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New Version of General Public License Close to Adoption

Members of the open source community anticipate that the Free Software Foundation (the "FSF") will release a final draft of version 3.0 of the General Public License ("GPLv3") on June 29, 2007. The current version of the GPL ("GPLv2") is the most widely used free and open source software license in the world, with some reports estimating that as much as 65 percent of the open source code available is governed by the license. Perhaps most importantly, the GNU-Linux operating system and the Linux Kernel itself are governed by GPLv2. While it is impossible to predict with certainty, no major changes are anticipated to the "last call" draft released by the FSF on May 31.

The wide application of the GPL and the significant changes in GPLv3 make this an important development for users and distributors of open source software. Users that currently have open and mixed source management programs will have to update those programs to include GPLv3 and make a number of risk and implementation decisions regarding code governed by the new license. Authors and distributors of GPLv2 code will be faced with the decision of whether to upgrade to the new version. While GPLv3 needs to be addressed in a timely fashion, code currently licensed under GPLv2 will remain under that license until it is migrated to GPLv3 by the copyright holder (if it is migrated); thus,

GPLv3 most likely represents an evolution in open source licensing and management issues, rather than a revolution.

We were deeply involved in the FSF's efforts to redraft the license, having served on the FSF Committee representing large end users during the drafting process. We have also provided extensive advice to numerous large end users and distributors of GPLd code during the GPLv3 process.

This advisory provides a brief synopsis of a few of the more notable changes anticipated in GPLv3. We also intend to host a webinar after the final draft of GPLv3 is released.

(1) Internationalization and License Compatibility

Two of the primary goals of the GPLv3 process have been largely accomplished. The first is that a number of issues that were raised by use and distribution of GPLd code on an international basis have been addressed. The FSF achieved its second goal by making the license much more compatible with other open source licenses than was GPLv2. Section 7 of the license permits specific "Additional Permissions" that may be added to the license and includes several other specifically approved provisions that users might incorporate to improve compatibility between the GPL and other open source

licenses. Most importantly, GPLv3 will enable full compatibility with Apache 2.0. This will reduce the complication and headaches of Apache incompatibility that many previously encountered.

(2) “Tivo-ization,” User Products and DRM

GPLv3 also addresses what has come to be popularly called “tivo-ization.”¹ Tivo-ization occurs when a distributor/manufacturer of a consumer product that contains GPL covered software blocks the operation of that product if the product’s software is modified (of course, modification of the source code via the copyleft mechanism is the fundamental cornerstone of the GPL). GPLv3 requires the distributor/manufacturer of consumer products to allow the recipient to modify GPLv3 software (as is the case with all code licensed under the GPL) and provide “Installation Information” necessary to install and run the modified code on the device. There are limitations on this requirement, however; most notably, the distributor/manufacturer may deny network access if the modification materially and adversely affects the operation of a network, and the requirement does not apply at all if the software on the device cannot be subsequently modified by the user or manufacturer. GPLv3 also addresses certain digital rights management issues by making technical changes regarding the anti-circumvention provisions of the Digital Millennium Copyright Act and similar legislation.

¹ Tivo, the digital video recording device, runs on the Linux operating system and has created quite a bit of consternation in the open source world by limiting attempts by programmers to install modifications for the OS, somehow changing or expanding the capabilities of the TiVo in ways not intended by the manufacturer.

Undoubtedly, this provision will receive significant scrutiny from content providers, hardware manufacturers and those that want to “hack” software residing on that hardware.

(3) Conveying to Outside Contractors

GPLv3 provides explicit permission for a user to provide a copy of its modified software to a contractor exclusively for that contractor to modify it further, or run it, on that user’s behalf. The contractor is permitted to keep the user’s copyrighted changes to the GPL-covered program confidential; however, previously GPLd components of the program obtained from other contributors remain fully subject to the GPL and the “copyleft” provisions of the license. The contractor could be any type of independent contractor, but obviously includes a code developer and, just as importantly, an outsourcing provider operating a data center or other computing facilities on behalf of end users. This issue was not addressed in GPLv2 and provides a significant clarification for implementation of the license by large end users and their service providers.

