

The Limits of Open Source: Lawful User Rights, Exhaustion and Co-Existence with Copyright Law

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INTRODUCTION

A series of court decisions in Germany has held the General Public Licence (GPL) enforceable, including its prohibition on commercial exploitation of Open Source Software (OSS). The decisions were decided on the basis of contract rather than copyright law. The defendants, who in each case had attempted to exploit OSS commercially in other products, were prohibited from any further use.¹ But despite initial cries of joy from the open source community, the decisions' true impact remains far from clear: Open source licensing (OSL) models—apart from the merits of rationale to enforce OSS agreements as a matter of legal policy²—do not easily co-exist with copyright law. Although open source models utilise copyright protection to protract a binding effect of licensing agreements, reliance on copyright is at odds with its provisions restricting the owner's powers for more overarching public policy concerns, such as consumer protection and market transparency. Enforcing the GPL is, therefore, not a matter of declaring it "valid" but of elaborating meaningful distinctions between standard

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¹ District Court of Munich I, 21 O 6123/04, May 19, 2004, *In re Welte v Fortinet UK Ltd* (text in English available at http://www.oii.ox.ac.uk/resources/feedback/OIIFB_GPL2_20040903.pdf; [accessed January 6, 2008]) District Court of Munich I, *In re Welte v Sitecom Deutschland GmbH*, December 4, 2005, 21 O 7240/05; District Court of Frankfurt am Main, *In re Welte v D-Link Deutschland GmbH*, September 22, 2006, 2-6 O 224/06; District Court of Berlin, 16 O 134/06, February 21, 2006 *In re Wireless LAN Software*; District Court of Munich I, 7 O 5245/07, July 24, 2007, *In re Voice over IP Telephone*. All decisions concerned interim relief. See further, J. Höppner, "The GPL Prevails: an Analysis of the First-ever Court Decision on the Validity and Effectivity of the GPL" [2004] SCRIPT-ed 628, <http://www.law.ed.ac.uk/ahrc/script-ed/issue4/GPL-case.asp>. For robust criticism, see T. Hoeren, "The First-ever Ruling on the Legal Validity of the GPL—a Critique of the Case" http://www.oii.ox.ac.uk/resources/feedback/OIIFB_GPL3_20040903.pdf [accessed January 6, 2008].

² District Court of Munich I, *In re Welte v Sitecom Deutschland GmbH*, December 4, 2005, 21 O 7240/05, para.19 (referring to the political will to foster the development of open source structures).