



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

Are you Open Source compliant? Understanding OS licensing in preparation for the Internet of Things

**Corporate Counsel Commission
IP/TMT Commission**

Prague, 2014 – Workshop A

National Report of Austria

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18. February 2014

1. Description of the Workshop

It all started with Stallman's slogan saying to "think free as in free speech, not free beer" but year after year, open source softwares have slowly taken over in several fields. Open source licenses, however, can be really challenging for lawyers, not only for the issues related to their compatibility with and enforceability within national legal systems (or lack thereof) but also under a number of other profiles, such as their contaminating effect (often a tiny OS element is capable of attracting into OS a much more complicated software) and the compatibility among different OS licenses. For this workshop, the IP/IT and the Corporate Counsel Commissions have joined forces to provide to all lawyers (and not only IT lawyers or tech-lovers) some valid instruments to deal with open source licenses. This workshop will also aim at providing to all lawyers - whether or not they are inhouse - the right knowledge to ensure awareness and compliance on this issue that can have, whichever is the industry involved, a disruptive impact if not correctly managed; an awareness that might become even more strategic as the internet of things is developing, extending the use of software - often OS - to the most various devices.

2. Introduction to and scope of Questionnaire

In our AIJA workshop in Prague, we will present ways to ensure compliance with Open Source for clients and companies in various industries, i.e. not only for software developers.

Since OS challenges the concept of national laws, the workshop is not aimed at dealing with OS compliance issues from the perspective of national laws, but rather from practical issues that arise across the jurisdictions. The reports are intended to set the stage for the workshop.

The reporters do not have to strictly follow the questionnaire and are explicitly encouraged to think "out-of-the-box" and share their experiences with OS issues. The questions shall be mere guidelines to help structure the ideas.

We appreciate your effort and enthusiasm very much. Please send your national report per e-mail to the General Reporters (see cover sheet) before 15 February 2014.

3. Questionnaire for national reporters

1. Compatibility:

Are there specific issues in your jurisdiction relating to the structure of OS licensing (e.g. problems relating to the fact that there is no consideration; possibility of binding counterparts to the adoption of license terms towards third parties, conflict with copyright laws, etc.)?

OS Software has, as far as can be judged from the information available today, always been well received in Austria. At least no cases are known, in which Austrian courts would have debated or even denied the validity of OS licenses.

In 2005 the City (and at the same time Federal State) of Vienna has even started¹ developing its own Linux-distribution called “Wienux”². While the distribution has been rolled out to 1.000 of then about 18.000 desktops at the city of Vienna, the project lost momentum, roll-outs were lessened and later halted and the distribution was finally abandoned in 2009.³ While this project has mainly been driven by the socialist government of the City of Vienna,⁴ the influence of OS in Austria did not wane with the Wienux project.

The Austrian Ministry of Justice decided in 2007 to adopt the OASIS Open Document Format (ODT), which has become an international standard ISO/IEC 26300 the year before, and at the same time to migrate from Microsoft Office to OpenOffice.org. This decision was not so much political,⁵ as rational: slight modifications to the proprietary Microsoft Word document format over time had significantly reduced compatibility between different versions. This was especially apparent when using forms, on which the Austrian Ministry of Justice relied heavily, especially in connection with its Electronic Legal Communication System.⁶ Thus the first office-ready⁷ open document standard was adopted.

¹ This has been 2 years after a similar project started by the city of Munich, Germany, which is still active today.

² An amalgamation of the words “Wien” (“Vienna” in German) and “Linux”.

³ Today the official website of the distribution (<http://www.wien.gv.at/ma14/wienux.html>) (18.02.2014) can still be found through , though search engines, opening it will however produce an error message.

⁴ The Austrian Socialist Party (Sozialistische Partei Österreich, SPÖ) has governed Vienna with absolute majority without interruption from 1945 until 2010 and currently governs in a coalition with the Austrian Green Party (Die Grünen).

⁵ The Austrian Minister of Justice at that time, as well as long before and after, was a member of the Christian Democrats, the Österreichische Volkspartei (ÖVP).

⁶ *Elektronischer Rechtsverkehr* (ERV). Today it is the exclusive means of communication between courts and lawyers. It has been extended to include communication with insurances.

⁷ HTML, ISO/IEC 15445, and XML, ISO 20002, preceded ODF as a document standards but were not suited for easy editing by means of office software

As Microsoft Word did not yet reliably support ODT,⁸ the switch to OpenOffice.org, the only office suite natively and fully supporting the ODT-standard, was a necessity.

Today, ODT is used as the primary document format among others by the Austrian Ministry of Justice and its associated organizations and institutions, the City of Vienna and the City of Linz. It is also, apart from PDF/A,⁹ the only document format accepted by the Austrian Electronic Legal Communication System. OpenOffice.org, despite no longer being the only office suite fully supporting the ODT-standard, is still the office suite of choice for the mentioned administrative bodies.

