

**DISTRICT COURT OF FRANKFURT AM MAIN<sup>1</sup>**

**On behalf of the people**

**JUDGMENT**

In re

**Harald Welte, [...]**

**- Plaintiff -**

**Counsel: Attorney-at-Law Dr. Till Jaeger, [...],**

vs.

**D... Deutschland GmbH, represented by [...]**

**- Defendant -**

**Counsel: [...]**

**the 6<sup>th</sup> Civil Panel of the District Court of Frankfurt am Main,**

**through Presiding Judge [...],  
Judge [...] and  
Judge [...],**

**based on the Hearing dated July 26, 2006, renders the following Judgement:**

**Defendant is ordered to pay to Plaintiff 2871.44 EUR, plus interest on this amount of 5 percentage points above the base interest rate since February 25, 2006; regarding the amount of 141.34 EUR, payment shall be made in exchange for the transfer of ownership of the data storage unit “[...] Wireless G Network Media Storage DSM-G6000” which is owned by Plaintiff.**

**Defendant is ordered to disclose to Plaintiff how many items of the data storage unit “[...] Wireless G Network media Storage DSM-G600” Defendant has acquired, the number of items of this data storage unit Defendant has sold, the identity of the commercial purchasers of the device, and from whom Defendant has acquired the data storage units.**

**Further claims are dismissed.**

**Defendant bears the costs of the proceedings**

**The decision is provisionally enforceable if a deposit of 15,000 EUR is made.**

**The value of this dispute is set at 10,000 EUR.**

**Facts**

Plaintiff brought claims against Defendant for reimbursement of costs and disclosure of information because of a copyright infringement in relation to a software program.

Plaintiff is a professional programmer. Defendant is a subsidiary company of a Taiwanese manufacturer and acts as a distributor of hardware and network components to private and commercial customers.

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<sup>1</sup> **DISCLAIMER:** This is an unofficial translation! The correctness or exactness of it is not guaranteed or represented in any way. The information is not intended to be a comprehensive study, nor to provide legal advice, and should not be relied on or treated as a substitute for specific advice concerning individual situations

With three contractual agreements designated “Fiduciary Licensing Agreements”, the exclusive rights to copy, to distribute, and of public display, as well as the right to allow a third party to undertake modifications in the programs, were transferred for three software programs to Plaintiff: Mr. Werner Almesberger, who is an Austrian citizen, transferred these rights to Plaintiff for the software “msdosfs” on December 12, 2004 (Annex K5) and for the software “initrd” on September 28, 2004 (Annex K7). On November 11, 2004, Mr. David Woodhouse, a UK citizen, transferred these rights to the Plaintiff for the software “mtd” (Annex K9). For further details reference is made to the cited agreements.

The three programs “msdosfs”, “initrd” and “mtd” are parts of the so-called Linux-kernel.

The software “msdosfs” allows access to data files that were stored on a data medium by other operating systems. The software “initrd”, among other things, makes it possible to start a system in two phases; a minimal system is initiated in phase one and additional modules can be started in phase two. The software “mtd” contains generic support for MTD device drivers as well as an interface for programs that access MTD devices, “MTD” being an abbreviation for Memory Technology Devices.

These three software programs are licensed [by Plaintiff] under the GNU General Public License (hereinafter referred to as the “GPL”) exclusively.

The GPL grants anyone who enters into such contract with the licensor the right to copy, distribute and modify the software, on the condition that the software is again distributed under the very conditions of the GPL, in particular by making reference to the GPL, by accompanying it with the GPL licence text, by making available the source code and by making reference to the disclaimer of warranty. According to Sec. 4 of the GPL, any copying, distribution or modification of the software that is not accordance with the GPL is void and automatically terminates the rights under the licence. However, parties who have received copies, or rights, under the license from the GPL infringer will not have their licenses terminated so long as such parties remain in full compliance. For further details reference is made to the submitted copy of the GPL (Annex K11).

In January 2006, Defendant offered the data storage unit “[...] Wireless G Network Media Storage DSM G600” (hereinafter referred to as the “data storage unit”) for sale. The distribution of the data storage unit did not satisfy the conditions of the GPL, since the licence text of the GPL was not enclosed, a disclaimer of warranty was not made, and the source code was not disclosed.

