BLUG

Open Source Legal Update

April 9, 2009

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"So doesn't this mean that the GPL is the new BSD license and that Google is the new Microsoft ?"

Bradley Kuhn

Former executive director of the FSF

~~*Open Source*~~ *Software?*

What is

"Open Source Software?"

Licensed software

protected by copyright laws

What is Open Source Software?

The 70s and 80s - Free Software is Born

> The word "free" *does not refer to price; it refers to freedom*. The *freedom to copy* a program and *redistribute* it to your neighbors, so that they can use it as well as you. The *freedom to change* a program, so that you can control it instead of it controlling you; for this, the *source code must be made available* to you.

- Free Software “Definition” embodied in 4 basic freedoms
  - 0 - Run the program, for any purpose
  - 1 - Study how the program works, and adapt it to your needs
  - 2 - Redistribute copies so you can help your neighbor
  - 3 - Improve the program, and release your improvements to the public, so that the whole community benefits
- Free software becomes synonymous with software that
  - Can be used, studied and modified without restriction, and
  - Can be redistributed in modified or unmodified form without restriction (or with minimal restrictions)

  But, only if other recipients can do the same things

What is Open Source Software?

The 70s and 80s - Free Software is Born

"You should think of 'free' as in 'free speech,' not 'free' as in 'free beer'."

Richard Stallman

What is Open Source Software?

The 90s – The Rise of Open Source Software

- In 1991, Linux operating system initially released
- In 1998, Netscape releases the Netscape Communicator as free software
  - Brings the benefits of free software to the software industry
  - Emphasizes the business potential of the sharing of source code without the ideological overtones of the Free Software Foundation (FSF)
- Open Source Initiative (OSI) formed (in response to the overly activist/ideological stance of Richard Stallman and the FSF)
  - Seeks to bring the benefits of free software to the commercial software industry by advocating the use of “open source” software
  - Adapts and repurposes the FSD (and other documents) to form the Open Source Definition to define the principles of “open source” software

What is Open Source Software?

"FOSS"

Free and Open Source Software

What is Open Source Software?

The Open Source Definition

- The “Open Source Definition” (OSD) articulates the principles a license must meet to be “open source”
  - Availability of source code
  - Free redistribution
  - Availability of “derived works”
  - Integrity of the author’s source code
  - No discrimination against persons or groups
  - No discrimination against fields of endeavor
  - License must travel with software
  - License not dependent on particular software distribution
  - License does not restrict other software
  - License technology neutral
- Used by the OSI to define licenses as “open source”
- OSI maintains a certification program to approve licenses as compliant with the OSD

