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Open Source Enforcement Litigation

BusyBox and Beyond

Friday
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Software Freedom
Law Center



BUSYBOX



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The BusyBox Lawsuits

History – A Growing List of Suits

- Round 1 – September 20, 2007
 - *Andersen and Landley v. Monsoon Multimedia Inc.* (No. 07-CV-8205)
- Round 2 – November 19, 2007
 - *Andersen and Landley v. High Gain Antennas, LLC* (Case No.: 07-CV-10456)
 - *Andersen and Landley v. Xterasys Corporation* (Case No.: 07-CV-10455)
- Round 3 – December 20, 2007
 - *Andersen and Landley v. Verizon Communications* (Case No.: 07-CV-11070)
- Round 4 – June 10, 2008
 - *Andersen and Landley v. Bell Microproducts, Inc. d.b.a. Hammer Storage* (Case No.: 08-CV-5270)
 - *Andersen and Landley v. Super Micro Computer, Inc.* (Case No.: 08-CV-5269)
- Round 5 – July 21, 2008
 - *Andersen and Landley v. Extreme Networks, Inc.* (Case No.: 08-CV-6426)
- Next Round?



The BusyBox Lawsuits

What Is BusyBox?

- Lightweight set of standard utilities
- Optimized for smaller computing platforms
- Commonly used in embedded systems
- Mobile phones, PDAs, wireless routers, network storage devices, and other mobile, wireless and networked devices
- First distributed in 1999
- Now, by all accounts, used in products sold by 100s of manufacturers, including IBM, Nokia, Hewlett-Packard, Siemens, and others
- Open source software licensed under the GNU General Public License (GPL) version 2



The BusyBox Lawsuits

History – Common Fact Patterns

- Filed in the Southern District of New York (Manhattan)
- Brought by Erik Andersen and Rob Landley (two of the principal developers of the BusyBox software)
- Allege very straightforward failure to comply with the GPL
 - BusyBox was included in firmware of a device
 - BusyBox has or has not been modified
 - Device (and firmware) distributed without the BusyBox source code or a written offer to receive source code (as required by GPL Section 2)
- Many appear to involve a relatively “innocent” violation of the GPL involving violations by upstream software providers
- Claim copyright infringement
- Seek relief in the form of
 - Unspecified damages
 - Litigation costs
 - Injunction against further use of the BusyBox software
- Will this become the model for GPL lawsuits?

The BusyBox Lawsuits

History – Settlements Reached

- *Monsoon Multimedia* – October 30, 2007 (40 days)
- *Xterasys* – December 17, 2007 (28 days)
- *High-Gain Antennas* – March 6, 2008 (107 days)
- *Verizon Communications* – March 17, 2008 (87 days)
- *Super Micro* – July 23, 2008 (43 days)

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The BusyBox Lawsuits

History – Settlement Terms

- Undisclosed amount of financial consideration
- Agreement to comply with the GPL
- Agreement to undertake “substantial” efforts to notify previous recipients of defendant’s products of the violation of the GPL
- Agreement to appoint an “Open Source Compliance Officer” within organization “to monitor and ensure GPL compliance”
- No NDAs signed on settlement

The BusyBox Lawsuits

What Have We Learned?

- Suits targeted very big, very small, and a growing number of middle-market technology companies



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The BusyBox Lawsuits

What Have We Learned?

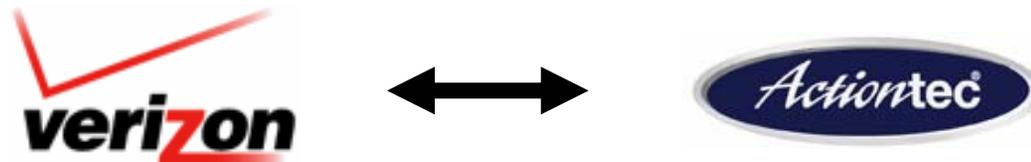
- Suits targeted very big, very small, and a growing number of middle-market technology companies
- Most all appeared to be (relatively) “innocent” offenders
- Often distributing third party products/firmware



The BusyBox Lawsuits

What Have We Learned?

- Suits targeted very big, very small, and a growing number of middle-market technology companies
- Most all appeared to be “innocent” offenders
- Often distributing third party products/firmware
- Only Verizon seems to have received an indemnification from its supplier



- Results are reflected in the terms of settlement
- Actiontec (not Verizon) assumed the obligations imposed by the settlement
- Others remained responsible for their own defense and settlement



The BusyBox Lawsuits

What Have We Learned?

