General Public License in Court

Analyses of the case law in EU countries

Joris Peeters

Under the academic supervision of prof. J. Dumortier

1. INTRODUCTION

The goal of this seminar is to provide an overview and comparison of the interpretation of the General Public License in European Countries. In order to do this, it is necessary to first understand the basic philosophy and history of the General Public License. The most important part of this seminar will be dedicated to the analysis of the few European Court decisions regarding the General Public License.

1.1 THE GENERAL PUBLIC LICENSE

The General Public License (hereafter: GPL) is the most widely used license for open-source applications and is intended to give a maximum of liberty to the users of the application. As such, it allows the user to use, modify, copy and distribute the source-code. The most notable limitation is the obligation to license derived code under the GPL, in case the code is released, which will be examined in more detail below[1].

1.1.1 History

The history of the GPL is connected to the Open Source Movement and the Free Software Foundation. It was Richard Stallman, a programmer at the Massachusetts Institute of Technology, who founded the Free Software Foundation and created the first GPL-version. When Richard Stallman started his career at MIT in 1971, where he worked in a group which used "*free software exclusively*", a habit at that time not uncommon even for software companies. He later referred to this group as "*the first software-sharing community*"[2]. This custom of sharing code fell into disuse in the '80s, when

[1] ENGELFRIET, A., "Het kiezen van een software-licentie", www.iusmentis.com/ computerprogrammas/ licenties/ kiezen/ , (consultatie 14 november 2007)
[2] www.gnu.org/ gnu/ thegnuproject.html, (consultatie 09/ 04/ 2007)

software became more and more subject to commercial use[3]. It is at this time that Stallman left the MIT and started the GNU-project in 1983 to create a free Unix-based operating system, which he considered the first step in the process of making free software readily available.

1.1.2 Free Software Foundation

The non-profit organisation Free Software Foundation was founded by Stallman in 1985 and proved to be one of the driving forces behind the Free and Open Source Movement, although its purpose was initially limited to the raising of funds for the development of the GNU-operating system[4]. The main objective of the FSF later became the stimulation of the free use of software. In order for software to be considered "*free software*" and fall under the Free Software Foundation's "*Free Software Definition*", it has to give the following rights to the users:

1) the freedom to use the program for any purpose
2) the freedom to study how the program works and adapt it
3) the freedom to redistribute copies
4) the freedom to improve the program and release these improvements to the public

The access to the source code is considered a precondition for these "freedoms"[5]. It is essential to keep in mind that "free" should be interpreted as freedom to use software, not free in the sense of not having to pay[6].

Today, the Free Software Foundation has many active projects, including the revision of the General Public License, Free Software directory, etc. The latest version of the GPL is version 3[7].

1.2 POLICY OBJECTIVES OF THE GENERAL PUBLIC LICENSE

1.2.1. Maximize the amount of free software available to the public

The GPL seeks to avoid that free software is turned into proprietary software, which happens often with software released under more permissive academic open source licenses (such as MIT License, BSD License, Apache license etc) [8]. Licensees would often take the code, use it in their own work and distribute further under a proprietary license. The reciprocity of the GPL imposes that

---

[3] www.gnu.org/ gnu/ gnu-history.html, (consultatie 09/ 04/ 2007)
[4] Free and open-source software, http:/ / en.wikipedia.org/ wiki/ FLOSS, (consultatie 13/ 05/ 2008)
[5] http:/ / www.gnu.org/ philosophy/ free-sw.html (consultatie 02/ 04/ 2008)
[6] See under "Footnotes", http:/ / www.gnu.org/ philosophy/ shouldbefree.html (consultatie 09/ 04/ 2008)
[7] GPL version 3, http:/ / www.gnu.org/ licenses/ gpl.txt (consultatie 02/ 04/ 2008)
[8] Examples of permissive open-source licenses, http:/ / en.wikipedia.org/ wiki/ Permissive_free_software_license (consultatie 05/ 5/ 2008)

licensees release derivative works under the GPL, which increases the pool of free software[9].

1.2.2. Improve compatibility of software

With the success of proprietary software an increasing number of incompatibility problems arose: source code has to be shared in order to create compatible software, but this is very difficult because of proprietary licensing. Open source facilitates software compatibility due to the fact that the source code and execution of a program can be studied in detail[10].

1.2.3.Free software as an ethical objective

The *Free Software Foundation* believes that "*to treat the public ethically, the software should be free – as in freedom – for the whole public*"[11]. This idea is also reflected in the Preambles of the different GPL-versions[12]. The *Open Source Movement* is more pragmatic and believes in the viability of open-source as an economic model, beneficial to efficiency and welfare[13].

1.3 COPYLEFT LICENSE

The GPL is qualified as a *copyleft* license: this means that anyone who uses the original source code must release the derived works under the same license as the original source code, while giving the user a maximum of freedom[14]. Copyleft is the opposite of copyright in the sense that copyleft aims to give a maximum of freedom while preserving the rights of the original author, while copyright aims to protect mainly the author by limiting other's freedom to use the work[15].

This method of maintaining the license conditions is based on the philosophy that the openness of the original code should be preserved and that everyone should have the ability to use the original code, as that would benefit society rather than individuals[16]. This is what some authors refer to as the "*viral*" or "*infecting*" characteristic of the GPL: anyone who uses a bit of code licensed

---

[9] ROSEN, L., *Open source licensing*, US, Prentice Hall Ptr, 2005, 107
[10] ROSEN, L., *Open source licensing*, US, Prentice Hall Ptr, 2005, 108
[11] Free Software Foundation, http:/ / www.fsf.org (consultatie 26/ 02/ 2008); ROSEN, L., *Open source licensing*, US, Prentice Hall Ptr, 2005, 108-109
[12] "*The licenses for most software are designed to take away your freedom to share and change it. By contrast, the GNU General Public License is intended to guarantee your freedom to share and change free software – to make sure the software is free for all its users*", GPL Preamble Version 2 and 3, http:/ / www.gnu.org (consultatie 13/ 05/ 2008);
[13] PERENS, B., "The emerging economic paradigm of open source", http:/ / perens.com/ works/ articles/ Economic.html (consultatie 5/ 05/ 2008)
[14] Section 5 GPLv2, http:/ / www.gnu.org/ licenses/ old-licenses/ gpl-2.0.txt (consultatie 20/ 02/ 2008); VISSER, E.N.M., "GNU General Public License – All rights reversed?", *Computerrecht* 2004
[15] Copyright law, http:/ / www.vowb.be/ auteursrecht9.html# optieGC2 (consultatie 2008/ 02/ 11)
[16] Pre-ambles GPL, http:/ / www.gnu.org/ licenses/ (consultatie 20/ 02/ 2008)

under the GPL will in theory only be able to use their copyright, when further distributing the program, under the conditions of the GPL. Other authors prefer to refer this character with the term *reciprocity* to underline the mutual benefits which result from using the GPL[17].

Section 5 GPLv2 states that the copyleft-clause applies in the case where a person redistributes modified versions of the program[18]. A valid redistribution requires:

> a) a clear notice that the program has been modified, along with the date of modification
>
> b) a clear notice that the program has been released under the GPL, along with any applicable terms from art. 7 GPLv2
>
> c) the entire work must be licensed under the GPL to anyone who comes into possession;
>
> d) the interactive user interfaces must clearly display Appropriate Legal Notices, if there are any such interfaces

It is important to note that the copyleft-clause will take effect only when there is a public distribution of the program; the GPL makes an exception for modifications for private use or internal use (e.g. organisation, company)[19].