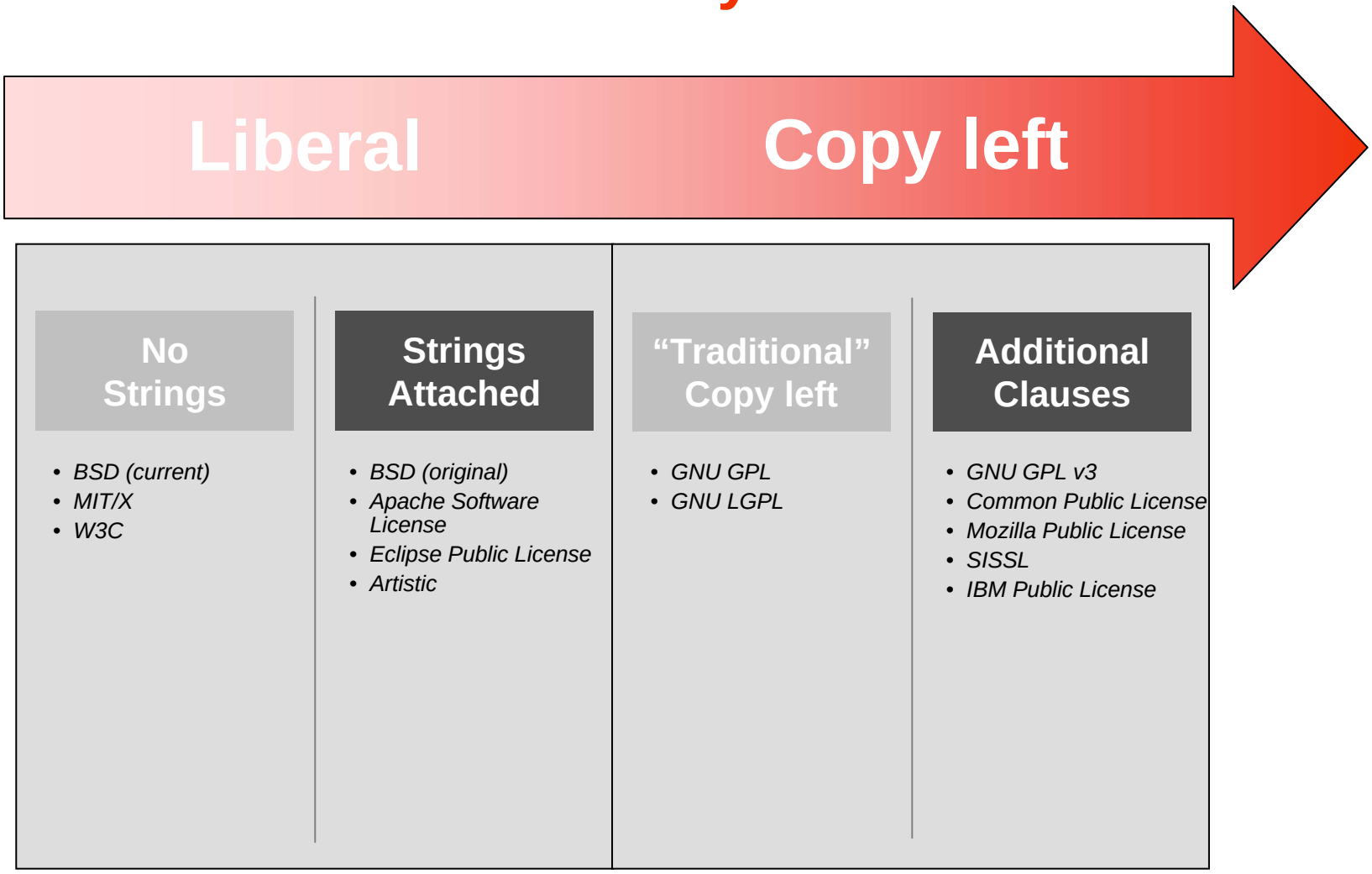
What is Open Source Software?

OSI-Approved Licenses

- Over 70 OSI-approved licenses
  - Big names:
    - GNU General Public License (GPL)
    - GNU Lesser General Public License (LGPL)
  - Other common OSS licenses: BSD, MIT, Apache, Mozilla, Common Public
- All implement the OSD, each with its own specific terms
- One definition, many *different* licenses
- Note that many other un-approved “open source” licenses exist
  - Many are based in part on OSI-approved licenses
  - Some even refer to themselves as “open source”
  - But, no guarantee that they comply with the terms of the OSD

Understanding Open Source Licenses

Standard Definition – Many Licenses



Understanding Open Source Licenses

Open source software is
licensed software

Open source licenses
make the software "open source"

Understanding Open Source Licenses

Understand the similarities

Understand the differences

Understand why they matter

Understanding Open Source Licenses

Open Source vs. Proprietary

OSS

- License flows with code
  - Unilateral permission
  - No negotiation
  - No affirmative assent to terms
- Use “Permissions”
  - Source and object code forms
  - Copy, modify, and distribute
  - May allow other end users to do the same
- Permissions do have boundaries
- Limited Licensor Obligations
  - No warranties
  - No updates/upgrades
  - No support obligations
  - No infringement indemnification

Proprietary

- “Arms-length” agreement
  - “Meeting of the minds”
  - Often negotiated
  - Affirmative assent (sign, click, etc.)
- Use “Restrictions”
  - Object code only
  - Limited copying and use
  - No reverse engineering
  - No distribution
- Robust Licensor Obligations
  - Warranties
  - Updates/upgrades
  - Support and maintenance
  - Infringement indemnification

Open Source and Copyright

Open source software licensing is
not anti-copyright

Open source software licensing is
dependent on copyright laws

Open Source and Copyright

“Copyleft”

All Rights Reversed

Copyright

All rights reserved

Open Source and Copyright

Open Source Evolved With Copyright Law

- Copyright law has evolved significantly over time
  - Decrease in the barriers to obtain copyright
  - Increase in the scope and duration of copyright

Past Copyright Law	Current Copyright Law
Copyright Act of 1909	Copyright Act of 1976
• Copyright attached only after following requirements for: – Notice – Publication • Failure to comply meant dedication to public domain • 28 year term (with chance for 28 year renewal)	• Copyright attaches when a work is “fixed in a tangible medium of expression” • Full publication not required • No chance of work falling into the public domain • Life of the author plus 70 years (and counting)

