollten, geht dieses zu Lasten des Anbieters und ermuntert andere zum – aufgrund der freiverfügbaren OSS – vergleichsweise günstigen Markteintritt. Deshalb können sogar mehrere Akteure an diesem Wettbewerb teilhaben: Diese Festsetzung sorgt also gerade für Preisderegulierung und mehr Wettbewerb, nicht für weniger und ist deshalb unbedenklich.[82] Aus teleologischen Gründen ist daher ein Verstoß gegen Art. 101 Abs. 1 AEU zu verneinen.

27 Wenn hingegen Entwickler bestehende OSS für eigene Programme nutzen, unterliegen sie – wie angeführt – ggf. dem Zwang, das Endprodukt (auch[83]) unter einer OS-Lizenz zu veröffentlichen, weswegen sie letztlich für dieses Produkt grundsätzlich kaum Geld erhalten können.[84] Dieses ist jedoch Folge des

Copyleft und bleibt deswegen erst im folgenden Schritt zu untersuchen.[85]

2. Hilfsweise: Freistellung durch GVOen

28 Preisfestsetzungen gehören gem. Art. 4 Abs. 1 lit. a) bzw. Abs. 2 lit. a) TT-GVO und Art. 4 lit. a) V-GVO[86] zu den Kernbeschränkungen. Teleologisch sollen aber auch diese Freistellungsausnahmen gerade wettbewerbsschädliche Beschränkungen verhindern, nicht wettbewerbsförderliche Gebührenverbote beseitigen.[87] Deswegen hinderten diese Kernbeschränkungen eine Freistellung nicht. Zudem bleibt darauf hinzuweisen, dass zwischen Nicht-Wettbewerbern, wie etwa Entwicklern und Distributoren, zumindest Höchstpreisfestsetzungen gestattet sind.

3. Zwischenergebnis

29 Betrachtet man das Lizenzgebührverbot isoliert und im Hinblick auf Distributoren – und nicht in unmittelbaren Wirkungszusammenhang mit dem Copyleft-Effekt –, ist es als kartellrechtlich unbedenklich und sogar wettbewerbsfördernd zu bewerten, wird doch dadurch ein (Informations-)Gut zur Verfügung gestellt, dass beliebig[88], auch von jedem, transferiert und angeboten werden darf.

II. Beurteilung des Copyleft

1. Negative Wettbewerbseffekte nach Art. 101 Abs. 1 AEU (ex Art. 81 EGV)

30 Wie dargelegt sind Programme, die auf OSS oder -code und solchen Copyleft-Lizenzen wesentlich basieren bzw. nicht unabhängig ausführbar sind, aufgrund der Verpflichtung für den Fortentwickler bei nicht bloß internem Gebrauch auch unter die betreffende Copyleft-Lizenz (bspw. die GNU GPL) zu stellen und anzubieten, wodurch wiederum Lizenzgebühren verhindert werden und der Quellcode bekannt wird. Es ist zu überlegen,[89] ob nicht dadurch die Amortisierung der zu diesem Programm notwendigen Arbeiten eingeschränkt und behindert und dadurch (potentieller) Wettbewerb verringert wird und deswegen ein Verstoß gegen Art. 101 Abs. 1 b) a.E. AEU bzw. § 1 GWB vorliegt.

31 Wenn sich nämlich der „virale Effekt“ auswirkt, kann durch das Zusammenwirken von Copyleft und das durch OS implementierte Gebührenverbot für das Programm als solches kein Geld[90] auf dem Markt akquiriert werden. Ferner wird durch die oktroyierte Lizenzerteilung – unter Vorbehalt der bloß internen Nutzung – das neue Programm allen umfassend bekannt und für diese auch „frei“ zum Gebrauch und zur Vervielfältigung.[91] Dem gegenüber kann auch nicht eingewandt werden, dass der Aufbau auf OSS freiwillig geschehe, ist doch die Freiwilligkeit im Rahmen des Art. 101 gerade der Normalfall.[92] Ergänzend ist zu erwägen, dass diese Umstände anfangs nicht seitens der hinzutretenden Entwickler bedacht werden, die frei angebotene Entwicklungsgrundlage zu verheißungsvoll erscheint oder das Risiko einer „Infizierung“ nicht überblickt wird.[93]

32 Dabei können unzweifelhaft in „abhängige“ Fortentwicklungen erhebliche Mittel investiert werden: Der Umbau einer Kirche in eine Kathedrale etwa ist ebenfalls mühsamer als der Neubau eines Fertighauses. Somit führt diese „geschenkte“ Software dazu, dass möglicherweise viel wertvollere aufbauende Arbeiten erneut „verschenkt“ werden müssen.[94] Somit wird ein Marktakteur in Gestalt des Entwicklers dadurch behindert und als potentieller Anbieter von Software ggf. sogar verhindert.[95] Dies wirkt sich folglich negativ auf den Wettbewerb und Investitionen aus. Deswegen ist dem Copyleft oftmals ein inhärenter negativer Wettbewerbseffekt anzulasten und ist deswegen als Verstoß gegen Art. 101 Abs. 1 AEU zu klassifizieren.

2. Freistellung durch GVOen

a. TT-GVO

33 Bei Programmfortschreibungen ist die TT-GVO in Anbetracht des vorherig Geschriebenen lediglich bei zwei beteiligten Unternehmen anwendbar. Neben der Wahrung der Marktanteilsschwellen[96] darf darüber hinaus keine Kernbeschränkung als Freistellungshindernis entgegenstehen. Sofern ein Wettbewerbsverhältnis vorliegt, ist die Liste des Art. 4 Abs. 1 TT-GVO einschlägig, ansonsten die des Art. 4 Abs. 2. Entsprechend sind nicht freigestellte Klauseln nach Art. 5 Abs. 1 bzw. Abs. 2 zu analysieren. Verstöße gegen Art. 5 wirken sich jedoch nicht auf die gesamte

Vereinbarung, sondern lediglich auf die einzelne Klausel aus bzw. lassen nur diese nicht von der Freistellung profitieren.

aa. Verstoß gegen Art. 4 Abs. 1 lit. d) bzw. Art. 5 Abs. 2 TT-GVO

34 Der Lizenznehmer einer OSS-Lizenz darf nach Art. 4 Abs. 1 lit. d) bzw. Art. 5 Abs. 2 nicht gehindert werden, seine eigene Technologie zu verwerten. Wie ausführt führt der mögliche OS-Zwang durch kumulative Wirkung von Copyleft und Lizenzgebührenverbot zu einem Verwertungshindernis. Wie bereits dargelegt, wird das betroffene Unternehmen nicht in der Entwicklung oder Benutzung eingeschränkt, jedoch bei der wirtschaftlichen Verwertung.

35 Diese Nicht-Freistellungsbeschränkung soll jedoch restriktiv angewandt werden – und zwar dergestalt, dass eine Freistellung nur unterbleiben soll, wenn der Akteur gehindert wird, eigene, vollständig abtrennbare oder eigenständige, konkurrierende Technologie einzusetzen.[97] Da es sich bei OSS selten um komplett eigenständige Entwicklungen handelt und zumal der „virale Effekt" dann nicht griffe, steht diese Kernbeschränkung Freistellungen nicht entgegen.

bb. Verstoß gegen Art. 4 Abs. 1 lit. c) bzw. Abs. 2 lit. b) TT-GVO

36 Aus anderer Perspektive betrachtet, ist die „Flucht in die interne Nutzung", um eben die Offenlegungspflicht zu verhindern, auch als Kundenbeschränkung erachtbar – nämlich als Kundenbeschränkung auf Null bzw. niemanden. Nach Art. 4 Abs. 1 lit. c) vi bzw. Abs. 2 lit. b) iii ist eine solche aber gleichwohl freigestellt, sofern sich die „Kundenkreisbeschränkung" auf die bloß unternehmensinterne Nutzung begrenzt. Daher steht dieses einer Freistellung nicht entgegen.

cc. Verstoß gegen Art. 5 Abs. 1 lit. a), b) TT-GVO

37 Der Lizenznehmer darf nicht dazu verpflichtet werden, Exklusivlizenzen für seine abtrennbare Verbesserung zu gewähren. Ungeachtet der Frage, wann eine solche abtrennbare Verbesserung nach Art. 1 Abs. 1 lit. n) TT-GVO vorliegt, ist festzuhalten, dass die OSS-Lizenz an „jedermann" ohnehin nur eine einfache Lizenz darstellt.[98]

b. FuE-GVO

38 Die FuE-GVO ist – wie dargelegt – höchstens in Fällen gemeinsamer Entwicklung anwendbar und sofern sich durch diese Kooperation nicht ein neues Unternehmen im Sinne des Art. 101 AEU konstituiert. Abgesehen vom Verbot – nicht einschlägiger – Preisfestsetzungen nach Art. 5 Abs. 1 lit. d) hinderte die FuE-GVO Freistellungen ansonsten nicht.

c. V-GVO

39 Die weitgehend lediglich Vertriebskonstellationen begünstigende VGO enthält keine besonderen, einschlägigen Kernbeschränkungen als Freistellungshindernisse.

d. Zwischenergebnis

40 Die TT-GVO nimmt zwar Software ausdrücklich in ihren Anwendungsbereich auf, enthält aber – wie auch die begleitenden Leitlinien – keine speziellen Anforderungen. Die allgemeinen Kernbeschränkungen passieren OS-Lizenzen in der Regel.