Thus OS has firmly established itself at the Austrian federal government, the local governments and beyond. If ever there were doubts in Austria, of which there is no indication, about the compatibility of OS licenses to our legal system, they have ceased to exist.

2. Enforceability:

Is OS licensing fully enforceable in your jurisdiction?

In short: Yes.

Austrian courts have always had a rather pragmatic approach, where software was concerned, opting to subsume something new and unknown under something that is known and seems to fit the purpose¹⁰ best. A prime example of this is the well known “Softwaredecision” (“*Softwareentscheidung*”) of the Austrian Supreme Court¹¹ from October 14, 1997, in which it stated, long before the German courts,¹² that software is a “thing” (“*Sache*”) and can thus be bought instead of merely licensed.

In this spirit, when the discussion arose whether OS “copyleft” licenses could be considered “true” licenses and treated the same way as traditional licenses, the majority of the scholars favored equal treatment and the adherence to known principles.

⁸ Microsoft was at that time still pushing its own Open Office XML as a new standard (DOCX, XLSX and PPTX, now ISO/IEC 29500). While a service pack released 2007 provided an ODT-converter for Microsoft office, it did not yet fully implement the ODT-standard.

⁹ ISO 19005-1:2005

¹⁰ Even if the legal dogmatic analysis may at first lead to other results.

¹¹ “*Oberster Gerichtshof*”, OGH 14.10.1997 JBl 1998, 577 = RdW 1998,127 = SZ 70/202 = ecolex 1998,127 (Wilhelm)

¹² However to be fair it has to be noted that this conclusion was easier under Austrian law, than under German law. While both legal systems stipulate that only “things” (“*Sachen*”) can be bought, under Austrian law “things” can be both material and immaterial, while under German law they can be only material.

Also as a member of the European Union, Austria has currently adopted all EU-Directives related to copyright law and licensing, especially Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. Therefore, decisions of other EU, especially German, courts on intellectual property, licenses or software are in most cases also followed by Austrian courts, despite the lack of a binding nature.

Thus, when the Regional Court of Munich¹³ stated in its decision from May 19, 2004¹⁴ that the GPL is valid and enforceable, this question was also considered as resolved in Austria.

If yes, is that feasible directly (contractually) or indirectly (through general principles of law, applicable copyright law, "moral suasion"/commercial reputation or otherwise?)

For Austria, both approaches are feasible, as each offer different benefits.

Direct legal action based on an alleged breach of contract would, under Austrian law, lead to the reversal of evidence, thus forcing the defendant to prove that he has upheld the provisions of the contract.

Indirect measures may however grant additional remedies. E.g. a claim based on unfair trade practices may (more) easily be coupled with a preliminary injunction. Additionally the claimant may demand publication of the verdict. Depending on the matter at hand, this may be done by means of direct communication to customers or public media, but in (almost) any case on the homepage of the defendant.

In practice the arguments and approaches are, if possible, combined though one has to be the primary basis for the claim which in principle would have to be dismissed for the others to be evaluated. In reality however the arguments are usually evaluated at the same time in a more or less structured manner, depending on the responsible judge. Thus more than one basis for the claim increases the chances for a positive outcome. Barring any stronger legal ties between claimant and defendant, copyright law is however most often used as the primary basis.

3. Case law:

Is there any case law in your jurisdiction on breach of OS license terms or, more broadly, on OS issues in general?

Unfortunately (or fortunately, depending on the point of view), no court cases on breach of OS licenses, neither minor nor major, are known in Austria.

¹³ "Landesgericht München"

¹⁴ Az. 21 O 6123/03

The single known case, which has however been settled out of court and before initiation of proceedings, related to the Austrian Electronic Health Card (“*Elektronische Gesundheitskarte*”, e-card) occurred in 2006.

The e-card has been introduced in 2005 and replaced the many then existing paper-based certificates, which a patient had to produce to a doctor to i) prove that said patient was beneficiary of the Austrian social security system and ii) to enable the doctor to have the costs of the treatment be paid by the relevant Austrian social insurance.¹⁵ The e-card merely had to be inserted into a card reader prompt the exchange of all the necessary information between the relevant social insurance and the medical practice.

However at that time still many medical practices in Austria did not use computers, especially in rural areas, where old, long established practices prevailed. For this reason, the GINA-box¹⁶ was created: essentially a small computer, to which peripherals, including the necessary card-reader, could be attached. And it was powered by a Linux system.

Since the homepage of the distributor¹⁷ provided neither copies of the applicable licenses, nor the source code of the used software, he was approached by gpl-violations.¹⁸

The distributor yielded and within a short time fully complied with all relevant licenses. The GINA-boxes, while now equipped with more modern hardware, are sold and used to this day.