Open Source and Copyright

Open Source Relies on Copyright Law

- Open source software licensing has arisen (at least in part) as a response to this evolution
- Open source licensing relies on the ability of a copyright owner to choose how to enforce (or not enforce) their copyright
- Each open source license *is intended to act* as a set of permissions (and restrictions) granted by a copyright owner under their copyright
- Like any license (or contract), open source licenses have limits
- Unlike proprietary licenses, these limits generally allow for more "open" or "free" use of the software
- Each open source license implements the Open Source Definition (some more closely than others)

Jacobsen v. Katzer

Jacobsen v. Katzer

History

- Involves model railroad software developed by Jacobsen and licensed under the (rarely used) Artistic License
- Originally filed as a patent infringement case in U.S. District Court in San Francisco (Case No.: 3:06-cv-01905-JSW)
- Katzer alleged that Jacobsen's "DecoderPro" model railroad software infringed U.S. Patent No. 6,530,329 (for a "model train control system")
- Jacobsen responded by seeking a declaratory judgment that the Katzer patent is invalid
  - Significant portions of the software covered by Katzer's patent (and marketed by Katzer under the name "Decoder Commander") is taken from Jacobsen's own DecoderPro software
  - Katzer's patent is thus invalid on the basis of fraud and obviousness

Jacobsen v. Katzer

History

- Jacobsen later amended to add a copyright infringement claim
  - DecoderPro is licensed by Jacobsen under the Artistic License (a longstanding but rarely used open source license)
  - The Artistic License requires that
    - All original copyright notices and disclaimers on the software received under the license be preserved in any distribution of software
    - Any changes made by the licensee be distinguished from the software originally received under the license
  - Asserted that Katzer's use of portions of DecoderPro in Decoder Commander was not in compliance with the Artistic License for failure to comply with the applicable attribution requirements
  - Reasoned that Katzer's action thus constitute copyright infringement
- Jacobsen moved for a preliminary injunction to enjoin Katzer from infringing the copyright in DecoderPro

Jacobsen v. Katzer

District Court Decision

- Court denied the motion in a decision issued on August 17, 2007
  - A license effectively constitutes a waiver of the right to sue for infringement, so long as the licensee is within the *scope of the license*
  - The Artistic License permits potential licensees to copy, distribute and create derivative works from software covered by the license
  - Katzer therefore did not exceed the *scope of the license* by copying and redistributing the software
  - Instead, Katzer's failure to include the required attributions constituted a breach of a *separate covenant on the license*
    - A restriction on the scope preserves the one-way permission granted in a license
    - A covenant is treated as a reciprocal promise (leading to a contract)
  - Attribution requirements are separate covenants
  - Violation gives rise to breach of contract, but not copyright infringement
- Injunction denied because Jacobsen cannot demonstrate a likelihood of success on the merits in a claim for copyright infringement

Jacobsen v. Katzer

Wrongly Decided?

- Case surprised many who had assumed that the terms of open source licenses should be legally construed as licenses
  - Failure to comply with the license would thus constitute a violation of the scope of the license and a claim for copyright infringement
  - Remedies would include injunction
- Court instead found that open source licenses can form contracts
  - Giving rise to actions for breach of contract
  - Remedies, however, are typically limited to monetary damages for breach of contract
- Jacobsen appealed the decision to the Court of Appeals for the Federal Circuit (CAFC)

Jacobsen v. Katzer

CAFC Decision

- CAFC reversed and remanded the District Court in a decision issued on August 13, 2008 (Docket No.: 2008-1001)
- The "clear language" of the Artistic License creates *conditions, not covenants*, to protect the rights of the licensor
  - Includes the provisions regarding the copying, distribution, and modification of the software, as well as the attribution provisions
  - Creates "significant and direct" economic benefit to the licensor under the Artistic License
  - Is necessary to accomplish the objectives of the licensor and must be enforced
- Any other interpretation would render the language of the license "meaningless" by foreclosing the ability to enforce those provisions through injunctive relief

Jacobsen v. Katzer

CAFC Decision

> "Copyright licenses are designed to support the right to exclude: monetary damages alone do not support or enforce that right. The choice to exact consideration in the form of compliance with the open source requirements of disclosure and explanation of changes rather than as a dollar-denominated fee, is entitled to no less legal recognition."