3. Freistellung durch Art. 101 Abs. 3 AEU in sonstigen Fällen

41 Primär wenn die Marktanteilsschwellen überschritten sind oder eine GVO aus anderweitigen Gründen – insbesondere der fehlenden Anwendungsmöglichkeit – nicht zur Freistellung führt, sind Freistellungen nach Art. 101 Abs. 3 AEU zu untersuchen. Allein aus einer prinzipiellen OS-Freundlichkeit der Europäischen Gemeinschaften[99] kann dieses nicht hergeleitet werden. Hingegen daraus, dass oftmals nur durch OS Wettbewerb gegen etablierte Produkte und Entwickler entsteht, OS in aller Regel zu kostenlosen oder zumindest günstigeren und oftmals auch sicheren Produkten für Konsumenten führt. Denn dies sind Voraussetzungen des Art. 101 Abs. 3. Auch der technologische Fortschritt kann durch ständig neue und bessere Programme als erfüllt angesehen werden. Allgemein hat die Verteilung von Technologie positive Effekte – nicht nur, wenn etwa wie bei Technologiegemeinschaften („pools") oder Kreuzlizenzierung die Technologiebe-

nutzung allgemein erweitert wird.[100] Jedenfalls entsteht durch OS ein ungemein produktives „Netzwerk“[101] und mehr Personen bzw. Unternehmen können auf dieser Basis entwickeln.[102]

42 Nach Art. 101 Abs. 3 lit. a) müssen die Beschränkungen durch OSS-Lizenzen aber auch unerlässlich sein. Ohne das Copyleft, den viralen Effekt, würden Anschlussentwicklungen der breiten Allgemeinheit von Entwicklern und Verbrauchern jedoch verloren gehen und vermutlich neue proprietäre Software entstehen oder eben solche Teile und Vorversionen gar nicht samt Quellcode veröffentlicht werden. Zudem bietet das „Copyleft“ allgemein einen großen Beteiligungsanreiz.[103] Deswegen sind solche Bedingungen der Überlassung bzw. Lizenzierung als unerlässlich anzusehen. Freistellungen nach Abs. 3 sind daher in aller Regel geboten bzw. gegeben.

E. Zusammenfassung und schlussbemerkung

43 OS-Lizenzmodelle sind im Hinblick auf Art. 101 Abs. 1 AEU sowie Art. 1 GWB keinesfalls immer absolut unbedenklich, doch sollten die Nachteile in aller Regel aufgewogen werden – also solche Vereinbarungen freistellungsfähig zumindest nach Art. 101 Abs. 3 AEU oder § 2 GWB sein: Der Copyleft-Effekt führt regelmäßig zu einer umfassenden Teilhabe und sogar zu gesteigerten Markteintrittschancen. Insgesamt sind die verbreiteten OS-Lizenzmodelle somit im Groben nicht nur mit dem allgemeinen Vertragsrecht und dem Urheberrecht vereinbar, sondern auch mit den kartellrechtlichen Vorgaben.[104] Dabei ist die Analyse bei OSS aufgrund der zahlreichen möglichen Akteure aus ggf. allen möglichen Staaten oftmals besonders komplex und vielschichtig.

44 Um die Frage der Anwendbarkeit der TT-GVO und das Tatbestandsmerkmal „Produkt“ wird nach wie vor gerungen. Nur ein restriktiver Ansatz kann jedoch ökonomisch gerechtfertigt sein und den Anforderungen des Technologietransfers gerecht werden. Allerdings ist die Anwendbarkeit der TT-GVO bei OSS oftmals ohnehin durch ihre bipolare Begrenztheit ausgeschlossen, hingegen ist die V-GVO zumindest bei Datenträgern anwendbar. Sind die Anwendungsvoraussetzungen jedoch erfüllt, kann von einer Freistellung durch GVOen regelmäßig asgegangen werden.

45 Für GVO-Analogien oder andere Ausweitungen besteht kein Anlass, zumal die GVOen auch aufgrund des Problems der Marktanteilsberechnung[105] ohnehin kaum einen „sicheren Hafen“ darstellen. Gerade ein „more economic approach“ sollte sich ohnehin auf eine Einzelfallanalyse verlassen, denn auf

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fragwürdige, schematisch festgelegte Negativklauselllisten und fragwürdige Erläuterungen in Leitlinien.

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1 Vgl. zur Entwicklungsgeschichte *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 13 ff.

2 Abgesehen von MAC OS für Macintosh-Computer, auf welchen tlw. auch Betriebssysteme für IBM-kompatible Computer ausgeführt werden können.

3 Etwa *Koch*, CR 2000, S. 333 ff. (insbes. S. 341 ff.).

4 So schon *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 330 Fn. 842. Eine der wenigen Ausnahmen: *Konrad/Timm-Goltzsch/Ullrich* in: Ullrich/Lejeune (Hrsg.), Der Internationale Softwarevertrag, 2. Aufl. 2006, I Rdnr. 865 ff.

5 Im Sinne der Legalausnahme bedarf es keiner Freistellungserklärung mehr – dazu s. B.

6 http://www.opensource.org/docs/osd.

7 In den Grenzen der jeweils gewährten Lizenz.

[8] Zu betonen ist dabei, dass auch bei ausgelieferter Software in aller Regel nur der Objektcode einsehbar ist, der wirtschaftlich bedeutsame Quellcode dabei in aller Regel also geheim bleiben kann, soweit er nicht durch Dekompilierung usf. kenntlich gemacht wird.

[9] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 3 – dabei primär die rechtlichen Unterschiede betonend. Vgl. auch *Marly*, Praxishandbuch Softwarerecht, 5. Aufl. 2009, Rdnr. 900.

[10] Auf die Diskussion, was ein Lizenzvertrag ist, wird hier bewusst mangels Relevanz verzichtet. Damit wird die Gesamtheit der Gestattungen der Softwarenutzung bezeichnet.

[11] Aus dem Jahr 2007, abrufbar etwa unter http://www.gnu.org/licenses/gpl-3.0.html. Sie stimmt in den zugrunde liegenden Prinzipien überein mit v2 http://www.gnu.org/licenses/gpl-2.0.html; *Marly*, Praxishandbuch Softwarerecht, 5. Aufl. 2009, Rdnr. 953; *Funk/Zeifang* CR 2007, S. 622 (bzgl. des viralen Effekts als sehr ähnlich betrachtend); diff., die Änderungen weitgehend begrüßend *Jaeger/Metzger*, GRUR 2008, S. 130 ff.

[12] Schwächer als in der GPL etwa in der zugehörigen, ebenfalls die dritte Version zählende L(esser)GPL: http://www.gnu.org/licenses/lgpl-3.0.html. Dazu auch *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 81 ff. (zu „beschränktem" Copyleft), 98 ff. (ohne Copyleft).

[13] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 5 f., 45 ff. („zentrale Vorschrift der GPL"); *Metzger*, Innovation in der Open Source Community, in: Eifert/Hoffmann-Riem (Hrsg.), 2008, S. 188 ff.; *Marly*, Praxishandbuch Softwarerecht, 5. Aufl. 2009, Rdnr. 919 („wesensprägend"); *Teupen*, „Copyleft" im deutschen Urheberrecht, 2007, S. 56 f.

[14] „The output from running a covered work is covered by this License only if the output, given its content, constitutes a covered work." (Sec. 2 S. 3 GNU GPL v3); „You may convey a work based on the Program, or the modifications to produce it from the Program (...) provided that you also meet all of these conditions: (...) b) The work must carry prominent notices stating that it is released under this License. (...) c) You must license the entire work, as a whole, under this License to anyone who comes into possession of a copy. (...)" (Sec. 5). Vgl. Sec 2 GNU GPL v2.

[15] Vgl. Sec. 2 S. 5 ff. GNU GPL v3.

[16] Etwa *Schäfer*, Der virale Effekt, 2007, S. 96 ff. Oder auch als „Schneeballsystem" – *Heussen*, MMR 2004, S. 446. Als assimilierende „Borg" bei *Hawkins*, Netnomics 6/2004, S. 107.

[17] http://www.theregister.co.uk/2001/06/02/ballmer_linux_is_a_cancer/.

[18] Dazu *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 47 ff.; *Jaeger*, in: ifrOSS (Hrsg.), Die GPL kommentiert und erklärt, 2005, Ziff. 2 GNU GPL, Rdnr. 15 ff.; *Jaeger/Metzger*, GRUR 2008, S. 135 f.; äußerst kritisch zu den Formulierungen der GPL v3 *Marly*, Praxishandbuch Softwarerecht, 5. Aufl. 2009, Rdnr. 958 ff.; ähnlich *Wuermeling/Deike*, CR 2003, S. 87 ff.; vgl. *Schäfer*, Der virale Effekt, 2007, S. 2 f., 10 f., 96 ff. (insbes. S. 120-164); *Funk/Zeifang*, CR 2007, S. 618 ff. (dabei GNU GPL v2 u. v3 vergleichend).

[19] *Schäfer*, Der virale Effekt, 2007, S. 112 ff., 171, vgl. S. 166 ff. u. zur v3 S. 182 ff. (insbes. 184).

[20] Ohne Positionierung mit Verweis auf Wegweisung durch die Rspr. *Jaeger*, in: ifrOSS (Hrsg.), Die GPL kommentiert und erklärt, 2005, Ziff. 2 GNU GPL, Rdnr. 18.

[21] Krit. *Schäfer*, Der virale Effekt, 2007, S. 113 Fn. 463.

[22] Im Gegensatz zur Freeware. Teilweise wird auch OSS als „free" bezeichnet; etwa auch seitens der FSF (<fsf.org>: „we call this software free, because the user is free"), welche als freie Software solche proklamiert, die frei hinsichtlich des Verbreitens, des Erforschens und des Modifizierens ist. In der Präambel der GNU GPL v3 heißt es: „When we speak of free software, we are referring to freedom, not price." Freeware hingegen ist in aller Regel nicht „open", sondern lediglich kostenlos.

[23] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 4; *Marly*, Praxishandbuch Softwarerecht, 5. Aufl. 2009, Rdnr. 903.

[24] „You may not impose a license fee“ (Sec. 10 GNU GPL v3). Kosten dürfen nicht für die Lizenz und in aller Regel auch nicht für den Quellcode entstehen („no charge“ – Sec. 6 GNU GPL v3), aber für die Zugänglichmachung einschl. Mietkosten (dazu *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 30) – vgl. *Koglin*, in ifrOSS (Hrsg.), Die GPL kommentiert und erklärt, 2005, Ziff. 1 GNU GPL, Rdnr. 49 ff. Der amerikanischen Herkunft und dem damit verbundenen Rechtsverständnis ist es geschuldet, dass über eine „Sache“ Software (vgl. etwa *Hoeren*, Softwareüberlasung als Sachkauf, 1989, passim) keine Aussage getroffen wird, doch ist fraglich, was eine solche neben Nutzungsrecht und Datenträger oder -übermittlung noch sein sollte.

[25] Einschl. Anpassungen, Parameterkonfiguration usf.

[26] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 39 f., 18 ff.; *Koglin*, in: ifrOSS (Hrsg.), Die GPL kommentiert und erklärt, 2005, Ziff. 1 GNU GPL, Rdnr. 49 ff.

[27] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 40; *Koglin*, in ifrOSS (Hrsg.), Die GPL kommentiert und erklärt, 2005, Ziff. 1 GNU GPL, Rdnr. 57.

