

Free and Open Source Software Is Not A “Free For All”: German Court Enforces GPL License Terms

The GNU General Public License, version 2 (GPLv2) scores another court victory for the free and/or open source software (FOSS) community. Although the open-source movement has been active for nearly two decades, globally there are only a handful of cases in which a FOSS license has been reviewed by — let alone receive the imprimatur of enforceability from — a court. The latest case hails from Germany and serves to underscore the importance of proper FOSS-license compliance throughout the software development process and supply chain, including the obligation of distributors to independently verify FOSS-license compliance representations from their suppliers.

Welte v. Fantec

Harald Welte, founder of gpl-violations.org (a non-profit organization aiming at the enforcement of GPL license terms), is the owner of “netfilter/iptables” (firewalling software for GNU/Linux) which he distributes to the public for free as open source software under the GPLv2.

The GPLv2 is the most widely used open source license. Its express aim is to promote developer’s rights to freely use, study, modify and redistribute

computer programs, and to guarantee the same rights to the recipients of works licensed under the GPLv2.

The GPLv2 carries important conditions, however, most notably—and critical for its viability—that any distribution of software licensed under the GPLv2 must be accompanied with the “complete corresponding machine-readable source code” or “a written offer ... to give any third party ... a complete machine-readable copy of the corresponding source code”. GPLv2, Sections 3(a) and 3(b).

During a “Hacking for Compliance Workshop” organized in Berlin in 2012 by the Free Software Foundation Europe, the source code package for a media player with GNU/Linux-based firmware inside was found not to contain the source code for the iptables components. It was also discovered that the source code for other device components was not the same version used to compile the firmware’s binary code.

The media player at issue was distributed by Fantec GmbH (FANTEC), a German distributor of consumer electronic goods. Notably, FANTEC had an earlier run-in with Welte after it was discovered that FANTEC had failed to fully disclose the source code of its GPLv2-licensed

open source software. As part of their 2010 settlement, FANTEC agreed to refrain from future GPLv2 violations and to pay Welte a contractual penalty in the event of future non-compliance.

In 2012, following the discovery at the hackathon, Welte sent a cease-and-desist letter to FANTEC for its failure to make available for download a complete and current copy of the source code used in connection with its media player. FANTEC complied with the cease-and-desist request but refused to pay the contractual penalty.

In the court action Welte brought against FANTEC before the District Court of Hamburg, FANTEC raised two principle arguments:

- FANTEC relied upon the representations of its Chinese supplier, who had guaranteed that the source code was complete. FANTEC provided for download the very same source code package that it received from the supplier.
- FANTEC had investigated options with third parties for source code analysis and learned that such reviews are not only costly but also there is no warranty that the results would be complete or correct.

On June 14, 2013, in ruling in favor of Welte, the court rejected FANTEC's arguments, and held that relying on the assurances of a software supplier is not a valid defense. As a

manufacturer and distributor, FANTEC is responsible for checking its own products for GPLv2 compliance, either directly or by a competent third party, regardless of any additional cost.

Accordingly, the court found that FANTEC violated the terms of the GPLv2 because it did not provide the "complete" "corresponding" source code as required by the GPLv2, and therefore had forfeited its right to use the GPLv2-licensed iptables software. (See GPLv2, Section 4, which provides, in relevant part, "You may not copy, modify, sublicense, or distribute the Program except as expressly provided under this License. Any attempt otherwise to copy, modify, sublicense or distribute the Program is void, and will automatically terminate your rights under this License.")

The court therefore ordered FANTEC to pay Welte the € 5,100 contractual penalty, plus his attorney's fees and expenses in enforcing the GPLv2. Additionally, the court required FANTEC to turn over detailed information about the media player's sales to determine the license fees owed.

Practical Takeaways

This case serves as an important reminder that the term "open source" does not necessarily mean "free of restrictions." Companies using free and/or open source software need to properly assess and comply with the underlying FOSS licenses before

commercially exploiting any new software products in which such software is incorporated. As merely passing on binaries from an upstream vendor does not shield one from liability, companies should adopt open source license compliance programs which include thorough audits of any use of FOSS, however acquired.

(A copy of the *Welte v. Fantec* District Court decision is available in German [here](#).)

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