- Decision is broadly worded
- Likely applicable to other open source licenses (GPL, LGPL, etc.) and even to non-open source licenses
- Viewed as a ringing endorsement of open source licenses in general
- Opens the door for open source licensors to bring claims of copyright infringement as a remedy for license violations
  - Injunctive relief
  - Statutory damages
  - Attorney's fees

Jacobsen v. Katzer

Back to the District Court

- District Court denied Jacobsen a preliminary injunction in a decision issued on January 5, 2009
- Applies new higher standard for proof of damages to grant a preliminary injunction
  - Prior law provided that a demonstration of a likelihood of success on the merits in a copyright claim gave rise to a presumption of irreparable harm
  - No such presumption under recent U.S. Supreme Court decision
  - Jacobsen must establish that he is "likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374 (2008)

Jacobsen v. Katzer

Back to the District Court

- Finds that while Jacobsen made legal arguments regarding alleged harm (e.g., delays, inefficiency and lost time in development), he failed in offering evidence
  - No evidence of specific and actual harm suffered as a result of the alleged copyright infringement (or of imminent future harm)
  - Failed to identify (with the required particularity) the extent of his copyright ownership over the disputed material
    - Files in question incorporate material from many manufacturers' specifications (in addition to specific material owned by Katzer)
    - Unclear how Court would fashion an injunction narrowly tailored to enjoin only those allegedly infringing uses of Jacobsen's copyrighted material
- Dismissed breach of contract claim for failure to state a cause of action
  - Alleged damages do not arise from a breach of the Artistic License
  - Breach of contract claim overlaps copyright infringement claim (preempted)
  - Granted leave to amend

Jacobsen v. Katzer

Takeaways

- Clear that the standard for injunctive relief is higher than it has been in the past
- Specific details were key in this decision
  - Presentation of evidence
  - Proper pleading
  - Education of the judge (?)
- Interesting twist: Applicability of the DMCA to open source
  - Claim for deletion of “Copyright Management Information”
  - Could prove useful to open source licensors given the popularity of attribution requirements in open source licenses

Patents and Open Source

Open Source Software is

Protected by patent laws

PUBPAT

Patent Infringement

Patent "Aggression"

FREE SOFTWARE FOUNDATION

Patent Aggression

Patents Are Nothing New to Open Source

- 2004 study by Open Source Risk Management revealed at least 283 patents implicated by Linux

Results of First-Ever Linux Patent Review Announced, Patent Insurance Offered by Open Source Risk Management

Review of Linux Kernel Reveals No Infringement of Court-Validated Software Patents; 283 Issued But Not Yet Court-Validated Patents a Conceivable Risk

- At least 27 of those patents held by Microsoft

Patent Aggression

Patents Are Nothing New to Open Source

- November 2, 2006 - Novell and Microsoft announce their now historic series of collaboration/cooperation agreements

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Update: Microsoft, Novell strike Linux deal

Microsoft will support SUSE Linux on machines that run Windows

Elizabeth Montalbano Today's Top Stories ▸ or Other Operating Systems Stories ▸

November 02, 2006 (IDG News Service) -- In a significant acknowledgment of the viability of Linux as a desktop operating system, Microsoft Corp. today announced a deal with Novell Inc. to support SUSE Linux on machines that run Windows.

Microsoft will offer sales support for SUSE Linux and also co-develop technologies with Novell to make it easier for users to run both SUSE Linux and Microsoft Windows on their computers.

As expected, Microsoft CEO Steve Ballmer announced the news in a San Francisco press conference. As part of the deal, Microsoft also will agree not to assert rights over patents to any software technology that might be incorporated into SUSE Linux.

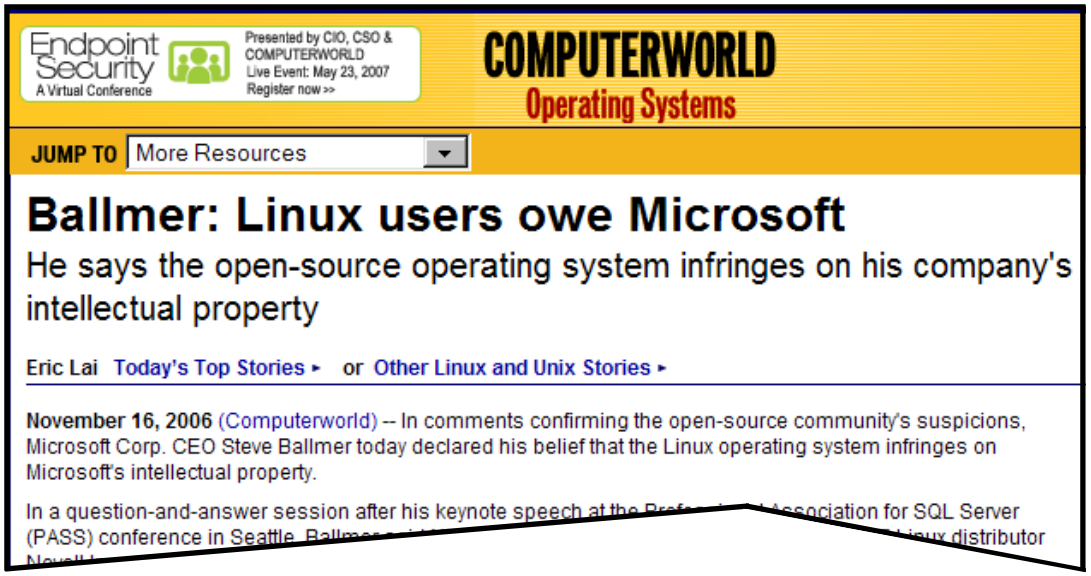
Microsoft has been relenting lately on its tight hold on patents through a progr...