[28] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 17, 18 ff.

[29] Besonders etwa dann, wenn über OS-Betriebssysteme eigene Märkte für Anwendungsprogramme definiert werden oder ein Markt nur für bestimmte OS-Betriebssysteme umrahmt wird.

[30] Zum Verhältnis der Rechtsmaterien untereinander etwa *Konrad/Timm-Goltzsch/Ullrich* in: Ullrich/Lejeune (Hrsg.), Der Internationale Softwarevertrag, 2. Aufl. 2006, I Rdnr. 758 f.

[31] S. Art. 1 Abs. 2, ABl. 2003/L1.

[32] „De minimis“, ABl. 2001/C368/13.

[33] Die Unklarheiten dieser Lehre beruhen gerade darauf, dass sich die herkömmliche Dichotomie von Bestand und Ausübung auch aus der Differenzierung zwischen nationalen Schutzrechten und europäischen Wettbewerbsregeln ergibt, welche mittlerweile insbesondere durch Art. 118 AEU in Zweifel zuziehen ist und bereits zuvor durch harmonisierende Richtlinien zu Urheberrechten und verwandten Schutzrechten ausgehölt wurde.

[34] Etwa durch die Computerprogramm-Richtlinie (2009/24/EG, ABl. 2009/L111/16) oder das Europäische Patentübereinkommen (EPÜ).

[35] Immenga/Mestmäcker/*Ullrich*, EG/2, 4. Aufl. 2007, GRUR A Rdnr. 51 ff., B Rdnr. 13 f.

[36] Nach dieser Farbenlehre sind weiße unbedenkliche, schwarze zur Nichtigkeit führende und graue solche, bei denen nicht die gesamte Vereinbarung nichtig ist, sondern nur die jeweilige Klausel.

[37] Vgl. *Lehmann*, CR 1990, S. 701 f.; *Moritz*, CR 1993, S. 263, S. 347; *Vinje*, CR 1993, S. 403; *Nordmeyer*, GRUR-Int. 2010, im Ersch.; a.A: wohl *Sucker*, CR 1989, S. 469; *Bödeker*, Die kartellrechtliche Bewertung von Softwareüberlassungsverträgen, 2008, S. 264 ff. nimmt zwar grds. illegale Klauseln an, verneint aber weitgehend relevante schädliche Markteffekte. Zu „Gebrauchtsoftware“ bzgl. Art. 82 EGV bzw. Art. 102 AEU *Herzog*, Handel mit gebrauchter Software, 2009, S. 128 ff. für eine allg. Zustimmungspflicht bei angestrebter Weiterübertragung, dagegen *Nordmeyer*, GRUR-Int. 2010, im Ersch.

[38] Diese rechtslogische Selbstverständlichkeit statuiert bzw. deklariert Art. 2 TT-GVO.

[39] Ausnahmsweise kann die Kommission die Freistellung gem. Art. 6 TT-GVO im Einzelfall entziehen.

[40] Insbesondere im Falle mehrpolarer Vereinbarungen – siehe II 1.

[41] S. TT-Leitl. (ABl. 2004/C101/02), Tz. 40, 51 f.

[42] Vielmehr handelt es sich oftmals um bewusste Regelungslücken aufgrund (bekannter) fehlender Ermächtigung.

[43] Insbesondere die Anwendung der TT-GVO in Fällen der bloßen Lizenzierung von Musik- und Filmwerken scheitert offensichtlich an dem Vergleich von Technologiegütern und damit verbundenen Fortschrittserwartungen mit bloßer Kosumgüterverbreitung.

[44] Das Ergebnis wäre eine Systemumkehrung: Vieles, was eine GVO nicht explizit nicht freistellt, wäre dann dennoch als freigestellt zu behandeln bzw. mangels Hinderungsgründen akzeptiert.

[45] *Wissel/Eickhoff*, WuW 2004, S. 1246 f.

[46] *Konrad/Timm-Goltzsch/Ullrich* in: Ullrich/Lejeune (Hrsg.), Der Internationale Softwarevertrag, 2. Aufl. 2006, I Rdnr. 779 f.; noch vom Entwurf der TT-GVO ausgehend restriktiv *Scholz/Wagener*, CR 2003, S. 885; weiter Wandtke/Bullinger/*Grützmacher*, 3. Aufl. 2009, § 69d UrhG Rdnr. 46; a. A. wohl *Schultze/Pautke/Wagener*, Die GVO-TT, 2005, Rdnr. 408 ff.; *Zöttl*, WRP 2005, S. 35; zumindest analog *Klawitter* in Wiedemann, Hb 2008, § 13 Rdnr. 54 f.; Downloadmöglichkeiten als Dienstleistung und somit als Produkt qualifizierend *Batchelor*, CTLR 2004, S. 167. Tlw. wird danach differenziert, ob der Lizenznehmer selbst vervielfältigt (angebliches Produkt) oder nur vertreibt.

[47] *Konrad/Timm-Goltzsch/Ullrich*, in: Ullrich/Lejeune (Hrsg.), Der Internationale Softwarevertrag, 2. Aufl. 2006, I Rdnr. 784 ff.; vgl. Immenga/Mestmäcker/*Fuchs*, EG/1, 4. Aufl. 2007, TT-GVO Rdnr. 180.

[48] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 331.

[49] Wie etwa durch Sec. 4 ff. GNU GPL v3 statuiert. Vgl. *Koglin*, Opensourcerecht, 2007, S. 201 ff.

[50] So fordert Hirsch/Montag/Säcker/*Röhling*, MünchKomm EG-WettbR 2007, Art. 1 TT-GVO Rdnr. 10, eine Erahnbarkeit für die beteiligten Unternehmen.

[51] S. dazu unter C.

[52] Gerade die GNU GPL schließt Sublizenzierungen aus (s. etwa Sec. 4 GNU GPL v2; Sec. 2 S. 9 GNU GPL v3, vgl. Sec. 10), anders hingegen etwa CPL (Common Public License), EPL (Common Public License) und Apache.

[53] Unbeachtet kann hier bleiben, dass die OSS-Lizenzen oftmals nicht einschlägig sind bzw. abgeschlossen werden, wenn die Programme lediglich (im Rahmen des § 69d UrhG) genutzt werden – *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 177; *Schäfer*, Der virale Effekt, 2007, S. 42 ff.

[54] *Schultze/Pautke/Wagener*, Die GVO-TT, 2005, Rdnr. 349 ff.

[55] Durch die sich ggf. ein Unternehmen im Sinne des Kartellrechts konstituieren kann – vgl. unter C.

[56] Krit. u. diff. *Konrad/Timm-Goltzsch/Ullrich*, in: Ullrich/Lejeune (Hrsg.), Der Internationale Softwarevertrag, 2. Aufl. 2006, I Rdnr. 787 ff.

[57] Vertikal-Leitl. (ABl. 2000/C291/01), Tz. 40. Dabei ist gleichwohl zweifelhaft, wie die Kommission „shrink wrap" im Allgemeinen mit Art. 5 I der Computerprogramm-Richtlinie vereinbaren kann.

[58] Pauschal für die Anwendbarkeit der V-GVO ohne weitere Begründung *Heath*, in: Spindler (Hrsg.), Rechtsfragen bei Open Source, 2003, G Rdnr. 9.

[59] Dazu unter C.

[60] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 126; *Spindler/Wiebe*, CR 2003, S. 873. Vgl. im Allgemeinen auch *Sahin/Haines*, CR 2005, S. 242 ff.

[61] Nach dem Entwurf begrenzt sich ihr Anwendungsbereich weiterhin auf Waren und Dienstleistungen, die nicht überwiegend mit der Übertragung von Immaterialgütern einhergehen. S. dazu http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html.

[62] In dem Katalog dieser sind niederzuschreiben die zivilrechtliche Nichtigkeit der Vereinbarung (Art. 101 Abs. 2 AEU) als auch die behördlichen Bußgelder sowie weitere Maßnahmen als auch zivilrechtliche Schadensersatzforderungen.

[63] *Metzger/Jaeger*, GRUR-Int. 1999, S. 840: „kommerziell arbeitende Firmen".

[64] Oder auch im Wege des „dual licensing" unter mehreren Lizenzmodellen.

[65] Dazu *Raymond* http://www.catb.org/~esr/writings/cathedral-bazaar/cathedral-bazaar/.

[66] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 191 ff.; *Schäfer*, Der virale Effekt, 2007, S. 17.

[67] In dem Fall ist es die FSF (Free Software Foundation), welche als „License Steward" auch eine Sonderrolle hinsichtlich der Formulierung neuer Versionen einnimmt.

[68] Etwa aus Münchener Vertragshandbüchern oder vergleichbaren Büchern oder Datenwerken.

[69] Zur Rolle der FSF (Free Software Foundation) und L. Torvalds *Koch*, CR 2000, S. 342 f. als „Konditionenkartell". Gerade erstgenannte bietet allerdings auch eigene Programme unter dieser Lizenz an (vgl. preamble GNU GPL v3).

[70] Lediglich grds. für Heranziehung ansonsten unbestimmter „developer communities" *Välimäki*, ECLR 2006, S. 130, welches er (Fn. 2) auf *EuGH*, Urt. v. 23.4.1991, Rs. C-41/90 (Höfer u. Elser/Macrotron) stützt, in welchem Fall die Bundesanstalt für Arbeit als Unternehmen qualifiziert worden ist, in Tz. 2 des Urteils aber auch eine sehr weite Anwendbarkeit dargelegt wird.

[71] „Kernteam" bei *Konrad/Timm-Goltzsch/Ullrich*, in: Ullrich/Lejeune (Hrsg.), Der Internationale Softwarevertrag, 2. Aufl. 2006, I Rdnr. 877; „core teams" bei *Schäfer*, Der virale Effekt, 2007, S. 21 f. S. auch *Metzger* http://www.iri.uni-hannover.de/tl_files/Materialien/Metzger/Publikationen/Metzger-VomEinzelurheberzuTeams%20und-Netzwerken2010.pdf (im Ersch.), S. 11; *Rossi*, in: Bitzer/Schröder (Hrsg.), The Economics of Open Source Software development, 2006, S. 30 ff.; *Xu/Christley/Madey*, in: Bitzer/Schröder (Hrsg.), The Economics of Open Source Software development, 2006, S. 254 ff.

