*[Coat of Arms]*
**Regional Court Halle**
Reference number: 4 O 133/15

**Execution**

Pronounced according to the minutes on: 27 July 2015

K.,Judicial Employee

in his/her capacity as registrar of the court

*[Receipt stamp]*

Received
30 July 2015

JBB Lawyers

**On behalf of the people**

**Judgment**

In the injunction proceedings

S. B.V., represented by

Netherlands

Plaintiff

represented by: Lawyers JBB, Christinenstraße 18/19,10119 Berlin,

vs.

University of

Germany

Defendant

for the cessation of copyright infringement

the Fourth Civil Chamber of the Halle Regional Court pursuant to the oral hearing on 21 July 2015 by Judge R. as Single Judge at the Regional Court

has **ruled** as follows:

1. The Defendant shall be prohibited from making the computer programme “S Client” available to the public without, in accordance with the licensing terms of the GNU Public License (GPL), also adding the licence text of the GPL as well as either making the full corresponding source code of the programme available to the public at no licence fee or making it available to anyone on a standard physical storage medium for a price not more than the reasonable cost of physically producing the copy.

2. For each case of violation, the Defendant shall be threatened with a fine of between EUR 5 and EUR 250,000.00, and in default of payment imprisonment of up to six months, or imprisonment of up to six months, to be executed against the Rector.

3. ) The Defendant shall pay the costs of the proceedings.

4. ) The value in dispute shall amount to EUR 50,000.00 as determined by the court.

Facts of the matter

The parties are in dispute over the infringement of the copyright in the free software “S Client” which enables institutions to permit visitors to use the institution’s wireless local area network (WLAN) using their own devices.

The Defendant has provided the software in the version “S Client 3.3.3” on its website since 2010 for download by staff and students, however without providing the licence text of the GNU General Public Licence (hereinafter: GPL) to the respective user prior to the software download and without making the full corresponding source code of the programme available to the user at no licence fee or making it available in a physical distribution medium for a price not more than the reasonable costs of physically performing this conveying of the source code, as provided for in the licensing terms of the GPL in §§ 1 and 3 of version 2 of June 1991 and/or sections 4 and 6 of version 3 dated 29 June 2007. By letter dated 22 May 2015 to the Defendant’s rector the Plaintiff’s legal representatives complained about the use of the software contrary to the terms of the licence and requested information about the previous use as well as a cease and desist declaration with a penalty clause. The Defendant rejected this by letter of its chancellor dated 28 May 2015.

The Plaintiff claims to have acquired the exclusive exploitation rights in the software “S Client” based on an agreement between itself and B.V. on 1 December 2006. Accordingly, it is entitled to assert the rights resulting therefrom against the Defendant.

The Plaintiff requests the court

1. order the Defendant to cease making the Software “S Client” available to the public without adding the licence text of the GPL and at the same time either making the full corresponding source code of the programme publicly available at no licence fee or making it available to anyone in a physical distribution medium for a price not more than the reasonable costs of physically performing this conveying of the source code,

2. threaten the Defendant, for each case of violation, with a fine of EUR 5 and up to EUR 250,000.00, and in default of payment with imprisonment of between one day and six months, or imprisonment of between one day and six months, to be executed against the chancellor.

In the alternative, the Plaintiff declared the legal dispute settled in the oral hearing on 21 July 2015, should the court on the grounds of the affidavit presented by the Defendant no longer recognise a prevailing risk of repeat infringement.

The Defendant requests the court dismiss the application.

The Defendant challenges the Plaintiff's standing on the grounds that it had not presented sufficient prima facie evidence to prove that it was the owner of the exclusive exploitation in the software "S Client". In the matter, the Defendant puts forward not to have used the programme in dispute before 2010, and that therefore not version 2 of the GPL of June 1991 was relevant, but the more recent Version 3 of 29 June 2007, section 8 para. 3 of which provides for a permanent reinstatement of the licence after the first violation on the condition that the violation is remedied within 30 days after receipt of a corresponding notice of infringement by the copyright owner. This was the case here, because according to the affidavit dated 17 July 2015 by the manager of the Defendant's computer centre, Mr. , the software in dispute was removed from the university's website on 26 May 2015, after the Defendant had become aware of the written warning dated 22 May 2015. Against this background, the asserted claim for injunctive relief was meaningless and was in bad faith.

## Grounds

The Plaintiff's application is admissible and well-founded.

**I.**

The Plaintiff is entitled to claim injunctive relief against the infringement in accordance with Sec. 97 (1) in conjunction with Sec. 69c No. 4 of the German Copyright Act (UrhG).

