Open Source / Content Licences before European Courts

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« Open Licences »

- **Free / Libre / Open Source Software Licences**
  - Free software definition – 4 freedoms – FSF
  - Open source definition – 10 criteria – OSI
  - Ex. : GPL, BSD, MPL, APACHE, EUPL, etc.
    - SOFTWARE

- **Open content licences**
  - Creative Commons Licences
  - GNU Free Documentation Licence
  - Licence Art Libre
  - Etc.
    - CONTENT

ADDRESSED ISSUES

- "Acknowledgement" of the licences

  ("validity"/"applicability" of the licence, "validity"/"applicability" of specific clauses, "understandability"/interpretation, etc.)

- Breach of (licence) **contract** procedure
  - **Cease and desist [?]**
  - **Indemnification (reparation of damages)**
  - **Compulsory execution [?]**

//

- **Copyright infringements** procedure
  - **Cease and desist (Injunctive relief)**
  - **Indemnification (reparation of damages)**

STOP

PAY

COMPLY

- Use of material under Open Licences when executing a contract (delivery of software).

List of EU cases

FREE/ OPEN SOURCE SOFTWARE

DE

- **H. Welte v. Sitecom** (Landgericht Munchen I, 19 May 2004)
- **H. Welte v. Fortinet UK** (Landgericht Munchen I, 12 April 2005)
- **H. Welte v. D-Link** (Landgericht Frankfurt, 9 September 2006)
- **H. Welte v. Skype** (Landgericht Munchen I, 12 July 2007)
- **AVM v. Cybits** (Landgericht Berlin, 8 November 2011)

FR

- **Mandrakesoft** (TGI Paris, 25 February 2003)
- **Educaffix** (TGI Paris, 28 March 2007)
- **ERN** (TGI Chamberry, 15 November 2007)
- **EDU 4** (Cour d'appel de Paris, 16 September 2009)

OPEN CONTENT

ES

- **SGAE v. Disco Bar Metropole** (Juz. 1st inst. Badajoz, 17 February 2006)

NL

- **Adam Curry v. Audax** (Voorz. Arr. Rechtbank Amsterdam, 9 March 2006)

DE

- **N. Gerlach v. DVU** (Landgericht Berlin, 8 October 2010)

BE

- **Linchôdmapwa v. Théâtre de Spa** (Civ. Nivelles, 26 October 2010)

FREE / OPEN SOURCE SOFTWARE LICENCES

Netfilter (H. Welte) v. Sitecom [DE]
(Landgericht Munchen I - 19 May 2004)

- **Netfilter/iptables is part of Linux: GPLv2**
  - **H. Welte is one of the authors and maintainer of the project**
- **Sitecom is a wireless hardware producer**

  => firmware downloadable => contains Netfilter/Iptables

  BUT : No reference to this fact/ to the licence /to source code on website
- **Court : preliminary injunction**
  - **GPL is not a waiver / GPL considered as General Business Conditions**
  - **Assessment of the validity of its clauses under DE law…**

    ⇒ Problem with automatic reversal of rights (GPL art.4, sentences 2 & 3)

    ⇒ Resolutory conditions >< exhaustion of rights => physical copies

    ⇒ GPL art. 4 sentence 1 and art.2 & 3 anyway valid.
  - **Clause invalid … => whole licence *could* be invalid (?)**
  - **…anyway, invalidity is not an accurate plea => any use illegal.**

  ⇒ Preliminary injunction upheld: GPL violation = copyright infringement

  ⇒ Sitecom enjoined under penalty from distributing / copying / making available without complying with the licence + pay. costs

STOP

H. Welte v. Fortinet UK [DE]
(Landgericht Munchen I, 12 April 2005)

- **H. Welte**
- **Fortinet: produces anti-virus / firewalls**
  - **Running on a « FortiOS » OS**
    - **⇒Use of GPLed code (linux kernel & other) concealed by encryption**
  - **Settlement attempt failed**
- **Court**

Injunction :

=> cease and desist until compliance with GPL

STOP

H. Welte v. D-Link [DE]
(Landgericht Frankfurt I - 9 September 2006)

- **"msdosfs", "initrd" & "mtd" = parts of the Linux-kernel : GPL2**
  - **H. Welte = fiduciary licensee**
- **D-link = producer of data storage units whose firmware encompasses the softwares hereabove**
  - **licence text of the GPL not enclosed, disclaimer of warranty not made, and source code not available**
  - **Cease and desist declaration SIGNED (without acknowledgment of obligation to do so)**
  - **D-Link refuses to pay lawyer's fees + enforcement costs** *"negotiorum gestio"*
- **Court : D-Link condemned to reimburse lawyer's fees and enforcement costs +** **"right of disclosure"** **(data on distribution of the units : suppl. & cust.)**
  - **Not complying with the GPL = violation of the copyrights in the programs => confirms obligation to cease and desist**

    "If GPL were not sufficient to form a legal relationship with Plaintiff, Defendant would not have any right to copy, distribute or modify the three programs, such that a copyright infringement by the Defendant would have taken place."
  - **No invalidity (if clause 2 invalid, whole licence invalid)**
  - **No antitrust-related problems**