[72] Allg. Immenga/Mestmäcker/*Emmerich,* EG/1, 4. Aufl. 2007, Art. 81 Abs. 1 EGV Rdnr. 21 ff., 33; *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, 2. Aufl. 2004, § 8 Rdnr. 16; im Kontext von OSS *Koch*, CR 2000, S. 341.

[73] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 199; *Teupen*, „Copyleft" im deutschen Urheberrecht, 2007, S. 154 ff.; *Grützmacher*, ITRB 2002, S. 86; zu haftungsrechtlichen Fragen *Spindler*, Rechtsfragen der Open Source Software (Studie), 2003, S. 96 f.; *Spindler* in: Spindler (Hrsg.), Rechtsfragen bei open source, 2003, E Rdnr. 16.

[74] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 143 ff., 199; *Schäfer*, Der virale Effekt, 2007, S. 24 ff.

[75] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 146; *Koglin*, Opensourcerecht, 2007, S. 74; *Schäfer*, Der virale Effekt, 2007, S. 36.

[76] *Metzger* http://www.iri.uni-hannover.de/tl_files/Materialien/Metzger/Publikationen/Metzger-VomEinzelurheberzuTeams%20undNetzwerken2010.pdf (im Ersch.), S. 10.

[77] Vgl. http://www.apache.org/foundation/how-it-works.html#meritocracy zu Kooptation.

[78] Vgl. http://www.heise.de/newsticker/meldung/Linux-Kernel-2-6-32-freigegeben-870889.html.

[79] Dazu aus der Präambel der GNU GPL v3: „For example, if you distribute copies of such a program, whether gratis or for a fee, you must pass on to the recipients the same freedoms that you received. You must make sure that they, too, receive or can get the source code. And you must show them these terms so they know their rights."

[80] Siehe A. II.

[81] „Can be seen" bei *Välimäki*, ECLR 2006, S. 132.

[82] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 334 (dort erörtert im Rahmen der TT-GVO); *Konrad/Timm-Goltzsch/Ullrich*, in: Ullrich/Lejeune (Hrsg.), Der Internationale Softwarevertrag, 2. Aufl. 2006, I Rdnr. 870 f.; im Kern so bereits *Koch*, CR 2000, S. 343; im Ergebnis ebenso *Välimäki*, ECLR 2006, S. 132; *Bond*, 104 Mich. L. Rev., S. 554 ff., insbes. noch 565 f. (2005).

[83] Den „Infizierten" kann es dabei vorbehalten bleiben, die Software ergänzend unter weiteren Lizenzen zu verbreiten (Stichwort: dual licensing).

[84] Hingegen ist es verfehlt, die kostenlose Verbreitung grds. als freiwilligen Akt der Entwickler zu betrachten – so jedoch *Konrad/Timm-Goltzsch/Ullrich*, in: Ullrich/Lejeune (Hrsg.), Der Internationale Softwarevertrag, 2. Aufl. 2006, I Rdnr. 869.

[85] In den USA versuchte um 2006 ein Entwickler gegen diese Preisfestsetzungen vorzugehen; in einer Reihe von Verfahren ging er u.a. gegen die FSF und etwa IBM erfolglos vor – http://sco.tuxrocks.com/?Case=Wallace. Er selbst jedenfalls partizipierte nicht an OSS, sondern sah sich durch die OSS am Markt gehindert, eigene (proprietäre) Programme zu entwickeln und anzubieten, da die OSS-„conspiracy" durch ihre kostenlosen Programme Wettbewerb verhindere. Richter *Young* lehnte mit einem „quick look" diese Klage ab und meinte abschließend: „GPL and open-source software has nothing to fear from antitrust laws" (*US Court of Appeals for the 7th Circuit*, Wallace vs. IBM/Red Hat/Novell, No. 06-2454, S. 6).

[86] Wie auch Art. 5 Abs. 1 lit. d) FuE-GVO und Art. 5 Abs. 1 lit. a) S-GVO.

[87] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 334 (dort erörtert im Rahmen der TT-GVO). A.A. *Heath*, in: Spindler (Hrsg.), Rechtsfragen bei Open Source, 2003, G Rdnr. 9.

[88] Im Rahmen der Lizenzauflagen.

[89] Ohne exakte Festlesung, insg. aber wohl tendentiell gegen die Annahme eines Verstoßes wider Art. 81 Abs. 1 (bzw. 101 Abs. 1) *Välimäki*, ECLR 2006, S. 130 ff. (insbes. 131 f., 132).

[90] Vgl. *Bond*, 104 Mich. L. Rev., S. 568 f. (2005).

[91] *Konrad/Timm-Goltzsch/Ullrich*, in: Ullrich/Lejeune (Hrsg.), Der Internationale Softwarevertrag, 2. Aufl. 2006, I Rdnr. 872 ff. konzentrieren sich bei der kartellrechtlichen Untersuchung auf das Gebot der Quellcodebekanntgabe und lehnen einen Kartellrechtsverstoß im Ergebnis ab.

[92] Der Kontrapunkt dazu bilden die Lizenzverweigerungen, denen Art. 102 AEU (ex Art. 82 EGV) über Pflicht- bzw. sog. Zwangslizenzen zu begegnen sucht.

[93] *Wuermeling/Deike*, CR 2003, S. 88 ff. (auch aufgrund unklarer Kriterien in den Lizenztexten), vgl. *Brügge/Harhoff/Picot/u.a.*, Open-Source-Software – Eine ökonomische und technische Analyse, 2004, S. 105 f. Aus anderer Sicht die möglichen positiven Effekte für Unternehmen, Software als OS zur Verfügung zu stellen, um damit durch freiwillige Helfer im Rahmen der Codepflege zu profitieren: *Hawkins*, Netnomics 6/2004, S. 106 ff. (insbes. auch S. 111 f. zu den Vor- und Nachteilen für Unternehmen bei viralen Lizenzen).

[94] Zur Anwendung des Schenkungsrechts: *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 205 ff.

[95] *Koch*, CR 2000, S. 344 sieht zumindest keine unzulässige Vertriebsbindung darin, da „alle" daran gebunden seien.

[96] Art. 3 TT-GVO.

[97] TT-Leitl. (ABl. 2004/C101/02), Tz. 95; *Schultze/Pautke/Wagener*, Die GVO-TT, 2005, Rdnr. 669 f., 673.

[98] *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 335; *Konrad/Timm-Goltzsch/Ullrich*, in: Ullrich/Lejeune, Der Internationale Softwarevertrag (Hrsg.), 2. Aufl. 2006, I Rdnr. 876; *Välimäki*, ECLR 2006, S. 133. Es sei denn nicht die GNU GPL, sondern „Lizenzen mit Sonderrechten" – also einer verstärkten, diskriminierenden Rücklizenzierung (grant back) zu Gunsten der Ursprungsunternehmen – finden Verwendung; vgl. *Jaeger/Metzger*, Open Source Software, 2. Aufl. 2006, Rdnr. 113.

[99] http://www.osor.eu/eupl.

[100] Vgl. Dazu bereits US-Antitrust Guidelines for the Licensing of IP, 1995, 5.5 (S. 29).

[101] Vgl. *Välimäki*, ECLR 2006, S. 131; *Bond*, 104 Mich. L. Rev., S. 558 ff. (2005).

[102] *Bond*, 104 Mich. L. Rev., S. 566, 569 (2005) („barriers to entry"); *Grützmacher*, ITRB 2002, S. 85; *Brügge/Harhoff/Picot/u.a.*, Open-Source-Software – Eine ökonomische und technische Analyse, 2004, S. 103 f., 165 ff.; *Bitzer/Schröder*, in: Bitzer/Schröder (Hrsg.), The Economics of Open Source Software development, 2006, S. 220 ff. (mit möglichen anderen Nachteilen auf S. 230 ff., welche sich überwiegend aus der ggf. „zerstreuten" Organisation ergeben kön-

nen); u.a. mit dem Aspekt, dass OSS zumindest gleichwertig oder gar besser sei *Mundhenke*, Wettbewerbswirkungen von Open-Source-Software und offenen Standards auf Softwaremärkte, 2007, S. 223 ff.

103 Vgl. *Metzger*, Innovation in der Open Source Community, in: Eifert/Hoffmann-Riem (Hrsg.), 2008, S. 204 f unter Zugrundelegung eines *do ut des*-Gedankens.

104 Die Frage nach möglichen Implikationen im Rahmen des Art. 102 AEU wird erst dann relevant, wenn Unternehmen über eine entsprechende Marktstellung verfügen (vgl. *Koch*, CR 2000, S. 344), was wiederum von der Methode der Marktdefinition abhängt. Eine Frage, welche sich dann stellt, ist, ob die Unternehmen ggf. verpflichtet werden können – wie MICROSOFT – Schnittstelleninformationen oder Code im Rahmen einer Zwangs- bzw. Pflichtlizenz herauszugeben, die nicht „viral" zu OS führt. Diesbezüglich sei auf *Välimäki*, ECLR 2006, S. 133 ff. verwiesen. Wie OSS auch seitens marktstarker Unternehmen gegen (potentielle) Wettbewerber eingesetzt werden kann, zeigt *Raymond*, The Cathedral & the Bazar, 2001, S. 146 ff. auf. Dass virale Effekte aber auch ohne beherrschende Stellungen genutzt werden können, um den Wettbewerb negativ zu beeinflussen, verdeutlichen bereits insbesondere bestimmte, nicht bloß „einfache" Rücklizenzierungsvereinbarungen (s. dazu Endnote 98 dieses Textes).

105 Einerseits die Schwierigkeit, Märkte „richtig" zu definieren, andererseits, die Anteile und insbesondere die – schwankenden – Verkaufszahlen konkurrierender Anbieter zu erfassen; vgl. *Schultze/Pautke/Wagener*, Die GVO-TT, 2005, Rdnr. 440; *Wissel/Eickhoff*, WuW 2004, S. 1248 f.; *Schumacher/Schmid*, GRUR 2006, S. 10.

Enforcement of the GNU GPL in Germany and Europe

by **Till Jaeger**

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Abstract: GPL enforcement is successful in Europe. In several court decisions and out of court settlements the license conditions of the GPL have been successfully enforced. In particular, embedded systems are the main focus of such compliance activities. The article describes the practice of enforcement activities and the legal prerequisites under the application of German law.

