

MEMORANDUM

Date: 5 February 2021

1. BACKGROUND AND SCOPE

The GNU Project has released and licensed GNU Unifont versions under the terms of the GNU General Public License, Version 2.0 or later (“**GPL-2.0+**”) with the GNU Font Embedding Exception, excluding documents, which embed the font’s glyphs from the application of the GPL-2.0+’s copyleft provision, and the SIL Open Font License Version 1.1 (“**SIL OFL-1.1**”), making them free for third parties to use, provided that the requirements of the GPL-2.0 or later, or the SIL OFL-1.1, are met.

Recently, third parties have started claiming that GNU Unifont versions are

- (1) not protected by copyright,
- (2) may thus be used without abiding to the GPL-2.0’s terms and
- (3) can be committed to the public domain.

We have been asked to assess the copyright protection of GNU Unifont versions, in particular the GNU bitmapped letter forms as well as the GNU icon designs, as described on <http://unifoundry.com/unifont/>. Furthermore, we have been asked to assess the legal consequences of using the GNU Unifont versions without meeting the requirements defined by the GPL-2.0, for example by not licensing derivative works of GNU Unifont versions under the terms of the GPL-2.0 or by committing GNU Unifont versions to the public domain.

2. KEY FINDINGS

The GNU Unifont versions displayed on <http://unifoundry.com/unifont/>, in particular the bitmapped letter forms and the icon designs are protected by copyright law in Germany, meaning that they may only be used by third parties other than the copyright holder(s), if the third party has been granted rights of use to the GNU Unifont versions by the copyright holder(s).

Such rights of use are generally granted by the GPL-2.0+, under which the GNU Unifont versions are licensed. However, the grant of rights under the GPL-2.0 is conditioned on the third party meeting the requirements of the GPL-2.0. This includes that derivative works of GNU Unifont versions must be licensed under the GPL-2.0's terms. The same applies for GNU bitmapped letter forms and GNU icon designs.

Distributing GNU Unifont versions, GNU bitmapped letter forms or GNU icon designs or derivative works thereof without meeting the GPL-2.0's requirements constitutes a copyright infringement. Such distribution without meeting the GPL-2.0's requirements occurs, if GNU Unifont versions, GNU bitmapped letter forms or GNU icon designs or derivative works thereof are licensed under terms other than the GPL-2.0 or if they are committed to the public domain.

Under German law, a copyright infringement may entail numerous claims from copyright holders, including claims for reimbursement of costs (including lawyers fees) and damages, (for list of court decisions confirming this finding see No. 3.4 below).

3. LEGAL ASSESSMENT

3.1. Copyright Protection of GNU Unifont versions

GNU Unifont versions, including GNU bitmapped letter forms and GNU icon designs are protected by German copyright law. Fonts are generally protected as a “*computer program*” as defined by Sec. 69a (1) German Copyright Act (“**Urheberrechtsgesetz**” or “**UrhG**”), as they generally represent the font designer's or developer's own creative programming achievement (cf. regional court of Cologne, decision dating from January 12, 2000, file number 28 O 133/97).

This copyright protection does not require other criteria to be met, especially qualitative or aesthetic factors are not relevant for fonts to be protected under German copyright law, see Sec. 69a (3) 2 UrhG.

3.1.1. Copyright protection of the GNU bitmapped letter forms

In line with the protection of GNU Unifont versions, the bitmapped letter forms are explicitly protected by Sec. 69a (1), (3) 1, 2 UrhG. They are the own creative programming achievement of their respective creators.

3.1.2. Copyright protection of the GNU icon designs

The GNU icon designs are protected both as computer programs and as works of fine art.

Protection as computer programs

The GNU icon designs are protected as computer programs according to Sec. 69a (1), (3) 1, 2 UrhG and settled German case law.

Protection as works of fine arts

In addition, the GNU icon designs are protected as works of fine art according to Sec. 2 (1) no. 4 UrhG, as they “*have so much peculiar aesthetic content which differs from the previously known forms and designs*” (cf. regional court of Cologne, decision dating from January 12, 2000, file number 28 O 133/97). Therefore, GNU icon designs meet the necessary level of creativity (so-called “*Schöpfungshöhe*”).

3.2. Copyright to GNU Unifont versions

The copyright to GNU Unifont versions, including the GNU bitmapped letter forms and the GNU icon designs is assigned to the developer(s), respectively the creator(s). These developer(s) and creator(s) can claim copyright protection for the GNU Unifont versions, the GNU bitmapped letter forms and GNU icon designs under German law, even if they are neither a German citizen, nor live in Germany.

