

# Free & Open Source Software Litigation

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## FOSS – Early US Cases

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- *Planetary Motion v. Techsplosion* (2001)
  - “Software distributed pursuant to [the GPL] is not necessarily ceded to the public domain” (dicta).
- *Progress Software v. MySQL* (2002)
  - GPL presumed binding – assent not questioned by Progress.
  - Court declined to grant summary judgment in favor of MySQL, noting that “affidavits submitted by the parties’ experts raise a factual dispute concerning whether the [Progress] Gemini program is a derivative or an independent and separate work under GPL.”
  - Settlement.
- *Computer Associates v. Quest* (2004)
  - Court (i) assumed enforceability of the GPL, (ii) assumed that modifications to the GPL code would be subject to GPL terms, but (iii) drew a distinction between code that modifies the GPL code and code that is the output of that code under the Bison GPL.

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## FOSS – Trademarks and Anti-Trust

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- *Linus Torvalds et al v. Della Croce* (1997)
  - Croce had taken advantage of Linus Torvalds' and the open source community failure to register and police the use of the Linux name and registered a Linux trademark himself, and then tried to extort license fees for the use of the name. The ensuing litigation resulted in a settlement assigning the mark to Linus Torvalds and reimbursing Croce for his trademark filing fees and costs.
  - In part to avoid future Croce-like cases, and wisened up to the "manage it or lose it" characteristic of trademark law, the Linux Mark Institute was set up to manage the Linux trademark.
- *Wallace v. FSF* (2005); *Wallace v. IBM et al* (2006)
  - Wallace alleged that contributors to GPL-licensed software, including IBM, Red Hat, and Novell, were engaged in an anti-competitive conspiracy to fix the price of operating systems at zero.
  - 7<sup>th</sup> Circuit: "GPL and open-source have nothing to fear from the antitrust laws".

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## FOSS – Patents

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- *Barracuda v. Trend Micro* (2007)
  - Leverage FOSS community for prior art search.
- *Firestar v. Red Hat* (2008)
  - Broad downstream & upstream protection in public settlement.
- *Microsoft v. TomTom* (2009)
- Open Innovation Network
- Linux Defenders

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## SCO saga

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- IBM
- Autozone
- DaimlerChrysler
- Red Hat
- Novell
  - Who owns Unix?
  - After 10<sup>th</sup> Circuit reversed the district court summary judgment in August 2009, jury trial has begun on March 8, 2010.

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# Software Freedom Law Center

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- Busy Box
  - First, the Hall of Shame (“no longer updated, these days we forward this sort of thing to the SFLC”)
  - Monsoon
  - Xterasys
  - High-Gain Antennas
    - Source was made available upon request, but not offered.
  - Verizon
    - Actiontec router: importance of supply chain diligence & indemnification.
  - Super Micro Computer
  - Bell Microproducts
    - Default judgment
  - December 14, 2009: Best Buy; Samsung; JVC; Western Digital & ten other defendants.
    - Bruce Perens (Busy Box’s original developer) disagrees.
- FSF software (GCC, GNU C library, etc.)
  - Cisco (Linksys)

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## Software Freedom Law Center cont'd

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- Settlement Terms:
  - Efforts to contact prior recipients to offer source;
  - FOSS compliance officer & audit;
  - Undisclosed cash amount.
- SFLC:  
“The First Rule of GPL Compliance: Be Responsive When Contacted”
- Bruce Perens:  
“companies don't fall out of compliance with the GPL license on the Busybox software unless they fail to exercise the slightest bit of due diligence, and then fail to respond appropriately when contacted by copyright holders who seek to remedy the situation. It is only after protracted failure to respond that non-compliant parties are pursued for damages. In short, *nobody violates the Busybox license for a smart reason.*”

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## Jacobsen v. Katzer

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- Complex and interesting dispute
    - » from FOIA requests, libel and & mail fraud,
    - » to unfair competition, cybersquatting & DMCA;
  - Started as a patent case (hence CAFC).
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- Re: FOSS, fundamentally a question of remedies
    - Breach of contract:
      - usually monetary damages;
      - injunctions are rare.
    - © infringement:
      - injunction (which may block development and distribution of closed source products based on the infringed FOSS);
      - statutory damages (which for willful infringement may range up to \$150,000 per infringed registered work).

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## Jacobsen v. Katzer cont'd

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- In August 2007, N.D.Cal had treated the attribution and other requirements of the Artistic License as independent covenants rather than conditions of use, and denied Jacobsen's copyright infringement claim and motion for a preliminary injunction, indicating that Jacobsen's remedies were limited to a breach of contract claim.
- On August 13, 2008, CAFC vacated the District Court's decision and held that a licensee's failure to adhere to the requirements of the Artistic License constitutes copyright infringement, and remanded the case to the District Court to determine whether injunctive relief based on copyright infringement would be an appropriate remedy.
- Artistic License 1.0: "You may distribute the programs of this Package in object code or executable form, provided that you do at least one of the following ..." Language & location matters.
- Importance of non-royalty benefits:
  - "There are substantial benefits [e.g. reputation, market share][...], to the creation and distribution of copyrighted works under public licenses that range far beyond traditional license royalties."
- FOSS licenses pointless w/o non-contract remedies:
  - Absent the ability to enforce license restrictions through injunctive relief, FOSS license requirements "might well be rendered meaningless" if speculative money damages under contract law were the only significant remedy available.

