Contractual Relationships in Open Source Structures

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Abstract: The article provides an overview of the legal relationships in Open Source Structures. It shows that – as within all software development and distribution models – different persons with different "functions" (developer, distributor, and user) can conclude contracts concerning various objects of agreement.

1 Legal Aspects of Open Source Software

The terms "Open Source Software" or "Free Software" denote software that may be copied, distributed and modified by anyone, and the source code of which is at the same time freely available. Open Source Software thus establishes a structure of decentralised software engineering as well as decentralised software distribution. In contrast to "conventional" ("proprietary") structures, the software is neither developed by individual corporations or organisations nor is it supplied exclusively by "authorised dealers".

Over the last fifteen years Open Source Software has gained considerable market shares in certain software sectors, especially core internet technologies, operating systems, server systems, and embedded software systems. In some sectors, *e.g.* web server software, Open Source Software even dominates the market. Due to the development of free "office software", browsers, mail clients etc., Open Source Software has also arrived on the end user's desktop. This growing market presence of Open Source Software has lead to intense economic activities in this field of software development and marketing. Companies are investing remarkable resources in further development and expanding the distribution of Open Source Software. Businesses of all branches acknowledge Open Source Software as a possible and worthwhile alternative to conventional ("proprietary") software for their own use.

The more Open Source Software is utilised in business processes and in security-sensitive business areas, the more legal aspects play a significant role to the different parties involved in Open Source development and marketing. Due to the high economic risks accompanying the commercial use of software, all parties concerned are in need of safe legal foundations for their relationships. For this reason it is not surprising, that one can observe increasing activity in examining the legal aspects of Open Source Structures (see *e.g.* JM02, SPI04, SIF02). Such legal analysis of Open Source Structures can come with different objectives. On the one hand it may attempt to clarify whether existing Open Source development and marketing strategies are consistent with the law. On the other hand it can be intended to establish new Open Source Licensing Models that fit

perfectly with the particular interests of the parties involved (see *e.g.* “Bremer Lizenz”, http://www.koopa.de/OSCI-Standard/OSCI-Bibliothek).

In both cases one has to keep in mind the international development and international marketing of Open Source Software: Different national legal systems can be applicable to the various transactions within Open Source development and marketing structures. This makes it very difficult to create valid Open Source Licenses and other agreements. Because national legal systems differ significantly, the same contract clause may be valid in some countries and invalid in others. Exactly the same contract clause will then be partly legally binding and partly not. Legal analysis of Open Source transactions, therefore, has to address the question, under which circumstances a certain national law is applicable, as well as the problem of whether Open Source Structures comply or can comply with the respective national legal system.

In the following, only one single aspect out of the wide range of legal problems regarding Open Source Software will be further examined: The analysis will be focused on the “contractual relationships” in Open Source Structures. Also, because the concepts of “contractual relationships” may vary among national legal systems, the discussion will be restricted to the application of German Law.

2 Elements of “Contractual Relationships” (under German Law)

Contracting is one of the core elements of organising relationships between different parties. It allows the parties binding arrangements to pursue their own economic and personal interests. In this respect, most national legal systems agree. However, the different national legal systems provide for varying legal regulations. It is therefore clear that the provisions for the conclusion of contracts, the scope of contractual freedom and the possible claims of the parties can differ, as well as the conditions and consequences for the contractors of a certain contract. At the same time, the term “contract” is used with different meanings depending on the general concept of regulation within the respective national legal system. Examining contractual relationships in Open Source Models may, therefore, lead to different conclusions according to the applicable law of the case at hand. In the following the term “contract” denotes – in accordance with the German Legal System – each set of corresponding declarations of intention made by different parties and addressed to cause a certain legal result (PAL04, Einf v § 145, 1). In contrast to the (traditional) Common Law approach, consideration is not required. (Note: Many common law states have adopted laws that remove consideration as a prerequisite of a valid contract).

A closer look at the contractual relationships in Open Source Models provides deeper insights into the theoretical framework of Open Source Development and Open Source Distribution. At first, it shows that there are various objects of agreement, various parties involved, and different contractual obligations:

2.1 Objects of Agreement

With Open Source Structures – as with all software development and marketing structures – various negotiable goods and rights as well as various legal positions which are possible subject-matters of contract can be distinguished. To begin with, there is the copy of the executable program. Independently from the executable program, the source code that contains the programming know-how can be a separate object of agreement. Executable program and source code can be distributed or made available via the internet, or they can be stored in a tangible medium. In the latter case the tangible medium itself is another possible subject-matter of contract.

