

# Introduction to the GPL and Creative Commons

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## 1. Introduction – Non-Commercial Copyright in Digital Content

The General Public License (GPL) – the Magna Carta of the Open Source Software movement – has passed its first important legal test. A district court in Munich has made the world's first ruling on it. The ruling has been greeted with enthusiastic and widespread applause among the free software community, as it enforces compliance with the GPL retrospectively on a piece of free software licensed under the GPL. Another company used the software in question without including the license.

The ruling comes at a crucial time. Open Source Software is becoming widely adopted and accepted. Major companies and governments from Brazil to China are using it or encouraging its use. Yet as the economic importance of Open Source increases, legal battles are becoming commonplace: the most significant case at the moment is a law suit between the American company SCO and IBM. SCO is suing IBM for patent infringement, alleging that IBM has broken its Unix contract by moving proprietary Unix software to the open-source programme Linux. Meanwhile the rapid spread of Creative Commons, which builds upon the same idea as the GPL but applies it to books, film, music and other creative products, is framing the debate about the future of copyright.

It is in this context that we need to place the decision of the Munich district court as it teaches important lessons about the future development of non-proprietary software and other forms of open content which rely on the legal tool of utilizing licenses to weaken an re-engineer standard copyright. Yet the logic behind the judgement leaves room for serious doubts about the legal structure of the GPL.

To enable the community to review the decision, the Oxford Internet Institute (OII) has translated substantial parts of the judgement and invited comments by Professor Thomas Hören, a German copyright expert, and Christian Ahlert, co-founder of iCreative Commons UK. In the following section Christian Ahlert gives an overview

of the origins, philosophy and meaning of the GPL and connects it to the debate surrounding Creative Commons and copyright on the Internet. Prof. Thomas Hören analyzes the court decision from German legal perspective. In addition the translated and edited court decision is provided. We do not claim to offer an authoritative interpretation of the legal ramifications of the decision, but rather make preliminary comments on the decision in order to stimulate wider debate about open content and the use of licenses to change the law. We also like to point to ongoing work at the OII by Professor Paul David, who is examining the economics of Open Science and Free Software. We therefore welcome any comments and suggestions the reader might have. Please send comments to: [enquiries@oii.ox.ac.uk](mailto:enquiries@oii.ox.ac.uk).

## **2. GPL: Origins, Philosophy and Similarities to Creative Commons License**

Since the Munich decision is the first of its kind, we need to place it in the wider context of the debate surrounding intellectual property rights and the development of apparently legal ways to weaken or re-engineer copyright so as to adapt it to the digital world.

The case itself is easily explained. Netfilter is a group of programmers who developed under the same name a programme, which is meant act as a protection mechanism for computers running Linux (more specifically it is a firewalling subsystem in the 2.4.x Linux kernel and runs on virtually every Linux installation). Netfilter has been developed by a group of programmers who license it under the GPL for free. However, a US company, Sitecom, with a subsidiary in Germany, used the software without including the terms of the licence. The Netfilter project claimed that Sitecom violated the terms of the license by not including it and the Court agreed. The question, of course is, why Court agreed and what the logic behind its reasoning was.

The basic idea behind the GPL is simple. Its primary purpose is not to protect software by preventing others from using it, as normal copyright does: rather, it is the exact opposite. It is meant to give others the power to understand, improve, manipulate, or build on the existing code, and to modify or adapt it in any way

deemed useful, as long as two conditions are adhered to: the code can't be used for commercial purposes, and the license must be kept attached. The purpose of the GPL is likewise not just to prevent a piece of software from being re-copyrighted and commercialised for the benefit of a single company, but to keep the software open even as it progresses into future forms and combinations.

The relevant sections of the GPL read as follows<sup>1</sup>:

GPL section 5:

You are not required to accept this License, since you have not signed it. However, nothing else grants you permission to modify or distribute the Program or its derivative works. These actions are prohibited by law if you do not accept this License. Therefore, **by modifying or distributing the Program (or any work based on the Program), you indicate your acceptance of this License to do so**, and all its terms and conditions for copying, distributing or modifying the Program or works based on it.

GPL section 4:

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**. However, parties who have received copies, or rights, from you under this License will not have their licenses terminated so long as such parties remain in full compliance.

Yet, as the Court decision has shown, if a license is included in the original version but removed afterwards, this is to be interpreted as “terminating the rights under this license”. Is this then a protection for intellectual products for all eternity? If this particular logic gets applied en passant to open source software, or even other forms of content, it seems to create in effect a legal tool which could be called an “eternity clause”. The intention, however, of the GPL is clear: it subtracts from copyright law

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<sup>1</sup> The full text of the license can be found at:  
[www.opensource.org/licenses/gpl-license.php](http://www.opensource.org/licenses/gpl-license.php)

rather than adding to it, but arguably —, and this is why the court case is important — the question remains whether or not compliance can be enforced.