- Among other terms, the agreements call for Microsoft not to assert its patent rights against users of SUSE Linux
- Agreements create instant controversy in the open source world

Patent Aggression

Patents Are Nothing New to Open Source

- Shortly after the Novell deal, Microsoft's Steve Ballmer sounds-off on patents and OSS



- Linux infringes Microsoft "intellectual property"
- Microsoft wants to get the "appropriate economic return" for its innovation

Patent Aggression

Patents Are Nothing New to Open Source

- Later in November 2006, rumors surface of a failed deal with leading Linux provider Red Hat

- To date Red Hat and has refused to play ball
- Rumors circulate of Microsoft singing deals with individual OSS users

Patent Aggression

Patents Are Nothing New to Open Source

- Then, in May of 2007, Microsoft levels accusations of patent infringement against Linux and other major OSS projects

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Microsoft takes on the free world

Microsoft claims that free software like Linux, which runs a big chunk of corporate America, violates 235 of its patents. It wants royalties from distributors and users. Users like you, maybe. Fortune's Roger Parloff reports.

By Roger Parloff, Fortune senior editor
May 14 2007: 9:35 AM EDT

FORTUNE

(Fortune Magazine) -- Free software is great, and corporate America loves it. It's often high-quality stuff that can be downloaded free off the Internet and then copied at will. It's versatile - it can be customized to perform almost any large-scale computing task - and it's blessedly crash-resistant.

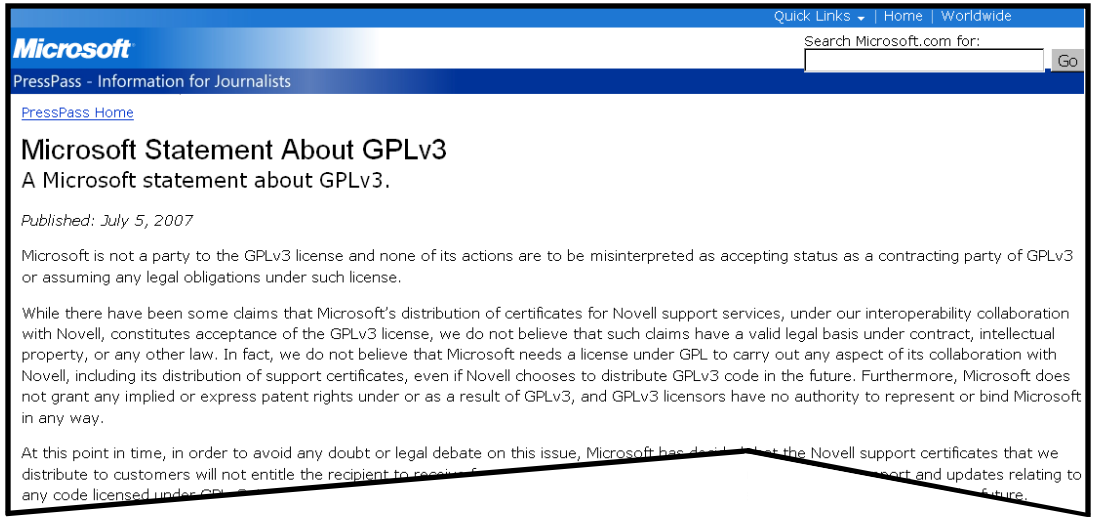
A broad community of developers, from individuals to l… …onstantly working to improve it and introd… …tically:

- To date, Microsoft has refused to identify the 235 patents
- Claims greeted with much skepticism

Patent Aggression

Patents Are Nothing New to Open Source

- July 5, 2007 - Microsoft issues a press release stating that it is not a party to GPLv3
  - Does not need a license under GPLv3 to carry out the Novell deal
  - Support for software licensed under GPLv3 is excluded from the scope of the Novell deal



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Microsoft Statement About GPLv3

A Microsoft statement about GPLv3.