1.4 VERSIONS OF THE GENERAL PUBLIC LICENSE

1.4.1 Version 1

The first version of the GPL was released in January 1989 and had two goals. The first was to prevent that distributors would publish only the binary files (computer readable only) – not the source code. GPLv1 introduced the obligation to spread the source code under the same license[20].

The second goal was to prohibit the imposition of additional restrictions, either by modifying the original license or by combining the software with software that fell under a more restrictive license. GPLv1 aimed to achieve this by stating that modified versions, as a whole, had to be distributed under the GPL-terms.

1.4.2 Version 2

The biggest change in version 2, released in June 1991, was section 7, which Richard Stallman referred to as the "Liberty or Death"-clause[21]. Section 7

---

[17] ROSEN, L., *Open source licensing*, US, Prentice Hall Ptr, 2005, 105-106
[18] Section 5 GPLv3, http:/ / www.gnu.org/ licenses/ gpl.txt (consultatie 20/ 02/ 2008)
[19] Section 2 and 3 GPLv3, http:/ / www.gnu.org/ licenses/ gpl.txt (consultatie 18/ 02/ 2008)
20 Section 2, 6 GPLv1; http:/ / www.gnu.org/ licenses/ old-licenses/ gpl-1.0.txt (consultatie 18/ 02/ 2008)
[21] STALLMAN, R.,

GPLv2 states: "*If you cannot distribute so as to satisfy simultaneously your obligations under this License and any other pertinent obligations, then as a consequence you may not distribute the Program at all* "[22].

A less restrictive version, the Library General Public License (in 1999 renamed to Lesser General Public License), was released simultaneously with version 2 and was aimed at software libraries, which are pieces of code designed to facilitate the creation of programs by providing libraries with commonly used software-functions[23].

1.4.3 Version 3[24]

Version 3 was released the 29th of June 2007, 15 year after version 2, as a response to recent evolutions that threaten to undermine the growth of open source, such as digital rights management, software related patents and "Tivoization". Version 3 is overall more rigid and radical than version 2.

1.4.3.1 Definitions

An important change in version 3 is the way definitions are used: instead of using common legal terminology, version 3 creates definitions by describing them. Examples of this are the use of "*modification*", "*propagation*" and "*conveyance*" instead of "*publication*", "*distribution*" etc[25]. These definitions will have to be interpreted by the Courts, and then translated to their respective legal meaning.

1.4.3.2 Consumer products26

Section 6 GPLv3 demands that all necessary keys, codes and additional installation-guides are included with consumer products[27]. The idea behind this article is to put a stop to the so called "*Tivoization*"-technique, against which the Free Software Foundation has been profoundly opposed for a long time[28].

This technique, named after the American company Tivo, consists in using GPL-licensed software for hardware, such as DVD-players, televisions, mobile phones, while only the company who creates the hardware is able to install and modify the firmware (although the company usually will hand out the code and

---

http:/ / fsfeurope.org/ projects/ gplv3/ fisl-rms-transcript.en.html# liberty-or-death, (consultatie 18/ 02/ 2008)

[22] Section 7 GPLv2; http:/ / www.gnu.org/ licenses/ old-licenses/ gpl-2.0.txt (consultatie 18/ 02/ 2008)

[23] Lesser General Public License, http:/ / www.gnu.org/ licenses/ lgpl.txt, (consultatie 02/ 04/ 2008)

[24] ENGELFRIET, A., "Uit principe: de GNU General Public License (GPL) versie 3", *Computerrecht* 2007

[25] Section 0 GPLv3, http:/ / www.gnu.org/ licenses/ gpl.txt (consultatie 18/ 02/ 2008)

[26] ENGELFRIET, A., "Uit principe: de GNU General Public License (GPL) versie 3", *Computerrecht* 2007

[27] Section 6, 6° GPLv3, http:/ / www.gnu.org/ licenses/ gpl.txt (consultatie 28/ 02/ 2008)

[28] Preamble GPLv3, http:/ / www.gnu.org/ licenses/ gpl.txt (consultatie 01/ 04/ 2008)

the right to change the code)[29]. The result of this is that, even though the installed firmware falls under the General Public License, it cannot be changed by the end-user, nor modified, because only the manufacturer has the ability to do this, which basically means that software isn't exactly open-source anymore.

Section 6 GPLv3 is controversial because of the risk in giving end-users the ability to change firmware at will: while "*tivoization*" limits the effectiveness of the GPL-software, it does have a security-aspect to it: mobile phones, car brake-systems, temperature-regulators, radio-waves etc. need to work correctly at all times, some of which are legal obligations required to receive the "CE"-mark[30]. This obligation might also be problematic with regards to the product liability of the manufacturer, who has to ensure the safety of his product, which is often achieved through firmware (e.g. locking down a machine when a certain temperature is reached etc.).

1.4.3.3 Technological Measures

Technological measures are measures that control the accessing and playing of movies and music. In many countries it is illegal to circumvent these measures, even if the software used for these measures is licensed under the GPL. The Free Software Foundation considers this a limit to the rights of GPL-users, which is why section 3 GPLv3 now states that GPL-protected software "*shall not be deemed part of an effective technological measure under any applicable law*". Additionally, the creator of the measures must "*waive any legal power to forbid circumvention of technological measures*". ENGELFRIET has pointed out that this clause may not be enforceable before Court.

1.4.3.4 Warranty and exoneration

Section 17 GPLv3 provides a "*conversion clause*" for the application of sections 15 and 16 GPLv3 (respectively "*Disclaimer of warranty*" and "*Limitation of liability*") by stating that the Courts "*shall apply local law that most closely approximates an absolute waiver of all civil liability*". This can be considered a positive change as European consumer law is quite protective in the area of liability and warranty.

1.4.3.5 Other Changes

Some other changes include:

- A more specific arrangement for the termination of the license (section 8 GPLv3).

---

[29] GPL Frequently Asked Questions, http:// www.gnu.org/ licenses/ gpl-faq.html# Tivoization, (consultatie 05/ 5/ 2008)

[30] ENGELFRIET, A., "Uit principe: de GNU General Public License (GPL) versie 3", *Computerrecht* 2007

- Obligation to display an '*appropriate copyright notice*", a reference to the GPL and an exoneration of the author if the program has an "*interactive interface*" (section 5 GPLv3).
- No choice of applicable law, in order to avoid abuse.

1.4.4 Which license version?

The GPL is sometimes considered a "*template license*", created to alleviate the need for programmers to write a new license. All a licensor has to do to make the GPL applicable is put a notice in the source code that states that the software is licensed under the GPL. The GPL handles unclarity about the version as follows: if the software specifies a version and "*any later version*", the licensee has the choice between the specified version or any later version; if no version is specified, the licensee can choose *any* version *ever* published by the Free Software Foundation[31]. Section 14 GPLv3 adds to this that the choice of a later version by the licensee can not impose additional obligations on the licensor[32].

Some licensors object to giving anyone the right to change the version by specifically identifying the version number[33]. Keeping in mind the differences between version 2 and 3, it is likely that there will be increased attention to the choice of the version.

2. ENFORCEMENT OF THE GENERAL PUBLIC LICENSE

Due to the international nature of the GPL, it is not easy to predict if and how the GPL can be enforced in practice. This section will comment on a few of the rare European cases and attempt to give an idea of how the GPLv2 is enforced, by whom it can be enforced and what clauses might be problematic. Comparison with other countries will be made, where possible, with most emphasis on the Netherlands and Belgium. Finally, the cases will looked at under the assumption that parties were bound by GPLv3 instead of GPLv2, to see how the Court might have decided under GPLv3.

