

# Redistribution of an (in)complete Linux distribution

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who is responsible for FOSS license compliance?

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# What is a „Linux distribution“?

- Linux distribution (aka „distro“) is a software collection based on the Linux kernel which is consistent with regard to dependencies and as a complete system
- Distros are existing for embedded systems and PCs
- Typically using package managers for installing, updating and removing software
- Examples: Debian, Fedora, Red Hat Enterprise Linux, Ubuntu, OpenWrt

# Distributions and IP Rights

- Software packages are protected by copyright
- Some distributions contain FOSS only, some distributions contain proprietary licensed software as well (e.g. Android)
- Ubuntu/Debian: „free“ and „non-free“, „main“ and „restricted“
- Examples: Adobe flash plugin, multimedia encoder/decoder (due to patent issues), TrueType fonts

# Distributions and IP Rights

- Collective works (and compilations) can be protected if there is a creation by reason of the selection or arrangement of the elements (sec. 4 German Copyright Act)
- Not much research and case law with regard to collective works in the field of computer programs
- District Court of Berlin: copyleft of the GPL-2.0 applies to the collective work (disputed in academia)

# Distributions and IP Rights

- Embedded Linux as a collective work? Functional or creative selection of software packages
- Probably both: most distros select software packages according to technical and creative aspects
- Creators of a distribution have a copyright in the collective work „distro“ which is an independent work from the software programs contained in the distro

# Distributions and IP Rights

- Why does it matter if there is a copyright in the collective work?
- Copyright in the collective work might be used to circumvent FOSS licensing (but: copyleft licenses do not allow “further restrictions”)
- The principle of exhaustion might not apply if the distro is modified by adding programs to it

# Distributions and IP Rights

- Linux: trade mark of Linus Torvalds and administered by the LMI (Linux Mark Institute)/Linux Foundation (<https://www.linuxfoundation.org/the-linux-mark/>)
- Red Hat wordmark and Red Hat logo: registered trademarks of Red Hat, Inc.
- Most distributors have trademarks, otherwise there are similar rights in the „work title“ of a distro

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### 74560867 - LINUX

Status: Live/Registered, The registration has been renewed.

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(731) Name and address of the applicant	(Applicant) Croce, William R. Della, Jr. Individual UNITED STATES, 33 Snow Hill St., Boston MA 02113
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(740) Name and address of the representative	(Attorney of Record) Susan M. Mulholland
(511) The International Classification of Goods and Services for the Purposes of the Registration of Marks (Nice Classification) and the list of goods and services classified according thereto	<b>i</b> 09 computer operating system software to facilitate computer use and operation
(512) National classification and/or list of goods and/or services classified according thereto	021, 023, 026, 036, 038

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# FOSS Licensing and Trade marks

- Do FOSS licenses cover trade mark use of the licensed software?
- Higher Regional Court of Düsseldorf („xt:commerce“): FOSSS licensing is neutral about trade marks, a copyright license does not cover trade mark use
- Function of trade marks: indication of origin

# FOSS Licensing and Trade marks

- Limits of trademark protection:
  - Mere brand naming (e.g. in this talk)
  - Use „for the purpose of identifying or referring to goods or services as those of the proprietor of that trade mark, in particular, where the use of that trade mark is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts” (e.g. offering consulting for embedded Linux systems)
  - Principle of exhaustion („first sales doctrine“)

# FOSS Licensing and Trade marks

- Principle of exhaustion (regulation 2017/1001 on the European Union trade mark):

## Article 15 - Exhaustion of the rights conferred by an EU trade mark

1. An EU trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been **put on the market** in the European Economic Area under that trade mark by the proprietor or **with his consent**.
2. Paragraph 1 shall not apply where there exist **legitimate reasons** for the proprietor to oppose further commercialisation of the goods, especially **where the condition of the goods is changed or impaired** after they have been put on the market.

# FOSS Licensing and Trade marks

- Options of the reseller of FOSS containing trade marks:
  - Removing all trademarks that are used to indicate the origin of the software (e.g. logos, installation screen etc.)
  - Redistributing copies distributed by the trade mark owner (e.g. Ubuntu DVDs), including downloaded copies (German Federal Court of Justice in „UsedSoft II“)
  - NOT: redistributing self-created copies (which needs consent of the trade mark owner)
  - Trade mark license → trade mark policy of distributors

# FOSS Licensing and Trade marks

- No exhaustion if the programs of the distribution have been modified
- How is the legal situation if applications have been added? Probably no legitimate reason to oppose such a use.
- But: distribution might be protected as collective work and copyright permission is required to modify the distribution by adding applications (or other programs)
- Most trade mark policies do not permit the distribution of modified distros

# Copyright and Exhaustion

- Principle of exhaustion applies to trade mark law and copyright law
- Free redistribution of goods within the European Union (and EEA)
- Copies lawfully put into circulation are allowed to be redistributed in unmodified form
- Does it matter whether a program was sold or distributed free of charge?

# Copyright and Exhaustion

- Art. 4 of Directive 2009/24/EC:

*“The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.”*

- German Federal Court of Justice in „GreenIT“: no payment required
- “Sale” is mentioned to delimit from “rental” and “lending”

# Copyright and Exhaustion

- Exhaustion of downloaded copies?
- Court of Justice of the European Union (CJEU) in “UsedSoft”: principle of exhaustion applies if some requirements are met:
  - The copyright holder has consented to the downloading of the copy in question from the internet onto a data carrier and had the opportunity to receive an appropriate remuneration.
  - The downloaded copy may be used without limitation in time.
  - The original acquirer has made his/her own copy unusable at the time of resale.

# Copyright and Exhaustion

- German Federal Court of Justice in „UsedSoft II“: license agreement has to be provided to subsequent acquirer
- Reasoning: subsequent acquirer needs to copy the software for installation and running the software
- These reproductions are permitted without the rights holder's explicit consent if “they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose.” (cf. Art. 5 Directive 2009/24/EC) – intended purpose needs knowledge of the license conditions

# Copyright and Exhaustion

- What about modifications of the distribution?
- CJEU in UsedSoft: principle of exhaustion applies to updated software (but: not for software otherwise modified)
- How is the legal situation if applications have been added? Modification of the “collective work” that represents the distro.
- Does the principle of exhaustion applies? If not there would be harm to the idea of interoperability – however no case law, unclear legal situation

# Recommendations

- Limits of the principle of exhaustion with regard to trade marks and collective works are not entirely clear in the field of software distribution
- Redistributing unmodified copies (except self-created copies) is permitted
- License texts and source code have to be provided to the subsequent acquirer
- Additional applications: ask for a trademark license or remove trademarks, and comply with license obligations – scope of exhaustion is unclear

# Recommendations

- FOSS license compliance matters if redistributing distros
- Taking care that only FOSS components are redistributed
- Control about the source code required
- Distributors might not be license compliant themselves

# Thank you for your attention!

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