STOP, + *a bit more…*

H. Welte v. Skype [DE]
(Landgericht Munchen I - 12 July 2007)

- **Skype Technologies SA sells (third party) Linux-based VoIP phones, through the Skype website.**
  - **Failed to provide the source code and the licence together with the phones.**
  - **Skype claimed that a URL was provided in the documentation, where (licence + code) were made available.**
- **COURT :**
  - **This is not compliant enough : (offering source code for downloading : only applicable when binaries are downloadable from the same place)**

  => Injunction
- **Skype appealed, then withdrew at the hearings, as a member of the panel has explained :**

  "If a publisher wants to publish a book of an author who wants his book only to be published in a green envelope, then that might seem odd to you, but still you will have to do it as long as you want to publish the book and have no other agreement in place"

AVM v. Cybits [DE]
(Landgericht Berlin - 8 November 2011)

- **AVM: producer of DSL terminals (FRITZ!Box router)**
  - **=> linux kernel (GPL2) => « iptables » (H.Welte)**
- **Cybits: producer of internet filtering software « DSL-sitter »**
  - **=> downloads FritzBox software from AVM**
  - **=> modifies it => re-installs it on the FritzBox**

⇒ AVM sues Cybits to make it stop, pretending (NB : no TPM)

- **that FritzBox software is a work, or at least a protected compilation, under AVM copyright and that cannot be modified without authorization.**
- **Trade mark breach : "Fritz!Box" still visible after modification**
- **Act of unfair competition (modified software => slight malfunctions => support)**

- **H.Welte intervenes as licensor**
  - **If FritzBox is a derivative work : it should be redistributed under GPL2**
  - **AVM releases source code as required=> not allowing modifications is incoherent**
  - **If it is a bundle of software parts : GPL parts should be modifiable**
- **Court : FritzBox is a collective work**
  - **⇒ GPL parts can be modified and re-installed … BUT …**
  - **⇒ Cybit prohibited from distributing the current version causing malfunctions**

Mandrakesoft [FR]
(TGI Paris, 25 February 2003)

- **Mandrakesoft outsources the creation of manuals to Logidee**
- **Contract :**
  - Any manual should mention “made by Logidee”
  - No “harmful modifications” to the documents
- **Mandrakesoft**
  - publishes the documents on line under GFDL & GPL
- **Logidee**
  - Names of the authors and Logidee not mentioned
  - Bad modifications + translation
- **Tribunal :**
  - Attribution clause not respected
  - Only the name of the company had to be mentionned
  - Indemnity : 1000 EUR.
- **TEACHING ? : importance of copyright ownership in FOSS licensing…**

Educaffix [FR]
(TGI Paris, 28 March 2007)

- **Agreement : transfer of copyrights** to e-learning software (« Baghera ») from authors (public sector) to Educaffix (commercial company) => commercial version (« Educaxion »)
- Educaffix' notice letter: **impossibility to exploit** the software as it includes (JatLite) software, which is under GPLv2
- **Answer from authors : JatLite not part of the transfer,**
  but it is substitutable (development work outside the deal).
- **Writ of summons : claim**
  - Nullity for fraudulent concealment (Dolus) : 1.000.000 EUR
  - /Alternative/ Termination for breach of contract : 10.000 EUR
- **Tribunal :**
  - Email from transferer to Educaffix : « *the « agent » communication platform is JatLite, licensed under GPL2 by the University of Stanford, and is not part of the transfer* » => No Dolus (no bad faith / no deception)
  - Transferers underestimated the time/costs of the development of a substitute to JatLite… mistake!

  ⇒ **Nullity pronounced against both parties => No indemnity**
- **TEACHING : importance of clarity and transparency**

ERN [FR]
(TGI Chamberry, 15 November 2007)

- **Educational software ("electronic schoolbag"):**
  - University + Administration => PRIVATE COMPANY ERN
    (res. project) (pol. programme) **Partnership** (commercial version)
  - Transfer (licence) of exploitation rights
  - Exclusivity of exploitation / Non-competition clauses
- **Problem : ERN's claims**
  - Exclusivity not respected : software mainly based on software under free licence with "contaminating effect"
  - + incompatible licences => unexploitable
- **Admin. announces that the exploitation has been granted to PENTILA**
- **ERN sues PENTILA for copyright infringement**
- **TRIBUNAL**
  - Copyrights transferred/licensed to ERN : Indeed **BUT**
  - Pentila: "ERN incoherent : Free software => ERN has no exclusivity!"
  - ERN: "but there are also proprietary modules"
  - TRIBUNAL : ERN does NOT prove that => **CLAIM DISMISSED**

TEACHING : ...?! Think before suing ?!...

