The first-ever ruling on the legal validity of the GPL - A Critique of the Case

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1. The decision of the District Court of Munich is celebrated as the first-ever judgement on the validity of the GPL. That is surprising. The decision is the judgement of only a single district court in Germany. And it is only a summary and preliminary decision based on injunctive remedies. Furthermore, the judgement refers to only one special case within the Open Source scene. There was only one main developer involved in this project, so there was no need to decide, for example, on the complicated questions of rights ownership involved in Linux.

2. Given the high importance that the Open Source community attributed to the judgement, the Court's legal arguments are extremely poor. I do not want to deal with the many spelling and grammatical mistakes in the original version of the decision; such things happen in the heat of the moment. But it is even more astonishing that most of the relevant legal literature has not been considered. The Court essentially refers only to an essay from Metzger/Jäger written in 1999, apart from two essays from Omsels and Plaß. None of the critical voices about the effectiveness of the GPL have been heard.

3. Apart from these formalities, the argumentation of the judges raises many questions and prompts many criticisms.

   a. The homepage of the plaintiff included a link to the GPL version 2 (June 1991), an American document of the FSF. However, the US version of the GPL was not considered by the Court. Instead the Court used an unofficial German translation without devoting even a single sentence to justifying this approach. The judges also did not mention the history of the GPL, nor did they ask how the GPL might be interpreted under US rules on the interpretation of contractual documents. They simply applied German methodology and concepts to a document whose legal roots are deeply intermingled with US law and the US Open Source mentality.

b. The court interpreted the GPL in the light of the German model of "condition subsequent" based upon Sect. 158 of the German Civil Act (BGB). The court argued that infringements of the GPL would lead to an automatic loss of rights, based upon a condition subsequent. The user of open source products gets the license to use the product only on the condition that, and as long as, he sticks to the rules of the GPL. The Court held that this extremely tight link between the use right and the GPL would not prevent the software product from being marketed, as a third party would be able at any time to re-acquire the rights from the software developer. However, sects. 2 and 4 of the GPL do not refer to the German concept of conditions. Sect. 4 refers to particular rights "provided that". Sect. 2 uses the term "conditions", but in a very broad and general sense, such as a contractual term which has to be met. It might well be that a violation of the GPL leads to contractual remedies for non-performance, but not to an automatic loss of use rights.

c. To operate with a condition subsequent is "beating the devil with the devil". If I were a producer of proprietary software products, I would be very happy with the judgement of the district court because nobody can prevent the producers of proprietary software from likewise using a condition subsequent. They can now restrict the transfer of sold software to third persons or the use of a programme on different computers by combing these (invalid) contractual restrictions with a condition subsequent related to the "license". If you pass software to anybody else or use it in another computer, you (and the third person) automatically lose your right to use the software. Everything courts had said on the (in-) validity of contractual use restrictions in the software business is now going to be undermined by the model of the condition subsequent.

d. Why does the GPL call itself a "license"? The term "license" is not used in the German Copyright Act and is not known in Continental European copyright law. That is good: the term "license" is nebulous and has been used in business as a smokescreen to mask the invalidity of "license" restrictions. In recent years the license model has been efficiently refuted by European courts and traced back to traditional concepts such as the purchase of rights or a

legal lease. The district court should have dealt with this *opinio communis*. But what happened in Munich?

e. The ignorance of the Munich court as to the *opinio communis* can also be demonstrated in connection with the problem of exhaustion. If the GPL is regarded to be binding even in cases of the transfer of software to a third person, the concept of exhaustion might be violated. The European Software Directive has provided that the exhaustion of the copy of a program is applied Community-wide by a first sale of that copy in the Community with the consent of the right-holder; once an author has sold a copy of a work, he or she loses the exclusive distribution right with respect to that work. A contractual limitation of this principle is held to be invalid, at least in Germany and Austria. The Munich court obviously did not know of these developments; instead it simply stated that the German copyright legislator had once expressed its support for Open Source. However, this support has been given only in other legislative debates regarding mandatory rights of creators to adequate remuneration. But even if the legislator generally likes Open Source, it does not at all mean that the legislator supports and considers every rule of the GPL as legally effective.

f. En passant, the Court raised some more radical questions without giving good arguments. For instance, the Court claimed that a non-exclusive license gives a right *in rem*; this contradicts the interpretation of the Federal Supreme Court, which held that non-exclusive use rights are not property rights but contractual rights (BGH, GRUR 1959, 201, 202 – Heiligenhof). The court has not really discussed rules relating to the conflict of laws. Of course, copyright law is governed by the principle of territoriality. But what about the relevant rules for contractual aspects, as with the interpretation of the GPL (see above) or the applicability of regulations concerning unfair contract terms?

g. Finally, there is the important question of the consequences of the assumed invalidity of the GPL. The Munich court argued that the question of the enforceability of the GPL was in no way relevant. According to the Bavarian judges, if the GPL is legally ineffective, the user does not have a license and is thus violating copyright law. On the face of it, that sounds plausible, but it is

not. If somebody offers software on the Internet for downloading and links the download with invalid general terms, he can hardly sue for copyright infringement. Instead, the validity of the standard terms is a matter for the software distributor: if he wants to use invalid contractual terms, he bears the risk of their use. It would violate equity and good faith if he were allowed to sue others merely on the grounds that his license terms were invalid.

4. I know some Open Source fundamentalists will hate me for my remarks: who is not for us is against us; who criticises us will be knocked down. I hope that one day we shall be ready for a non-fundamentalist and mature discussion about the legal possibilities of Open Source (and implicitly Open Content). The preliminary judgement of the German court is, so far as it goes, an important milestone. The judges have thrown a stone into the water, making waves that might help to clarify the difficult legal questions involved in the GPL.