In addition to these legal positions, there are intellectual property rights in computer programs which constitute further possible objects of transaction. Computer programs are inter alia protected by Copyright Law. Aside from a few legal exceptions, the copyright holder is granted the exclusive rights to copy, distribute and modify the software as well as the right to make the software available to the public. The most important exception in this context is that in the absence of specific contractual provisions the lawful acquirer does not require authorization by the rightholder for the use of the computer program in accordance with its intended purpose (see Council Directive of 14 May 1991 on the legal protection of computer programs, 91/250/EEC, Art. 5).

2.2 Parties Concerned

In Open Source Models one can distinguish persons with different "functions": Firstly, there are the developers, i.e. the individuals or entities programming the software. Secondly, there are the users, i.e. the individuals or institutions utilising the software for their respective personal or professional purposes and needs. Thirdly, there are the distributors, i.e. the individuals or entities passing the software to the users. However, in contrast to other marketing and development strategies, the different persons can change their functions easily. Every user is allowed to pass copies of the program to third parties and may therefore become a distributor of the program. Because the source code is freely available, he can also modify the program and thus become a developer. Hence, the same individual can become party to different contracts by acting in different funtions within the Open Source Structures.

2.3 Contractual Obligations

In software development and software marketing structures the different persons with their respective functions conclude contracts about various objects of agreement. Contracts between distributor and user regularly oblige the distributor to provide a copy of the software (via the internet or stored in a tangible medium) and possibly to grant certain rights which entitle the user to use the software. Contracts between developers and distributors usually oblige the developer to grant certain distribution rights. Finally, developers may conclude contracts with other developers to legally enable the latter to improve or customise the software. In these cases they are obliged to license the corresponding rights. Insofar, there are no differences between conventional ("proprietary")

and Open Source Structures. Differences, however, do exist in respect of the extent to which distribution and development rights are granted.

There are important problems, regarding the question of whether in contractual relationships in Open Source Structures the opposing party may be obliged to any valuable considerations: A fee may be charged for the transmission of the software (*e.g.* Sec. 1 GNU General Public License – GNU/GPL). Hence, distributor and user can agree on a one-off payment of a certain sum in return for the provision of the software. By contrast, the copyright holder shall not ask for a royalty or any other fee in return for licensing the distribution and development rights (otherwise the software is not "Open Source"). A duty of payment may, therefore, not be obliged in return. The latter statement, however, does not necessarily mean that considerations cannot be agreed upon at all in these cases. In fact, whether certain conditions in Open Source Licenses must be legally classified as considerations, is one of the most controversial questions in the legal debate on Open Source Software. This is especially true for the so-called "Copyleft-Clauses" which are used in a number of Open Source Licenses (*e.g.* GNU General Public License – GNU/GPL): The licensee must – inter alia – make the source code of his modifications available if he (voluntarily) distributes copies of the executable program. Some interpret this as an initial limitation of the granted rights. Other scholars construe it as a consideration, for in these cases the licensee must disclose his own valuable programming know-how, created by him and embodied in the source code.

3 Differentiation of "Contractual Obligations"

Keeping in mind that Open Source Structures consist of different obligations (they themselves possibly established at different times), deal with a variety of subject matters and above all bind various parties, it becomes obvious that it is hardly manageable to design one single contractual document which is to fulfil all conceivable terms and requirements. In fact, the Open Source Licenses, *e.g.* the GNU General Public License, organise the legal relationships between the developers and their respective opposing party, whereas the primary duties between distributors and users are not covered by these licenses. The Open Source Licenses only deal with the distribution and development rights, not with the act of transferring copies of the program from distributor to user. Contractual obligations concerning the transfer of program copies to users are agreed upon in independent (oral or written) contracts.

