CR
COMPUTER UND RECHT

Heft 12
Beilage

Zeitschrift
für die Praxis
des Rechts
der Informations-
technologien

European Public License (EUPL): Comments and Change Proposals

by

Deutsche Gesellschaft für Recht und Informatik (DGRI) e.V.

otto
Verlag
Dr. Otto Schmidt
Köln

www.computerundrecht.de

COMPUTER UND RECHT
CR Zeitschrift für die Praxis des Rechts der Informations-technologien

European Public License (EUPL): Comments and Change Proposals

by

Deutsche Gesellschaft für Recht und Informatik (DGRI) e.V.

DGRI (German Society for Law and Informatics) is a non-profit organization under German law, and the leading professional organisation in the field of information technology and law in Germany. DGRI provides a platform for legal professionals focusing on IT law, computer specialists and other professionals employed in the area of information technologies to effectively address legal issues arising from the application of information technology as well as the implementation of information technology in the legal framework. Much of its substantive work is concentrated in various working groups covering the different areas of IT law.

DGRI strongly supports the goal of the EC Commission to draw up a specific open source software ("OSS") license. In view of the existing OSS licenses designed under US-American law concepts, there has been for quite some time a need in the EU for a license better adapted to the concepts of law existing in the EU and the EC Member States. DGRI has discussed version 0.1 of EUPL within its respective working group and would like to submit some comments to this version and to draw your attention to some issues which you might want to address in the next release of EUPL:

(1) "Chain of Authorship" – Ownership in Copyright, no. 6 EUPL v.01

Pursuant to sentence one of no. 6 EUPL v.01, the "*Original Licensor warrants that the copyright in the Original Work granted hereunder is owned by him …*". The Original Licensor is the first person in the distribution chain distributing or communicating the Work. In the same way, any Contributor warrants that he is owner of the copyright.

(a) Different Concepts of Transfer of Copyrights in the EU Member States

Whereas in some Member States, mainly in the United Kingdom, copyrights can be transferred to another person, most do not allow a transfer of the copyright as such (ref.: § 29 par. 1 German Copyright Act; § 23 par. 3 Austrian Copyright Act). In the latter countries, only exclusive rights may be granted (and transferred) from one person to another. The wording of EUPL should be drafted in a way to take into account both legal concepts.

(b) No Limitation to "Copyright"

Limiting the grant of rights to the "copyright" might cause concern to users of the license whether they are guaranteed the entire rights necessary to make use of the OSS under <u>any applicable</u> intellectual property right the respective OSS might be subject to. Depending on the type of software, at least two further intellectual property rights will have to be considered:

The rights a software is granted under the EC directive on databases (*Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases*) will under German law perhaps not be considered as a "copyright" because under German law (as in most other Member States) a data bank may be subject to the specific protection under the EC directive <u>and</u> under the general copyright laws.

The original Licensor may decide to seek additional protection for his software under the applicable patent laws. Even if he does not decide to file for patent protection, the mere patentability may vest rights in the author of the software: In Germany for example, the Statute on Employees' Inventions (*Arbeitnehmererfindungsgesetz*) grants certain rights to employees making an invention. Under the statute, an employee creating software which is entitled to patent protection has to make available the invention to his employer who, under certain circumstances and within certain time limits, may claim it for himself. If he does not claim the invention for himself, the right to claim patent protection will reside with the employee, not with the employer. As the original Licensor in most cases will be the company/public authority employing the respective software developer, not the developer himself, but the Licensee will want to be sure that the Licensor has acquired from his employee any possible right to claim a patent for himself.

<u>Proposal:</u> Redraft no. 6 EUPL v.01 first two sentences to read:

The original Licensor warrants that the intellectual property rights and utilization rights in the Original Work granted hereunder are owned by him and that he has the power and authority to grant the Licence.

Each Contributor warrants that the intellectual property rights and utilization rights in the modifications he brings to the Work are owned by him and that he has the power and authority to grant the Licence.

(c) Fiduciary Licence Agreement

To clarify problems of ownership and competence to sue, one might want to consider linking the EUPL to the Fiduciary Licence Agreement ("FLA") issued by the Free Software Foundation Europe (FSF Europe). The FLA may be included on a voluntary basis or – more effectively – on a mandatory basis.

Proposal: add additional wording:

The owner of copyright or other exclusive rights in the Work grants rights to FSF Europe on a fiduciary basis pursuant to the Fiduciary Licence Agreement (FLA) as attached to this Licence.