In line with Sec. 69c UrhG, these copyright holders have the exclusive rights to:

- permanently or temporarily reproduce the GNU Unifont versions, the GNU bitmapped letter forms and the GNU icon designs, in whole or in part, by any means and in any form,
- translate, adapt, arrange or otherwise modify the GNU Unifont versions, GNU bitmapped letter forms and the GNU icon designs, as well as reproduce any result thereof,
- distribute the GNU Unifont versions, the GNU bitmapped letter forms and the GNU icon designs or copies of them, and to
- make the GNU Unifont versions, the GNU bitmapped letter forms and the GNU icon designs publicly available.

Third parties may only perform any of the above-mentioned acts, if they can rely on a license granting them one or all of the respective rights.

3.3. Licensing GNU Unifont versions

The copyright holders have chosen to grant rights of use to GNU Unifont versions, the GNU bitmapped letter forms and the GNU icon designs under the terms of the GPL-2.0+, thus generally giving everyone the freedom to use, study, change, access and redistribute GNU Unifont versions, the GNU bitmapped letter forms and the GNU icon designs, as well as the freedom to distribute modified versions of them.

However, these freedoms are granted under the condition that the requirements defined by the GPL-2.0+ are met. This especially requires third parties distributing derivative works of GNU Unifont versions, the GNU bitmapped letter forms or the GNU icon designs to license these derivative works under the terms of the GPL-2.0+.

Accordingly, any attempt to license derivative works of GNU Unifont versions under other terms or to commit them to the public domain is an infringement of the GPL-2.0's terms.

3.4. Termination of rights in case of non-compliance

If the requirements of the GPL-2.0 or later are not met upon the distribution of derivative works of GNU Unifont versions, the GNU bitmapped letter forms or the GNU icon designs, the rights generally granted by the GPL-2.0 are terminated with immediate effect. This immediate termination is defined in Section 4 GPL-2.0, which states:

*“You may not copy, modify, sublicense, or distribute the Program except as expressly provided under this License. Any attempt otherwise to copy, modify, sublicense or distribute the Program is void, and **will automatically terminate your rights under this License.**”*

For Germany, the immediate termination of rights has been confirmed by countless court decisions and courts of all instances (cf. district court of Cologne, decision dating from October 20, 2017, file number 14 O 188/17, district court of Bochum, decision dating from March 3, 2016, file number I-8 O 294/15, district court of Halle, decision dating from July 27, 2015, file number 4 O 133/15, district court of Hannover, decision dating from July 21, 2015, file number 18 O 159/15, district court of Leipzig, decision dating from June 02, 2015, file number 05 O 1531/15, district court of Köln, decision dating from July 17, 2014, file number 14 O 463/13, district court of Hamburg, decision dating from June 14, 2013, file number 308 O 10/13, district court of Berlin, decision dating from November 08, 2011, file number. 16 O 255/10, district court of Bochum, decision dating from February 10, 2011, file number I-8 O 293/09, district court of München I, decision dating from July 12, 2007, file number 7 O 5245/07,

district court of Frankfurt a.M., decision dating from September 06, 2006, file number 2-6 O 224/06, district court of Berlin, decision dating from February 21, 2006, file number 16 O 134/06, district court of Munich I, decision dating from May 19, 2004, file number 21 O 6123/04).

In line with these decisions, a third party, who creates a derivative work of GNU Unifont, the GNU bitmapped letter forms or the GNU icon designs and distributes this derivative work under terms other than the GPL-2.0+ and the SIL OFL-1.1 immediately loses all rights of use to the GNU Unifont versions, the GNU bitmapped letter forms or the GNU icon designs, which they relied on to create the derivative work. The same applies, if the GNU Unifont versions, the GNU bitmapped letter forms or the GNU icon designs themselves are attempted to be licensed differently than under the terms of the GPL-2.0+ and SIL OFL-1.1, or if either the GNU Unifont versions, the GNU bitmapped letter forms and the GNU icon designs themselves or derivative works thereof are attempted to be committed to the public domain.

3.5. Legal effects of the termination of rights

The termination of rights in cases, means that any distribution of GNU Unifont versions, the GNU bitmapped letter forms or the GNU icon designs or derivative works thereof without meeting the requirements of GPL-2.0+ and the SIL OFL-1.1 constitutes an infringement of the rights of all copyright holders.

Under German copyright law this entitles the copyright holders to all claims available under the German Copyright Act, including:

- Claims to remove the infringement,
- Claims to cease and desist from future infringements,
- Claims for compensation of all costs incurred, including lawyer's fees, and
- Claims for damages.

3.6. Final note

This memorandum is strictly limited to the matters stated herein and may not be read to extend by implication to any matters not specifically addressed herein.