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Intellectual Property
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December 3, 2007

Client Alert

Busybox Stays Busy Enforcing GPL: Second Wave of Open Source License Enforcement Lawsuits Filed

by James G. Gatto

On the heels of successfully enforcing the GNU General Public License (GPL) against Monsoon Multimedia, in one of the first lawsuits of its kind in the U.S.¹, the Busybox team has filed two more lawsuits to enforce the GPL. At issue is whether the defendants have complied with the terms of use of the GPL—one of the most commonly used open source licenses—in connection with use of plaintiff's Busybox software. One of the conditions of the GPL is that redistributors of BusyBox are required to ensure that each downstream recipient is provided access to the source code of the program. According to the lawsuits, both companies have continued to distribute BusyBox illegally without source code.

The two lawsuits were filed on Nov. 19, 2007, in the U.S. District Court for the Southern District of New York. The first is *Erik Andersen and Rob Landley v. High Gain Antennas, LLC*; the second is *Erik Andersen and Rob Landley v. Xterasys Corporation*. The suits seek injunctions, damages and litigation costs.

As is typical with many GPL enforcements, the defendants were allegedly contacted on behalf of the plaintiffs by the Software Freedom Law Center (SFLC). Oftentimes, if a company is not in compliance, they can take corrective action and it largely resolves the matter. But when companies fail to remedy a GPL breach after notice, they risk being sued. In a press release issued by the SFLC its legal director stated: "When we learn of an instance of GPL infringement, we prefer to work with the company involved to help them come into compliance.... If they are unwilling to work with us, then our only choice is to go to court to ensure that they respect the GPL."

¹ For details of the prior suit and its resolution, please see our prior advisories, "GPL Enforcement Lawsuit Settles—Underscores the Importance of Open Source Compliance Measures" and "First U.S. Lawsuit Filed to Enforce the General Public License."

No suit of this kind has gone to trial in the United States. However, the GPL has been successfully enforced in Germany and elsewhere and injunctive relief has been granted. This is significant because some people have questioned the enforceability of the GPL. However, the Free Software Foundation, which authored the GPL, dismisses this by saying that the GPL is a valid license and that if someone uses a GPL-covered program without a valid license, then they are guilty of copyright infringement.

This growing trend of enforcement of GPL licenses heightens the need for users of open source to ensure that they comply with all license terms. This can sometimes be complex, especially when multiple open source programs, covered by different open source licenses, are used together. However, the ramifications of not complying can be significant. Among the risks are getting sued, as has happened here. Additionally, it can be a big problem for a company that is seeking financing or being acquired when the due diligence reveals non-compliance with open source licenses.

Open source issues have become a more substantial part of the IP due diligence process in connection with financings, acquisitions and other transactions. It is important for companies to prepare for such diligence investigations and take any necessary corrective actions **before** diligence occurs. Pillsbury Winthrop Shaw Pittman's Open Source Team, which was one of the first such dedicated teams at a major law firm and is one of the largest, routinely advises clients on all aspects of open source compliance issues and handles all aspects of open source diligence, including pre-diligence open source compliance analyses.

Live Links

"GPL Enforcement Lawsuit Settles—Underscores the Importance of Open Source Compliance Measures," Pillsbury Winthrop Shaw Pittman LLP Client Alert, James G. Gatto, 02-Nov-2007

"First U.S. Lawsuit Filed to Enforce the General Public License," Pillsbury Winthrop Shaw Pittman LLP Client Alert, James G. Gatto, 24-Sep-2007

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