(2) Disclaimer of Warranty, no. 7 EUPL v.01

The Licence provides for a complete exclusion of any warranty. Under no. 9 EUPL v.01, any user of the Licence may choose, however, to grant a warranty, such warranty being binding only to him. In this case he has to defend and hold harmless any other Contributor from third party claims. Whereas the concept and idea which has inspired this clause seems quite clear, it is less clear whether this clause would be valid under German law. If it is not, use of EUPL in Germany might be scarce, because (i) Licensors will be reluctant to accept the "hold-harmless-clause" in no. 9 EUPL v.01, and (ii) because the entire no. 7 EUPL v.01, if invalid, will be replaced by the respective statutory laws (§ 306 par. 2 German Civil Code) and will impose warranty obligations upon the Licensor. Case law has held, however, that clauses being drafted in separable sentences will not be altogether invalid but only with respect to those parts of the clause which are contrary to the law.

EUPL will be used as standard terms in the sense of §§ 305 et seq. of the German Civil Code. If standard terms are used in B2C business, § 309 no. 8 lit. (b) (aa) German Civil Code declares void any exclusion of the statutory warranty. Even in B2B business, the statutory warranty may be limited but never excluded altogether (§ 307 German Civil Code; consolidated case law, ref. German Supreme Court, dec. of 29 Oct. 1997, VIII ZR 347/96, CR 1998, 212).

We understand that EUPL may be provided either against remuneration or free of charge. In the first case, the Licensor will have to offer an additional warranty under German law, but this will be his decision. In the second case, providing the work would be qualified as a donation. Under German law the donator may not exclude any warranty for wilfully concealing his not being owner of the rights granted (which warranty is already granted under no. 6 EUPL v.01 – please note, however, that under German law the disclaimer for *"non-infringement of intellectual property rights other than copyright"* will most probably be contrary to German law), and may not exclude his warranty for wilfully concealed defects (which, in case of OSS, will often be the case as such software quite often is passed on with the knowledge of existing defects – and the hope that the Licensee will contribute to the Work by debugging the software).

A warranty can always be excluded if the acquirer positively knows of the defect. There is, however, no clear rule whether a warranty can be excluded by merely stating that the software is still in the making and therefore inherently defective (that is, without explicitly naming the specific defect). In our opinion, such a statement would be at least much less risky than the present wording of no. 7 EUPL v.01, which, under German law, would most probably lead to a warranty for any defects known to the Licensor.

Proposal: Delete "absence of" in no. 7 sentence 1 EUPL v.01 to read:

(…) including (…) purpose, defects or errors, accuracy, (…)

Insert after sentence 1 of no. 7 EUPL v.01 an additional sentence:

This is a Work in progress, which is perfected by numerous Contributors. It may contain certain defects inherent to this type of software development.

(3) Disclaimer of Liability, no. 8 EUPL v.01

(a) Invalidity of Unconditional Disclaimer of Liability

As already stated above, when using the EUPL as standard conditions, there are only limited possibilities to exclude the statutory liability. § 309 no. 7 German Civil Code declares void any disclaimer of liability for (i) personal damages and for (ii) wilful misconduct or gross negligence.

(b) Invalidity of Salvatorian Clause

If a clause is invalid under the German statutory rules for standard terms, it is not replaced by such a valid clause which most nearly achieves the goal of the invalid clause, but it is replaced by the statutory rules (§ 306 par. 2 German Civil Code). This consequence cannot be avoided by clauses like the one chosen in no. 8 EUPL v.01 (*"Except to the extent required by applicable law …"*). Such a clause would still result in the application of the general statutory rules. Consequently, under German law only a limited clause will be held valid. We do see the problem of incongruity of the German solution with the solutions of other Member States; nevertheless we would like to submit the German position for consideration by Interoperable Delivery of European eGovernment Services to public Administrations, Citizens (IDABC).

Proposal: Change the beginning of no. 8 EUPL v.01 to:

Except in cases of intent or gross negligence the Licensor will in no event be liable for any....damages...

Add after sentence 1 of No. 8 EUPL v.01 an additional sentence:

Licensor will also be liable under statutory product liability laws as far as such law applies to the Software.

(4) Obligation to make Public/Making available within a Concern or Public Authority

We understand that EUPL does not impose upon any Licensor the anybody in the public, even if he has decided to distribute it to certain third parties. We suggest, however, to insert a clear statement to that avail, as public authorities and companies are voicing their concerns whether they might be obliged to make public the source code even if they decide to use the software exclusively within their concern or within the public authorities.

