INSTITUT FÜR RECHTSFRAGEN DER FREIEN UND OPEN SOURCE SOFTWARE

Comment by the Institute for Legal Issues of Free and Open Source Software's ("ifrOSS") regarding draft revision of section 108a of the German Insolvency Code ("§ 108a InsO-E"), referring to the Federal Ministry of Justice ("BMJ") draft dated 18.01.2012

1.
The Institute for Legal Issues of Free and Open Source Software – ifrOSS – is a private institute covering and supporting legal issues of the development of open source software. The institute's activities also cover related topics such as open content, open access and more general legal issues in the areas of IT-Law, copyright, patent, contract and competition law. The ifrOSS institute exists since the year 2000 and has participated in the amendments of German copyright law in 2002, 2003 and 2008 with several comments. The so-called 'Linux clauses' of §§ 32 III 3, 32a III 3 and 32c III 2 UrhG [German Copyright Code] can be traced back to initiatives of the institute.

2.
The ifrOSS has taken notice of the following BMJ draft, which is the reason for this statement:

§ 108a InsO-E
Debtor as Licensor

(1) In case the insolvency administrator according to §103 rejects the fulfillment of a license agreement the debtor concluded as licensor, the licensee has one month from the time of denial's delivery to demand from the administrator or a legal successor a new license contract allowing continued use of the license rights under appropriate terms. Determining the license costs, an appropriate share of the licensee's gains from the ultilization of the protected rights shall be secured for the insolvency assets' benefit; expenses preparing the license's use shall be factored in to the extent they increase the license's value.

(2) If the license agreement the debtor concluded as licensor is a sublicensing contract and the insolvency administrator rejects fulfillment of the license contract with the main licensor, a sublicensee of the debtor can demand a license according to the conditions set out in paragraph (1) of this section. The main licensor may require a security deposit for this license in case facts cast legitimate doubts on the sublicensee's ability to fulfill the contractual duties.

(3) The licensee's rights from the license remain in place until the conclusion of a new license agreement. If a new license contract is not concluded within three months following the licensee's proposal was delivered, a further use is only permissible, if

(1) contractual payments according to paragraph (1) of this section are made and
(2) the licensee proves within two weeks that he brought an action for a license agreement against the administrator (paragraph (1)) or main licensor (paragraph (2)).

Unless the parties agree otherwise, the new license agreement will have retroactive effect.

The ifrOSS would like to weigh in on this draft act as laid out in the following paragraphs. The general problems of bankruptcy-proofness of license agreements in cases of insolvency are not touched upon. Only the specific interests of free and alternative license models, especially open source software, will be highlighted.

3.
In open source software and open content license arrangements distinct from other licensing models frequently multiple rights holders are involved collaborating in the development of a work.. Prime examples are the Linux operating system and the Wikipedia encyclopedia. The collaborative development of a work means that every contributor is simultaneously licensee of the contributions of the other contributors and licensor of their own contributions. Thus a license failure for a single contribution can lead to a disturbance of the whole license system.

The following problems arise if one of the licensors becomes insolvent:

a)
In case the grant of rights of use predates the start of insolvency proceedings, the applicability of § 103 InsO is at issue. The insolvency administrator having a right to choose requires a bilateral contractual relationship that has not yet been fulfilled by any party. Prior statements in the field of IT law assume that neither requirement is fulfilled in the case of open source license agreements. In the literature related to insolvency law there appear to be no relevant statements.

For the following reasons, ifrOSS considers a legislative clarification in line with the provisions of §§ 32, 32a, 32c UrhG imperative. Not applying § 103 InsO is in line with the interests of both the collaborators participating in the development and the public. Open Source license agreements concluded before the start of insolvency proceedings are generally fulfilled as far as their main opposed obligations are considered. A great deal of legal uncertainty among users would be the consequence of giving the insolvency administrator the power to challenge the transfer of rights retrospectively. This group of users consists not only of end-users, but also of companies in fields such as mechanical engineering, the automotive industry, the IT industry and last but not least, the public sector, all of whom rely on the continued availability of the relevant technologies both as users and licensees. The coalition agreement of the parties currently forming the German government explicitly refers to this issue.[1]