Plaintiff made a test purchased of Defendant’s data storage unit, from which costs in the amount of 141.34 EUR accrued. He reengineered the data storage unit in order to investigate the firmware contained in the device.

Through a lawyer’s letter of February 1, 2006, (Annex 12) Plaintiff demanded that Defendant cease and desist from its infringing actions, asserting that the Defendant used in the firmware of the data storage unit the three programs “mtd”, “initrd” and “msdosfs” without complying with the GPL. Defendant thereafter responded that – without acknowledging any corresponding legal obligation to do so – Defendant has issued a declaration to cease-and-desist. Defendant asserts that the source code of the software in question is available for download from Defendant’s ftp-server free of charge. Defendant further asserts that Defendant will inform its purchasers about the distribution of the devices being GPL violating (Annex 13).

By letter of February 10, 2006, Plaintiff called upon Defendant to reimburse him for the lawyers’ fees for the formal cease-and-desist letter (1.5x the general fee based on a value of the dispute of EUR 150.000,00 plus expenses, 2,397.50 EUR), the costs of the test purchase and the cost for the re-engineering until February 24, 2006 (Annex 14).

Plaintiff alleges that the programs msdosfs, initrd and mtd as well as the creative efforts made by Messrs. Almesberger and Woodhouse constitute in each case sufficient individual creative achievements to be protectable by copyright law. Plaintiff further claims that Mr. Almesberger is the creator of the program msdosfs and initrd, and Mr. Woodhouse is the creator of the program mtd. Plaintiff asserts that the programs were only modified after their initial creation by third parties through the addition of open source developments. Plaintiff alleges that Mr. Hans Lermen is also named with respect to the program initrd.txt, as a result of the pre-existing program parts “initrd” of Mr. Almesberger and “bzImage” of Mr. Lermen having been connected.

Plaintiff asserts that the data storage unit distributed by Defendant contains firmware that also contains the programs “msdosfs”, “initrd” and “mtd”.

Plaintiff claims that the re-engineering took 4 hours. Plaintiff is of the opinion that he can for this matter claim 140 EUR per hour, i.e. an aggregate amount of 649.60 EUR gross.

Plaintiff asks the Court to:

1. Order Defendant to pay to Plaintiff 3,188.44 EUR plus interest on this amount of 5 percentage points above the base interest rate since February 25, 2006; regarding the amount of 141.34 EUR, payment shall be made in exchange for the transfer of ownership of the data storage device “[...] Wireless G Network Media Storage DSM-G6000” which is owned by Plaintiff.
2. Order Defendant to disclose to Plaintiff how many items of the data storage unit “[...] Wireless G Network media Storage DSM-G600” Defendant has acquired, the number of items of this data storage unit Defendant has sold, the identity of the commercial purchasers of the device, and from whom Defendant has acquired the data storage unit.

Defendant asks the Court to:

Dismiss the case.

Defendant asserts that the Plaintiff has no right of action as Mr. Almesberger and Mr. Woodhouse are only co-authors, and Section 8, Para. 2, Subpara. 3 of the German Copyright Act (UrhG) is therefore not applicable since Plaintiff only relies on derived rights. Defendant also argues that the claims based on *negotiorum gestio* and for damages and the right to disclosure do not enjoy the privilege afforded by Section, 8 Para., 2 Subpara. 3 of the German Copyright Act (UrhG) in the first place.

Defendant further argues that the GPL is invalid due to violations of Art. 81 of the Treaty establishing the European Community and Section 1 of the German Antitrust Act (GWB) as it prejudices trade between Member States and leads to a restriction on competition. In addition, Defendant asserts that the conditions of the GPL do not apply because of the principle of exhaustion.

Moreover, Defendant alleges that by means of the so-called re-engineering, which in the opinion of Defendant comes close to an illicit decompilation, Plaintiff has gained information that must be excluded from this case because it has been improperly obtained. Defendant argues that Plaintiff, in any event, cannot claim for reimbursement of cost allegedly accrued as a result of such illegal interference.

