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# **Three Models of Copyright Contract Law**

**Prof. Dr. Alexander Peukert**

Goethe University Frankfurt/Main

[a.peukert@jur.uni-frankfurt.de](mailto:a.peukert@jur.uni-frankfurt.de)

## **Model 1: Classical copyright contract law**

- Closed Innovation/Communication:
  - Bilateral relationships between identifiable parties (author-producer and producer-consumer)
  - Copyright contract law highly developed
    - The original right holder
    - Party autonomy
    - Author protective rules
    - Consumer contracts
- Pecuniary Open Innovation/Communication
  - E.g. Amazon customer reviews

## Model 2: F/OSS and Open Content Licensing

- Open access culture
  - Subverting model 1 contract law to share and socialize knowledge
- Authors grant every person
  - A nonexclusive, royalty-free, worldwide, perpetual, irrevocable license
  - Conditions, in particular copyleft/share alike-clauses
  - Termination of licenses and enforcement of copyright
- Success
  - in numbers
  - as an alternative narrative

## Model 2: F/OSS and Open Content Licensing

- Legal problems of subverting model 1 for the open access culture
  - Author protective rules of model 1 do not fit
    - E.g. German mandatory claims for equitable remuneration do not apply
  - Validity of the licenses under the law of standard contracts?
    - Global English version (GPL)
    - Exclusion of any warranty
  - Upstream and downstream compatibility of licenses
    - Variety of licenses
    - National versions of CC licenses
  - Migration of licenses
    - "Any later version" only optional (Linux kernel)
    - Wikipedia example

## Model 2: F/OSS and Open Content Licensing

- Problems of subverting model 1 for open access culture
  - Legal uncertainty
  - Formalization of communication (duty to affix the license to copies)
  - Reinforcement of IP rights in a non-IPR communication culture (*Elkin-Koren, Dusollier*)
- The practical relevance of Open Content Licenses?
  - Very few cases enforcing the underlying copyright (not the license!)
  - No single case enforcing copyleft/share alike!
  - The significance of community norms

## Model 3: Implied consent

- Example
  - German Federal Court of Justice, 29.04.2010, I ZR 69/08 - *Thumbnails I*
- Solution under German copyright (contract) law
  - Reproduction, making available, no limitation applicable
  - No contract (grant of exploitation rights or license)
  - But: Upload without technical restrictions implies consent to foreseeable common uses
    - Non-contractual legalization of certain uses
  - Reach of the consent:
    - Non-commercial copies
    - Thumbnails and snippets in commercial search engines
    - Re-distribution? Derivative works?
  - Revocability of the consent (code is law)

## Model 3: Implied consent

- Criticism
- But: a big hooray to German doctrine!
  - Achieves the same effect as model 2: some rights reserved
  - Legalizes community norms
  - Without formalization = reduction of transaction costs
  - Flexibility
  - Global reach
    - Application of the law of the country where the author has her habitual residence
  - Developing a global norm for open communication on the Internet by legal comparison
    - Core of digital copyright

## Looking forward: Replacing Model 2 by Model 3?

- Objections
  - Less free/open culture?
  - More legal uncertainty?
  - Less differentiation?
    - Different communities with different sharing norms (e.g. software, scholarly writings, art)
    - Majority operates on model 3
    - Minority approaches have to apply model 2