(5) Problem of "Forking"/Quality Control, no. 9 EUPL v.01

EUPL does not impose any obligation on a Contributor to submit his Derivative Work to a specific body which

would ensure consolidation of the various contributions into a new version, thus leading to the risk of splitting the original version into various diverging and perhaps incompatible versions (so-called "forking"). The copyleft clause in no. 5 EUPL v.01 prohibits any restriction of the terms of the License. This prevents the Licensor from including an obligation upon the Licensee to submit his Contributions to a body designed by the Licensor and thus prevents a consolidation of the various subsequent contributions into a new version, even where the original Licensor deems such consolidation useful and where Licensor is willing to set forth the necessary structure to carry out such consolidation.

DGRI holds that in order to use EUPL for a broad variety of OSS, Licensor should be able to add such an obligation when distributing his OSS. We think that a general obligation is not advisable as not every Licensor has the ability or willingness to consolidate the various Derivative Works. DGRI does not see a necessity to include a general clause obliging the Contributor to submit his Derivative Work before Distribution to the Licensor for approval – if a Licensor has a need for such prior quality control he should use another type of OSS licence.

Proposal: Add additional subsection in no. 9 EUPL v.01:

While distributing the Original Work or Derivative Works, You may also choose to oblige the Licensee to submit to You (or another person you designate in the form prescribed in no. 11) any Contributions he makes and distributes or communicates to third parties under the Licence.

(6) Information Duties, no. 11 EUPL v.01

The information duties included in no. 11 EUPL v.01 are obviously based on the E-Commerce-Directive, which, however, only applies to contracting by electronic communication. In this respect, the clause seems to be too broad, e.g. with respect to transactions by distributors with respect to off- the-shelf software products. It may be appropriate to insert a limitation referring to distribution as considered in the E-Commerce Directive.

Proposal: Change the beginning of no. 11 EUPL v.01 to:

In case of any Distribution and/or Communication of the Work by You with means of electronic communication (…)

Comments drafted for the DGRI Working Group on Economic Law by Dr. Anselm Brandi-Dohrn,, maître en droit, Berlin, and Prof. Dr. Andreas Wiebe, LL.M., Hannover/Vienna.

Deutsche Gesellschaft für Recht und Informatik e. V.

Dr. Wolfgang Büchner	President
Dr. Anselm Brandi-Dohrn	Vice-President
Prof. Dr. Andreas Wiebe	Vice-President

European Union Public Licence V.01

This European Union Public Licence (the "EUPL") applies to the Work or Software
This European Union Public Licence (the "EUPL") applies to the Work or Software
(as defined below) which is provided under the terms of this Licence. Any use of the
Work, other than as authorised under this Licence is prohibited (to the extent such use
is covered by a right of the copyright holder of the Work).
The Original Work is provided under the terms of this Licence when the Licensor (as
defined below) has placed the following notice immediately following the copyright
notice for the Original Work:
Licensed under the EUPL v.01
or has expressed by any other mean his willingness to license under the EUPL.

1. Definitions

In this Licence, the following terms have the following meaning:

- *The Licence:* this Licence.
- *The Original Work or the Software:* the software distributed and/or communicated by the Licensor under this Licence, available as Source Code and also as Executable Code as the case may be.
- *Derivative Works:* the works or software that could be created by the Licensee, based upon the Original Work or modifications thereof. This Licence does not define the extent of modification or dependence on the Original Work required in order to classify a work as a Derivative Work; this extent is determined by copyright law applicable in the country mentioned in article 15.
- *The Work:* the Original Work and/or its Derivative Works.
- *The Source Code:* the human-readable form of the Work which is required in order to make modifications to it.
- *The Executable Code:* any code which has generally been compiled and which is meant to be interpreted by a computer as a program.
- *The Licensor:* the physical or legal person that distributes and/or communicates the Work under the Licence.
- *Contributor(s):* any physical or legal person who modifies the Work under the Licence, or otherwise contributes to the creation of a Derivative Work.
- *The Licensee or "You":* any physical or legal person who makes any usage of the Software under the terms of the Licence.
- *Distribution and/or Communication:* any act of selling, giving, lending, renting, distributing, communicating, transmitting, or otherwise making available, on-line or off-line, copies of the Work at the disposal of any other physical or legal person.

2. Scope of the Rights Granted by the Licence

The Licensor hereby grants You a world-wide, royalty-free, non-exclusive, sub-licensable licence to do the fol-

lowing, for the duration of copyright vested in the Original Work:

- ▷ use the Work in any circumstance and for all usage,
- ▷ reproduce the Work,
- ▷ modify the Original Work, and make Derivative Works based upon the Work,
- ▷ communicate to the public, including the right to make available or display the Work or copies thereof to the public and perform publicly, as the case may be, the Work,
- ▷ distribute the Work or copies thereof,
- ▷ lend and rent the Work or copies thereof,
- ▷ sub-license rights in the Work or copies thereof.