Inasmuch as certain facts and opinions are not included herein, reference is made to the written statements exchanged between the parties as well as to the Annexes hereto that have been submitted to the Court.

### **Rationale for the Decision**

The action [brought by Plaintiff] is admissible and justified in almost all respects.

Plaintiff can demand that Defendant reimburse him for the costs of the formal cease-and-desist letter of February 1, 2006, of the test purchase, as well as for the re-engineering pursuant to Section 683, 670 of the German Civil Code (BGB) on the basis of a justified *negotiorum gestio* claim.

Sending the cease-and-desist letter was justified as Plaintiff is entitled to make the claims asserted therein. By distributing the data storage unit, in the firmware of which the programs mtd, initrd and msdosfs are included, without complying with the provisions of the GPL, Defendant violated the copyrights in the programs, as a result of which Plaintiff, who is entitled to exercise the copyrights, could assert a claim to cease-and-desist against Defendant (Section 97 of the German Copyright Act (UrhG)).

Plaintiff has standing to bring an action since he was granted the exclusive rights of use in the programs mtd, initrd and msdosfs by the authors.

In regard to the program msdosfs, Mr. Almesberger is the author. The presumption of authorship (Section 10 of the German Copyright Act (UrhG)) applies, because he – as can be seen from the printout (Annex K 6) – is

named in the source code of the software and is therefore designated as author in the usual fashion. In regard to the program mtd, Mr. Woodhouse is designated as author in the source code, the printout of which has been submitted as Annex K 10. As a result, the presumption of authorship applies to him as well. Defendant initially denied that the printouts submitted [by Plaintiff] are really the original printouts of the code; he argues that the pages [with the names of Messrs. Almesberger and Woodhouse] could very easily have been typed [after the fact] in the program "Word". Defendant has not countered the assertions of Plaintiff in a substantial manner, however, following submission by Plaintiff of a comparison of the original code programmed by Messrs. Almesberger and Woodhouse, respectively, and the source code used by Defendant.

As a result, Defendant has not proven that contrary to the presumption (as provided in Section 10 of the German Copyright Act (UrhG)), Messrs. Woodhouse and Almesberger are in fact not the exclusive authors of both programs.

Initially, Defendant asserted that Messrs. Woodhouse and Almesberger are merely to be regarded as joint authors and that Plaintiff should have alleged that the software was produced in integral parts programmed by both of them. In response, Plaintiff substantiated his allegations by explaining that Messrs. Woodhouse and Almesberger each performed the initial programming, respectively, and that later only modifications by third parties within the meaning of Sections 3, 23 of the German Copyright Act (UrhG) took place. Defendant has not countered this explanation in its written statement of August 16, 2006, which was allowed by the Court. Inasmuch as Defendant points out with respect to the program msdosfs that Mr. Almesberger, according to the submitted printout of the Internet page [www.almesberger.de](http://www.almesberger.de) (Annex B2), declares that he no longer works on the program and that code has been added to [the existing version of the program] to a great extent by third parties, Defendant has not contradicted the allegations of Plaintiff that the initial programming was carried out by Mr. Almesberger and that later modifications were contributed by third parties.

This is also the case with respect to the program mtd and the reference made by Defendant in the written statement submitted after the hearing to the description of Mr. Woodhouse's activities on the Internet page about that program (Annex B3). Based precisely on the description on that Internet page, it follows that Mr. Woodhouse carried out the initial programming ("he started MTD from scratch..."). In particular, it cannot be concluded from either Defendant's allegations or the printouts submitted that either program is an integrative creation of Mr. Almesberger and others, or Mr. Woodhouse and others, respectively, generated conjointly by the deliberate co-operation of the individuals involved. In particular, where several authors have participated in creating a work and have not made their contributions at the same time but instead have made them successively, the possibility of joint authorship is not excluded, but the presumption is that each individual involved has rendered his/her contribution in subordination to a common overall idea (BGH, GRUR 2005, S. 860, 862 – Flash 2000). Such subordination to the common overall idea has not been shown by Defendant. As to Defendant's reference that Plaintiff himself refers to a "core-team" in his article on Wikipedia (cf. printout Annex B4), this does not prove joint authorship in the programs in question because Plaintiff has undisputedly not contributed to them.

