

Austin Intellectual Property Law Association
May 2007 Meeting Program



Some Perspectives on Patent Licensing
Language Appearing in Free & Open
Source (form) Licenses

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FOSS – GPLv2



• **Licensing System:**

- GPL = “General Public License”
- If I take a copy of the software, I can modify and redistribute **if**:

- no royalties	- source code available
- propagate the same terms	- extend terms to “other” software (“infectious”)
- must attribute changes & give notice of terms	- disclaim warranties & liabilities

- Use – “the act of running the program is not restricted”

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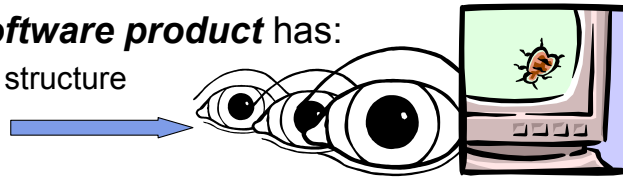
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FOSS Development & Impact

- Unique **development process** – “Peer Production” model
- Resulting **software product** has:

- unique cost structure
- reliability



Market impact

Red Hat Enterprise Linux
The new definition of the business operating system.

IBM

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FOSS Licensing Continuum

Issue	Apache or “BSD” style (www.apache.org)	OSD (www.opensource.org)	GPL (www.fsf.org)
source with redistribution?	not required	required	required
royalties?	not prohibited	prohibited	prohibited
extension or “infectious” provision?	implicitly required, effect is minor	no	yes
reapplication of same terms?	implicitly required, effect is minor	must be allowed, not required	required
Notes	Attribution-only	Certification program	First, and most controversial
Most licenses disclaim warranties and liabilities, and some have provisions for anti-discrimination & patents Click-wrap & shrink-wrap issues – often no “I accept” assent			

One popular open source project/product repository is at:
www.sourceforge.net

Camps

Free Software – not free beer



Stallman

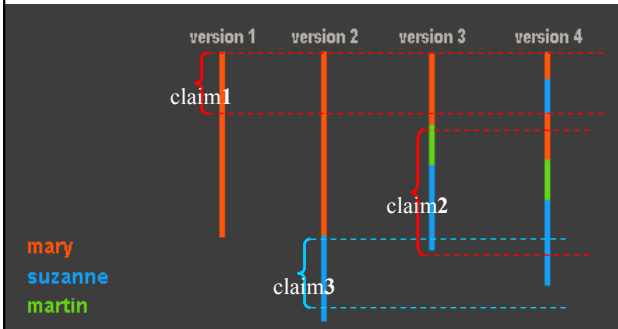
Open Software – good development



Torvalds



Incremental Development and Patent Claim Coverage



Grant* of right to infringe patent claim(s):

- currently controlled for present version
- currently controlled and controlled in the future for present version
- currently controlled for present and future versions
- currently controlled and controlled in the future for present and future versions

* triggered by what? contribution, distribution, receipt, something else?

Loss† of right to use by asserting patent claim(s):

- assert against Distributor of the FOSS Program
- assert against any Distributor or User of the FOSS Program
- assert against any Distributor or User of any FOSS software
- assert against anyone any claim(s) covering any software
- and so on . . .

† triggered by what? threaten to sue, file suit, judgment, something else?



Graphic Source:
<http://www.research.ibm.com/history/explanation.htm>



GPLv2

License	[A] Grant as Developer, Distributor or Contributor	[B] Condition of Use (sometimes with "Retaliation")	[C] Other
GPL 2.0	"implied" § 7: if a patent license would not permit royalty-free redistribution of the Program by all those who receive copies directly or indirectly through you, then the only way you could satisfy both it and this License would be to refrain entirely from distribution of the Program.		Preamble: We wish to avoid the danger that redistributors of a free program will individually obtain patent licenses . . . any patent must be licensed for everyone's free use or not licensed at all.

refrain entirely from distribution

"any patent must be licensed for everyone's free use or not licensed at all"



GPLv3, July 2006

"essential patent claims" . . .
"whether already acquired or to be acquired, that would be infringed by making, using, or selling the work"

License	[A] Grant as Developer, Distributor or Contributor	[B] Condition of Use (sometimes with "Retaliation")	[C] Other
GPL 3.0	<p>Sec. 0. A party's "essential patent claims" in a work are all patent claims that the party can give permission to practice, whether already acquired or to be acquired, that would be infringed by making, using, or selling the work.</p> <p>Sec. 11. You receive the Program with a covenant from each author and conveyor of the Program, and of any material, conveyed under this License, on which the Program is based, that the covenanting party will not assert (or cause others to assert) any of the party's essential patent claims in the material that the party conveyed, against you, arising from your exercise of rights under this License.</p> <p>If you convey a covered work, you similarly covenant to all recipients, including recipients of works based on the covered work, not to assert any of your essential patent claims in the covered work. If you convey a covered work, you also covenant not to knowingly rely on a non-substantive patent license that is not generally available and either (1) act to shield against the possible patent infringement liability that the license protects in a copy of the work, or (2) use, first, in the work, or in any other work, a technology that is not a structural, functional, or ornamental use or otherwise permitted by law.</p>	<p>Sec. 2. This License permits you to make and run privately modified versions of the Program, or have others make and run them on your behalf. However, this permission terminates, as to all such versions, if you bring suit against anyone for patent infringement of any of your essential patent claims in any such version, for making, using, selling or otherwise conveying a work based on the Program in compliance with this License.</p> <p>Sec. 7(b)(5). [added addl reqs.] [additional requirements, added to specify] terms that terminate, or allow termination of, permission of the material they cover, for a user without a software patent lawsuit (that is, a lawsuit patent) not filed or defense against the earlier filing of a software patent lawsuit, or in which the software includes some of the material, possibly in combination.</p>	<p>Preamble: Finally, every program is threatened constantly by software patents. States should not allow patents to restrict development and use of software on general-purpose computers, but in places where they do, we wish to avoid the special danger that redistributors of a free program will individually obtain patent licenses, in effect making the program proprietary. To prevent this, the GPL assures that patents cannot be used to render the program non-free.</p> <p>Sec. 12. . . . if you accept a patent license that prohibits royalty-free conveying by those who receive copies directly or indirectly through you, then the only way you could satisfy both it and this License would be to refrain entirely from conveying the Program.</p> <p>Sec. 13. If the conveying and/or use of the Program is restricted in certain countries either by patents or by copyrighted interfaces, the original copyright holder who conveys the Program may request that the recipient of the Program take additional measures to avoid infringing any such patents or copyrights.</p>