Keywords: Free Software, Open Source Software, GNU GPL, enforcement, out of court proceedings, license violation, damages

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A. Rationale for enforcement of the GPL

1 At present, the enforcement of the GPL license conditions is driven by single developers and organizations supporting Free Software. Most famous is Mr. Harald Welte, former maintainer of the Netfilter/Iptables project, who is running the enforcement project gpl-violations.org. Some years ago, Mr. Welte became aware of the fact that many manufacturers use the Linux kernel in their products without complying with the GPL conditions, and give the necessary credit to the Free Software community. His letters to the companies remained mostly unanswered or negotiations were so protracted that by the time the source code was eventually published, the relevant product was no longer available for sale. Therefore, he decided to take legal action in a more formal way.

2 After the first enforcement cases became public, more and more interested parties informed Mr. Welte about other violations. He then decided to establish 'www.gpl-violations.org' to provide a platform for enforcement activities and public documentation of his and others' efforts to bring commercial GPL users into GPL compliance.[1] Having access to modified source codes of technical devices is a strong motivation to participate in the enforcement of the GPL, and thus many people support gpl-violations.org.

3 In 2006, the FSF Europe launched a Freedom Task Force (FTF) to collect and share knowledge about Free Software law and safeguard the interests of Free Software projects. FTF cooperates with gpl-violations.org with regard to GPL compliance issues and facilitates the European Legal Network (ELN), where

lawyers and representatives of companies from the software industry maintain a lively exchange of ideas.[2] This strategic approach has been enhanced and refined, and has had impact on the general behaviour of IT industries with regard to GPL compliance.

4 GPL is popular not just among developers but also among companies because it helps secure a proper competition with regard to a particular software product and prevents unfair withholding of improvements of the software released in the Free Software world. Moreover, as the dual licensing model – i.e. offering a software product under the GPL and a proprietary license – is widely used, it can be expected that companies will also start to enforce their rights in the near future. Even companies that distribute GPL products without holding copyrights may soon begin to enforce the GPL by relying on unfair competition law (instead of copyright law) in order to obtain the complete corresponding source codes of improved software solutions from their competitors.[3]

B. Information about GPL violations

5 One might think that the detection of GPL violations in proprietary products is difficult or almost impossible, when no source code is at hand or the software is even hidden in an embedded system. In reality, however, there are many different ways to get the necessary information to prove the use of GPL-licensed software.[4] To quote an easy example: On a recent flight, when the entertainment system in the seat in front of me booted, I was surprised to see the typical boot information of the Linux kernel, including a copyright notice of one of my clients.

6 But GPL violations are not restricted to the Linux kernel. Once, another client of mine was contacted by a customer of a proprietary product asking for support. Thus, my client learned that a header file written by him was made available on the vendor's website, and that the latter shipped his proprietary product without any information about the fact that the software was licensed under the GPL.

7 Many violations concern embedded systems. Typically, violations become obvious when manufacturers provide firmware updates on their websites. Violations can often be shown by a simple analysis of strings showing typical debug information or even copyright notices. Strings are sequences of characters, and sometimes text strings from the source code remain intact after the compilation process. String searches with an editor can be sufficient to receive strong indication for the use of a certain program.[5] Specialised research providers are currently developing a software tool for easy detection of GPL violations.[6]

8 More complex efforts are necessary to provide evidence for the use of the Linux kernel in an embedded system, if no firmware access is given. With the necessary expert knowledge, a serial port can be detected on the printed circuit board (PCB). The typical structure of a booting Linux kernel can be found with the help of an oscillograph and, if the suspicion is confirmed, a hardware interface can be soldered on the PCB to extract the firmware from the serial port for further analysis.

9 In our current practice, we frequently see cases of firmware being encrypted in order to hide the use of GPL software, but where the violation can be shown with the help of the advanced reengineering skills of the Free Software community.

C. Modes of violations

10 The typical GPL infringing product does not contain any notice about the fact that GPL software is contained. Consequently, no license text and no source code are provided. Such products are the main focus of enforcement activities. Sometimes a GPL notice is provided, but the license text of the GPL and the source code are not available, or the notice points to a webpage that might contain this material or nothing at all. Although a situation where the necessary information is provided on a webpage is in general no reason for enforcement activities, one should keep in mind that the District Court of Munich has decided that the mere referral to a webpage does not comply with section 3 of the terms and conditions of the GPL (version 2).[7] This example demonstrates that careful in depth consideration of all obligations of

the GPL is required for compliant use of GPL software.

11 Far more common is the situation that firmware updates are offered on the website of the manufacturer but no *"complete corresponding source code"* is made available.[8] In particular, it is not sufficient to provide the most current version of the source code, if several older versions of the firmware are still offered on the website – the "correspondent" source code for all software versions would be missing. Furthermore, gpl-violations.org often faces the problem that the available source code is not complete, because only parts of the source code are offered or only the modified files, but not the *complete* source code allowing compilation and installation of the software on the very same device are available. It is a common violation that the *scripts used to control compilation and installation* are missing for embedded systems.[9]

12 Derived works of a GPL licensed software have to be licensed under the GPL according to section 2 b) GPLv2 (so called "Copyleft"[10]), and the source code of the modified version has to be provided. Although we have not seen any court cases regarding the scope of the "Copyleft" so far, it is most likely that such cases will come to court in the future. At present, there is uncertainty about what has to be considered as a derivative work and how it can be distinguished from an independent piece of software.[11] This might discourage parties to institute court proceedings with an uncertain outcome. Nevertheless, developers and competitors are highly interested in using modifications of successful programs, and therefore, companies unwilling to release the source code of derivative works will sooner or later become targets of GPL enforcement.

D. Out of court proceedings

13 Enforcement proceedings usually start with a cease and desist letter explaining the GPL violation and demanding a declaration to cease and desist from distributing the product, unless according to the requirements of the GPL, each product contains a copy of the license text and the complete corresponding source code is made available. Therefore the violator is allowed to continue the use of the GPL software if he shifts the distribution of his product in a GPL compliant way. In addition, the violator is demanded to accept the reimbursement of the costs of the enforcement (expenses for a test purchase, reengineering and lawyer's fees[12]) and to provide information about the supplier of the software (if any) and commercial consumers. This information is needed to safeguard and ensure that the distribution chain is also compliant.

14 Depending on the concrete case, damages may be claimed.[13] Some infringers defend themselves with the argument that no damage was incurred, as the software is available without any license fee. But this line of argument is without any merit: under German law the copyright holder may claim the vendor's profit that is based on the use of the GPL software. Copyright holders who offer their software under a dual licensing model are easily able to prove their actual damage when demanding the equivalent of license fees not earned.

15 The vast majority of infringers accept to declare to cease and desist from GPL incompliant distribution of their products and to reimburse the costs of the enforcement. In some cases a settlement can entered into, which addresses particular issues, e.g. a grace period.

16 German procedural law allows to file for a preliminary injunction in urgent matters. It is generally accepted that a permanent copyright infringement constitutes an urgent matter.[14] However, this assumption is not upheld where the infringed party fails to act in an urgent matter by waiting a inappropriate time (measured from the moment the rights holder becomes aware of the infringement) before filing for a preliminary injunction. What is considered an appropriate time in this context depends on the competent court.[15] Therefore out of court proceedings have to be conducted within a short period to keep the option alive to apply for a preliminary injunction.

17 Out of court settlements are not restricted to violations in Germany. The gpl-violations.org project enforced the GPL in other European countries like Slovenia, the Netherlands, Sweden, France, Austria and the UK, as well as outside Europe, e.g. in Taiwan, Korea,

the US and China. This has led to a growing awareness about GPL compliance issues, in particular in software producing countries as Korea and Taiwan.[16]

18 E. Enforcement in court proceedings

19 The first lawsuit to enforce the GPL in Europe was filed in 2004.[17] The infringer, a manufacturer of a WLAN router that deployed GPLed software in its firmware, refused to provide a declaration to cease and desist from GPL incompliant distribution. The copyright holder applied for a preliminary injunction on April 1, 2004. The District Court of Munich granted a preliminary injunction on April 2, 2004, thus only one day later. After an objection of the manufacturer against the preliminary injunction and a court hearing the District Court of Munich confirmed the preliminary injunction and provided a written reasoning. The infringer had to bear the complete costs of the proceedings including the lawyer's fees of the copyright holder.

20 The most important aspect of this judgment is the court's conclusion that a violation of the GPL results in a copyright infringement with regard to the automatic termination clause of section 4 GPLv2.[18] The GPL is considered a license agreement with a resolutory condition that provides for an automatic reversal of rights in case a licensee does not abide by his contractual obligations.[19] Therefore, GPL incompliant distribution is a copyright infringement and not only a breach of contract.[20] Consequently, licensors of GPL software may rely on all the enforcement means established by the European "Directive on the enforcement of intellectual property rights"[21], when enforcing the GPL obligations.

21 If this reasoning will prevail in other countries of the European Union, has still to be proven in court cases. Currently, a lawsuit aiming at the enforcement of the GPL is pending in France.[22] Independently from this case, the Paris Court of Appeals held in a recent decision that it is a breach of an IT contract, if GPL software is delivered in fulfilment of the contractual obligations, but the conditions of the GPL are not observed.[23] This case was not an enforcement case, but examined the GPL as a preliminary question.

22 However, enforcement lawsuits with effect on other European countries are existent. In the case *Welte ./. Skype Technologies S.A.*, the GPL has been enforced against a Luxembourgian company acting in Germany.[24] This is the single case in Germany, in which a GPL infringer appealed a District Court decision, mainly for alleged violation of antitrust law. However, the defendant withdrew the appeal, after the Munich Court of Appeal expressed in the hearing its clear intention to uphold the decision of the District Court, arguing that even in the unlikely case that the GPL would violate antitrust provisions, such violation would not result in releasing a licensee of GPL software from observing the conditions of the GPL. Another case with international perspective concerned a UK company with a branch office in Germany, which allowed to serve a preliminary injunction in German language.

F. Conclusion

23 The well-established practice of GPL enforcement in Germany and some parts of Europe leads to a growing number of GPL compliant products. Since embedded systems often contain third party software, enforcement cannot stop with legal actions against manufacturers or importers of infringing products, but must aim for compliance of the complete distribution chain and needs to have a more general strategy of information policy for such software developing companies and countries.[25]. Plenty of documentation exists that can be used for providing the software industries all over the world with the necessary know-how to avoid GPL violations.[26] Considering the increasing use of GPL software in the software market, license enforcement will continue being an essential issue in the OSS world.