EDU 4 [FR]
(Cour d'appel de Paris,16 Sept. 2009)

- APFA =>public procurement for training spaces (mat.+Software)
- EDU4 : multi-media training spaces builder => CONTRACTOR
- APFA : administrative procedure
  - Verification of aptitude and services
  - APFA : questions on the legal nature of the installed software
    - No mention on the inclusion of free software VNC (under GPL)
    - Modified version of VNC concealed in the software
    - No original copyright notice: replaced by EDU4 copyright notice
    - Licence text deleted
    - Source Code not provided
  - GPL infringed => counterfeit software
  - APFA proposes amicable termination >< EDU4 sues for payment
- EDU4 : never said EDU4 would be copyright owner

  the version delivered is not the final version

  => verification for the tech. characteristics only
- TRIBUNAL : Verification of Integral conformity (not tech. only)

Breach of contract by EDU4 => Termination

OPEN CONTENT LICENCES

SGAE v. Disco Bar Metropol [ES]
(Juzgado de primera instancia de Badajoz n°6 - 17 February 2006)

- **SGAE : collecting society of authors and editors**
- **DISCO BAR METROPOL :**
  - Plays <u>music in the bar</u>
  - No authorization from SGAE to use its repertoire
  - Sued by SGAE for illegal use of music
  - DEFENSE :

    « I only play free / CC music : I need no authorization! »
- **TRIBUNAL**
  - Accepts the existence of a rebuttable presumption that SGAE manages the copyrights to a majority of musical works.
  - However, the Disco Bar proves that it has access to music that is not part of that repertoire : this reverses the presumption
  - The Tribunal reverts to the SGAE arguments and evidences and notices that SGAE does not prove the use of its repertoire
  - The tribunal rejects SGAE's claim and condemns it to the payment of the procedure's costs.

Adam Curry v. Audax [NL]
(Voorzieningenrechter Arrondissementsrechtbank Amsterdam - 9 March 2006)

- **Adam Curry:** publishes pics of his own on Flicker under CC BY-*NC*-ND (Logo + link) (Non Commercial)
- Notice « *this photo is plublic* »
- Tabloid (Weekend) published by Audax :
  - Article : The real life of A. Curry v. what he pretends it is…
  - => comparison of pictures => reuses and publishes the 4 pics

⇒ **Cease and desist action / fast track proceeding**

- **Judge :**
  - Audax is a professional, could not be mislead by the dual message « cc / public »
  - In case of doubt: should have contacted the author
  - Conditions of the licence not respected

⇒ **INJUNCTION**

STOP

NB: Highly criticizable appreciation of the court :

«the value of the pictures is minimal, given that the pics are already freely available on the Internet »

N. Gerlach v. DVU [DE]
(Landgericht Berlin, 8 October 2010)

- **Nina Gerlach**

  => picture of Thilo Sarrazin from the DVU (far-right political party)

  => published under a CC Attribution – ShareAlike 3.0 Unported

- **DVU (Deutsche Volksunion)**

  uses the photo

  - without providing attribution to the photographer and

  - without providing notice of the license used

- **Fast track cease and desist proceeding**

Thilo Sarrazin am 3. Juli 2009
by Nina Gerlach / CC BY-SA

⇒ **Court's finding:**

Breach of the licence => use not covered by authorization

⇒ **Court's decision : injunctive relief on preliminary ruling**

STOP

- prohibition to reproduce and/or make publicly available the photo without naming the creator and adding the license text or its full internet address corresponding to the license terms of the Creative Commons license "Attribution ShareAlike 3.0 Unported" under a penalty of 250.000 EUR

- defendant bears the costs of the proceeding (4.000 EUR)

Lichôdmapwa v. Théâtre de Spa [BE]
(Civ. Nivelles – 26 October 2010)

- **Lichôdmapwa = small Belgian music band**
  - publishes songs on http://www.dogmazic.net/
  - Licence CC BY-NC-ND (Non Commercial)
- **A theatre uses a small part of the song in a radio advertisement**
- **The band sues :** breach of contract
  - **or in the alternative** copyright infringement
  - => Claim an indemnity of 10.380 EUR

⇒ **Court's Findings**

- BY not respected (no attribution)
- NC not respected (commercial advertisement)
- ND not respected (music modified to create the ad)

PAY

- **Calculation of the indemnity**

  "the court deems contradictory to advocate a non commercial ethic on the one hand, but to claim indemnities on basis of a commercial tariff that would be higher than the one of SABAM [collecting society]"

- **Condemnation : 1500 EUR per infraction = TOTAL 4.500 EUR**

CONCLUSION

- **The validity of the licences is generally not a problem in practice**
  - Open licences are not waivers / conditions are to be respected /…
  - If the licence is invalid, then you still have no rights to use the work

  NB: no case where author or licensor raises the invalidity of the licence
- **Getting an injunctive relief : no problem**
  - "Stop until you comply"
  - Copyright infringement
- **No case of active copyleft clause enforcement as such**

  ⇒ No case where infringers were forced to release a modified version under a copyleft/share alike licence … => no case on "derivative works"…
- **Indemnification**
  - Much more tricky and unsure : Judges seem more confused

  HOWEVER
  - A work released under an open licence does not become « worthless »
  - When an open licence's condition is not respected, a damage *is* done!
  - Assessing the damage done is always problematic (open licence or not)
  - Copyright infringements should be treated equally (cfr. Linchôdmapwa)

Thanks for your attention !

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