Those rights can be exercised on any media, supports and formats, whether now known or later invented, as far as the applicable law permits so.

In the countries where moral rights apply, the Licensor waives his right to exercise his moral right to the extent allowed by law in order to make effective the licence of the economic rights here above listed.

3. Communication of the Source Code

The Licensor may provide the Work either in its Source Code form, or as Executable Code. If the Work is provided as Executable Code, the Licensor provides in addition a machine-readable copy of the Source Code of the Work along with each copy of the Work that the Licensor distributes or indicates, in a notice following the copyright notice attached to the Work, a repository where the Source Code is easily and freely accessible for as long as the Licensor continues to distribute and/or communicate the Work.

4. Limitations to Copyright

Nothing in this Licence is intended to deprive the Licensee of the benefits from any exception or limitation to the exclusive rights of the rights owners in the Original Work or Software, of the exhaustion of those rights or of other applicable limitations thereto.

5. Obligations of the Licensee

The grant of the rights mentioned above is subject to some restrictions and obligations imposed on the Licensee. Those obligations are the following:

- ▷ **Attribution right:** the Licensee shall keep intact all copyright, patent or trademarks notices and all notices that refer to the Licence and to the disclaimer of warranties. The Licensee must include a copy of such notices and a copy of the Licence with every copy of the Work he distributes and/or communicates. The Licensee must cause any Derivative Work to carry prominent notices stating that he modified the work, indicating the name and contact information of the Contributor.
- ▷ **Copyleft clause:** If the Licensee distributes and/or communicates copies of the Original Works or Derivative Works based upon the Original Work, this Distribution and/or Communication will be done under the terms of this EUPL Licence. The Licensee (becoming Licensor) cannot offer or impose any additional terms or conditions on the Work or Derivative Work that alter or restrict the terms of the Licence.
- ▷ **Provision of Source Code:** When distributing and/or communicating copies of the Work, the Licensee will provide a machine-readable copy of the Source Code or indicates a website where this Source will be easily and freely available for as long as the Licensee continues to distribute and/or communicate the Work.
- ▷ **Legal Protection:** This Licence does not grant permission to use the trade names, trademarks, service marks, or names of the Licensor, except as required for reasonable and customary use in describing the origin of the Work and reproducing the content of the copyright notice.

6. Chain of Authorship

The original Licensor warrants that the copyright in the Original Work granted hereunder is owned by him and that he has the power and authority to grant the Licence.

Each Contributor warrants that the copyright in the modifications he brings to the Work are owned by him and that he has the power and authority to grant the Licence.

Each time You, as Licensee, become Licensor by the fact You distribute and/or communicate the Work, the original Licensor and subsequent Contributors grant to the recipient a licence to the Work on the same terms and conditions as the licence granted to You under this Licence.

7. Disclaimer of Warranty

The Work is provided under the Licence on an “as is” basis and without warranties of any kind concerning the Work, including without limitation merchantability, fitness for a particular purpose, absence of defects or errors, accuracy, non-infringement of intellectual property rights other than copyright. This disclaimer of warranty is an essential part of the Licence and a condition for the grant of any rights to the Work.

8. Disclaimer of Liability

Except to the extent required by applicable law, the Licensor will in no event be liable for any direct or indirect, material or moral, damages of any kind, arising out of the Licence or of the use of the Work, including without limitation, damages for loss of goodwill, work stoppage, computer failure or malfunction, loss of data or any commercial damage, even if the Licensor has been advised of the possibility of such damage.

9. Additional Agreements

While distributing the Original Work or Derivative Works, You may choose to conclude an additional agreement to offer, and charge a fee for, acceptance of support, warranty, indemnity, or other liability obligations and/or services consistent with this Licence. However, in accepting such obligations, You may act only on your own behalf and on your sole responsibility, not on behalf of the original Licensor or any other Contributor, and only if You agree to indemnify, defend, and hold each Contributor harmless for any liability incurred by, or claims asserted against such Contributor by the fact You have accepted any such warranty or additional liability.

10. Acceptance of the Licence

The provisions of this Licence can be accepted by clicking on an icon *"I agree"* placed under the bottom of a window displaying the text of this Licence or by affirming consent in any other similar way, in accordance with rules of applicable law. Clicking on that icon indicates your clear and irrevocable acceptance of this Licence and all of its terms and conditions. Similarly, the creation by You of a Derivative Work or the Distribution and/or Communication by You of the Work or copies thereof indicates your clear and irrevocable acceptance of this Licence and all of its terms and conditions.

