

# Open source GPL licence does have bite to its bark

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On 14 April 2004, the Munich District Court granted a preliminary injunction against Sitecom Germany for infringing the terms of the GNU General Public Licence (GPL). This decision is one of the first instances in which the actual terms of the GPL have been judicially enforced. This judgment could potentially be of enormous significance to organisations that have been using open source software, as it indicates that the terms of open source software licences are just as binding on vendors as the terms of proprietary software licences are.

## Background

Sitecom is a multinational company that specialises in home networking, data communication and computer connectivity products. Sitecom had recently developed and marketed a wireless access router called a 'WL-122 Wireless Network Broadband Router 1000G+', which enables users to access other wireless network adapters and wired networks on their computer via a certain band of radio frequencies. As the product is 'wireless', no cable is required to access networked information.

The software required to develop Sitecom's wireless router product included software source code created by the "Netfilter Project". Netfilter is an extremely powerful software program that enables a user to set up complex IP filtering and accounting rules. Netfilter is open source software derived from the Linux 2.4.x and 2.6.x kernel, and licensed under the GPL.

At present, the GPL is the most common licence that is applied to the use of open source software. For computer code obtained under or subject to the GPL, a 'copyleft'<sup>1</sup> effect is created by allowing users to copy, modify and distribute the software, provided that three basic obligations are fulfilled:

- the work must be licensed under the GPL (Clause 2);
- the work must include the GPL licence text (Clause 1); and
- the 'full source code'<sup>2</sup> to the base work, along with any modifications or enhancements must be provided with the work (Clause 3).

As the Sitecom product was developed using open source software licensed under the GPL, Sitecom was under an obligation to fulfil these conditions.

## Facts

The Netfilter Project has long been trying to fight against the increasing number of products sold in violation of the GPL. A number of organisations that had downloaded Netfilter's software and developed and distributed modified works without fulfilling their obligations under the GPL were contacted, and requested to sign letters to cease and desist. Most organisations co-operated with this request, and any GPL compliance issues were settled out of court. Sitecom, however, refused to sign a declaration to cease and desist, claiming that 'it was phrased... as an admission of guilt on Sitecom's part and that Sitecom [would be] liable for unlimited costs'<sup>3</sup>.

Harald Welte, Chairman of the Netfilter Project, subsequently sued Sitecom's German subsidiary for breaching both clause 1 of the GPL (by failing to provide the GPL licence terms with their product), and clause 3 (for failing to provide the source code with the product).

A preliminary injunction was granted by a three judge panel of the Munich District Court. The injunction prevented Sitecom from redistributing their product unless all requirements of the GPL were complied with. Specifically, the court forbade Sitecom's German subsidiary from

distributing the Netfilter software without attaching the GPL text and the Netfilter source code free of royalties. The Court also warned that Sitecom could be further penalised up to the sum of 250,000 Euros for each product that continued to be shipped in violation of the GPL.

Since the injunction, further issues have surfaced. For example, there now appears to be a dispute as to the extent of the requirement for Sitecom to disclose to the world its source codes in order to comply with the GPL. After the preliminary injunction was granted Sitecom made available for download a package of files that included the base source codes for the relevant software product. However, counsel for Netfilter have submitted that Sitecom must release all programming instructions and scripts that are associated with the base source code in addition to the actual source code of the product.<sup>4</sup> Harald Welte has said that 'the source code they have published is not "full source code" as defined by Section 3 of the GNU GPL', which specifically states that '*for an executable work, complete source code means all the source code for all modules it contains, plus any associated interface definition files, plus the scripts used to control compilation and installation of the executable*'.

It has also transpired that the software at stake for the Sitecom product was not developed by an in-house Sitecom team of programmers, but rather by a Taiwanese or US chip manufacturer.<sup>5</sup> It has been reported that the judges were of the view that the purported receipt of the software from a third party does not excuse Sitecom's failure to abide by the GPL distribution terms.

Sitecom have also filed a statement of appeal to Munich District Court. The case has not yet been heard, and full details of the statement of claim are not yet available. However it appears that the primary thrust of the appeal is

directed at issues unrelated to the strict question of whether the GPL is enforceable, and no objection has been made to the allegation of copyright infringement that results from failing to abide by the terms of the GPL.