Moreover, Defendant on whom the burden of proof lies in respect of rebutting the presumption of authorship has not offered relevant evidence.

With respect of the program initrd, Mr. Almesberger is to be regarded as author as well.

However, the presumption of authorship, Section 10 of the German Copyright Act (UrhG), does not militate in favour of Mr. Almesberger being sole author. For on the submitted printout "initrd.txt" (Annex B8) Hans Lermen is designated as author alongside Mr. Almesberger. Where multiple persons are designated as authors it is presumed that these persons have acted as joint authors (Dreier/Schulze, UrhG, 2<sup>nd</sup> edition, Munich 2006, § 10, Rz. 24). In this respect Plaintiff has asserted that the designation of both individuals is due to the fact that Mr. Almesberger developed the software component "initrd" on his own, whereas Mr. Lermen developed a software component "zlmage". Both components, that can be used separately, were then connected with the effect that the connected components are regarded as a connected work pursuant to Section 9 of the German Copyright Act (UrhG). This scenario under which the separately useable software component "initrd" was created by Mr. Almesberger acting alone has not been substantially countered by Defendant. Defendant has only alleged that, as displayed in the submitted printout of the website (Annex B2), Mr. Almesberger himself no longer asserts that he is actively involved with the computer program "initrd". The fact that Mr. Almesberger currently no longer actively modifies the program does not change anything with respect to the [original] authorship of this component.

The computer programs msdosfs, mtd and initrd are protected by copyright law since they are the result of a sufficiently individual, intellectual creation of their authors. As shown by the source code (cf. Annexes K6 and K10 as well as Annex K20), the three programs are complex computer programs. Based on this, a factual

presumption arises in favour of there being sufficient originality in the program design to merit copyright protection. In the face of this presumption, it is therefore the burden of Defendant to show that the programs are instead the result of programming efforts of only trivial quality or merely adaptations of the programming results of another programmer (BGH GRUR 2005, 860, 861 – Fash 2000). Defendant has not done this.

As Mr. Almesberger and Mr. Woodhouse are citizens of other member states of the European Union, they enjoy copyright protection for their works (Section 120, Subsection 2, No. 2 of the German Copyright Act (UrhG)).

Since Mr. Almesberger and Mr. Woodhouse granted to Plaintiff in the contracts submitted to the court (Annex K5, Annex K7, and Annex K9) the exclusive rights to copy and to distribute the software as well as to make it available to the public and also the right to allow third parties to modify and supplement the software, Plaintiff has a right of action.

It was possible for Mr. Almesberger and Mr. Woodhouse to validly grant an exclusive right of use to Plaintiff even though rights of use had been granted to third parties under to the GPL prior to the grant of rights to Plaintiff, since the GPL only grants non-exclusive rights of use. It follows from Section 33 of the German Copyright Act (UrhG) that exclusive rights of use may be granted that are restricted by non-exclusive rights of use granted before, just as the authors of the programs could still grant non-exclusive rights of use according to the GPL after having granted exclusive rights of use to Plaintiff. This follows from Section 4, Subsection 2, of the agreements the authors entered into with Plaintiff, under which Plaintiff grants back to the authors additional non-exclusive and transferable rights of use as necessary for the authors to further license the programs.

The firmware of the data storage unit includes the programs msdosfs, initrd and mtd. Defendant initially alleged that as only a distributor [of the data storage unit], Defendant had no knowledge of the code embedded in the data storage unit itself. Plaintiff then submitted a comparison of the original source code programmed by Mr. Almesberger and Mr. Woodhouse and the source code used by Defendant, specifying in detail which of the code strings contained in both of the source codes have the highest possible degree of likelihood of originating from the source code of “mtd”, “initrd” or “msdosfs.” Defendant has not contested this evidence with any substance, and has only claimed that Plaintiff has not proven that the code is in fact actually identical but only provided assertions that the code may be identical. Contrary to the claims of Defendant, however, Plaintiff has indeed sufficiently substantiated its assertions of copyright infringement. In general, the fact that there are code strings which with utmost likelihood originate from a particular source code leads to the conclusion that such source code has in fact been used. Defendant has not offered any other explanation for the code strings that have been individually enumerated by Plaintiff and which undisputedly point to the usage of that source code by Defendant. Since Defendant itself distributed the data storage unit with that firmware, it cannot claim to have no knowledge thereof and to have not received any such information from its parent company.