Published: July 5, 2007

Microsoft is not a party to the GPLv3 license and none of its actions are to be misinterpreted as accepting status as a contracting party of GPLv3 or assuming any legal obligations under such license.

While there have been some claims that Microsoft's distribution of certificates for Novell support services, under our interoperability collaboration with Novell, constitutes acceptance of the GPLv3 license, we do not believe that such claims have a valid legal basis under contract, intellectual property, or any other law. In fact, we do not believe that Microsoft needs a license under GPL to carry out any aspect of its collaboration with Novell, including its distribution of support certificates, even if Novell chooses to distribute GPLv3 code in the future. Furthermore, Microsoft does not grant any implied or express patent rights under or as a result of GPLv3, and GPLv3 licensors have no authority to represent or bind Microsoft in any way.

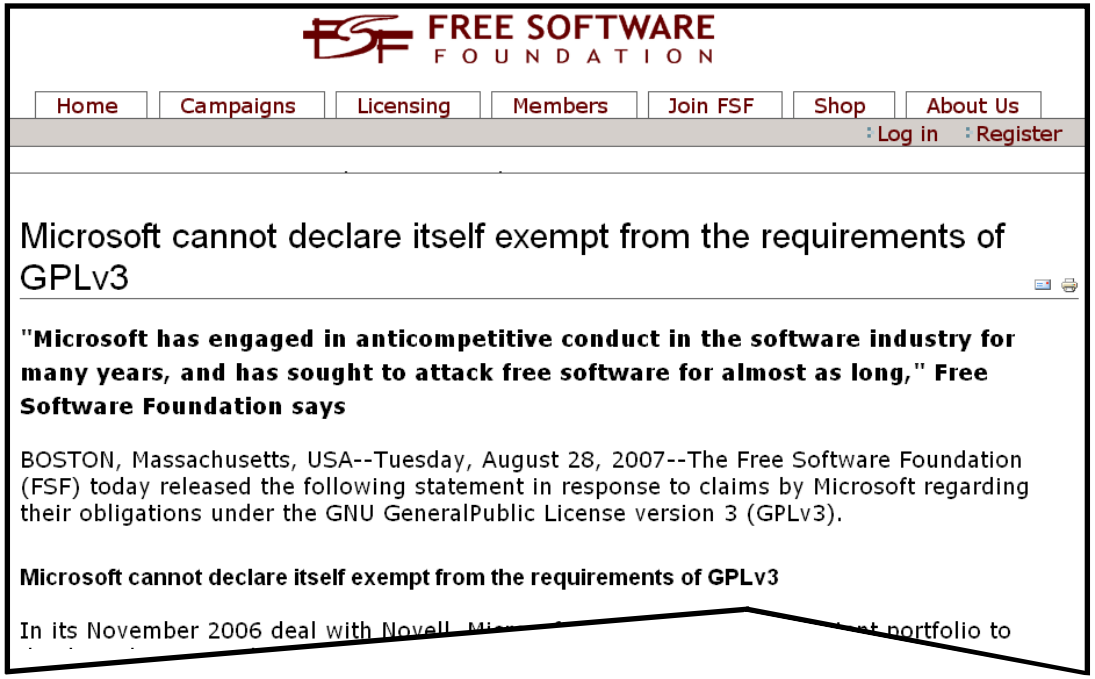
At this point in time, in order to avoid any doubt or legal debate on this issue, Microsoft has [illegible] that the Novell support certificates that we distribute to customers will not entitle the recipient to receive [illegible] port and updates relating to any code licensed under GPL [illegible] future.

- Microsoft's claims are greeted with much skepticism

Patent Aggression

Patents Are Nothing New to Open Source

- August 28, 2007 - The FSF officially fire back
- Issued a press release challenging Microsoft's statements around the applicability of GPLv3



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Microsoft cannot declare itself exempt from the requirements of GPLv3

"Microsoft has engaged in anticompetitive conduct in the software industry for many years, and has sought to attack free software for almost as long," Free Software Foundation says

BOSTON, Massachusetts, USA--Tuesday, August 28, 2007--The Free Software Foundation (FSF) today released the following statement in response to claims by Microsoft regarding their obligations under the GNU GeneralPublic License version 3 (GPLv3).