Eben Moglen, the main legal architect of the Free Software Foundation (FSF), and professor of law at Columbia University, tells us (Moglen 2001) that “he enforced the GPL dozens of times, without ever going to court”.<sup>2</sup> The foundation was able to enforce the GPL by means of arbitration when there were violations. The position of the foundation has always been “that compliance with the license, and security for future good behaviour” (Moglen 2001) are its most important goals. Moglen continues: “We do not find ourselves taking the GPL to court because no one has yet been willing to risk contesting it with us there.” Now it has happened, it seems at first glance that he was right, if he is, this leaves questions about the legal logic applied locking Code in perpetuity into the free domain.

The same question also arises in the context of Creative Commons, a project that shares the concept and spirit of the GPL, but applies it to a much broader set of intellectual products. Film, music, photography, graphics, books, articles and other written work can all be licensed by Creative Commons.

This raises the significantly wider question of how copyright law is developing. The semantics and practices of cyberspace contradict traditional copyright in legal terms as well as established norms of intellectual creation. They have even given rise to a new term, “mashing”: the mixing and remixing of digital images, sounds, music and text is an integral part of the attraction of the Internet, as is the modifying and sharing of software; which has arguably led to a legitimacy crisis of copyright law. If this is so, there seems to be a fundamental clash between the intention and most common reading of copyright on the one hand and cultural practices in the digital realm on the other.

Sometimes technology changes but nothing else seems to change; this means there is a problem. Law in itself is always relative to technology. Technology, in the case of networked digital media, has disrupted the balance between some of the intentions behind copyright — securing a revenue for creators — and the integral capacity of the

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<sup>2</sup> The comments of Eben Moglen can be found at:  
<http://emoglen.law.columbia.edu/publications/lu-12.html>  
<http://emoglen.law.columbia.edu/publications/lu-13.html>

Internet of making perfect reproduction nearly costless as well as widespread dissemination. It is this balance which needs to be redefined. Copyright as we know it was facilitated and defined through the invention of the Gutenberg press, but now reproduction of intellectual products can occur without the creative work ever becoming fixated in an analogue format.

Text, software and other forms of media are becoming much more fluid in the digital world. This has undeniably changed the traditional meaning of the difference between copy and original, between scarcity of analogue and physical thought containers, which were therefore static media containers, namely, books and printed paper – which, because copying was so time-intensive and so expensive, were arguably the most effective form of intellectual property protection.

And as Barlow (1994) has already argued, “our system of copyright makes no accommodation whatever for expressions which don't become fixed at some point nor for cultural expressions which lack a specific author or inventor”.

This is why the GPL, as well as Creative Commons (CC), have one thing in common: they are meant to open up information rather than locking it in. In the eyes of their founders they are legal tools that grant permission to do what would otherwise not be allowed. In some ways their goal is arguably close to the Jeffersonian philosophy underlying intellectual property protection; in a way it re-engineers the spirit of copyright (by decreasing the protection copyright offers) or perhaps the meaning copyright has acquired. What sounds like a potential paradox is one reading of the standardised licensing regime that CC and the GPL offer the producers of content.

However, there are major differences between CC and the GPL. The GPL is a global license meant to work in exactly the same way all over the world, whereas CC licenses are adapted to national law. In addition CC applies to a much broader set of intellectual products. It does not distinguish between types of content: music, film, written work – whether science or poetry – are all treated the same way. So normally CC tries to argue from the point of view of producers and creators: in some sense every work is derivative; in one way or another we all stand on the “shoulders of giants”. In this sense the GPL and CC reflect a similar set of norms and values: they both assume that culture and intellectual enterprise derive from collective processes,

an idea that is often masked by the classical conception of copyright. In a way, they try to adapt the law to changes in technology, and not vice versa.

However, another reading of the GPL and CC is that they do not have much in common with the law in a narrow sense. For the users of the GPL or CC it is not the legalese that matters but the act of using them. They perceive the GPL or CC as an ethical code, which is less about preventing their work being used by others than about preventing others building on it and locking it in.

It is in this sense that CC and the GPL are unusual legal tools. They are not about control, or about the power to exclude, but about restricting potential control. This is also where the problem lies: how can content be transformed from one legal state – free – to a commercially exploitable state, arguably one that is more closed? What happens to a licensed work as it becomes mashed, remixed, transformed, and mixed with other pieces of code (or other media) as it progresses from its original form into many different new ones? These are some of the questions one needs to bear in mind whilst following the recent ruling by the court in Munich and the increasingly heated debate about the future of copyright, which is legally expanded and technically built into new digital devices. In order to understand the legal logic of the German court look at Prof. Thomas Hoeren's comments.