Plaintiff's copyright claim may also be based on the code strings identified by Plaintiff. Contrary to Defendant's claims, this evidence is not excluded.

To identify the strings which with the utmost likelihood originate from the source codes of the three programs, Plaintiff downloaded the firmware from the Defendant's website, unpacked it, and proceeded as specified in Plaintiff's statement of July 20, 2006, page 3. This procedure does not constitute an illegal decompilation prohibited under Section 69 e of the German Copyright Act (UrhG).

Regarding the claims of Defendant that this pleading is irrelevant since the Internet page in question was only uploaded by Defendant because of Plaintiff's cease and desist letter to Defendant and can therefore not result in evidence relating to the code used in the firmware, such argument is not successful. Firstly, Defendant has failed to contest that the code published after Plaintiff's cease and desist letter is indeed the code of the data storage unit. Secondly, the pre-trial letter of February 9, 2006, submitted by Defendant (Annex K13) shows that Defendant itself states towards Plaintiff that the source code uploaded onto the ftp-server is the source code of the relevant firmware. Defendant, for example, has also neither alleged that the source code uploaded onto the server was been given to her by Plaintiff nor explained where the code originates from.

Defendant was not entitled to copy, distribute or modify the three software programs.

The GPL applies to the legal relationship between the authors and Defendant. The three software programs are undisputedly licensed only under the terms of the GPL. In the case of free software it is to be assumed that the copyright holder by putting the program under the GPL makes an offer to a determinable or definite circle of people and that this offer is accepted by users [of the software] through an act that requires consent

under copyright law; in this respect, it can be assumed that the copyright holder enters into this legal relationship without receiving an actual declaration of acceptance [from the users] (Section 151 of the German Civil Code (BGB)).

In addition, if the GPL were not sufficient to form a legal relationship with Plaintiff, Defendant would not have any right to copy, distribute or modify the three programs, such that a copyright infringement by the Defendant would have taken place. In particular, the conditions of the GPL can in no case be interpreted to contain a waiver of legal positions afforded by copyright law. The GPL precisely stipulates that the freedom to use, modify and distribute the corresponding software initially afforded by way of a grant of a non-exclusive license to everyone is automatically terminated upon a violation of the GPL (cf. Dreier/Schulze, § 69a, Rz.11)

The conditions of the license granted under the GPL must be regarded as standard terms and conditions that are subject to Sections 305 et seq. of the German Civil Code (BGB).

Since the conditions of the license granted by the GPL are easily available on the Internet, they were without a doubt incorporated into the contractual relationship between the authors and Defendant (Section 305, Subsection 2, No.2 of the German Civil Code (BGB)).

Pursuant to Sec. 4 of the GPL the rights under the GPL are terminated and revert to the author if the user violates the obligations set forth in Sec. 2 of the GPL. In particular, these obligations provide that the user has to publish a disclaimer of warranty on each copy [of the program], make reference to the GPL, accompany the program with the license text, and provide the source code of the program. These rules do not unduly discriminate the user and are therefore not invalid pursuant to Section 307, Subsection 2 No. 1 of the German Civil Code (BGB).

The obligations [under the GPL] are not a valid limitation of the right to use under Section 31, Subsection 1, Sentence 2 of the German Copyright Act (UrhG), since the possibility to split up into different forms of use requires a sufficiently distinguishable, economically-technically uniform and autonomous form of use from the point of view of the relevant public (BGH GRUR 2001, p. 153, 154 – OEM Version). Section 2 of the GPL does not fulfil this requirement.