Following things should be kept in mind:

1) the GPL is used in an international environment, which means that a program is often created by programmers from various nationalities; most programmers will choose a Court in their proximity, which in turn will affect the interpretation of the GPL

[31] Section 9 GPLv2, http:// www.gnu.org/ licenses/ old-licenses/ gpl-2.0.txt (consultatie 05/ 05/ 2008)
[32] Section 14 GPLv3, http:// www.gnu.org/ licenses/ gpl.txt, (consultatie 05/ 05/ 2008)
[33] ROSEN, L., *Open source licensing*, US, Prentice Hall Ptr, 2005, 113

2) The outcome of a procedure is very dependant on the International Private Law used by the judge. As a result, some countries prefer to apply the copyright law of the country where the procedure is opened, while others will use the law of the country where the program was first published.

3) The small amount of GPL-related cases deal with the relationship between professionals: it is not unlikely for a Court to decide fundamentally different when the case concerns relationships with consumers.

2.1 NETFILTER/SITECOM (GERMANY)[34]

2.1.1 Facts

Netfilter/Sitecom is generally considered the first European decision on the enforceability of the GPL[35]. "*Netfilter/iptables*" is an open-source program, created in 1999 by Paul Russel, designed to replace the old Linux-firewall ("*ipchains*"). Since 2001 Coreteam, a four-person team, was in charge of coordinating further development and distribution of the software. The program and source code was made available for download on the website www.netfilter.org, under the conditions of GPLv2.

The defendant in this case was the German subsidiary of the Dutch company Sitecom, a company group specialised in selling hardware used in networks. The software-package offered on Sitecom's website included parts of the "*netfilter/iptables"*-program inside the object code, along with 2 software modules programmed by Netfilter. The website did not mention that the software-package contained GPL-protected software, nor did it display a reference to the license text of the GPL or the "*netfilter/iptables*" source code, as required by the GPL.

Netfilter sent a warning to Sitecom on the 18th of March 2004 and demanded that Sitecom would make a declaration of forbearance, but this was ignored. Netfilter then applied for a temporary injunction, which was granted on the 2nd of April 2004. Sitecom appealed to this injunction.

Arguments Netfilter:

- Sitecom violated the copyright of Netfilter by offering the program for download without respecting sections 2, b and 3 GPLv2. According to section 4 GPLv2, any violation of the license leads to a termination of the license. A distribution of the software without reference to the GPL and without offering the source code violates the GPL and thus the copyright of Netfilter.

[34] District Court of Munich 19/ 05/ 2004, http:/ / www.ifross.de/ ifross_html/ eVWelte.pdf (consultatie 18/ 02/ 2008)

[35] THOLE, E.P.M. and SEINEN, W., "Open-source softwarelicenties: een civielrechtelijke analyse", *Computerrecht* 2004

- Sitecom is liable to be sued for the current copyright infringement: continuing the current situation would damage Netfilter's recognition of authorship for the Netfilter-software.

Arguments Sitecom:

- Sitecom is not liable to be sued as Netfilter has no right to sue them: Sitecom is a support company not concerned with the sales or distribution of the software and is not responsible for the software offered in the website.

2.1.2. Authorship and the right to sue[36]

Without giving a detailed reasoning, the Court considered the right of plaintiff to sue to have been established according to § 8, 2 German Copyright Act. HÖPPNER considers this a fundamentally important decision, because open-source programs are usually created by a multitude of authors. In most circumstances, the German Copyright Act deals with co-authorship rather restrictively, allowing co-authors to sue only conjointly. The exception to this rule is the aforementioned §8, 2 German Copyright Act, which allows co-authors to individually claim their rights without requiring the other co-authors to join them in court. In this case, Welte was the member of a team of co-authors, but he was allowed to legally pursue Netfilter.

2.1.3. Browse-wrap

The court first examined whether or not the GPL was in effect between Netfilter and Sitecom. The download-page on the Netfilter-website displayed a reference to the license conditions. The link to the license conditions on the Netfilter-webpage can be qualified as a *browse-wrap*, which usually consists of a link or license notice at the bottom of the download-page[37]. Users can freely download the software without having to perform any specific action, but they are in the ability to take knowledge of the license-conditions by following the hyperlink. The Court decided that the use of a browse-wrap is a valid way of expressing consent to the conditions, which the court viewed as "*general terms and conditions of business"* subject to §305 German Civil Act. It would appear that the Court considered the browse-wrap in itself to be a valid way to express consent, as the use of a reference to the license conditions on the webpage is a sufficient "*incorporation"* under §305 German Civil Act, because of the "*easy accessibility"* of the conditions[38][39].

---

[36] HÖPPNER, J., "The GPL prevails: An analysis of the first-ever Court decision on the validity and effectivity of the GPL", http:/ / www.law.ed.ac.uk/ ahrc/ script-ed/ issue4/ GPL-case.asp, (consultatie 17/ 04/ 2008)

[37] PAAPST, M., "GPL, de auteursrechtelijke toestemming tot gebruik", http:/ / rechten.eldoc.ub.rug.nl/ FILES/ departments/ Algemeen/ Recht2/ 2007/ GPLauteursrechtelijk/ GPL.pdf (consultatie 04/ 04/ 2008)

[38] §305 German Civil Act, http:/ / www.iuscomp.org/ gla/ statutes/ BGB.htm (consultatie 16/ 04/ 2008)

[39] VISSER, E.N.M., "GNU General Public License – All rights reversed?", *Computerrecht* 2004

2.1.3.1 Comparison to the Netherlands

a. A similar decision on the validity of *browse-wrap* licensing was reached in the Dutch case Netwise/NTS[40]. Netwise was the owner of the website www.e-mailgids.com, which hosted a publicly accessible database of Dutch e-mail addresses. The left-side of the webpage contained a hyperlink to the license conditions, which explicitly forbid the use of the listed e-mail addresses for "*spamming*". Netwise sued NTS, who was using the addresses for mailing lists, but NTS claimed before Court that it was not bound by the license.

The Court decided that the existence of a hyperlink with the words "*conditions*" is sufficient to conclude that the license is in effect, since "*it can be expected from a professional user that he understands that the conditions, of which he can easily take knowledge, are conditions linked to the use of the website*"[41]. This reasoning is similar to the one used in the Netfilter-case and follows the principle that the acceptance of an accompanying license is considered to be established when the other party has received knowledge of the conditions or could reasonably have taken knowledge of the conditions[42].

The two elements similar to the Netfilter-*case* are the professional relationship and the public availability of the license conditions:

a) *professional relationship*: both Netwise and NTS are professional companies whose main activities involve working with software on a daily basis
b) *public availability*: the license conditions were easily accessible: visitors only had to click the hyperlink in order to be able to read the conditions.

b. THOLE and SEINEN qualify open-source license conditions as "*general terms*", which are part of standard agreements[43]. Art. 6:233 Dutch Civil Act requires that the licensor electronically transfers the license conditions, prior to the installation of the program, to the licensee, who should be given possibility to save the license for further review. These conditions are fulfilled, according to art. 6:234 Dutch Civil Act, when the licensee had knowledge of the existence of the conditions or when it was possible for the licensee to take knowledge of the conditions, and when the conditions could be saved for later viewing. Art. 6:235 Dutch Civil Act creates an exception to this rule for certain

[40] Rotterdam 5 december 2002, http:/ / zoeken.rechtspraak.nl/ resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AF2059&u_ljn=AF2059 (consultatie 14/ 04/ 2008)
[41] Translated from Rotterdam 5 december 2002, http:/ / zoeken.rechtspraak.nl/ resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AF2059&u_ljn=AF 2059 (consultatie 14/ 04/ 2008)
[42] art. 6:233 sub b Dutch Civil Act
[43] Rb. Amsterdam 24 mei 1995, COSS Holland BV/ TM Data in THOLE, E.P.M., SEINEN, W., "Open-source softwarelicenties: een civielrechtelijke analyse", *Computerrecht* 2004

companies, and licensees who have contracted with the same person under the same conditions earlier[44].