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## Jacobsen v. Katzer cont'd

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- District Court on remand (January 2009):
  - Still denied Jacobsen's motion for a preliminary injunction (inadequate showing of “irreparable harm”), but later injunctive relief following merits not precluded;
  - But granted some of Jacobsen's motions for summary judgment, holding that:
    - Monetary damages were available to Jacobsen under the Copyright Act despite the distribution of the Java Model Railroad Interface (JMRI) code at no cost, due to "evidence in the record attributing a monetary value for the actual work performed by the contributors to the JMRI project."
    - The defendant's removal of the attribution information could constitute a violation of the Digital Millennium Copyright Act (DMCA), as the "author's name, a title, . . . copyright notice, and the copyright owner" constituted copyright management information under Section 1202(c) of the DMCA.
- Settlement (February 2010):
  - payment of \$100,000 to Jacobsen within 18 months of the settlement;
  - permanent injunction preventing Katzer from reproducing any JMRI materials and from registering any trademarks or domain names related to JMRI;
  - dismissal of the pending appeal; and
  - a mutual release of all pending and future claims.

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## Europe – Harald Welte & friends

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- [www.GPL-Violations.org](http://www.GPL-Violations.org) (Harald Welte + 2)
  - Historically most active enforcer in Europe (primarily in Germany)
  - © holder of netfilters/iptables code (under GPLv2 or later) + enabled to sue on behalf of other copyright holders through fiduciary exclusive license agreements
  - Claims 100 enforcement actions by June 2006, w/ 100% success in either settling or obtaining judgments
  - Cases include Fortinet, Securepoint, Siemens, Fujitsu, Asus, Belkin, TomTom, Longshine, ARP Datacom, Edimax (settlements typically secret)
  - “Forensic” hacking (software embedded in network aware consumer devices) approach to infringement detection may not work in the US because of DMCA
- Free Software Foundation Europe (FSFE)
  - European sister organization to US FSF
  - Signed agreement w/ [www.GPL-violations.org](http://www.GPL-violations.org) in May 2008 to increase collaboration on future enforcement activities

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## Europe – Some Welte cases

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- *Welte v. Sitecom Germany* (Germany 2004)
  - Affirmed injunction for failure to provide source code under GPL (wireless access points).
  - Court rejected defendant's claims that:
    - it had not agreed to the GPL; and
    - that the plaintiff had waived all of his rights in the code by distributing it under the GPL.
- *Welte v. D-Link* (Germany 2006)
  - Held: Failure to provide source code violates GPL (data storage units).
  - Noted: Even if GPL were not legally enforceable, use would be unlicensed and therefore constitute copyright infringement.

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## Welte: Skype

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- *Welte v. Skype* (2008)
  - Skype sold third-party hardware on its website unaccompanied by source code or copy of license.
  - Remedy attempt: provide links to both.
  - Holding: not sufficient; must be exact compliance.

Skype Logo Copyright eBay, used for illustration purposes

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## Welte: Skype cont'd

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- Judge (paraphrasing from Welte):
- "If a publisher wants to publish a book of an author that wants his book only to be published in a green envelope, then that might seem odd to you, but still you will have to do it as long as you want to publish the book and have no other agreement in place."

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## France

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- *Educaffix* (2007)
  - Contract rescinded where transferor failed to clearly disclose that transferred software would only run in conjunction with a separate FOSS program (under GPL).
  - Transferee argued its development options were limited because of the need to rely on the FOSS program and comply with the license.
  - Court did not rule specifically on GPL, but implicitly treated GPL as valid.
- *AFPA v. Edu4* (2009)
  - Licensee can sue to enforce its rights under the GPL;
  - Licensor's failure to comply with its obligations under the GPL with respect to FOSS software included in its commercial product constitutes breach of the commercial license agreement itself (Edu4 had replaced the original FOSS copyright notices with its own and deleted the GPL license terms).

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## France

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- *Illiad* (2008)
  - Telecom provider distributes routers containing GPL'd *Freebox* w/out source code.
  - Defense: not a distribution, part of internal network (routers not sold, just lent);
  - Outcome still pending



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## Creative Commons

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- European courts enforce other “open” licenses

### Cases:



- *Curry v. Audax* (Netherlands, 2006)
  - Tabloid violated license
  - Should have gotten permission
- *SGAE v. Fernández* (Spain, 2006)
  - Bar owner successfully argues he only plays CC-licensed music to rebut presumption that where bars play music royalties owed to collection society

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## Key questions remain unanswered ...

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- Meaning of Derivative Works
- Meaning of Distribution
  - Peer-to-Peer cases
  - Affero GPL
- Software patents & *In re Bilski*

- **Questions?**

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