VIRTUAL REALITIES

AVM v Cybits, testing the scope of open-source licence

Heather Schafer of Hubbard Bowman & Schafer LLP discusses the possible repercussions *AVM V Cybits* could have on the open-source community

Open-source licensing schemes are a source of confusion for software developers and major industry players alike. The aim of the open-source software (OSS) movement is to stimulate innovation through encouraging collaboration. OSS projects bring about mass collaboration by making source code available to the public with the intention that the code will be changed and improved. In theory and in practice, open collaboration allows products to be developed, optimised, and released to the public faster than if the projects were carried out in isolation.

Open-source licences grant permission to use and modify underlying software source code in exchange for the user's release of any resulting product or source code to the public on the same terms. The open source movement is often referred to as "copyleft", a play on the word copyright. Copyleft refers to the practice of using copyright law, which is a set of exclusive rights granted by the government to a creator of a work, to achieve the opposite effect – rights in OSS are granted freely to all – on the condition that the resulting work is also released as OSS.

The District Court of Berlin is currently faced with deciphering the interplay of the OSS licence scheme, in this case, the GNU General Public License (GPL), with the theories of copyright, trademark and competition law[1]. The case currently at issue in Germany arose between AVM Computersysteme Vertriebs GmbH (AVM) and Cybits AG (Cybits). AVM is a company selling modems/routers and Cybits provides a modification that adds functionality.

AVM's Fritz!Box router, which allows secure broadband access, is a significant player in the digital subscriber line (DSL) router market. Cybits created the Surf-Sitter DSL software, a filtering software program aimed at protecting children from objectionable internet content. Surf-Sitter works by downloading the Fritz!Box software and/or firmware onto a user's computer, modifying that software, and then reloading the Surf-Sitter-modified software back onto the user's computer. AVM, through legal action, seeks to enjoin Cybits from selling the Surf-Sitter software, claiming that the software renders inoperable several of the Fritz!Box functions,

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thereby compromising user satisfaction and ultimately, AVM's reputation. The rub is that the Fritz!Box uses a Linux kernel (free and open-source software), which AVM licensed under the GNU General Public License. The GNU licence is a type of OSS licence permitting unrestricted use and modification of GNU-licensed software in exchange for release of the resulting product in OSS format.

The Berlin regional court initially granted AVM an injunction against Cybits' distribution of the Surf-Sitter DSL software for use with the Fritz!Box. The court cited anti-competitive and reputation effects of the Surf-Sitter's reduction of the Fritz!Box's functionality. On appeal, the Berlin Court of Appeal lifted the injunction, a move attributed to the intervention of a Linux kernel programmer Harald Welte. Mr Welte, participating in the case on behalf of Cybits argued, among other things, that the GPL licence governed the use and distribution of the Fritz!Box product. Therefore, under that licence, AVM is required to publish source code and permit that code to be re-implemented on an open source product. In other words, under the terms of the GPL licence, Cybits' activities were fully in line with the GPL licensing scheme. Along the same vein, AVM's lawsuit was in direct contradiction of the GPL licence, by which AVM obtained a head start on its software in exchange for allowing others to do the same.

On 21 June 2011, the District Court of Berlin heard the arguments of AVM and Cybits/Welte, but did not indicate a clear opinion on the case. AVM claimed the Surf-Sitter violates its copyrights in the non-GPL portions of the software/firmware and by substantially deactiving the Fritz!Box functions, the Surf-Sitter software compromises the product leading to reputational harms in violation of the trademark and competition laws. Cybits relied upon the GPL licence to address the copyright claims, eg, AVM is required by GPL licence to allow copying and modification of their OSS derived software. Cybits further pointed out that the very nature of the Surf-Sitter installation process, which requires that a consumer purchase the product and

intentionally load it onto their Fritz!Box, renders unlikely any customer confusion as to the source of the modifications. AVM asserts that it is completely happy to release its GPL-derived source code to the public. However, AVM wants to prohibit the public from reloading derivative third-party software (like Surf-Sitter) onto its DSL products. AVM is likely protecting themselves from not only the possible reputational harm (loss of sales) but also the added expense of supporting products modified by the third-party software.

Open-source concerns

Welte, his organisation gpl-violations. org and The Free Software Foundation Europe (FSFE) represent the following open-source community concerns if AVM is successful:

- It will create a precedent allowing other GPL licensees to use trademark and competition laws to circumvent the spirit of the GNU General Public License terms, and thereby violate the rights of the original software authors on whose backs the licensees develop their products.
- It will allow device manufacturers to "veto software from third parties on their products, resulting in worse products for the user and them being locked-in to purchasing future products from a particular vendor"[2].
- It will undermine the open-source software movement and the innovative opportunities that it provides to individuals and companies alike.

The question then becomes, in all of this confusion, how does this case affect how individuals and companies developing software and software-based products do business? The advice that can be taken from this case is not a far cry from the current best practices of most of the major software players:

If your product is OSS-derived you must:
1) Know how to comply with your licence. The FSFE provides guidelines, compliance tips, and resources to help vendors understand and comply with free software licences[3].
2) Limit your service plans and warranties to unmodified, factory-state products. In

other words, after-modification voids all warranties.
3) Keep up with the activities of third party vendors, know how their modifications affect your product and maintain an active public product forum to advise your clients of possible service

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interruptions caused by after-market modifications.
4) Arm your product with a simple method of restoring factory settings.

If you do not want to invest extra time or effort into trouble-shooting the compliance issues and possible consequences of the open source licence, re-allocate your funds to research and development and avoid the use of OSS. Many companies choose this route. It means adopting a strict employee policy against using OSS derived software, regularly scanning software for compliance with policies, and not purchasing or in-licensing software built on an OSS platform. There exists numerous source code scanning tools that allow companies to detect open-source software embedded in applications.

Overall, it really comes down to a cost-benefit analysis. Companies using OSS conserve time, effort, and money on the R&D side. They get products out faster and cheaper, and possibly better than they would otherwise. However, the trade off is that the companies have to make sure that they take precautions on the back end. As this case illustrates, by entering into an

open-source arrangement, you expressly give up (or at least add complexity to) the exclusivity and legal safeguards provided by copyright, trademark, and the competition laws. This is the deliberate effect of the OSS licence. However, that does not mean that you cannot protect yourself, you just cannot protect yourself in the same way as you would if you created the software yourself. Instead, you find yourself protecting your interest on the back-end with the suggestions provided above.

Footnotes

1. Court documents are available at, http://fsfe.org/projects/ftf/kg-avm-vs-cybits.pdf, http://fsfe.org/projects/ftf/avm-nebenintervention.pdf, last visited August 19, 2011.
2. Linux kernel at the centre of the battle for control of embedded devices. Free Software Foundation Europe, 2011-06-20, available at http://fsfe.org/news/2011/news-20110620-01.en.html.
3. Free Software Foundation Europe. Legal, Compliance resources available at http://fsfe.org/projects/ftf/ftf.en.html, last visited 19 August 2011.

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