THOLE and SEINEN further point out that the instructions provided for in the GPL do not meet this legal requirement because the GPL simply states "*you should have received a copy of the GNU General Public License along with this program; if not write to the Free Software Foundation, …".* This is, in my opinion, not problematic as this is merely an instruction; it is up to the licensor to ensure that the legal requirements are fulfilled; the conditions imposed by Dutch Civil Act are easily met by using a *click-wrap* or even *browse-wrap*. Essential is that the licensee knows of the license and that he is in the ability to take knowledge of the conditions before installing the software.

In the hypothesis that no valid license is in effect, the use of the software will be considered a copyright infringement. Art. 45j Dutch Copyright Act will rarely provide justification for the use of software without a valid license, nor will it give much protection to third parties. The general consensus is, according to the THOLEN and SEINEN, that a license is not a limited right, but a personal right of the author. This means that the protection for third parties provided in art. 3:86 and 3:88 Dutch Civil Act does not apply to a person who received a copy from someone who did not posses a valid GPL-license[45]. Since section 4 GPLv2 remedies this situation by giving third parties the option to accept the GPL regardless of whom they received the software, this will in practice lead to sufficient protection for the author: even if a user is not validly bound by the GPL the only option to avoid copyright infringement is to accept the GPL.

2.3.1.2 Comparison to Belgium

There is so far no Belgian Court decision on the topic of the *browse-wrap*, so it is debatable whether or not Belgian Courts consider the *browse-wrap* valid. The general principle is that a user is bound by general terms and conditions if they have knowledge of the conditions or if it is "*reasonably possible for them to take knowledge of the conditions*". Some authors claim that Belgian Courts will decide similar to the American case *Specht vs. Netscape*, where it was decided that the single act of downloading software from a page that contained a hyperlink to the license conditions does not imply consent to the license[46].

It is my opinion that Belgian Courts might decide similar to the Netfilter-decision and consider the *browse-wrap* a valid way of expressing consent, depending on following elements:

---

[44] Art. 6:235 Civil Law, http:/ / www.kluwer.nl/ cl2/ docpopupbyIOframeset.jsp?&move=&link=5256537&namepopup=1197284239359 (consultatie 3/ 05/ 2008)

[45] THOLE, E.P.M., SEINEN, W., "Open-source softwarelicenties: een civielrechtelijke analyse", *Computerrecht* 2004

[46] DE PRETER, C. en DEKEYSER, H., "De totstandkoming en draagwijdte van open-source licenties", *Computerrecht* 2004

- *Professional users:* the GPL is (so far) usually violated by professional users, as the GPL is specifically aimed at the use of source coding. It is a general principle in Belgian case law for the Courts to be more strict when dealing with professionals, since professionals have a more in-depth knowledge and can be expected to research further than a non-professional when it comes to their area of expertise. It would then seem only logical for a Court to decide that a professional is bound by the GPL, because professionals are generally more familiar with the GPL and software-licenses.
- *Visibility of the license notice:* following the principle that a user should be in the ability to take knowledge of the conditions, the hyperlink to the license conditions should be visible and it should be clear that the license applies to the software available for download. When those conditions are met there should be enough possibility for the user to view and read the conditions prior to the use of the software.

2.3.1.3 Other methods: shrink-wrap and click-wrap

Following 2 methods are alternatives to the *browse-wrap*:

a. Shrink-wrap mechanism is another way to express consent to a license: the performing of certain acts (e.g. breaking the seal of the package) will be considered as consent. This technique is often used for software sold in stores[47]. The package of the software will usually state that, by breaking the seal, you will accept certain conditions.

In the Dutch case *Coss/TM Data16* it was decided that "*the single act of opening a package does not constitute acceptance to the license. In order for it to be considered consent to the license, the user will have to be in the knowledge that by opening the package, he or she consents to the license. Furthermore, the user has to have knowledge of the conditions of the license prior to opening the package. Failing any of these conditions implies a lack of consent.*"[48]. This decision, which was the first on the subject of the shrink-wrap mechanism, follows the general Dutch contract law principle and confirms that the shrink-wrap mechanism is valid when all conditions are met[49].

b. Click-wrap mechanism is used most often for programs distributed over the internet. People who wish to download and install the software will only be able to do so after expressing consent with the license, which can be done by

[47] http:/ / www.suse.de, distributor of Linux-software, who uses the Shrink-wrap mechanism, in DE PRETER, Chr. en DEKEYSER, H., "De totstandkoming en draagwijdte van open-source licenties", *Computerrecht* 2004

[48] Rb. Amsterdam 24 mei 1995, Coss/ TM Data in THOLE, E.P.M., SEINEN, W., "Open-source softwarelicenties: een civielrechtelijke analyse", *Computerrecht* 2004, 63-65

[49] SIJSSENS, J., "Software Licensing. Een analyse aan de hand van internationale rechtsleer en rechtspraak", http:/ / www.statbel.fgov.be/ studies/ thesis_nl.asp?n=750 , (consultatie 27/ 03/ 2008)

clicking an "*I agree*"-button or anything similar. The download will commence only upon acceptance. Courts in Belgium and the Netherlands will most likely accept the validity of the click-wrap as it explicitly requests accepting of the conditions; without acceptance it is not possible to download or install the software[50].

This is a more favourable mechanism than the *browse-wrap* as it leaves less room for uncertainty: the user is explicitly asked to accept the conditions, which is necessary in order to be allowed to use the software. This makes it much harder for a user to prove that he did not know of the conditions or that he was not given the possibility to examine the conditions beforehand.

2.1.4. Lack of official German translation

Another important aspect of the *Netfilter/Sitecom*-case is the fact that the Court did not consider the lack of an official German translation to be a problem in the relationship between two professionals, because the original text of the GPL is written in English, perceived by the Court as "*the common technical language in the computer industry".*

This argument can be criticized for 2 reasons:

- The GPL is in essence a license aimed at regulating legal aspects. It is true to some extent that English is the common technical language, but this does not necessarily imply that the same holds truth for licenses created for the use of software. There is, in my opinion, a difference between the use of English as a technical language and the use of English for legal matters.
- Secondly, the Court viewed the GPL-license as general terms and conditions of business. It is not clear what the impact of the use of an English text is on the application of §305 German Civil Act, which deals with "*Surprising and ambigious clauses*"; more specifically it is unclear if clauses will be considered ambiguous faster because of the use of a foreign language.

However:

- The GPL is used in an international context: it may not always be possible or necessary to provide a translation; furthermore, the Free Software Foundation only accepts unofficial translations under certain conditions[51].
- The language used in the GPL is rather clear and straightforward; use of ambiguous terms is (overall) avoided.

---

[50] THOLE, E.P.M. and SEINEN, W., "Open source-softwarelicenties: een civielrechtelijke analyse", *Computerrecht* 2004

[51] GPL Translations, http:// www.fsf.org/ copyleft/ gpl-faq.html# GPLTranslations (consultatie 2/ 5/ 2008)

2.1.5. Sections 2, 3 and 4 GPLv2 valid

Since the Court considered the GPL to be in effect between Netfilter and Sitecom, the next step was to decide on the validity of the relevant sections 2, 3 and 4 of GPLv2:

a. Section 2, b GPLv2 states that a work that contains the program can only be released as a whole under the terms of the GPL[52].

b. Section 3 GPLv2 requires that a distribution of the Program or a work based on the program is accompanied by the corresponding source-code.

c. Any rights granted under the license are terminated, according to section 4 GPLv2, when the obligations in sections 2 and 3 GPLv2 are not respected.