The regulations of the GPL must be understood to provide that the grant of the non-exclusive right of use under the GPL is subject to the condition subsequent (Section 158 of the German Civil Code (BGB)) that the licensee must not fail to comply with the terms of the agreement. Upon occurrence of the condition the license [granted under the GPL] is terminated.

This arrangement is not invalid pursuant to Section 307, Subsection 2, No. 1 of the German Civil Code (BGB) and does not, in particular, circumvent Section 31 of the German Copyright Act (UrhG). Section 31 of the German Copyright Act (UrhG), which provides for the possibility to split up the right *in rem* to use but at the same time restricts such possibility, establishes a balance between the interests of the author to, in the most thorough and complete way, exploit his works, on the one hand, and the public interest in the protection of its legal relations, on the other hand, *i.e.* to be able to recognize and clearly distinguish which different forms of use exist in order to acquire corresponding separate rights of use or for the purpose of complying with those rights as such (Dreier/Schulze, l.c., § 31, Rz. 9). Hence, a provision must be regarded as circumventing Section 31 of the German Copyright Act (UrhG) if it severely affects the marketability of the rights or the physical copies of the work. The GPL, however, only provides that the very user who does not comply with the conditions of the GPL loses his license. Sec. 4, Sentence 3 of the GPL explicitly stipulates that licenses [granted under the GPL] to parties who received copies or rights from someone whose license has been terminated according to Sec. 4, Sentence 1, will not be terminated so long as these parties continue to observe and comply with the terms of the GPL. As far as the marketability of a physical copy is concerned, such marketability is not inadequately limited, either. The person who purchases such a copy from someone who at the time of making the copy was not entitled to do so for having had his/her license terminated can accept the GPL and acquire the license necessary from the author at any time (cf. LG München I MMR 2004, 693, 695).

Since Defendant violated the obligations provided for in Sec. 2 of the GPL, the condition subsequent has occurred with the result that Defendant has lost its license.

Defendant cannot invoke a claim of exhaustion of the right to distribute (Section 69 c, No. 3, Sentence 2 of the German Copyright Act (UrhG)), even though the three programs are available to the public on the Internet. The principle of exhaustion only applies to the individual physical data carrier onto which the software is copied during the downloading process. With respect to the right to copy, no exhaustion takes place; thus,

Defendant is not entitled pursuant to Section 69 c, No. 3, Sentence 2 of the German Copyright Act (UrhG) to [freely] copy the software onto the individual data storage units.

With respect to the data storage units already sold by Defendant, no exhaustion of the right to distribute takes place, since those data storage units were not put into circulation by sale with the consent of the authors as the sale of the data storage units did not comply with the GPL. However, purchasers can, as described above, at any time acquire the necessary rights of use [the three programs] directly from the author by recognising the GPL.

It need not be decided whether, as Defendant argues, the provisions of the GPL violate Article 81 EC and Section 1 of the German Antitrust Act (GWB), in particular the prohibition against price fixing and of predetermining the conditions of secondary contracts in the first contract. This would, according to Section 139 of the German Civil Code (BGB), result in the invalidity of the entire license agreement with the consequence that Defendant would not have a right of use in the software at all, so that Plaintiff could file a copyright infringement claim for that reason. If an agreement is partly invalid, the entire transaction is invalid pursuant to Section 139 of the German Civil Code (BGB), unless it can be assumed that the parties would carry out the transaction without the invalid part. This is not the case here. Since the parties agreed on the grant of the license being subject to the condition subsequent of compliance with the GPL, the possibly invalid part [of the GPL] (Sec. 2 of the GPL) is inseparably connected to the primary obligation, i.e. the grant of the license. In addition, invalidity of this part of the GPL would also jeopardize the further development of the software and therefore affect the basic principle of open source, which is incorporated into the contract by virtue of the preamble of the GPL (cf. Annex K11).

Plaintiff would also be entitled to plead invalidity of the entire contract and therefore allege that Defendant is lacking any license [to the three programs] whatsoever. This case is not one in which Plaintiff would be barred from pleading invalidity for reasons of good faith and, in particular, because of the objection of improper exercise of a right.

