Contractual classification of Open Source

Subject of examination is the question whether Open Source Software can be sorted into an existing type of contract. For reaching such a classification it is essential to at first precisely determine the subject matter of contract at the obtainment of Open Source Software.
On the one hand the software itself has got a market value. Furthermore the Open Source licences grant simple rights of use for this software. These rights also constitute an independent market value, acquired by the user through the download. Thereby it is possible that the obtainment of rights takes place later than the acquisition of the software. This matter of fact becomes obvious if you make yourself clear that for the pure usage of the software no special granting of rights of use is necessary.
But into which type of contract –if this is possible at all- can the download of Open Source Software be sorted being aware of the fact that it has two independent objects of agreement (the program and the right of use)?

1. Mandate

A classification as a mandate is not possible because a mandate requires that the offeror of internet software obligates himself to gratuitously execute a transaction for the user that was transferred to him by the user before. This procedure does not correspond with the actual events on a download of Open Source Software. By offering his products the offeror regularly does not act on behalf of someone else, but he acts for his own interest. In addition there is no job done for the user like fulfilling a task but the user gets a concrete object.

2. Contribution to an association

Sometimes the making of and the making available of free software is classified as a contribution to an association. One important element of a memorandum of association is the contractual obligation of promoting the purpose of association. But the one who is using the free software is not obligated at all to advance the software. Only when spreading the software the user has to fulfil the conditions of the GPL. But from this fact an obligation of support constituting a claim to others can not be derived.

3. Gift

In literature you can often find a classification as contractual gift. But here are also some problems. At first it is doubtable whether there really is a permanent and final reduction of the donator's property. By making software accessible for download only copies are made available. Also not convincing is the idea of a property reduction through the loss of a copyright property part. As that would require that in the first place there is an emergence of a copyright property part. This is in all those cases doubtable where software that is accessible to download only is an editing that does not represent a personal intellectual creation.

In addition the criteria „free (of charge) " is problematic. The expression „free (of charge)" in a gratuitous promise does not only mean free in the sense of no payment. An attribution is also not considered as "free" if it is made under a causal or conditional conjunction without the requirement of a mutual dependance. The programmer of Open Source Software makes it a condition that every alteration and editing of his software has to be made available to everyone. This is a profit for the originator because he can participate in the improvements and alterations of his own program.

The obligation of gratuitously adding a source code with every transmission can perfectly be seen as a consideration (return service).

4. Conclusion

The reason for the fact that Open Source Software cannot be subsumed under the criteria of a German type of contract simply is that there is no design for it. The GPL can generally not be regarded as a problem out of the legal faculty.

This is proven by the fact that even the licence contract as such does not withstand verification by means of German legal norms for standard business conditions.

In this way the caveat emptor (exclusion of warranty) in section 11 of the GPL, as well as the exclusion of liability in section 12 GPL is invalid and therefore void. Already because of the provision in § 276 Abs. 3 BGB a release of liability out of intent can not be changed.

This possibility to completely vitiate the GPL through legal provisions shows that GPL is not meant to fit to legal norms. The purpose is not to create a contractual system, which is able to withstand legal verification but to place the Open Source Software's determinations of aims.

Background of the failure to sort the Open Source Software into the German legal system is that Open Source Software originates from the USA and was also advanced mainly there. But the American legal system is based on a principle different from the German one: in the U.S. - like in Great Britain- the judge and the case law developed through his decisions is the centre and not the legislator or the jurists.

For a jurist from continental Europe the idea of an area that is free of legal provisions is rather incomprehensible because to his mind there has to exist an adequate legal solution for every imaginable case. In Anglo-American Law there is an imagination of a "virgin territory of the law" that is not entered by law. This area (a German expression is missing as well as an English expression) is a field that can at any time become the object of legal issues as soon as there is a concrete case demanding it. Up to the point when this happens there is "no law" concerning this question. It is like a primitive state of free human activity, natural life and of forces that can develop in all directions. This room free of case law is part of the citizen's guaranteed freedom.