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1 See www.gpl-violations.org.

2 See K. Kopenhaver, *Collaboration Among Counsel Celebrating the Formation of a Community of Lawyers for the Advancement of Understanding of Free and Open Source Licensing and Business Models,* 1 IFOSS L. Rev. 53 et seq. (2009), http://www.ifosslr.org/ifosslr/article/view/7/18.

[3] See G. Spindler, *Rechtsfragen bei open source*, p. 128 and T. Jaeger/A. Metzger, *Open Source Software,* 2. ed, para. 336 et seq.

[4] For detailed information see A. Hemel, *The GPL Compliance Engineering Guide (v.3.00),* http://www.loohuis-consulting.nl/downloads/compliance-manual.pdf.

[5] Before a string research, it might be necessary to extract data from an image file by decompressing and extracting the kernel image and file systems hidden in such file.

[6] Development by OpenDawn and Loohuis Consulting funded by NLnet Foundation. The detection tool is expected to be launched in the near future.

[7] District Court of Munich, 12 July 2007, case 7 O 5245/07 (*Welte v. Skype Technologies S.A.*), available at http://www.ifross.de/Fremdartikel/LGMuenchenUrteil.pdf.

[8] Section 3 GPLv2: *"...complete source code means all the source code for all modules it contains, plus any associated interface definition files, plus the scripts used to control compilation and installation of the executable. However, as a special exception, the source code distributed need not include anything that is normally distributed (in either source or binary form) with the major components (compiler, kernel, and so on) of the operating system on which the executable runs, unless that component itself accompanies the executable."*

[9] More detailed information is provided at http://www.gpl-violations.org/faq/sourcecode-faq.html.

[10] Definition of the FSF, see http://www.gnu.org/copyleft/.

[11] On the concept of „derivative work" under European copyright law, especially with regard to the Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0250:EN:HTML), see T. Jaeger, *Kommerzielle Applikationen für Open Source Software und deutsches Urheberrecht*, in Hoffmann/Leible (eds.), Vernetztes Rechnen, Softwarepatente, Web 2.0 (2008), 61, 70 et seq. (available at http://www.ifross.org/ifross_html/HoffmannLeible_Beitrag%20Jaeger.pdf). See also ifrOSS, *Die GPL kommentiert und erklärt,* Ziffer 2, http://www.ifross.org/Druckfassung/Die_GPL_kommentiert_und_erklaert.pdf (licensed under the CC license Attribution-Noncommercial-No Derivative Works 1.0).

[12] According to German law, the violator has to compensate for the actual costs for the test purchase and the reengineering efforts and the costs for the services of a lawyer under a statutory scale according to the German Lawyers' Fees Act, http://www.gesetze-im-internet.de/rvg/index.html.

[13] German civil law does not stipulate claims for punitive damages, but is designed to compensate the claimant for its economic loss. In the case of an infringement of copyright three methods of calculation are accepted: 1. equivalent to license fees, 2. concrete actual damage and 3. profits of the violator, BGH GRUR 1995, 349, 351 –*Objektive Schadensberechnung*.

[14] See Fromm/Nordemann-J.B. Nordemann, *Urheberrecht,* 10th ed. (2008), § 97 UrhG, para 202.

[15] The courts of Munich apply a strict deadline of one month, OLG München, GRUR 1992, 328.

[16] F. Ko, *The Introduction of Viral Effect of the GPL and German Case Studies*, in: Y-C. Wang (ed.), Exploring the Unknown of Science and Technology Law (2006), p. 93-117.

[17] District Court of Munich, 19 May 2004, case 21 O 6123/04 (*Welte v. Sitecom Deutschland GmbH)*, available in German language at http://www.jbb.de/fileadmin/download/urteil_lg_muenchen_gpl.pdf, and in English translation at http://www.jbb.de/fileadmin/download/judgment_dc_munich_gpl.pdf

[18] *„You may not copy, modify, sublicense, or distribute the Program except as expressly provided under this License. Any attempt otherwise to copy, modify, sublicense or distribute the Program is void, and will automatically terminate your rights under this License."*

[19] A. Metzger/T. Jaeger, *Open Source Software and German Copyright Law,* IIC Vol. 32, 2001, p. 52.

[20] Similar to the conclusions of the United States Court of Appeals for the Federal Circuit in *Jacobsen v. Katzer*, 535 F.3d 1373, 1379 (Fed. Cir. 2008), http://www.cafc.uscourts.gov/opinions/08-1001.pdf. For an analysis see T. Jaeger/J. Gebert, *USA/CAFC - Open Source Licensing – Comment on " Jacobsen v. Katzer",* IIC 2009, pp. 345 et seq; L.

Rosen, *Bad Facts Make Good Law: The Jacobsen Case and Open Source,* 1 IFOSS L. Rev. 27 et seq. (2009), http://www.ifosslr.org/ifosslr/article/view/5/9; M. Henley, *Jacobsen v Katzer and Kamind Associates – an English legal perspective, 1* IFOSS L. Rev. 41 et seq. (2009), http://www.ifosslr.org/ifosslr/article/view/4/13.

21 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R%2801%29:EN:HTML.

22 http://gpl-violations.org/news/20071120-freebox.html, http://www.fsf.org/blogs/licensing/2007-11-29-lawsuits.

23 *EDU 4 v. AFPA*, Cour d'Appel de Paris, Pôle 5, Chambre 10, no: 294, http://fsffrance.org/news/arret-ca-paris-16-.09.2009.pdf. For a report see M. von Willebrand, *Case law report: A look at EDU 4 v. AFPA, also known as the "Paris GPL case"*, 1 IFOSS L. Rev. 123 et seq. (2009), http://www.ifosslr.org/ifosslr/article/view/17/41.

24 District Court of Munich, 12 July 2007, case 7 O 5245/07 (*Welte v. Skype Technologies S.A.*), available at http://www.ifross.de/Fremdartikel/LGMuenchenUrteil.pdf.

25 See R. Kemp, *Towards Free/Libre Open Source Software ("FLOSS") Governance in the Organisation,* 1 IFOSS L. Rev. 61 et seq. (2009).

26 See e.g. A. Hemel, *The GPL Compliance Engineering Guide (v.3.00),* http://www.loohuis-consulting.nl/downloads/compliance-manual.pdf, the FAQ of the FSF, http://www.gnu.org/licenses/old-licenses/gpl-2.0-faq.html, the FAQ of gpl-violations.org, http://gpl-violations.org/faq/index.html, and the information provided by ifrOSS, http://www.ifross.org/en/node/3.

Book review:

Yi Shin Tang, The international trade policy for technology transfers – Legal and economic dilemmas on Multilateralism versus Bilateralism, Wolters Kluwer Law & Business 2009 (Global Trade Law Series, vol. 20), 230 p., ISBN-10: 9041128255, ISBN-13: 978-9041128256

by **Thomas Dreier**

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1 The importance of international technology transfer for economic development can hardly be overstated. Whereas the often conflicting interests of developed countries on the one hand and developing countries on the other have long been the cause of serious political obstacles to technology transfers, by now it appears to be accepted by most scholars that higher levels of intellectual property rights protection are fundamental for encouraging both foreign direct investment (FDI) and licensing. However, the best strategies for attaining a sufficient level of protection and to what extent such strategies would be in conflict with other strategies and objectives pursued in international negotiations and relations remains an open issue. In particular, it is not quite clear if, and if so, to what extent, either FDIs or licensing agreements by and amongst private firms are to be preferred. Similarly doubts exist with regard to the effects of multilateral or bilateral treaties on the transfer of technology.

2 In view of these questions, the main focus of the present book – which was written as a Ph.D. thesis at the Universities of Turin/Italy and Ghent/Belgium – is on assessing whether certain types of international rules are more or less capable of efficiently encouraging technology flows from developed to developing countries. Of course, such an endeavor will encounter a variety of methodological obstacles, which Yi Shin Tang describes right at the very beginning of his book. In particular, the relationship between FDIs and licensing is much more intertwined than the formal opposition might suggest. The reason is simply that licensing decisions by private firms are taken in view of the existing international or at least bilateral legal framework. Inversely, existing licensing habits, needs or demands are shaping the content of FDIs. Statistical data is also not always available, or if it is available, it is not sufficiently fine-grained for permitting unambiguous conclusions. However, the data available do clearly indicate that in spite of an increase in the in-

ternational and bilateral instruments in the wake of the creation of the WTO system and the TRIPS agreement, the flows of technology to developing countries have not taken place as expected by both policy makers and economists. Even amongst developing countries, the benefits of the agreements seem to be rather unbalanced towards few countries, in particular those in South East Asia.

3 Against this background, Yi Shin Tang uses a methodology that is predominantly legal in nature (because of the normative construction and effects of legal rules), but is combined with an economic and institutional analysis (because of the concerns of efficiency to be achieved by the legal rules in question). In this combination of economic analysis and a comparative law approach (comparative law and economics), Yi Shin Tang has attempted to mitigate the risk of arriving at insufficiently founded results, one which is inherent in an economic analysis of international law.

4 After the introductory chapter, the five remaining chapters of the book focus on the following: the current scenario of international transfer of technology (chapter 2); the law and economics of intellectual property in the international market (chapter 3); the legal structure of the international regimes on technology transfer (chapter 4) and the relationship between bilateral investment treaties (BITs) and multilateral intellectual property rights (IPRs) regimes (chapter 5). The last chapter (chapter 6) is reserved for a general conclusion.

5 While chapter 2 is mainly devoted to the introduction and explanation of fundamental notions, such as the economic nature of innovation, foreign direct investment and licensing, the role of nation-states and transnational corporations, a practical and theoretical description of current technology flows and the grounds for international cooperation in the technology market, in chapter 3 Yi Shin Tang develops a series of tools that are needed for more detailed understanding of these factors. Based on previous work by Nicholson, he develops a formal mathematical model in order to explain "how the structure of IPRs creates incentives for increased flows of FDI and licensing in foreign markets" (p. 86). In this way, he is able to demonstrate that – and under what circumstances – the same level of IPR protection has different impacts on FDIs and licensing, which in turn may influence an individual firm's decision to invest or license abroad. In addition, a comparison of both domestic and international law systems reveals that international IPR legislation provides a greater incentive to technology transfer than mere domestic legislation. Of course, this conclusion may hardly surprise, if only for the simple fact that technology transfer has to rely on some minimum level of IPR protection outside of the domestic jurisdiction of the exporting or licensing firm. Similarly, Yi Shin Tang analyzes the policy options resulting from his findings for developing countries. Also in this chapter, Yi Shin Tang clarifies the relationship between FDI and licensing on the one hand and the multilateral and bilateral options on the other. According to his analysis, FDI is more often achieved by BITs, whereas licensing incentives are rather to be found within multilateral IPR instruments. From a transnational firm's perspective, BITs have the advantage that in general they not only provide a higher degree of IPR protection in the developing country, but that the means of enforcement are usually more efficient than under a multilateral IPR instrument. It should be noted, however, that in emphasizing the lower level of information that private firms might gain with regard to the target state's domestic level of IPR protection and enforcement under a multilateral IPR treaty as opposed to a BIT, Yi Shin Tang does not mention the effect of the information that is exchanged on exactly these matters within the TRIPS Council.

