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Three Models of Copyright Contract Law

Prof. Dr. Alexander Peukert

Goethe University Frankfurt/Main

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