Open Source Licenses - License or Contract?

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Relevance of Classification

- Consequences of a copyright infringement (US):
  - "Irreparable harm is presumed" and a preliminary injunction is possible
  - Reimbursement of attorney fees
  - US Copyright applicable
Relevance of Classification

- Consequences of a copyright infringement (Germany):
  - „Urgency is presumed“ and a preliminary injunction is possible (if „likelihood of success on the merits“)
  - Easy and cheap enforcement (about two or three days)
  - Infringing party is not heard before the preliminary injunction is issued
Relevance of Classification

- Consequences of a breach of contract (US):
  - Preliminary injunction denied
  - Reimbursement of attorney fees problematic
  - State law applicable
Relevance of Classification

- Consequences of a breach of contract (Germany):
  - Copyright holder has to explicitly terminate the contract
  - Problem of principle of exhaustion: no legal action against distributors possible
  - Time consuming lawsuit
US: Jacobsen v. Katzer

- Decision of the US Court of Appeals for the Federal Circuit (August 13, 2008)

- Terms of the Artistic license: "conditions of the copyright license" or "covenant to the copyright license"

- Generally, the grant of a non-exclusive license is a waiver of the right to sue the licensee for copyright infringement

- Exception: license limited in scope
US: Jacobsen v. Katzer

- „Provided that“ - traditional language of conditions (under Californian contract law)

- Compliance with the terms of a OSS license is consideration for license gant
Germany: Welte v. Sitecom

- GPL is a contract (under German law)
- License terms are conditions
- „Automatic termination“ of the license
- Copyright infringement
Germany: Welte v. Sitecom

- There has been no reason for District Court of Munich to evaluate the contract/license question
- Every license is a contract (according to the definition of “contract” under German law)
- For a “contract” no consideration is required
Further Information