The Court first examined section 4 GPLv2 and confirmed the underlying idea: the GPL is not a waiver of copyright, the existence of copyright protection is the very fundament of the GPL[53]. The Court then tested if section 4 was a circumvention of §31 German Copyright Act by testing the effect of section 4 GPLv2 on the marketability of the software. The conclusion was that section 4 GPLv2 preserves the marketability of the program, since the GPL states "*that the licenses of third parties are not terminated as long as they fully acknowledge and observe the GPL"*. The loss of rights affects primarily the contractual violator, but even this is, according to the Court, not that serious as the violator can re-obtain the use-rights by accepting and complying with the conditions. Since third parties can continue to use the software under the conditions of section 4 GPLv2, the danger of the program not being marketable anymore is avoided.

The Court further expressed that sections 2 and 3 GPLv2 are admissible because the basic principle of open source software is explicitly confirmed by the German legislator in §32 German Copyright Act. As such, the controversial "*viral"*-clause of the GPL is valid under German law since these clauses only require that the software is distributed in a way that allows third parties to use it to the same extent as the licensee. Netfilter violated the GPL by not fulfilling the requirements imposed by section 2 GPLv2, which then leads to loss of license on the basis of section 4 GPLv2.

The fact that the Court considered these clauses to be valid is generally considered a big step forward in the advancement of open-source software[54]. However, it can not be concluded that GPL in its entirety is valid: section 11 and 12 GPLv2 have yet to be reviewed by Court, but it is not unlikely that these liability- and warranty exclusions are invalid under German law.

---

[52] Section 2 GPLv2, http:/ / www.gnu.org/ licenses/ old-licenses/ gpl-2.0.txt, (consultatie 13/ 05/ 2008)
[53] MOGLEN, E., "Enforcing the GPL", http:/ / www.gnu.org/ philosophy/ enforcing-gpl.html (consultatie 17/ 04/ 2008); SPINDLER, G., *Rechtsfragen bei open source*, 2004, Keulen, Dr. Otto Schmidt, 25; VISSER, E.N.M., "GNU General Public License – All rights reversed?", *Computerrecht* 2004
[54] HÖPPNER, J., "The GPL prevails: An analysis of the first-ever Court decision on the validity and effectivity of the GPL", http:/ / www.law.ed.ac.uk/ ahrc/ script-ed/ issue4/ GPL-case.asp (consultatie 17/ 04/ 2008)

2.1.6. GPLv3

Assuming that Netfilter and Sitecom had been bound by GPLv3 and not GPLv2, following topics might have been looked at differently by the Court:

2.1.6.1 Termination of the license

The GPLv3 deals with the termination-procedure more extensively. Section 8 GPLv3 states that any *propagation* (defined in section 0 GPLv3) or *modification* in violation of the conditions will lead to an automatic loss of license. Exceptions to this rule are provided for the case where the violator ceases further violation: from the moment further violation is stopped, the license is reinstated *provisionally* for 60 days, during which the copyright holder can terminate the license, and *permanently* if the copyright holder fails to provide a notification by reasonable means within 60 days[55]. The loss of rights leaves the rights of third parties who received a copy from the violator intact, which is similar to section 4 GPLv2, but the violator can not re-obtain new licenses for the same material under section 10 GPLv3[56].

As shown in the Netfilter-decision, the Court did not consider the loss of rights on the basis of section 4 GPLv2 that serious since the violator can re-obtain his rights at any time by complying to the GPL. This would only be partly true under GPLv3 since section 8 GPLv3 allows the copyright-holder to terminate the license even *after* the violation is ceased. Furthermore, there is no more possibility to receive the use-rights for the same material. It is possible that the Court would consider this clause more detrimental to the marketability of the software. This could affect the rights of third parties as well, since it is not unlikely that they violate the GPL as well due to the fact that they received a copy from a user who did not make mention of the accompanying GPL-license and, as such, did not know the software was licensed under the GPL.

2.1.6.2 Acceptance of the license

The opinion of ENGELFRIET that section 9 GPLv3 is a "*trap*" for acceptance[57]. Section 9 GPLv3 states that the license is accepted when a covered work is "*propagated*" or "*modified*"[58]. The reason why ENGELFRIET considers this a "*trap*" is because of the definitions used in section 0 GPLv3: "*to propagate*" is defined as "*to do anything with it that, without permission, would make you directly or secondarily liable for infringement under*

[55] Section 8 GPLv3, http:/ / www.gnu.org/ licenses/ gpl.txt (consultatie 04/ 05/ 2008)
[56] Section 10 GPLv3, http:/ / www.gnu.org/ licenses/ gpl.txt (consultatie 04/ 05/ 2008)
[57] ENGELFRIET, A., "Uit principe: de GNU General Public License (GPL) versie 3", *Computerrecht* 2007
[58] Section 9 GPLv3, , http:/ / www.gnu.org/ licenses/ gpl.txt (consultatie 4/ 05/ 2008)

applicable copyright law". "*secondarily liable*" could mean that even co-operating to infringement of the GPL brings forth acceptance of the GPL.

Sitecom argued in this case that is was only a support company not burdened with the programming of the software. The Court rejected this argument and held the subsidiary company liable, but if Sitecom's argument had been accepted, it would imply that under GPLv3 Sitecom would still be bound by the GPL as they were co-operating to the infringement by making the software available for download. This is another example of the more rigid nature of GPLv3, and in this interpretation it would be even more difficult to "escape" the viral nature of the GPL. It is, however, debatable if Courts would interpret section 9 GPLv3 this way since that would be a rather "ambiguous" interpretation.

2.2 D-LINK/WELTE (GERMANY)

2.2.1 Facts

D-link/Welte is the second German case on the enforceability of the GPL. The facts are the following: Harald Welte, a German programmer, received exclusive rights (to copy, distribute, display and allow third programs to undertake modifications) over 3 programs: "msdosf", "initrd" and "mtd". He maintained and released these programs further under the conditions of GPLv2.

D-link, a German subsidiary of a Taiwanese manufacturer, used the code of these programs in the firmware of their data storage unit (Wireless G Network Media Storage DSM G600), without respecting the GPL-conditions. Welte purchased one of these units and re-engineered the unit in order to research the firmware. In doing so, he discovered that the firmware contained the programs "msdosf", "initrd" and "mtd".

By lawyer's letter of 1 February 2006, Welte demanded D-link to cease further infringement, which D-link responded to with a declaration of cease-and desist. They further stated that the original source-code was made available for download from D-link's FTP-server and that purchasers of the unit would be informed that the unit contained firmware that violated the GPL.

Welte demanded on February 10, 2006, in a second letter, reimbursement for the laywer's fees and the cost of purchase of the unit, as well as reimbursement for the expenses of re-engineering. D-link refused to comply and the matter was taken to Court.