### Implications of the decision

In requiring Sitecom to comply with the terms of the GPL, the District Court of Munich has affirmed the validity of the GPL and the contractual bargain it creates. Harold Welte has observed that 'this clarifies the situation for commercial developers because they now have to take the GPL seriously.'<sup>16</sup> Whilst it is too early to predict the long term

implications of this decision, and there do not appear to have been any similar cases before Australian courts, this case is undoubtedly of great significance to the burgeoning open source software movement as it shows a clear willingness of at least one significant court to comprehensively enforce the terms of the GPL.

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1 'Copyleft' is generally defined as a method of copyrighting a work whereby the copyright holder grants an irrevocable licence to the recipient of a copy, generally permitting the free unlimited use, modification and redistribution of copies. The distinctive condition to that licence is that any modifications to the work, if redistributed, must carry the same permissions (ie licence terms) and be made available in a form which

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facilitates modification. For software, this means in source code.

2 As defined in clause 3(c) of the GPL

3 Sherrif, L 'Court slaps injunction on GPL infringer', *The Register*, 21 April 2004. Available at [www.theregister.co.uk/2004/04/21/licence\\_germany/](http://www.theregister.co.uk/2004/04/21/licence_germany/)

4 Shankland, S 'Attorney: More disclosure will end GPL case' *CNET News.com*, 23 April 2004. Available at [www.news.com.com/2100-7344\\_3-5198886.html](http://www.news.com.com/2100-7344_3-5198886.html).

5 Shankland, S 'Attorney: More disclosure will end GPL case' *CNET News.com*, 23 April 2004. Available at [www.news.com.com/2100-7344\\_3-5198886.html](http://www.news.com.com/2100-7344_3-5198886.html).

6 Welte, H 'An interview with Harald Welte, of the Netfilter Project', 27 April 2004. Available at [www.orangecrate.com/article.php?op=Print&sid=690](http://www.orangecrate.com/article.php?op=Print&sid=690)

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## Don King sues for internet libel

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A recent case involving Don King, the US boxing promoter, has confirmed that it is possible to sue for libel in the UK in relation to articles posted on US websites. King alleges that comments published in articles on two US boxing websites were defamatory and that they were published in the UK. Mr Justice Eady has given King the green light to pursue his claim for libel against Lennox Lewis, Lewis' lawyer and Lion Promotions L.L.C. The judge found that King has a substantial reputation in England and, as a result, has allowed the action to proceed in the UK, despite the majority of parties being US based. King is now allowed to claim for the damage to his reputation within England and Wales.

The action centres around comments made by US lawyer Judd Burstein, who represented Lennox Lewis and Lion Promotions in their action against Don King, Mike Tyson and others, over a re-match between Lewis and

Tyson. During interviews for the US boxing websites [www.boxingtalk.com](http://www.boxingtalk.com) and [www.fightnews.com](http://www.fightnews.com), Burstein was asked about highly unflattering comments made by King about Burstein. Burstein's response, which was also unflattering, was later published in articles on the websites.

Don King sued for libel in the UK and, in a preliminary hearing, Burstein, Lewis and Lion Promotions L.L.C. asked that the action be dismissed on the grounds that the English court did not have jurisdiction to hear the claim. Mr Justice Eady refused on the grounds that publication takes place where the defamatory words are published by way of being heard or read. He commented that the publication of an internet posting takes place when it is downloaded. As a result, King was entitled to rely on a presumption that the case should be heard in the jurisdiction where the libel occurred. In Mr Justice Eady's

opinion, an English court is the "natural forum for achieving vindication and assessing compensation" where a person wishes to protect their reputation within England and Wales.

This ruling strongly supports the similar judgment of the High Court of Australia in *Dow Jones & Company Inc. v Gutnick* [2002] HCA, where a wellknown Australian businessman was able to found a claim in Australia for libel in respect of statements published on Dow Jones' US web site. The idea, once so prevalent, that the world wide web is a lawless place, is now clearly dead. For web publishers, there now seems to be the potential not for too little law, but for too much.

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