6 Chapter 4, the structural analysis of the international legal rules governing FDI and licensing, is then again much more conventional in style and methodology. Here, Yi Shin Tang describes both the development and the contents of the major IPR conventions (the Paris and Berne Conventions, the Rome Convention, the Madrid Agreement and, most notably, of course, the TRIPS agreement), before giving an overview and analyzing the – relatively "boiler plate"– normative structure of BITs, which is based on more than 2000 BITs. This structure includes legal protection of foreign investment against every type of hostility, including the imposition of the national treatment principle, measures securing full market access

and repatriation of investments, measures against deliberate expropriation and strong dispute settlement mechanisms. Of course, it is true that the international regime of IPR treaties as they presently exist is the result of a historic piecemeal process rather than of a unique legislative design. However, it might be worth noting that the TRIPS agreement in particular did react in a comprehensive fashion to the gaps and lacuna of the existing international treaties. Nevertheless, BITs, Yi Shin Tang concludes, do provide a greater level of security to private firms and investors, which – one might add – could work equally well as an incentive to increased FDI and licensing.

7 In chapter 5, Yi Shin Tang develops his major idea, namely that under both article XXIV of the GATT and article 4 of TRIPS not only is there room left for bilateral action, but that – contrary to the view held by most scholars – BITs may indeed have beneficial effects on the transfer of technology (pp. 151 et seq.). Here, his analysis is again based on an economic model which – by way of an analysis of the expected behavior of the players involved – intends to demonstrate the beneficial effects of a combination of both multilateral and bilateral actions taken in view of promoting the international transfer of technology, notably to developing countries. But in this respect Yi Shin Tang has to admit that his theory must rely on the assumption that the states "have a sufficient capability to decide on a rational basis, subject only to the forum of negotiations in which they are interacting" (p. 191). However, given both the potentially unequal bargaining power between the two parties involved in the conclusion of a BIT and the "boiler plate" structure of the latter, one may have serious doubts whether this assumption is fulfilled in reality, in particular when BITs are negotiated between highly developed and developing countries.

8 In sum, Yi Shin Tang refutes both the view held by many scholars that the lack of a desired transfer of technology from developed to developing countries is the result of the growing dominance of BITs over multilateral IPR-agreements and the view – also held by many – that the level of IPR-protection contained in the IPR-agreements has to be held responsible. Rather, Yi Shin Tang suggests that "stronger IPRs may indeed provide better and more stable incentives for international technology transfers" due to the fact that IPR-goods are "not only owned by private multinationals but also depends on the capacity of high investments in research and development that only these companies enjoy". Also, contrary to the view shared by most international trade law scholars, Yi Shin Tang concludes that "bilateral treaties do not necessarily create a harmful influence on the existing multilateral IPR framework" (p. 193). He argues that if it is true that multilateral and bilateral instruments are strategies independent from one another, they might well produce beneficial effects if pursued together. Of course this conclusion has then to face the question of why the present use of BITs does not produce better results with regard to the desired transfer of technology. To answer this question, Yi Shin Tang points out that so far, most BITs have been concluded between developed countries and that developing nations do not (yet) make optimal use of BITs, mainly due to ideological reasons yet to be overcome. Second, in spite of all his attempts to adequately describe and model the economic effects of the different normative tools, in the end Yi Shin Tang must admit "that many other factors are equally or more significant in promoting technology inflows to developing countries" than the institutional conditions at the international level (p. 194). In particular, problems inherent to the domestic environment are of importance, such as a developing country's gross domestic product, inflation and level of imports as well as institutional issues such as the rule of law and the skill of labor and, one might add, infrastructure and the educational system.

9 However, even if a complete model that could take into account all the different factors is still far off, the present book adds additional insight and contains enough food for further thought. The book provides a robust guideline to policy makers, researchers and students wishing to identify and categorize the factors that influence the process of technology flows across national boundaries as well as the economic theories and legal arguments that may support a given position in international forums. The book may serve as a valuable source of argumentation for both developed and developing countries in the yet unexplored relationship between foreign

investments, technology licensing and international trade.

10 Undoubtedly, Yi Shin Tang is a new talent on the international IP and trade law horizon. He studied law at the University of São Paulo and specialized in international trade law for his post-graduate studies at the University Institute of European Studies (IUSE) in Turin/Italy and at the University of Ghent/Belgium. He also obtained a joint master degree from the New York University/National University of Singapore (LL.M in Law and Global Economy from NYU and LL.M. in Asian Legal Studies from NUS). He was a teaching assistant at the Fundacao Getulio Vargas School in São Paulo and a research assistant at the Cornell University of Law School in Ithaca, NY/USA, and he has worked as a researcher for the International Trade Law and Development Institute in São Paulo. Internationally networked already at an early stage in his career, in 2007 and 2008 Yi Shin Tang was a fellow of the Akademie Schloss Solitude in Stuttgart, Germany. He won the NYU@NUS Dean's Award in 2008 as well as awards from the University of Paris, Graduate Institute of Geneva, Coase Institute and the European Council. Yi Shin Tang is now back in Brazil, working as a lawyer in the São Paulo office of the firm of Magalhães, Nery e Dias and teaching at a local university. Earlier publications include: "How Evil is Bilateralism?", working research presented at the Second Conference on Economic Geography in Beijing/China (2007); "Technological Innovation, State Rationality, and Design of International Agreements", a working paper presented at the Law and Society International Conference in Berlin (2007); "An analysis of the international institutions governing the transfer of technology to developing countries", research presented at the IEL Conference in Ghent/Belgium (2006) and "Telecommunication Services: Perspectives for Brazil in the Doha Round", a book chapter published in Trade in Services in the WTO, edited by Umberto Celli Jr., São Paulo (2004).

Book review:

Dário Moura Vicente, La propriété intellectuelle en droit international privé, Brill Academic Pub 2009 (Les Livres de Poche de L'Academie de Droit International de la Haye), 516 p., ISBN-10: 9004179070, ISBN-13: 978-9004179073

by **Axel Metzger**

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1 The private international law of intellectual property is currently high on the agenda in Europe and abroad. Art. 8 of the Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), which codifies a territorial approach for the infringement of intellectual property and the associated remedies, has provoked an intensive discussion in Europe whether the lex loci protectionis is still appropriate for intellectual property litigation in the age of worldwide networks. A condensed outcome of this debate is summarized in the „Principles for Conflict of Laws in Intellectual Property" (CLIP Principles) drafted by the European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), which have been published recently in a second preliminary draft.1 On the international scale, the American Law Institute's „Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes" of 2007 (ALI Principles)2 are the focal point of the debate. A Japanese project („Transparency proposal") has been finalized in 2009.3 All three projects, if one sets aside some remarkable differences in specific rules, confirm the general tendency to stick with the territorial approach both for industrial property and copyright but to allow for moderate deviations for certain infringement cases in the Internet („ubiquitous infringement").

2 Against this background, Dário Moura Vicente, Professor at the University of Lissabon and author of a long list of contributions both on private international law and intellectual property, has now published in the French language his Hague Lecture held in 2008. After a short introduction, chapter 1 presents a comparative overview of the different types of intellectual property on the level of substantive law. The main purpose of the chapter is to demonstrate the diversity of intellectual property protection in some of the main jurisdictions worldwide. For the most part, France, Germany, the US, the UK and, what is added value as such to the ongoing debate, Portugal are briefly analyzed. For copyright and neighboring rights, the two main traditions of „copyright" and „droit d'auteur" are

presented for some of the most crucial issues such as initial ownership for works created in the course of employment, moral rights, scope of economic rights, duration, transferability, collecting societies, neighboring rights and remedies. The description of the differences is accompanied by a thoughtful analysis of the factors determining this diversity (n° 20). The parts on trademark, patent law and unfair competition, although shorter, follow a similar structure. A basic understanding of the sources and the different concepts applied on a substantive law level is indispensable for understanding the conflicts of law issues that are the main subject of the book. Given the didactic concept of the lecture underlying the book, it may be justified to provide the reader (or class participant) with the basic sources and concepts. Specialist of intellectual property may skip the chapter and start reading with chapter 2.

3 Chapter 2 continues with an analysis of the system of international conventions in the field. Regarding copyright and neighboring rights, the Berne Convention is explained in detail. Although it may be technically correct that the minimum rights of the Berne Convention are only applicable to foreigners and not „uniform law" stricto sensu (n° 52), it has to be emphasized that these minimum rights have led to a remarkable approximation of the substantive rules among the Berne member states since the discrimination of a state's own nationals as against foreigners is hard to justify for lawmakers. Regarding the integration of copyright in the international trade negotiations that have lead to the adoption of the TRIPS agreement in 1994, one may add that the US have since the late 1990s shifted their foreign trade policy away from multilateral to bilateral negotiations. The result is a growing network of Free Trade Agreements that often provide „TRIPS-plus" rules. The secret negotiations on an Anti-Counterfeiting Trade Agreement (ACTA) between the US, Europe and a small number of other states currently taking place will further undermine the drafting of new (or different) multilateral standards in the framework of WIPO or WTO. Chapter 2 also summarizes the harmonization of copyright law in the European Union in the case law of the ECJ and the multiple Directives in the field. The same pattern is used for the description of the international and European framework for the protection of industrial property and against unfair competition. Of special interest are the well-balanced remarks on the protection of subject matters different from copyright and typical industrial property, summarized as „sui generis" protection (n° 87), including database protection, domain names, plant breeder's rights, traditional knowledge and folklore.