Arguments Welte:

- the programs msdosf, mtd and initrd constitute sufficient creative efforts to merit copyright protection

- the firmware of the data storage unit contains the programs "mtd", "initrd" and "msdosf", but it did not comply to the GPL-obligations

- Welte claims the amount of €649, 60 for the re-engineering of the firmware

Arguments D-link:

- Welte has no right of action since the programmers of "mtd", "initrd" and "msdosf", who granted Welte exclusive rights, are only co-authors; as such, Welte relies on derived rights and cannot claim damages nor disclosure
- the GPL violates art. 81 of the Treaty establishing the European Community, and section 1 of the German Antitrust Act because it restricts competition. Furthermore, the GPL-conditions do not apply because of the principle of exhaustion
- the re-engineering by Welte was illegal and any information resulting from it should be excluded from the case; Welte can not claim reimbursement for the costs of this illegal action

2.2.2 Authorship

The Court examined in detail the authorship of the three programs, since D-link had claimed that Welte's right was based merely on derived rights. In order for Welte to posses a right of action according to German law, he must be in the possession exclusive rights. Following considerations by the Court illustrate the importance of copyright:

1. Presumption of authorship

The presumption of authorship (§10 German Copyright Act) applies to Mr. Almesberger, with regards to the program "msdosf", and to Mr. Woodhouse, with regards to the program "mtd", because both programmers are mentioned as author in the source code of the respective programs, which is considered by the Court "*the usual fashion*" of designating authorship. D-link then claimed that the printouts of the source code provided by Welte could easily have been created or modified by him, but the Court refused this argument as D-link failed to provide evidence for this claim.

2. Joint authorship

a. D-link further claimed that Woodhouse and Almesberger were merely joint authors of the respective programs "msdosf" and "mtd", but Welte successfully defended that Woodhouse and Almesberger did the initial programming, and that any later modifications by third parties were modifications in the meaning of sections 3 and 23 of the German Copyright Act. The case where several authors have contributed to a work not at the same time, but successively, creates a presumption that their work is in subordination to a common overall idea; the Court did not consider the presence of such a common overall idea proven with regards to these programs.

b. The program "initrd" also had 2 persons designated as authors, which creates a presumption of joint authorship. Welte countered this argument by

proving that Almesberger created one of two separable parts, which implies that Almesberger' copyright was exclusive for his part. D-link argued that Almesberger was no longer actively modifying the program, but the Court considered this irrelevant with respect to the original authorship as this did not influence the original authorship of Almesberger.

3. Sufficiently individual and intellectual creation

The fact that the three programs are rather complex computer programs creates a presumption that they are original enough to merit copyright protection. This presumption could in theory be countered, but D-link failed to do so. Since Almesberger and Woodhouse are the authors of copyright-protected programs, they could grant a valid exclusive right of use to Welte, which makes Welte eligible to pursue license violations.

These considerations by the Court illustrate the importance of copyright law. The Free Software Foundation tries to facilitate the enforcement of the GPL in Court by urging authors to transfer their copyrights to the FSF, so the FSF can pursue GPL-violations[59]. KOELMAN has mentioned on this topic that art. 4, 1b of a recent European Guideline might allow each user of an open-source product to pursue violators because the guideline imposes member states to give a right of action to licensees[60]. The extent of this right of action is unclear.

2.2.2.1. Comparison to the Netherlands[61]

a) Authorship

The general principle in the Dutch Copyright Act (hereafter: DCA) is that only those programmers who have made a "*noteworthy contribution*" will be considered (co-)authors. When it is clear what specific contribution was made to the program and if the contribution can be separated from the rest of the program, the authors will be able to enforce their rights on their respective contributions. When it is no longer clear which author created what part of the code, each author will have the right to prosecute for the entire program[62].

When a committee is appointed for the composition of the final program, art. 5 DCA allows it to pursue violations that affect the entire program. Licensees are able to pursue only in the rare case that they have been given a mandate to do so[63].

[59] http:/ / www.gnu.org/ licenses/ why-assign.html, (consultatie 3/ 05/ 2008)
[60] Richtlijn nr. 2004/ 48/ EG in KOELMAN, K.J., "Brothers in arms: open source en auteursrecht", *Computerrecht* 2004
[61] KOELMAN, K.J., "36. Brothers in arms: open source en auteursrecht", *Computerrecht* 2004
[62] Art. 26 Dutch Copyright Act 23 september 1912,
http:/ / www.ivir.nl/ wetten/ nl/ auteurswet_01_04_2006.html (consultatie 02/ 03/ 2008)
[63] KOELMAN, K.J., "36. Brothers in arms: open source en auteursrecht", *Computerrecht* 2004

b) Possible conflict: art. 25 DCA

A possible conflict might exist between section 2 GPLv2 and art. 25 DCA: this article grants the author the "*moral right*" to oppose against any modification or "*mangling*" of his work[64]. Only the right to oppose *"modification"* can be the subject of a waiver, the right to oppose "*mangling*" can not. However, this possible conflict is most likely a purely theoretical problem: the right granted by art 25 DCA is mostly aimed at preserving the "*artistic and literary*" value, while open-source applications will nearly always be considered functional technology.

2.2.2.2. Belgian Copyright Act and Belgian Software Copyright Act

Art. 1 Belgian Software Copyright Act of 30th of June 1994 (hereafter: BSCA) states that computer programs, as well as material used to prepare the preparation of the program, are treated in the same way as works of art and literature under the Belgian Copyright Act (hereafter: BCA), with some minor exceptions[65]. Art. 2 BSCA states that, in order for a program to merit copyright protection, it must be "*materialised"* and "*original"*, which means that it must be the intellectual creation of the author.

a) Authorship

Art. 6 BCA creates a presumption of authorship when a name or initials are displayed. When there is more than one author, a distinction must be made between the case where a contribution can be separated and the case where it can't:

-In case the contribution can be separated, each author can pursue his copyright in the way he sees fit as long as his actions remain limited to his own contribution and as long as they do not affect negatively the rights attached to the entire work[66]. It is allowed, however, to deal with this matter in a contract.

- When it is no longer possible to distinguish each individual contribution, the law assumes that each co-author has the same rights to the whole work. This implies that no author can legally act without the permission of his co-authors, except for preserving the rights to

[64] Art. 25 Dutch Copyright Act 23 september 1912, http:/ / www.ivir.nl/ wetten/ nl/ auteurswet_01_04_2006.html (consultatie 02/ 03/ 2008)
[65] Art. 1 Belgian Software Copyright Act 30 june 1994, http:/ / www.juridat.be/ cgi_loi/ loi_a.pl?language=nl&caller=list&cn=1994063036&la=n&fromtab=wet&sql=dt='wet'&tri=dd+as+rank&rech=1&numero=1, (consultatie 3/ 05/ 2008)
[66] GOTZEN, F., http:/ / www.law.kuleuven.ac.be/ cir/ publications/ auteursrecht.htm, (consultatie 3/ 05/ 2008); art. 5 Belgian Software Copyright Act, http:/ / www.juridat.be/ cgi_loi/ loi_a.pl?language=nl&caller=list&cn=1994063035&la=n&fromtab=wet&sql=dt='wet'&tri=dd+as+rank&rech=1&numero=1, (consultatie 3/ 05/ 2008)

the program, in which case each author can claim damages for his contribution to the work.

b) Possible conflict: art. 4 BSCA

The BSCA grants authors a "*moral right of integrity*", which can not be the subject of a waiver[67]. Art. 4 BSCA states the "*moral right of integrity"* is regulated by art. 6bis, 1 of the Bern Convention, which states: "*Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation* "[68]. This "*moral right of integrity*" is, similar to the DCA, aimed at preserving the "*artistic and literal*" value of a work. As such, any possible conflict with sect. 2 GPLv2, which grants licensees the right to modify the program, will most likely remain a theoretical problem as it is hard to imagine how modifying source-code could violate the "*artistic or literary*" value of a program: after all, an open-source application should be considered functional technology, not a work of art[69].

c) Presumption of transfer of property: art. 3 BSCA[70]

Art. 3 BCSA creates a presumption of transfer of property to the employer when a program is created by an employee. If Woodhouse and Almesberger had been employed by Welte, a transfer of property to Welte would be presumed with regards to all programs created by them in execution of the employment, unless explicitly stated otherwise in an agreement between the authors and Welte. Assuming that Welte was employing Woodhouse and Almesberger, he would be able to pursue copyright-infringements without having to prove that the copyright was transferred to him.