This differentiation between the various contractual relationships is not always taken into account in the German debate about the legal aspects of Open Source Software. It is partly stated that Open Source Models come into conflict with German Consumer Protection Law: The distributors of program copies, it is said, often fail to apprise the user the (Open Source) license texts before conclusion of contract, even though German Consumer Protection Law requires information about standard business conditions to be provided before that moment. The licenses, it is therefore assumed, are not included in the contractual relationships. Yet, this would – in any case – only be a problem, if the Open Source Licenses actually affected the contractual relationships between distributor and user.

Differentiation is also a key factor when classifying the respective contractual relationships as contracts of a certain type. German Contract Law provides for specific requirements as well as different legal consequences applying to different types of contracts, *e.g.* one will find crucial differences as to the scope of liability. The classification of the particular type of contract depends on the primary obligations the parties are to fulfil. Since in Open Source Structures the same person can change "functions" easily – *e.g.* a user can become a distributor or developer – he can also easily become a party to different contracts. One first has to separate the transactions when intending to classify the different contractual relationships in Open Source Structures.

4 A More Detailed Look at the Contractual Relationships

Separating the different contractual relationships in Open Source Structures leads to some important insights:

With contracts between *distributor and user*, the distributor regularly has to provide a copy of the program for permanent use. In return, the user may be obliged to pay a certain (one-off) amount. In such cases (see SCH03, p. 789 et seqq.) the contract between distributor and user is to be qualified as an act of sale. In cases where the copy is provided free of charge, the agreement is to be classified as a donation contract. These different classifications are primarily important for the scopes of liability and warranty. On the one hand, the seller of a product implicitly warrants that the product is fit for the usual and/or agreed purposes, and the contractual liability is extensive. This scope of warranty and liability can only be modified to a certain and relatively limited extent by standard business conditions (see JM02, p. 145 et seqq.). On the other hand, the donor implicitly warrants that no defects in the product are fraudulently concealed, and is only liable in cases of gross negligence.

The contractual relationship between the *developer an the respective opposing party* is uniformly arranged by the Open Source Licenses. In this respect the Open Source Model does not differentiate between development agreements and distribution agreements. Without exception, the development rights as well as the distribution rights are granted to the licensee in a single act (see *e.g.* Sec. 1 GPL: "You may copy and distribute […]", Sec. 2 GPL: "You may modify […]"). These contracts can easily be classified as "License Agreements" since they deal with the granting of intellectual property rights. However, "License Agreements" are not expressly regulated in German Contract Law. It is therefore accepted that the legal preconditions and consequences of the respective contracts are to be extracted by comparing them to those contract types which are explicitly regulated by the law. Where legitimate interests of the parties are comparable, the existing legal regulations are to be adopted. To which regulated contract types Open Source Licenses are actually comparable, however, is a very controversial issue. Are they sharp-in/sharp-out transfer contracts (like sales and donation contracts) or are they dealing with a continuing obligation (like lease contracts or contracts of loan for use)? Are Open Source Licenses imposing an obligation on one party only (like donation contracts or contracts of loan for use) or is the licensee also (partly) obliged in some way?

Having regard to the above, it is also problematic whether further differentiation is necessary. Since many Open Source Licenses (*e.g.* BSD License) impose no or only minor restrictions on the rights to distribute modifications, licenses using the so-called Copyleft-clauses (*e.g.* GPL) stipulate that in the case of distribution of object code containing own modifications one must make the source code available as well. This means that in such cases one must make one's own valuable know-how embodied in the programs source code available.

The final answers to these questions will have an important impact on the further development of Open Source Structures in Germany, especially because the scopes of liability and warranty are significantly affected. German Consumer Protection Law forbids the extensive disclaimer of warranty and liability as used in most U.S.-licenses. Therefore, the scopes of liability and warranty greatly depend on the legal balance of risks which differs between the various contract types.

5 Perspectives

The examination of contractual relationships in Open Source Structures shows that there are still a lot of unanswered questions. Amongst other things, the further legal debate and the further evolution of "software law" will have important effects on the scopes of liability and warranty of the parties concerned. Hopefully, an appropriate balance of risks will be found, keeping in mind that

- the author of Open Source Software does not have a sufficient revenue stream from the program to fund liability insurance and legal fees

and at the same time

- other developers, modifying the program and making their own valuable know-how available, rely on the "licensor's" testimony that he really is the copyright owner and as such is indeed legally able to grant development and distribution rights.

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