4. Compliance:

Do you have any recommendation (to clients/your company) to ensure OS compliance?

The first rule in ensure OS compliance is: “Stay informed, keep informed.”

Staying informed (or actually being informed in the first place) proves to more challenging than one might think. E.g. in Cloud Computing projects I always advise to first compile a list of all software, which is to be migrated, as well as their respective licenses. It is astonishing in how many cases “new” licenses, mostly OS licenses, appear that “suddenly” need to be taken into consideration.

¹⁵ In Austria, separate social security institutions exist e.g. for employees, farmers etc.

¹⁶ Short for “*GesundheitsInformationsNetz-Adapter*”: “HealthInformationNetwork-Adapter”

¹⁷ SV-Chipkarten Betriebs- und Errichtungs GmbH, a private company owned by, among others, the Republic of Austria and the social security institutions.

¹⁸ <http://gpl-violations.org/> (18.02.2014), an organization initiated by the founders of the netfilter/iptables.project, who were also responsible for the proceedings which led to the decision of the Regional Court of Munich on the validity of the GPL; cp. 14.

Though if such a first step has been taken once, staying up to date is less problematic, at least for companies, which do not produce software themselves. If software is merely purchased, the applicable licenses would need to be checked the very first time and upon each update. Ideally the software- or IT-service-provider should be contractually obliged to notify the customer of any changes to the applicable licenses.

Software producing companies on the other hand need to ensure, that none of the developers, be they in house or external, introduces OS code or components without permission. Here education of the developers or other responsible persons is the key, as code audits would be most often not be economically and/or practically feasible, however best supported by additional contractual measures to provide additional incentives for compliance.

Are you addressing the OS issue (or have you witnessed the same being addressed) in the subcontracting of software development and/or in the licensing of software that includes OS components?

Due to the reasons explained above I always address OS issues in relevant contracts and have also seen them addressed by others. In general it can be said that while in Austria OS is in principle accepted and used, it is also viewed as a sensitive issue which needs to be explicitly addressed any time OS may be involved.

Are specific clauses being adopted in the relevant contracts? Can you provide examples of such clauses?

The clauses commonly used are only superficially specific to OS. Usually the same ones that are employed for protection against any violation of third party IP-rights or licenses are also used for OS issues, though sometimes with the specific mention of OS. This includes an appropriate system of penalties

If no contractual clauses are being included in the contracts, what are the measures adopted to ensure compliance?

Unanswered, as clauses (though not OS specific) are used.

5 OS in non IT-related industries:

With specific reference to OS used in non-IT industries (e.g. “internet of things” or other products that contain electronic parts with OS components): Do you believe there is, broadly speaking, awareness of the diffusion of OS in traditional, non-IT industries? Is that an issue, from a legal perspective? If not, why?

On the one hand I perceive a general awareness, that concepts like “licenses” or “IP-rights” exist. For a significant part this is can certainly be attributed to the treatment of these subjects in mass media, sometimes due to lobbying/advertising by interest groups, other times due to media coverage of measures taken against alleged infringers or disputes arising out of alleged infringement.¹⁹

On the other hand there seems to be relatively little awareness relating to products, which are not easily recognizable, better yet: explicitly denominated, as “software” or “computers”.

A rather telling example was the case of a business, which had acquired a large amount of machinery with embedded systems. When I discussed the contracts with the CEO and mentioned the update policy, he was taken completely aback, having only then realized that the machines included software. After some general remarks of disbelief he said: “Next thing someone will tell me my car needs updates.” Considering the recent announcement of a standard for intervehicular communication,²⁰ this may prove to be a very accurate prediction.

In my opinion this unawareness is an issue from the legal perspective, as no one can be expected to comply with rules they don’t know to apply for a certain situation, even if they may know the rules themselves. As an extension of the compliance-rule mentioned above under 4. “Stay informed, keep informed.”, people will need to be educated that devices or products may contain software, for which they need to observe the same rules as they would in case of a “regular” computer.

That said, being personally involved with many people who modify and experiment with OS systems, some for fun and entertainment, some for research purposes, I find it comforting to see that those people, who would be capable to violate OS licenses are usually very well aware of their legal rights and obligations.

6. Do you have any practical OSS cases that you would like to share?

Currently I have unfortunately no extraordinary OS-related cases to share.

¹⁹ While not OS-related, a recent case has been the mass notice on grounds of copyright violation of people who have consumed certain streaming videos on Redtube. From a legal perspective the claims are generally regarded as baseless, however the notices nevertheless once again raised awareness for IP-rights, albeit in a negative way.

²⁰ See <http://www.etsi.org/news-events/news/753-2014-02-joint-news-cen-and-etsi-deliver-first-set-of-standards-for-cooperative-intelligent-transport-systems-c-its> (18.02.2014)