2.2.3 GPL as general terms and conditions

The Frankfurt Court confirms that the GPL is to be considered as standard terms and conditions subject to §305 German Civil Act, which regulates standard terms. More importantly, the fact that the GPL is "easily available" leads the Court to conclude "that they were without a doubt incorporated into the contractual relationship between the authors and defendant". The Court

[67] GOTZEN, F., http:/ / www.law.kuleuven.ac.be/ cir/ publications/ auteursrecht.htm# 21, (consultatie 3/ 05/ 2008)
[68] Bern-convention, http:/ / www.wipo.int/ treaties/ en/ ip/ berne/ trtdocs_wo001.html# P123_20726, (consultatie 13/ 05/ 2008)
[69] KOELMAN, K.J., "36. Brothers in arms: open source en auteursrecht", *Computerrecht* 2004
[70] Belgian Copyright Act FAQ, http:/ / mineco.fgov.be/ intellectual_property/ patents/ faq/ faq_nl_005.htm# 6, (consultatie 13/ 05/ 2008)

does not provide further arguments, so it can be assumed that the Munich-decision is confirmed.

The lack of an official German translation is not taken into account by the Court, which probably means that this is, again, not a problem for the relationship between two professionals.

2.2.4 Validity of section 2 and 4 GPLv2 confirmed

a. The firmware of the data storage unit contained the three programs. This falls under the qualification of section 2, b GPLv2, since the firmware "in whole or in part contains or is derived from the Program or any part thereof" and can only be released further by D-link under the GPL-terms. The Court considered the obligations imposed by section 2 GPLv2 valid under §307, 2 German Civil Act, which states "In case of doubt, an unreasonable disadvantage is assumed if a provision cannot be reconciled with essential basic principles of the statutory rule from which it deviates"[71]. It would also be against the principle of good faith if D-link would plead invalidity of the license while still continuing to use the licensed work.

b. The Court confirms the legal basis of section 4 GPLv2, which states that the rights granted by the license are terminated in case the requirements are not met, claiming that the GPL can in no case be interpreted to contain a waiver of copyright since the freedoms of the GPL are granted on the basis of a non-exclusive license. Furthermore, the condition subsequent in section 4 GPLv2 is not a circumvention of §31 German Copyright Act since the marketability is not severely affected, as section 4 GPLv2 allows parties to further use the program by complying to the conditions. The same applies to third parties, since section 4 GPLv2 states "licenses (granted under the GPL) to parties who received copies or rights from someone whose license has been terminated according to Sec. 4, Sentence 1, will not be terminated so long as these parties continue to observe and comply with the terms of the GPL".

a) Work that contains the program - Derived works

Section 2, sub b GPLv2 states that derivative programs and work that contains the program can only be distributed under the GPL-conditions, unless the GPL-distributed part can be distinguished and separated from the rest of the program[72]. The interpretation of "work that contains the program" is fairly straightforward, as seen in the D-link case.

More complicated is what should be qualified as a derivative work ("work derived from the program"): the interpretation of the concept "derivative work" is dependant from local copyright law and an unclear concept in itself.

[71] German Civil Act, http:// www.iuscomp.org/ gla/ statutes/ BGB.htm (consultation 24/ 04/ 2008)
[72] SPINDLER, G., *Rechtsfragen bei open source*, 2004, Keulen, Dr. Otto Schmidt, 355-356

Following topics have been pointed out by DEKEYSER and DE PRETER as potential problems[73]:

1. Libraries

A library is a compilation of frequently-used functions, created to avoid that the programmer would have to recode the same functions over and over again. These libraries are not standalone programs, so in order to be executed, they must be used by an executable program.

There are 2 ways of using a library in a program:

- static linking: copying the library code directly into the program. The library code becomes part of the program and will, most often, become an essential component. This will result in "a work that contains the program".
- dynamic linking: consists in creating a reference in the code to the library. In essence, this method of linking maintains the independence of both the library and the program, because dynamic linking "outsources" a certain task to the library (the library receives an input, executes a function based on the input and then returns the result).

a. As mentioned above, static linking is not much of a problem as it can be considered "work that contains the program" under section 2 GPLv2, which would result in the GPL being applicable to the entire program. It is rather straightforward to decide whether or not a program contains GPL-protected code, as shown in the D-link case.

b. The solution is less clear when it comes to dynamic linking, which is a topic subject to debate. McGowan claims that "it is more natural to say the program simply runs the GPL code, causing it to do no more than it was designed to do in the way it was designed to do it" and that it should not impose the GPL-conditions on a program only because it uses a GPL-licensed library[74]. The open-source community, on the other hand, has voiced the opinion that the entire program is connected to the library and should, regardless of static or dynamic linking, be further released under the GPL[75]. The open-source community solved this discussion for now by releasing the Lesser General Public License, aimed specifically at the use of libraries[76].

c. American precedents lean towards the opinion that programs that link dynamically should be considered "derivative works". As such, the Ninth Circuit Court of Appeals judged, in the case Micro Star vs. Formgen Inc., that

---

[73] DE PRETER, Chr. en DEKEYSER, H., "De totstandkoming en draagwijdte van open-source licenties", *Computerrecht* 2004

[74] McGOWAN, D., "Legal Aspects of Free and Open Source Software", http:// www.law.umn.edu/ uploads/ images/ 253/ McGowanD-OpenSource.rtf, (consultatie 2/ 5/ 2008) in DE PRETER, Chr. en DEKEYSER, H., "De totstandkoming en draagwijdte van open-source licenties", *Computerrecht* 2004

[75] STALLMAN, R., http:// www.gnu.org/ licenses/ why-not-lgpl.html (consultatie 2/ 05/ 2008)

[76] Lesser General Public License, http:// www.gnu.org/ licenses/ lgpl.html (consultatie 15/ 03/ 2008)

the graphic generated by the execution of a program was enough for the program to be considered a "derivative work", despite the independence of both the program and the library[77].

d. There is, so far, no European case law on the topic of dynamic linking, but it is possible Courts would decide that, for example under German law, the use of dynamic linking does not result in the program being licensed under the GPL for following reasons:

> -§307 German Civil Act states "In case of doubt, an unreasonable disadvantage is assumed if a provision cannot be reconciled with essential basic principles of the statutory rule from which it deviates"[78]. Depending on the facts it could be very unfair to decide that a program can only be released further under the GPL, simply because it used a library in a dynamic way. This could very well be considered against the principle of "good faith" and create an "unreasonable disadvantage" in the sense of §307 German Civil Act, combined with the principle in §305c German Civil Act, which states "In case of doubt, standard business terms are interpreted against the user".
>
> - Furthermore, section 2 GPLv2 states explicitly "it is not the intent of this section to claim rights or contest your rights to work written entirely by you". If that were the case, it would limit the accessibility of GPL-code, since using it might result in the program being restricted for release under the GPL only.

e. GPLv3, on the other hand, is very clear on this topic: section 1, 4 GPLv3 states that the source code includes materials "that the work is specifically designed to require"[79]. This implies that the program must be licensed under the GPL, even in the case of dynamic linking and regardless of the fact whether using the library is constitutes "a derived work" under copyright law[80]. This is part of the general approach towards definitions in version 3, but it also illustrates what ENGELFRIET has marked as a "rigid free-software regime": where version 2 still made the remark that it is not the intent of section 2 to "claim" software as free software, version 3 no longer mentions this.

