

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 grant

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

- <http://www.cafc.uscourts.gov/opinions/08-1001.pdf>
- http://www.jbb.de/fileadmin/download/urteil_lg_muenchen_gpl.pdf
- http://www.jbb.de/fileadmin/download/judgment_dc_munich_gpl.pdf (English translation)

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