(4) Patents

In what will clearly be one of the most closely examined provisions of the new license, GPLv3 includes an express grant of a patent license; the patent license in GPLv2 was implicit only. The details of this license grant, including its scope and other specific terms, could have significant implications for patent portfolios, future patent cross licenses and other patent issues raised by GPLv3. As is the case with many open source licenses, GPLv3 includes a version of a patent enforcement provision triggered if a licensee later

seeks to sue others in the open source development “chain.” Patent-related provisions received, by far, the most time and attention during the GPLv3 development process and it is likely that they will continue to do so as the license is integrated in open source distribution, management, contribution and development programs.

(5) Novell-Microsoft Issues

In November 2006, Microsoft entered into a landscape-changing agreement with Novell, pursuant to which Microsoft agreed not to assert its patents against Novell’s SUSE Linux customers in connection with their use of the Linux operating system. This is an intriguing development in the open source world in its own right, and it did not go unnoticed by the FSF. GPLv3 includes two provisions addressing the Novell-Microsoft Agreement. While somewhat of a simplification, the first provision attempts to extend patent protection granted to any user of GPLv3 code to all users of GPLv3 code. This, of course, could have the impact of extending Microsoft’s patent “protection” granted to users of SUSE Linux to the entire GPLv3 community under certain circumstances. The second provision attempts to prevent any future agreements similar to the Novell-Microsoft Agreement by barring so-called “discriminatory patent license[s].”

The released draft of GPLv3 occurred just weeks after Microsoft made a general allegation that Linux and other open source software infringes 235 of its patents.² Specifically, Microsoft claims that the Linux kernel infringes 42 patents, the Linux graphical user interface

² Roger Parlog, *Microsoft takes on the free world*, *Fortune*, May 14, 2007, at 76.

infringes 65 patents, the Open Office suite infringes 45 patents, various open source email programs infringe 15 patents and other FOSS programs infringe 68 patents.³ Microsoft was not deterred by these provisions in the last call draft of GPLv3, having reportedly entered into similar patent-sharing and interoperability agreements with Xandros and Linspire (formerly "Lindows") since the release of that draft.⁴ Additionally,

³ Publicly filed, but redacted versions of the Microsoft/Novell agreement, reveal that it expressly excludes patent protection for widely used open source programs, including OpenOffice, Wine, OpenXchange, and StarOffice. Just as importantly, patent protection is excluded for office productivity applications and new features and functions related to video games, business applications, mail transfer agents, and unified communications. It is not a "patent pass" from Microsoft, nor should it be interpreted as such.

⁴ Peter Galli, *Microsoft Gives Xandros Linux Users Patent Protection*, <http://www.eweek.com/article2/0,1895,2140955,00.asp>; Ina Freed, *Microsoft signs technology pact with Linspire*, http://news.com.com/Microsoft+sigs+technology+pact+with+Linspire/2100-1012_3-6190846.html

Microsoft entered into patent cross-licensing agreements with Samsung and LG Electronics; both companies have music players, digital video recorders and other devices utilizing open source software.⁵ Without doubt, there will be many more developments and much more discussion regarding Microsoft's patent portfolio and how it might relate to open source software programs governed by the GPL and other open source licenses.

Conclusion

While GPLv2 was not perfect, it had been analyzed and its relative strengths and weaknesses from a legal perspective were well known to those who work in the area regularly. While GPLv3 also has its relative strengths and weaknesses from a legal perspective, it will

⁵ *Microsoft, LG Set Pact on Cross-Licensing*, *The Wall Street Journal*, June 8, 2007, at B6; Ina Freed, *Microsoft, Samsung in patent swap deal*, http://news.com.com/Microsoft,+Samsung+in+patent+swap+deal/2100-1014_3-6177381.html

take some time until all of the ramifications of the license for users, developers and distributors are fully understood and implemented.

Hunton & Williams is able to assist you if you or your company have questions or need assistance in open source and intellectual property issues generally and, in particular, in preparing for GPLv3 and the potential issues that may arise from it. We will circulate further details regarding our webinar on GPLv3 when the final draft is released.