GPL ENFORCEMENT IN GERMANY

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Who's Talking?

- Rechtsanwältin ("Attorney at Law")
- Since 2012.
- Until August 2016 at JBB Rechtsanwälte's IT/IP department.
- Since then at Lumesse GmbH and still doing IT/IP law.
- Focus on IT/IP law since 2005.

- And the answer is yes.

Overview

- GPL enforcement has been on the agenda in Germany for quite some time.
- Currently, Germany sees many GPL related court decisions that get a lot of attention internationally.
- Keep in mind: Even more cases never make it to court, but are settled out of court.

Why would you go to Court over the GPL?

- Because companies don‘t comply with the terms of the GPL.
  - License text is missing.
  - Source code is not available.
  - Source code is not complete corresponding.
- Why don‘t you try and get the companies to comply by making them aware of that?
  - That is usually the first step.
  - But some of them don‘t care. They argue:
    - The GPL is ineffective, because of the German laws on general terms and conditions.
    - As the GPL is ineffective, it and its terms cannot be enforced. („You can‘t sue us anyway. Why should we bother?“)
    - Those who license their software under the GPL waive their rights.

Enforceability of the GPL

- 2004: Regional Court in Munich I - Welte v. Sitecom:
  - GPL- 2.0 is enforceable in Germany; rights are not waived.
  - Two options:
    - Either the GPL is ineffective, then there‘s no license, no rights were granted.
    - Or the GPL is effective, then the licensee bound by the terms
  - Section 4 GPL-2.0 *„provides for an automatic reversal of rights, when an infringement of the code of behavior as set forth in Section 2 occurs*“.
  - The rightholder is entitled to all claims the German Law provides for in case of copyright infringement.
- 2015: Regional Court in Halle – The same applies for GPL-3.0-licensed software.

Violation of GPL = Copyright Infringement

- Violation of the GPL-2.0 requirements is a copyright infringement.
  - 2004: Regional Court in Munich I - Welte v. Sitecom
  - 2006: Regional Court Berlin
  - 2006: Regional Court Frankfurt a.M. - Welte v. D-Link
- 2015: Regional Court in Halle – The same applies for GPL-3.0-licensed software.

  - Claims under the German Copyright Act can be brought.
    - What are those claims?

Claims under German Copyright Law

- Claim to cease and desist from further infringements, Art. 97 I UrhG
- Claim for damages, Art. 97 II UrhG
- Claim for removal (i.e. recall from the supply chain), Art. 98 II UrhG
- Claim for information about the chain of distribution, number of sold devices
- Claim for reimbursement of costs

  - All these claims can only be brought in case of a copyright infringement.

Copyright Infringement

- Definition:

  A copyrightable work is used, although the necessary rights weren’t granted by the rightholder.

- Requirements:
  - Copyrightable work = Computer program
  - Rightholder
  - Rights weren‘t granted or in other words: There is no license.

Computer Program

- According to Art. 69a Section 1 UrhG computer programs are programs of any form, including the drafts and their preparatory design material.
- That covers object code and source code.
- Assumption that "complex" software is protected.

BGH GRUR 2005, 860 – Fash 2000

- What about "trivial" software?

Trivial software is protected, if it is „original in the sense that it is the author's own intellectual creation."

ECJ Infopaq - Case C-5/08

Rightholder

Directive 2009/24/EC

Article 2

Authorship of computer programs

1. The author of a computer program shall be the natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation.

- Under German law, the authorship is presumed under the conditions defined in Art. 10 UrhG.
- Condition: „designated as the author in the usual manner".
  - Copyright notice on „interactive user interfaces".
  - Copyright notice in header file.

No License

- In general, the authors licensing their computer program under the GPL extensively grant rights of use to everyone.
- Automatic termination of rights of use (e.g. GPL-2.0)

  „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."
- Under German law that means that rights of use are granted under a condition according to Section 158 Subs. 2 BGB.

  District Court Munich, May 19, 2004, 21 O 6123/04
  District Court Berlin, February 21, 2006, 16 O 134/06
  District Court Frankfurt, September 6, 2006, 2-6 O 224/06
- In other words: Violations of the GPL lead to copyright infringements, because the license is terminated.

What Constitutes a Violation of the GPL?