The Plaintiff has demonstrated its ownership of the exclusive exploitation rights in the software "S Client" sufficiently credibly by presenting the agreement of 1 December 2006 between the Defendant *[sic!]* and B.V. in connection with the German translation of the transfer of rights in section 2.1 of the agreement as contained in the statement of claim.

By its indisputable use of the programme, as outlined in greater detail under the facts of the matter, and until the software was removed on 26 May 2015, the Defendant was certainly in violation of §§ 1 and 3 of the GPL version 2 of June 1991 and/or sections 4 and 6 of the GPL version 3 of 29 June 2007, which constitutes an infringement of the Plaintiff's exclusive right to authorise communication of a computer programme to the public as specified in Sec. 69c No. 4 UrhG.

A risk of repeat infringement within the meaning of Sec. 97 (1) UrhG is indicated by the infringement of rights that has occurred in the past (v. Wolff in: Wandtke/Bullinger, Praxiskommentar zum Urheberrecht *[Practical Commentary on Copyright Law]*, fourth edition 2014, § 97 para. 36). This risk has neither been eliminated by the affidavit of the manager of the Defendant's computer centre, , according to which the software in dispute was removed from the Defendant's website on 26 May 2015, nor by the Defendant's chancellor declaring in the oral hearing that the instruction of the Defendant to remove the software in dispute from the network and refrain from its use in the future was of a strategic nature. According to prevailing case law of the highest court, neither the cessation of operation nor a change of production to an alternative product nor a legally binding declaration of the infringing party that it will refrain from violations in the future are sufficient to remove the risk of repeat infringement (v. Wolff in: Wandtke/Bullinger loc. cit. para. 37

with further references). Based on this case law, the removal of the software in dispute from the Defendant's website was not sufficient to eliminate the risk of repeat infringement, neither was the declaration of the Defendant's chancellor as cited herein above. While the removal of the software merely constitutes a de facto process that could be reversed by the Defendant any time, the declaration of the Defendant's chancellor is lacking the required legal security which could and still can only be achieved by a cease and desist declaration with a penalty clause from the Defendant (v. Wolff in: Wandtke/Bullinger loc. cit. para. 37), which, however, the Defendant was not prepared to submit, either at the pre-trial stage or in the oral hearing. The affidavit by the Defendant's chancellor dated 20 July 2015 presented in the hearing may be disregarded as well because it limits itself to the presentation of legal arguments.

Contrary to the Defendant's opinion, section 8 para. 3 of the GPL version 3 of 29 June 2007 does not preclude the asserted claim. This is the case because even though the provision grants reinstatement of the licence to the violator on the condition that the violation is remedied within 30 days of receipt of a corresponding notice, as the Chamber would expect in light of Mr. affidavit. However, this granting of the right to continue using the licence cannot be interpreted to mean that the licensor at the same time had the intention of waiving his right to demand a cease and desist declaration with a penalty clause from the (first time) violator. Despite the fact that the licensor thereby affords the violator a "second chance" to use the licence, it does, on the other hand, have an interest worth protecting in the lasting prevention of further infringements after the first infringement has occurred. If the interpretation of the Defendant was correct, this would in effect be tantamount to an invitation to every user of the licence to violate the terms of the licence in the secure knowledge that he would only need to reckon with having to submit a cease and desist declaration with a penalty clause or a cease and desist order issued by a court upon discovery of the second case of infringement. Based upon an equitable interpretation of section 8 para. 3 GPL version 3 of 29 June 2007, neither the pre-trial warning letter to the Defendant nor the assertion of the claim for injunctive relief through the courts appear to be meaningless or in bad faith.

**II.**

The Plaintiff may rely upon the existence of grounds for an injunction pursuant to Sec. 935 German Code of Civil Procedure [ZPO], because without a preliminary safeguarding of its legally protected position, it would be defencelessly exposed to further infringements by the Defendant, which are not capable of being reversed. It is also not apparent that the Plaintiff delayed the assertion of its claims against the Defendant for an unduly lengthy period of time after having become aware of the infringement.

**III.**

The threat of a fine or imprisonment is based on Sec. 890 (1) and (2) ZPO.

**IV.**

The decision on costs is based on Sec. 91 (1) ZPO and the amount in dispute has been determined based on Sec. 63 (2) No. 1 German Court Fees Act [GKG].

R.

Executed:
Halle, 27 July 2015
*[Signature]*
K., Registrar of the Court *[Round stamp of the Regional Court Halle]*