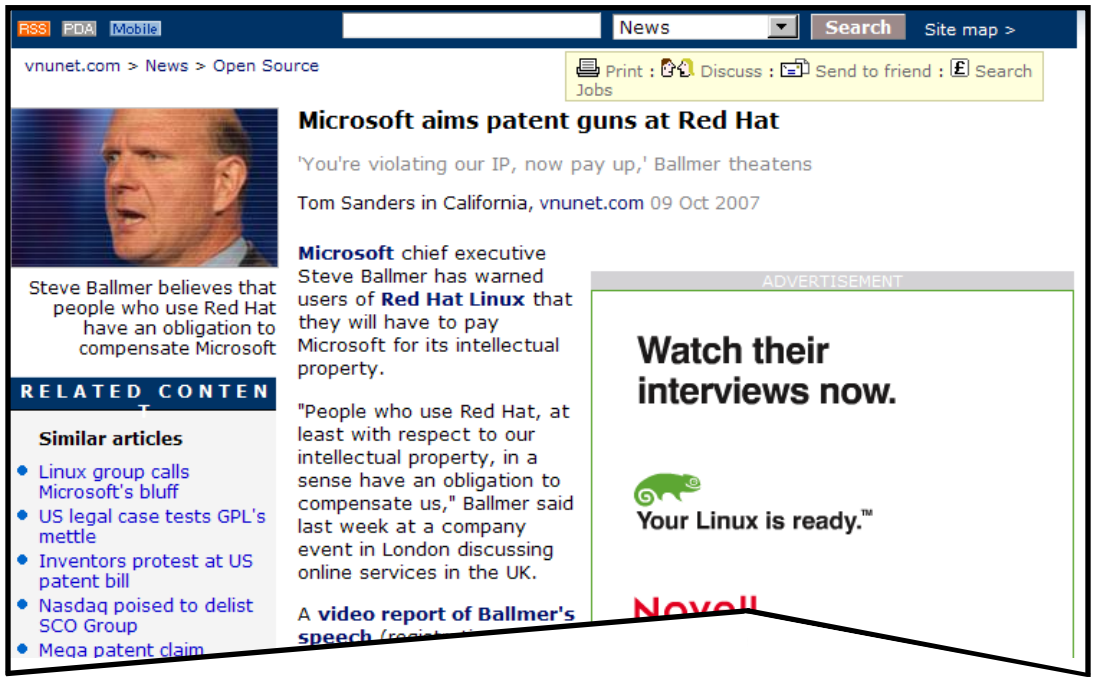
Microsoft cannot declare itself exempt from the requirements of GPLv3

In its November 2006 deal with Novell, Mic[illegible] portfolio to

Patent Aggression

Patents Are Nothing New to Open Source

- Late 2007, Microsoft sounds off against Red Hat
- Users of Red Hat Linux “will have to pay Microsoft” for its intellectual property



Patent Aggression

Patents Are Nothing New to Open Source

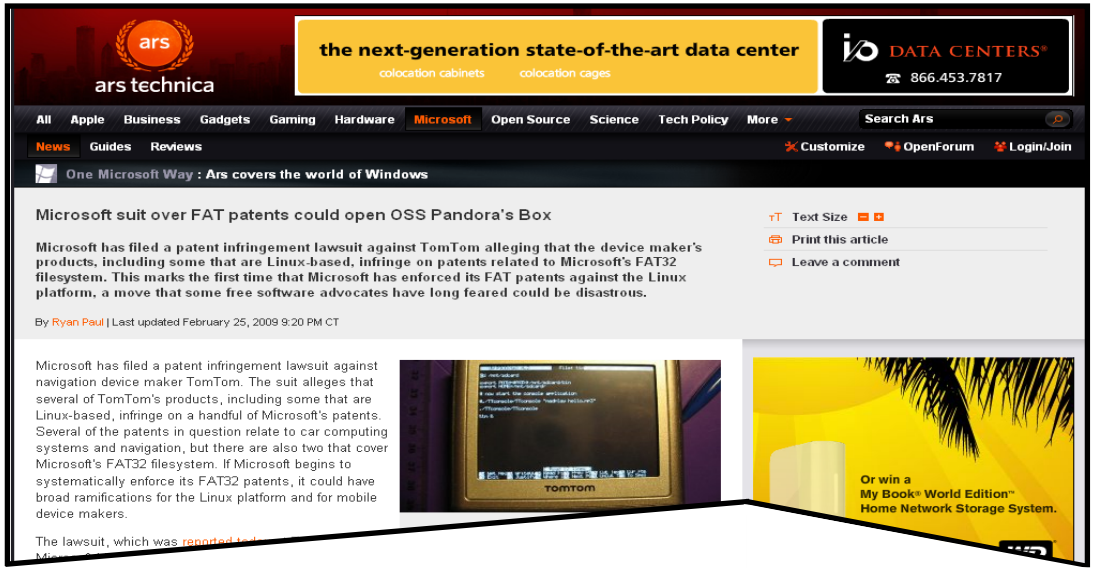
- In the meantime, Microsoft has (not all that quietly) built an increasingly broad patent licensing and cross-licensing program

