



Client Alerts

Client Alert: Free Software Comes at a Price

July 29, 2010



Free Software Comes at a Price: Violation of Open Source License Leads to Enhanced Monetary Damages and Forfeiture of Products in *Software Freedom Conservancy v. Best Buy et al.*

On July 27, Judge Shira Scheindlin of the Southern District of New York issued a notable judgment in a case involving open source software. The software at issue, known as BusyBox, is a set of small utility programs customized for resource-constrained environments such as embedded systems. BusyBox software, including its source code, is available at no cost, subject to the GNU General Public License (or "GPL"), a common open source copyright license that requires those who further distribute the licensed software to make the source code and any improvements or modifications available on the same free terms. The GPL also prohibits licensees from distributing software under any license more restrictive than the GPL itself.

In this case, the author of the BusyBox software asserted that Westinghouse (as well as thirteen other commercial electronics distributors) infringed the copyrights in the software when it distributed high-definition televisions that ran the copyrighted software, because Westinghouse attempted to impose terms more restrictive than those specified in the GPL, by limiting use of the software to "personal, non-commercial purposes only."

Several months after the case began, Westinghouse stopped participating in the lawsuit as it entered bankruptcy. Ultimately, the plaintiff moved for a default judgment and Judge Scheindlin entered judgment for the plaintiff.

Of particular note is the remedy the judge imposed. First, Judge Scheindlin found Westinghouse's infringement to be willful and therefore awarded treble statutory damages of \$90,000. The court also entered a permanent injunction prohibiting distribution of HDTV products with the BusyBox software and further ordered all infringing HDTVs to be forfeited to the plaintiff. Finally, the court invited the plaintiff to submit an application for reimbursement of its attorneys' fees.

This case is significant in view of the enhanced monetary damages award, injunctive relief, and potential attorneys' fees award imposed against the defendant for software that is otherwise available at no cost, and the case demonstrates the significant consequences that can result when terms of open source software licenses are ignored, whether intentionally or not.

For additional information, contact Adam Kessel, Chair of F&R's Open Source Initiative, at kessel@fr.com or 617-368-2180.

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