One distinguishing feature of open source license agreements is that they are generally concluded without personal contact between licensor and licensee. Additionally, it is not allowed to charge a license fee for their use. Hence it's factually hardly possible for the insolvency administrator to deny the ongoing fulfillment of the agreement towards individual licensees. Additionally, if one of the contributors of a collaborative work is affected by the insolvency, there is a danger that modifications based upon a part could no longer be used following the denial of a license by the insolvency administrator for the mentioned part. Also, in most denial cases a profitable use for a different purpose seems improbable. This is especially the case if works the debtor holds the rights for include parts of bigger programs or works which are not usable independently. (see Metzger/Barudi, Computer und Recht [Computer and Law] 2009, 557 ff. [German]) Thus, there is no danger of discrimination of creditors in the insolvency proceedings if § 103 InsO is not be applicable for such license agreements.

b)
If from a legal perspective the granting of rights occurs after the opening of insolvency proceedings, because the licensee accepts the offer delivered before the initiation of proceedings only once the proceedings have begun, the question arises as to whether the licensee can still effectively obtain rights because of the limitation of available power of disposal under § 80 InsO. The main arguments against a valid transfer of rights are of a

[1] http://www.cdu.de/doc/pdfc/091026-koalitionsvertrag-cducsu-fdp.pdf, S. 102.

dogmatic or systematic nature, such as the fact that the offer of a license is regarded as turning void due to the discontinued powers of disposal. (BGHZ 27, 360, 366 [Decisions of the German Federal Court of Justice in Civil Law, Vol. 27 p. 360, 366])

However, this result does not take into account the interest of the parties involved and is unenforceable in practice since it mainly depends on chance, whether potential licensees start to use a specific piece of open source software, and thus silently accept the license offer, before or after the start of the insolvency proceedings.
For the open source license model this is of crucial importance because the license offer is established by distributing the license text along with the work by the licensor, so that for further distribution, the offer can be accepted outside of the original licensor's sphere of influence. Despite a lack of any objective reasons this would lead to the existence of two classes of open source licensees. Additionally, especially for the insolvency administrator it would likely be unfeasible or even impossible to determine when the users of open source software concluded the license agreement. The reason lies in the fact that frequently the distribution, e.g. downloading a program, does not take place in the sphere of the licensor but of third-parties (distributors).

The problems discussed have rarely been discussed in academia, possible solutions are incompatible with each other, and without legislative action a sufficient level of legal certainty can not be expected (Jaeger/Metzger, Open Source Software, 3. Aufl., Rn. 170g [3rd ed., note 170g]).

4.
Taking into account the specific problems described, the introduction of § 108s InsO-E should include a specific clause for open source and open content license agreements. The ifrOSS proposes that the existing legislative draft of the act be amended by a fourth clause as follows:

> *(4) If the debtor grants a gratuitous non-exclusive right to everyone by means of a license agreement, the rule stipulated in § 103 Insolvency Code shall not apply. The debtor's offer to conclude such license agreement made before the initiation of the insolvency proceedings may still be accepted after the insolvency proceedings have been initiated.*

Sentence 1 resolves the issues mentioned above under 3 a), which can arise before the start of insolvency proceedings by means of legislative clarification. Not applying § 103 InsO ensures that open source license agreements, once concluded, are still fully effective even after the start of insolvency proceedings. The wording is in line with the ‘Linux clauses’ of §§ 32, 32a, 32c UrhG having worked well as a neutral description of the license model in the past. Sentence 2 is necessary with regard to the problem of concluding a valid license agreement after the start of insolvency proceedings as described under 3 b). With the proposed rules, the acceptance of the offer after the start of insolvency proceedings and the acceptance of the offer before the start of proceedings are treated identically. In conjunction with sentence 2, this rule ensures the legal certainty necessary for the development and distribution in an open source or open content model.

Kirchmöser, 5th May 2012

Dr. Till Jaeger
Dr. Olaf Koglin
Dr. Till Kreutzer
Stefan Labesius, M.A.
Prof. Dr. Axel Metzger, LL.M. (Harvard)

Translation: Florian Idelberger, Dennis G. Jansen