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- Most all appeared to be “innocent” offenders
- Often distributing third party products/firmware
- Only Verizon seems to have received an indemnification from its supplier
- Disputes preceded by (at least some) contact with the defendants
 - Initially by “third parties”
 - Follow-up by SFLC
- Meaningful attempts to negotiate?
- Rapid movement to lawsuits (sometimes very rapid)
- None of the defendants have chosen to (materially) challenge the allegations (yet)



The BusyBox Lawsuits

What Should You Do?

- Do not overlook “third party” inquiries
 - Help desks
 - Email inquiries
- Keep open communications with SFLC
- Increased premium on preemptive action
- Diligence of software (and hardware) products
 - Do your products use BusyBox (or another would-be plaintiff’s software)?
 - Are you in compliance with the GPL (or applicable open source licenses)?
- Agreements with software providers
 - Compliance with applicable laws
 - Indemnification provisions
 - Compliance policies and procedures

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New trend?

Evolution?

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Evolution
of a trend in private enforcement actions



“Private” License Enforcement Actions

Anatomy of an Enforcement Action

- Common traits
 - Primarily against those distributing proprietary technology
 - Agnostic as to size of company, industry, location, etc.
 - Typically involve the GPL (but increasing focus on other licenses)
 - Brought by a variety of parties
- Few established rules of engagement, but patterns exist
 - Informal inquiry
 - More formal inquiry and demand for compliance
 - Cease and desist letters (and involvement by legal counsel)
 - No actual legal proceedings (until BusyBox)
- Not long in duration (weeks or months – but can be longer)
- Collaborative resolution process
- Goals vary by enforcer, but typically not as severe as those sought in proprietary software enforcement actions
- Typically kept private (even though NDAs not signed)

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Evolution
of a trend in non-US court actions

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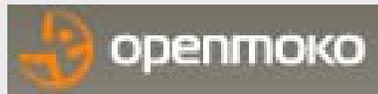


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Thu, 08 Nov 2007

Slowly getting back to work on gpl-violations.org

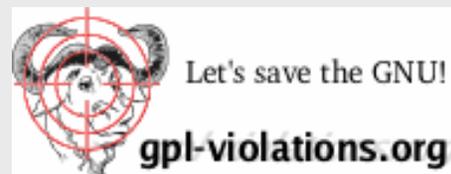
". . . Today I've finally started to pro-actively work on gpl-violations.org again. I haven't been able to do any work on it for almost 1.5 years due to my intense involvement with OpenMoko."

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GPL-Violations.org

The Skype Case

- District court in Munich, Germany (neither Skype nor SMC are based in Germany)
- Directed at Skype's SMCWSKP100 voice over IP (VoIP) handset
- Suit alleged that
 - The handset incorporates the Linux operating system kernel in its firmware (licensed under the GPL)
 - Skype violated the GPL by failing to provide a copy of the GPL license and the source code to the firmware to users of the phone
- Skype defended by noting that it did provide a URL where buyers could access the GPL and the source code involved
- Court held that this was not sufficient

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GPL-Violations.org

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“Companies must adhere to the conditions of the GPL just as with any other contract [. . .]. Inaccuracies in compliance are not to be allowed.”

Decision of the District Court in
Welte v. Skype

“Vendors have to comply [with OSS licenses], just like they would have to with any other proprietary software license.”

Harald Welte following
Welte v. Sitecom

GPL-Violations.org

The Skype Case

- Handset is manufactured for Skype by SMC Networks
 - Nonetheless, Skype held liable to fulfill the conditions of the GPL because it sold the handsets
 - Note that SMC is the target of a separate case (has not yet been decided)
- Skype held liable even though it was simply (and innocently) distributing a product it did not manufacture

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Closing Thoughts

***Cause for
Concern?***

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Closing Thoughts



**“The policeman ain't there to *create* disorder,
the policeman is there to *preserve* disorder.”**

**Richard J. Daley
Mayor of Chicago (1955-1976)**

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Closing Thoughts

*The current situation is
not all that surprising
(and not even unique to open source)*

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Closing Thoughts

*Open source licensing need not be
any more risky (or disorderly)
than proprietary software licensing*

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Thank You.

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