4 Chapter 3 is the most voluminous of the book. It examines the core question of the law as applicable to intellectual property cases. In a preliminary remark, the question of whether courts should apply international substantive law rules on intellectual property instead of choice of law principles is answered in the negative. Also, the author is not convinced that a lex mercatoria may be applied as the law governing the case in intellectual property matters. However, an interpretation of the applicable national law in the light of international custom should be allowed (n° 112-114).

5 Regarding protected subject matter and scope of protection in the field of copyright, three possible approaches are discussed: the lex originis, the lex fori and the lex loci protectionis. According to the author, the lex loci protectionis is the preferred approach because it is „mostly in harmony with the nature of copyright and the interests at stake." (n° 118) Because copyright restricts competition and access to information and culture, it is up to each state to decide about the creation and scope of exclusive rights in works. However, according to the author, one should not equate to easily the lex loci protectionis and the territoriality principle. If territoriality should mean that no effect whatsoever may be given to foreign copyright legislation, the principle would interfere with the lex loci protectionis principle since the latter does not prevent pleading before the competent court, especially the natural forum, for the infringement of foreign copyrights. However, the lex loci protectionis principles is compatible with a „relative" concept of territoriality that allows for certain extraterritorial effects (n° 118). Besides the substantive arguments, the author refers to Art. 5 para. 2 Berne Convention, which may be interpreted, although this line of argument is controversial, as a reference to the lex loci protectionis and to

more recent national legislation, especially to Swiss, Italian and Belgian law and to German case law. For copyright infringement on the Internet, however, a deviation from the lex loci protectionis is suggested. Here the court should limit the number of applicable laws by either referring only to jurisdictions with a real and substantial connection to the case or, in analogy to the Satellite Directive, to the law of the state where the server is located if it coincides with the habitual residence of the responsible person or, as proposed by the ALI Principles, to the law with the closest connection the case.

6 For the initial ownership of copyright, the author pleads for the application of the lex originis. This is in line with French, Greek, Portuguese and Romanian law. The author can also refer to US case law but also admits that in Germany the lex loci protectionis is governing the initial title. There are good arguments for the latter approach since courts, when applying the lex originis, often invoke the national order public or internationally mandatory rules to cushion the far-reaching consequences of this approach.4 This is one of the reasons why the CLIP Principles and the Japanese „Transparency Proposal" suggest sticking with a territorial approach.5

7 For industrial property, according to the author, the lex loci protectionis principle may be found in several provisions of the Paris Convention and in the Madrid Agreement. In addition to the arguments put forward for its application in copyright cases, the „act of state"-doctrine may be invoked when it comes to registered rights (n° 131). However, also for patents and trademarks it is emphasized that certain extraterritorial effects may result from the recognition of an industrial property right for one jurisdiction, e.g. regarding famous trademarks under Art. 6bis Paris Convention or „telle quelle"-protection under Art. 6quinquies Paris Convention. Regarding the right to a patent in case of an employee's invention, the solution put forward is to apply the law governing the employment contract including freedom of choice, a solution that is only compatible with Art. 60 para. 1 of the European Patent Convention if the rule is interpreted as referring both to substantive and to conflict rules, which is doubtful. For trademark infringements on the Internet, the approach adopted by the WIPO and Paris Union Joint Recommendation is supported.6 Finally, for „sui generis"-rights, specific rules may be of interest. This is e.g. the case for Art. 11 of the European Database Directive according to which only nationals of EU member states, persons with their habitual residence within the Union or companies having their seat or being otherwise closely connected with a member state may rely on the sui generis-protection afforded by the Directive. Again, the approach of the book to give special attention to such „sui generis"-rights should be applauded.

8 For contracts having as object the transfer or license of intellectual property rights, the book takes into account the Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations of 2008 („Rome I"). For the law applicable in the absence of choice, the solution suggested is a flexible approach, applying the law of the licensee, e.g. the editor, if he is performe the characteristic performance or of the licenser, if the agreement resembles an outright sale (n° 146). For contracts covering only one country of protection, the lex loci protectionis is put forward as an alternative that can be applied under the rebuttal of Art. 4 para. 3 „Rome I". Of special interest is the analysis of employment contracts since, according to the author, initial title to these works is also governed by the lex contractus. Here the general principles of Art. 8 „Rome I" are decisive, including freedom of choice. In the absence of choice, the lex loci laboris is applicable.

9 The question that remains to be answered is, which questions are to be characterized as contractual. One crucial issue is the transfer of the right as such, which according to the author should be characterized as an intellectual property issue and therefore governed by the lex loci protectionis. In this respect it seems that Art. 14 „Rome I" may better be used as an argument for the application of the lex contractus. By contrast, transferability should be governed by the lex loci protectionis. A final point of main interest is the law applicable to the activities of collecting societies (n° 154-158). The author's arguments for the application of the lex originis to all questions concerning the business organization of these entities deserve support – at least if the place of establishment is within the European Union. By contrast, for

the contractual relationship of the collecting society with rightholders and users, the conflict rules on agency or contracts may be applied.

10 Art. 8 para. 1 „Rome II" – which determines the lex loci protectionis as the governing law for the non-contractual obligations arising from infringement – has provoked a lively debate in Europe. One point of criticism refers to Recital 26 of the Regulation, which justifies the application of the lex loci protectionis as the application of a „universally acknowledged principle". The book rightly emphasizes that some jurisdictions, e.g. France and Portugal, have traditionally applied the lex loci delicti commissi to the remedies of an infringement, especially the calculation of damages. However, allowing for a dépeçage for the issues of infringement and remedies may lead to practical problems, as the author rightly points out (n° 161). In addition, one may put forward the main arguments pleading for the application of the lex loci protectionis when it comes to remedies. The amount of damages is a crucial element of national policy concerning the protection of intellectual property. With regard to Art. 8 para. 3 „Rome II", which excludes party autonomy, the author's criticism seems to be in line with the majority opinion. Art. 8 para. 2 „Rome II" is analyzed in detail; for multistate infringements of unitary Community rights, the author pleads for party autonomy or the application of the law governing a pre-existing relationship, especially a contract (n° 163). Regarding the scope of the applicable law according to Art. 8 and 15 „Rome II", the book suggests a rather restrictive approach (n° 164). It must be confessed that Art. 8 and 15 „Rome II" should not be interpreted as covering the issues of existence and ownership of intellectual property rights. However, a dépeçage of the question of whether the right has been infringed, in other words the scope of protection, and the limitations and exceptions (see Art. 15 lit. b) is hardly conceivable and should be avoided. The chapter on the applicable law ends with remarks on the law applicable to unfair competition (n° 167-173) and preliminary measures (n° 174-176).

11 Chapter 4 is devoted to issues of international civil procedure, especially the jurisdiction of courts in intellectual property cases. The book describes, after introducing the main sources, for most part the jurisdiction rules of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters („Brussels I")7 and of the Lugano Convention of 30 October 2007.8 The unlimited competence of the courts at the domicile of the defendant under Art. 2 „Brussels I", which may decide on the infringement of domestic and foreign intellectual property rights, is described as an extraterritorial or universal effect of these rights – which makes sense if contrasted to older English and recent US case law, which denies jurisdiction in these cases with reference to the territoriality principle.9 The chapter also gives an outline of other grounds for jurisdiction and of the rules on exclusive jurisdiction under Art. 22 n° 4 „Brussels I", including the necessary criticism on the recent case law of the ECJ10 (n° 185-186). Special emphasis is given to the jurisdiction of the forum delicti commissi according to Art. 5 n° 3 „Brussels I". In this regard, it is rightly pointed out that only activities conducted in the country for which protection is sought may give rise to jurisdiction under Art. 5 N ° 3. Nevertheless, for internet cases it may seem excessive to grant jurisdiction to the courts of each state where contents can be downloaded and possibly infringe intellectual property rights. Therefore, the author pleads for a limitation of the possible fora, especially to the courts of the states that have been targeted by the alleged infringer or where the activities have caused a substantial impact. A point of main interest is that the author pleads against the application of the ECJs ruling in Shevill v. Presse Alliance11 for the unlimited jurisdiction of the forum deliciti commissi as long as the claim is brought before the courts of the state to which the service has been primarily directed (n° 183). This is as a well-balanced approach and goes beyond the current proposal of the CLIP Principles (Art. 2:203).

12 A clear added value to most other volumes on the subject published recently is the analysis of arbitration and other alternative dispute resolution mechanisms in chapter 5. Neither ALI Principles or CLIP Principles nor the „Transparancy Proposal" provide rules for such extrajudicial procedures, although their growing importance in the field can hardly be denied. The book provides an analysis of

whether intellectual property cases may be settled in arbitration proceedings, what law should govern such proceedings and whether the awards may be recognized and enforced. In addition, mediation as well as more intellectual property-specific procedures like the Uniform Dispute Resolution Settlement Procedure of ICANN for domain name disputes and the Dispute Settlement of the WTO are taken in account.

13 In summary, this is a highly valuable and comprehensive study of the current state and of the reform perspectives of the private international law of intellectual property. Reading the book, one would have liked to have participated in the Hague Lecture underlying the published text. The book is rich in ideas and sources – among them many from southern European countries often neglected in the international discussion – and provides a coherent concept for the many detailed and complex questions raised by the subject. There can be no doubt that it will have an impact on the ongoing debate in Europe and worldwide on how to shape a well-balanced system of conflict rules for intellectual property in the age of worldwide media and communication services.

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1 European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), Principles for Conflict of Laws in Intellectual Property, Second Preliminary Draft (6 June 2009), available at http://www.cl-ip.eu.

2 Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes, 2007.

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

4 See e.g. French Court of Cassation, 28 May 1991, D. 1993, jur. 197 – John Huston.

5 Art. 3:201 CLIP-Principles, Art. 305 Transparency Proposal.

6 Joint Recommendation Concerning the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet of 24 September-3 October 2001, WIPO Pub. No. 845.

7 OJ L 12, 16.1.2001, p. 1-23.

8 OJ L 339, 21.12.2007, p. 3-41.

9 See Voda v. Cordis, 476 F.3d 887 (Fed. Cir. 2007)

10 See ECJ, 13.07.2006, C-4/03, ECR 2006-I, 6509 – GAT/LuK and ECJ, 13.07.2006, C-539/03, ECR 2006-I, 6535 – Roche Nederland/Primus.

11 ECJ, 07.03.1995, C-68/93, ECR 1995-I, 415 - Shevill/Press Alliance.

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