2. Compilers

Compilers are programs that convert human-readable source code into machine-readable object code[81]. Some compilers released under the GPL copy part of their code into the object code, which could then be considered a

[77] Ninth Circuit Court of Appeals 11 september 1998 in DE PRETER, Chr. en DEKEYSER, H., "De totstandkoming en draagwijdte van open-source licenties", *Computerrecht* 2004

[78] German Civil Act, http:/ / www.iuscomp.org/ gla/ statutes/ BGB.htm (consultatie 2/ 05/ 2008)

[79] Section 1 GPLv3, http:/ / www.gnu.org/ licenses/ gpl.txt (consultatie 4/ 05/ 2008)

[80] ENGELFRIET, A., "Uit principe: de GNU General Public License (GPL) versie 3", *Computerrecht* 2007

[81] Some well known compilers: Visual Studio, Delphi, Turbo Pascal

derivative work. The author of the compiler can use an exception created by the open-source community for this specific case, but keeping in mind that the GPL is intended as a template-license aimed at programmers not familiar with legal licensing, it might be better to see this exception written in the default GPL-license[82].

2.2.4 No violation of antitrust-law

D-link raised the argument that the GPL is invalid, on the basis of §139 German Civil Act, because it supposedly violates antitrust-law (art. 81 Treaty establishing the European Community and §1 German Antitrust Act) by fixing prices and predetermining the conditions of secondary contracts in the first contract. The Court rejected this argument: since it can not be assumed that parties would further carry out the agreement without the invalid part, since the alleged invalid section 2 GPLv2 is inseparably connected with the primary obligation, which is the grant of license. Furthermore, the Court concluded that if section 2 GPLv2 would be invalid, it would jeopardize the further development of open-source software by affecting the basic principle of open source.

2.2.5 GPLv3

a) Licenses of third parties

The Court considered section 4 GPLv2, which terminates the rights granted by the GPL in case of violation, valid because it does not severely affect marketability. One of the arguments used by the Court is that third parties "who received copies or rights from someone whose license has been terminated according to Sec. 4, Sentence 1, will not be terminated so long as these parties continue to observe and comply with the terms of the GPL". This basically means that the marketability for third parties is not severely affected for the very reason that the license from third parties will not be terminated if the person from whom they have received their license no longer holds a valid license, as long as the third parties themselves comply with the conditions of the GPL.

The same is not necessarily true under section 8 GPLv3, which allows the copyright holder to terminate the license even after all violations are ceased, in the following situation:

A downloads program X, which is released under the GPL. A then modifies the program and offers it for download on his website, without fulfilling the

[82] www.fsf.org/ licenses/ gpl-faq.html (consultatie 2/ 5/ 2008); DE PRETER, Chr. en DEKEYSER, H., "De totstandkoming en draagwijdte van open-source licenties", *Computerrecht* 2004

obligations imposed by the GPL (mentioning that the program is modified and released under the GPL, accompanying it with the source code etc.). Third parties then download the program, not knowing that the program is GPL-protected, and further distribute/modify the program without following the GPL-related requirements. At this point, the rights granted to A are terminated by the copyright holder because of the copyright infringement, on the basis of section 8 GPLv3. The third parties, who now become aware of the GPL-obligations (f.e. because A had to disclose information), cease all further violations in order to ensure that they can continue to exercise their rights, since section 8 GPLv3 explicitly states that the termination of the rights granted to A does not affect the rights of users who received a copy from him. However, section 8 GPLv3 also states that "if you cease all violation of this License, then your license from a particular copyright holder is reinstated (a) provisionally, unless and until the copyright explicitly and finally terminates your license". This means that, even though the third parties are no longer violating GPL, their rights can still be terminated if the copyright holder decides to do so.

This is different from GPLv2, where section 4 GPLv2 merely states "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", which does not leave any room for appreciation for the copyright holder. However, if the Court would consider the option for the copyright holder to terminate the license to be a general principle of copyright law and/or already implicitly included in GPLv2, there would not be much difference between GPLv2 and GPLv3 with regards to this aspect and the effect on the marketability would be not be different either.

b) User Products

An important aspect about GPLv3 is the specific arrangement with regards to "user products". Section 6 GPLv3 defines a "user product" as either a "consumer product" or "anything designed or sold for incorporation into a dwelling", regardless of the "substantial commercial, industrial or non-consumer uses, unless such uses represent the only significant mode of use of the product". Following this definition, the Court would probably conclude that the data storage unit, produced by D-link, is a "user product". Section 6 GPLv3 requires that the manufacturer accompanies the product with the "installation information", which consists of "any methods, procedures, authorization keys, or other information required to install and execute", unless it has become impossible to install or change the software on the product.

If the firmware of the data storage unit could still be altered, it would mean that D-link violated section 6 GPLv3 by not transferring the installation information, which could be considered a "tivo"-practice: D-link hands out the source code, but it is not realistically possible for a user to change the firmware

as only D-link has the ability to do this. The current D-link decision does not pay attention to the realistic possibility for a user to change the firmware since GPLv2 does not mention it anywhere, only the more formal aspects (handing out the source code, display of GPL terms etc) are taken into account. This particular aspect will become increasingly important under GPLv3 since section 6 GPLv3 uses a rather broad definition for the term "user product", so it will apply to most products that contain GPL-protected software. It is possible that manufacturers will attempt to avoid this clause by installing the firmware on Read-Only Memory (which can not be altered). This clause is quite controversial, as pointed out by ENGELFRIET, because of the safety-aspect: malfunctioning firmware can sometimes cause dangerous situations (as mentioned above: car-brake systems etc)[83].

3. CONCLUSION

The D-link and Netfilter-case demonstrate that the GPL, contrary to what some believe(d), is in fact an enforceable license and not merely soft-law. However, there are still many uncertainties regarding the application of the GPL: both the D-link and Netfilter case dealt with the relationship between 2 professionals, while Courts might take a different approach when consumers are involved.

Furthermore, the liability and warranty-clauses in sections 11 and 12 GPLv2, which exclude any liability and warranty, product liability and consumer law have yet to be discussed before Court. THOLE and SEINEN have expressed their doubts about the validity of the exoneration-clause according to Dutch and European Consumer Law, and the "product liability"-regime[84].

The large array of changes in GPLv3 will only add to the existing uncertainties, when taking into account the way it deals with technological measures, user-products and software-patents, all of which are part of the rigid approach of GPLv3 towards open-source. ENGELFRIET considers GPLv3 overall a rather negative development, as the main emphasis of GPLv3 is aimed at dealing with recent evolutions "*that threaten to undermine the growth of open-source"*; a more constructive, positive approach towards open-source might have been more favourable[85]. It can be concluded from the existing case law that the GPL is a license that has its use in practice, but many controversies surrounding it remain unsolved.

---

[83] ENGELFRIET, A, "Uit principe: de GNU General Public License (GPL) versie 3", *Computerrecht* 2007

[84] THOLE, E.P.M. en SEINEN, W., "Open source-softwarelicenties: een civielrechtelijke analyse", *Computerrecht* 2004

[85] ENGELFRIET, A., "Uit principe: de GNU General Public License (GPL) versie 3", *Computerrecht* 2007