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- potentially "shield downstream users" if you rely on a patent license

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GPLv3, March 2007



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GPL 3.0 of 2007	<p>Sec. 0: A party's "essential patent claims" in a work are all patent claims owned or controlled by the party, whether already acquired or hereafter acquired, that would be infringed by some manner, permitted by this License, of making, using, or selling the work, but do not include claims that would be infringed only as a consequence of further modification of the work. For purposes of this definition, "control" includes the right to grant sublicenses in a manner consistent with the requirements of this License.</p> <p>Sec. 11: Each contributor grants you a non-exclusive, worldwide, royalty-free patent license under the contributor's essential patent claims in its contribution, to make, use, sell, offer for sale, import and otherwise run, modify and propagate the contribution.</p> <p>For purposes of the following three paragraphs, a "patent license" means a patent license, a covenant not to bring suit for patent infringement, or any other express agreement or commitment, however denominated, not to enforce a patent.</p> <p>[NONE] If you convey a covered work, knowingly relying on a patent license, . . . then you must either (1) cause the Corresponding Source to be so available, or (2) disclaim the patent license for that particular work, or (3) arrange, in a manner consistent with the requirements of this License, to extend the patent license to downstream recipients.</p>	<p>Sec. 8: . . . If you violate this License, [after notice] the copyright holder may, at any time, terminate the rights (including any patent rights) that the copyright holder has granted to you under this License.</p> <p>Sec. 10: . . . you may not initiate litigation (including a cross-claim or counterclaim in a lawsuit) alleging that any patent claim is infringed by making, using, selling, offering for sale, or importing the Program (or the contribution of any contributor).</p> <p>Sec. 11: [TWO] If, pursuant to or in connection with a single transaction or arrangement, you convey, or propagate by predicable means, a covered work, and you convey, or propagate by predicable means, a license providing freedom to use, modify or convey a specific copy of the work to any of the parties receiving the copy then the patent license you grant is extended to all recipients of the copy and works based on it.</p> <p>Nothing in this License shall be construed to exclude or limit any implied warranties, defenses or other rights that may be available to you under applicable law.</p>	<p>Preamble: . . . Finally, every program is threatened constantly by software patents. States should not allow patents to restrict development and use of software on general-purpose computers, but in places where they do, we wish to avoid the special danger that patents applied to a free program could make it effectively proprietary. To prevent this, the GPL assures that patents cannot be used to render the program non-free.</p> <p>Sec. 11: [THREE] You may not convey a covered work if you are a party to an arrangement with a third party that is in the business of distributing software, under which you make payment to the third party based on the extent of your activity of conveying the work, and under which the third party grants, to any of the parties who would receive the covered work from you, a patent license (a) in connection with copies of the covered work conveyed by you, and/or copies made from those, or (b) primarily for and in connection with specific products or compilations that contain the covered work, which licenses does not cover, prohibits the exercise of, or is conditioned on the non-exercise of any of the rights that are specifically granted to recipients of the covered work under this License, unless you entered into that arrangement with the patent holder.</p>

"essential patent claims" . . . "whether already acquired or hereafter acquired, that would be infringed by . . . making, using, or selling the work . . . but do not include claims that would be infringed only as a consequence of further modification of the work"

grant by a "contributor"

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Provisions intended to prevent future arrangements similar to the Microsoft/Novell deal



MPL 1.0



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MPL 1.0	<p>§ 2.1(b): under patents now or hereafter owned or controlled by Initial Developer, to make, have made, use and sell ("Utilize") the Original Code (or portions thereof), but solely to the extent that any such patent is reasonably necessary to enable You to Utilize the Original Code (or portions thereof) and not to any greater extent that may be necessary to Utilize further Modifications or combinations.</p> <p>2.2(a): under patents now or hereafter owned or controlled by Contributor, to Utilize the Contributor Version (or portions thereof), but solely to the extent that any such patent is reasonably necessary to enable You to Utilize the Contributor Version (or portions thereof) and not to any greater extent that may be necessary to Utilize further Modifications or combinations.</p>	<p>§ 3.1: The Modifications which You create or to which You contribute are governed by the terms of this License, including without limitation Section 2.2 . . .</p>	<p>§ 3.4(a): If You have knowledge that a party claims an intellectual property right in particular functionality or code (or its utilization under this License), you must include a text file with the source code distribution titled "LEGAL" which describes the claim in sufficient detail that a recipient will know whom to contact.</p>

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