11. Information to the Public

In case of any Distribution and/or Communication of the Work by You (for example, by offering to download the Work from a website) the distribution channel or media (for example, the website) must provide the following information to the public:

- your name, as new Licensor providing the Work,
- your geographic and electronic address,
- where the Licensor is registered in a trade or similar public register, the trade register in which the Licensor is entered and his registration number,
- the different technical steps to follow to conclude the Licence, prior to the Distribution and/or the Communication of the Work,
- where the Licence contract will be accessible,
- the languages which can be used for the conclusion of the Licence.

The Licence terms provided to the Licensee must be made available in a way that allows him to store and reproduce them.

12. Termination of the Licence

The Licence and the rights granted hereunder will terminate automatically upon any breach by the Licensee of the terms of the Licence. Such a termination will not terminate the licences of any person who has received the Work from the Licensee under the Licence, provided such persons remain in full compliance with the Licence.

13. Miscellaneous

Without prejudice of article 9 above, the Licence represents the complete agreement between the Parties as to the Work licensed hereunder. If any provision of the Licence is invalid or unenforceable under applicable law, this will not affect the validity or enforceability of the Licence as a whole. Such provision will be construed and/or reformed so as necessary to make it valid and enforceable.

14. Jurisdiction

Any litigation resulting from the interpretation of this license, arising between the European Commission, as a Licensor, and any Licensee, will be subject to the jurisdiction of the European Court of Justice, as laid down in article 238 of the Treaty establishing the European Community.

Any litigation arising between parties other than the European Commission, and resulting from the interpretation of this license, will be subject to the exclusive jurisdiction of the competent court:

- where the Licensor resides or conducts its primary business, if Licensor resides or conducts its primary business inside the European Union;
- where the Licensee resides or conducts its primary business if Licensor resides or conducts its primary business outside the European Union;
- where the Licensor resides or conducts its primary business, if both the Licensor and the Licensee reside or conduct their primary business outside the European Union.

15. Applicable Law

This License shall be governed by the law of the European Union country where the Licensor resides or has his registered office.

This License shall be governed by the Belgian Law if a litigation arises between the European Commission, as a Licensor, and any Licensee.

This License shall also be governed by the Belgian Law if the Licensor has no residence or registered office inside a European Union country.

Computer und Recht (CR)

Redaktion: RA Ulrich **Gasper**, LL.M. (Edinburgh), leitender Redakteur, Köln; RAin Stefanie Fuchs-Galilea, LL.M., Redakteurin, Köln; Carina **Alves Rosa**, Redaktionsassistentin, Köln; Anschrift des Verlages, Telefon 02 21/9 37 38–1 80 (Redaktion) bzw. –4 99 (Vertrieb/Abonnementsverwaltung), Telefax 02 21/9 37 38–9 03 (Redaktion) bzw. –9 43 (Vertrieb/Abonnementsverwaltung), E-Mail: *computerundrecht@otto-schmidt.de*.

Verlag: Verlag Dr. Otto Schmidt KG, Gustav-Heinemann-Ufer 58, 50968 Köln, Postfach 51 10 26, 50946 Köln, Erfüllungsort und Gerichtsstand ist Köln.

Anzeigen: Renate **Becker** (Anzeigenleitung), Telefon 02 21/9 37 38–4 21, Telefax 02 21/9 37 38–9 42, E-Mail: *anzeigen@otto-schmidt.de*, gültig ist die Preisliste Nr. 18 vom 1.1.2005.

Satz: FotoSatz Pfeifer GmbH, Lochhamer Schlag 11, 82166 Gräfelfing.

Druck: Boyens Offset, Wulf-Isebrand-Platz 1–3, 25746 Heide.

Erscheinungsweise: Jeweils zum 15. eines Monats.

Bezugspreis: Jahresabonnement 309,– € (für Mitglieder der Deutschen Gesellschaft für Recht und Informatik (DGRI) e.V. jährlich 264,– €), Einzelheft 30,90 €. Kombinations-Abonnement in Verbindung mit der CR-CD jährlich 409,– € (für DGRI-Mitglieder jährlich 364,– €). Alle Preise zuzüglich Versandkosten und inklusive Umsatzsteuer.

Bestellungen: Bei jeder Buchhandlung sowie beim Verlag. Kündigungstermin für das Abonnement 6 Wochen vor Jahresschluss.

ISSN: 0179–1990

Hinweise für Autoren und Einsender: Bitte senden Sie alle Aufsatzmanuskripte (als Datei per E-Mail), zum Abdruck bestimmte Gerichtsentscheidungen und Leserbriefe unmittelbar an die Redaktion. Bei der Einsendung von Entscheidungen sind wir für den Hinweis dankbar, ob sie rechtskräftig sind.