- When is the **GPL-2.0** violated?
  - License text is missing.
    - 2007: Regional Court in Munich I - Welte v. Skype
    - The entire text of the GPL-2.0 has to be provided with the program.
    - The reference to the license alone is not sufficient („This product includes…")
  - Source code is not complete corresponding.
    - 2013: Regional Court Hamburg - Welte v. Fantec
    - The source code has to be identical with the current version.
- 2015: Regional Court in Halle – The same applies for **GPL-3.0**-licensed software.

Changing Mindset?

- Some of the circumstances/ conditions/ requirements set by the courts might be changing at large.
- The general mindset of the companies and courts might be changing due to the (aggressive?) enforcement we've observed since appr. 2013/2014.
- One of the netfilter coreteam members was suspended by the other members.

  http://marc.info/?l=netfilter-devel&m=146887464512702&w=2

- The "*Guiding Principles in Community-Oriented GPL Enforcement*" were published by the SFC and endorsed by the FSF.

  https://sfconservancy.org/copyleft-compliance/principles.html
  https://fsf.org/licensing/enforcement-principles

- Claims against VMware were brought in Hamburg and dismissed in July 2016.

VMware: The Outcome

"The Plaintiff is not entitled to the injunction being claimed […] When considering the merits of the claim, the court […] has to examine whether the Plaintiff's pleading is sufficiently substantiated to establish the cause of action and whether the Plaintiff has proved where necessary:

- which parts of the Linux program he claims to have modified, and in what manner;
- to what extent these modifications meet the criteria for adapter's copyright pursuant to Copyright Act § 69c No. 2 clause 2 in conjunction with § 3; and
- to what extent the Plaintiff pleads and where necessary proves that the Defendant has in turn adopted (and possibly further modified) those adapted parts of the program that substantiate his claim to protection.

[…] the questions (on which the legal interest of the parties and their counsel presumably focus) can and must remain unanswered."

- What does that even mean?

Legal Background

- Claim to cease and desist brought against VMware.
- In plain words: The court was asked to order VMware to end the alleged copyright infringement.
- According to the plaintiff, the copyright infringement occurred, because
  - VMware doesn't license "*vmkernel*" under the terms of the GPL-2.0,
  - "*vmkernel*" has to be licensed under the GPL-2.0, because it constituted a "derivative work" of "*vmklinux*",
  - "*vmklinux*" was derived from the mainline kernel. It contains the SCSI subsystem, especially the SCSI Hotplug, as well as the Radix Tree,
  - he contributed to the SCSI subsystem, the SCSI Hotplug and the Radix Tree
  - he was named as rightholder,
  - the SCSI subsystem, the SCSI Hotplug and the Radix Tree are copyrightable works.

The Court‘s Reasoning

- Aspects the court didn‘t deal with:
  - Do “vmklinux” and “vmkernel” form a “derivative work” (and what legal criteria are to be applied for determining this)?
  - If “vmklinux” and “vmkernel” form a “derivative work” do the Plaintiff’s parts of the code adopted in “vmklinux” constitute an adaptation/modification (which you need a license for), or do they constitute free usage (which you don’t need a license for).
- Aspects the court dealt with:Has the Plaintiff sufficiently substantiated
  - that he **holds rights** to the SCSI subsystem, the SCSI Hotplug and the Radix Tree, because he made contributions to them,
  - that these contributes meet the criteria of a „**computer program**“, and
  - that the **Defendant used** just his contributions (and possibly further modified them)?
- … and for those aspects the court raised the requirements.
  - Not with respect to the material requirements.
  - But with respect to what you have to show in court to be able to successfully bring a case.

Rightholder

- Before: Art. 10 UrhG – being named as rightholder sufficed.
- After:
  - Not sufficient to
    - be named in the header files of the kernel,
    - provide the git repository,
    - provide the complete corresponding source code,
    - provide the blame files.
  - Full comparision of the source codes has to be provided specifying exactly the Plaintiff‘s shares in it.
    - General possibility of verifying the history of the adaptation of Linux is not sufficient.
    - Providing history.tgz and/ or linux.tgz is not sufficient.
    - Providing the changelogs is not sufficient.

Copyrightable Work

- Before: Fash 2000 (see above)
- After:
  - „The Plaintiff cannot refer to the complexity of the overall SCSI subsystem for arguing the protectability of his own contributions".
  - The Plaintiff has to show to what "extent **his contributions** involve complex programming indicative of creative originality."

Thanks for Your Attention!

Questions?

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