It is possible that the principle of good faith is contravened when a party who is called upon because of a culpable violation of a contractual obligation pleads nullity of such contractual provision because another contractual provision is invalid (BGH GRUR 1971, 272, 273 – Blitzgeräte). This applies especially where there is no connection between the invalid clause and the clause that pertains to the contractual obligation that has been violated (BGH GRUR 1969, 701, 702 – Auto-Lok).

That, however, is not the case here. Plaintiff, or the licensors from whom Plaintiff derives his right, have not violated any contractual obligations themselves. Rather, Defendant, who violated contractual obligations, relies on rights granted by contract. Moreover, the allegedly invalid clause Sec. 2 of the GPL, that imposes duties on the licensee, and the provision of the GPL according to which the licensor grants a non-exclusive license to the other party are closely connected by the fact that the failure to meet the obligations of Sec. 2 of the GPL is a condition subsequent for the grant of the license. Therefore, Plaintiff would not be not barred from claiming invalidity of the entire contract.

Contrary to the Defendant's opinion, this likewise does also not result in the fact that any clauses of the GPL violate antitrust law. The only consequence of the invalidity of the entire contract is that Defendant is not a licensee [of the programs].

Therefore, Plaintiff can call upon Defendant for reimbursement of the costs of the cease-and-desist letter of February 1, 2006. However, Plaintiff can only claim reimbursement of a 1.3x the General Fee instead of the 1.5x the General Fee claimed in the action, since the matter was only of average difficulty. The presumed value of the dispute of 150.000 EUR is not inappropriate considering the fact that the claim is founded in copyright infringements of three software programs. Adding the statutory lump sum for expenses, Plaintiff can demand reimbursement of 2,080.50 EUR.

Likewise, Plaintiff can pursuant to Sections 683, 670 of the German Civil Code (BGB) demand reimbursement of the costs for the test purchase (141.34 EUR) upon transfer of ownership of purchased data storage unit to Defendant (Section 322 of the German Civil Code (BGB)).

Finally, Plaintiff can demand reimbursement of the reengineering costs of the data memory unit purchased for testing purposes. The costs incurred were costs that Plaintiff could rightly assess as necessary costs considering the circumstances, since reengineering was the only possible means for him to examine whether the firmware used in the data storage unit contained the three software programs. In reengineering, Plaintiff also did not infringe Defendant's copyright, since he did not perform a decompilation which would only be permissible under the conditions of Section 69e of the German Copyrights Act (UrhG). Plaintiff did not

translate the object code back to the source code but only recorded the booting process of the data storage unit and examined the result for evidence of usage of one of the software programs.

Plaintiff is entitled to the customary remuneration for the time invested in the reengineering, since such services are part of Plaintiff's profession as a free programmer (cf. Palandt-Sprau, 65<sup>th</sup> edition, München 2006, § 683, Rz. 8). The suggested hourly rate of 140.00 EUR net has not even been contested as unusual by Defendant. Plaintiff could also claim an amount of time spent of four hours. Initially, Defendant contested the reengineering costs by pleading lack of knowledge. However, after Plaintiff described the way he proceeded in a detailed manner in the statement of July 20, 2006, Defendant no longer contested the alleged amount of time spent. It would have been the burden of Defendant as a company that offers a large variety of hardware and network components to demonstrate that the amount of time spent was not necessary to carry out the reengineering.

The decision on interest is based on Sections 280, 286, 288 of the German Civil Code (BGB). Plaintiff is, however, only entitled to the payment of interest on account of delay in the amount of 5 percentage points above the base rate.

Because of the copyright infringement, Plaintiff also has a right of disclosure against Defendant based on copyright infringement pursuant to Section 101 a of the German Copyright Act (UrhG).

Defendant bears the full costs of the litigation, since Plaintiff's claims only slightly exceeded the claims granted by the court and only lead to a marginal increase in costs (Section 92, Subsection 2, No. 1 of the German Code of Civil Procedure (ZPO))

The decision on the provisional enforceability follows from Section 709 of the German Code of Civil Procedure (ZPO).

The setting of the value of the dispute is based on Section 3 of the German Code of Civil Procedure (ZPO).

Signatures