- Unknown how many of these deals include patents implicating Linux or other open source

Patent Aggression

Patents Are Nothing New to Open Source

- February 2009, Microsoft files suit against GPS device maker TomTom alleging infringement of eight patents

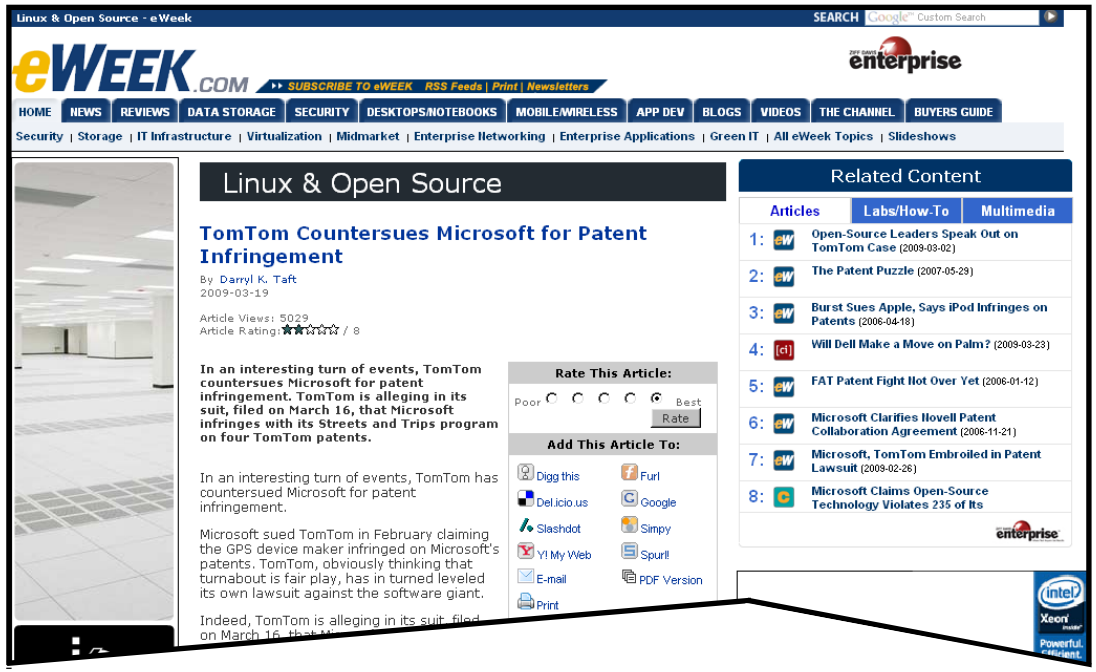


- Among them, patent numbers 5,579,517 and 5,758,352 for techniques for implementing a “common name space for long and short filenames”
- Covering Microsoft's FAT32 file system
- Microsoft claims the suit is not a direct attack on Linux

Patent Aggression

Patents Are Nothing New to Open Source

- March 2009, TomTom countersues Microsoft
- Alleging infringement of four TomTom patents related to TomTom's Streets and Trips program



Patent Aggression

Patents Are Nothing New to Open Source

- TomTom also joins the Open Innovation Network (OIN)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TomTom joins Linux protection group

Tags: TomTom, Linux, UNIX, Open Source, Operating Systems...

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By David Meyer ZDNet.co.uk

Posted on ZDNet News: Mar 23, 2009 11:50:18 AM

TomTom has joined the Open Invention Network, a company that was formed to protect Linux, as a licensee.

The satnav maker announced it had signed up to the OIN on Monday. By joining, it gained access to more than 275 patents and patent applications. In return, it has to open up its own intellectual property to other OIN members, royalty-free.

"As we look to enable the Linux Ecosyst

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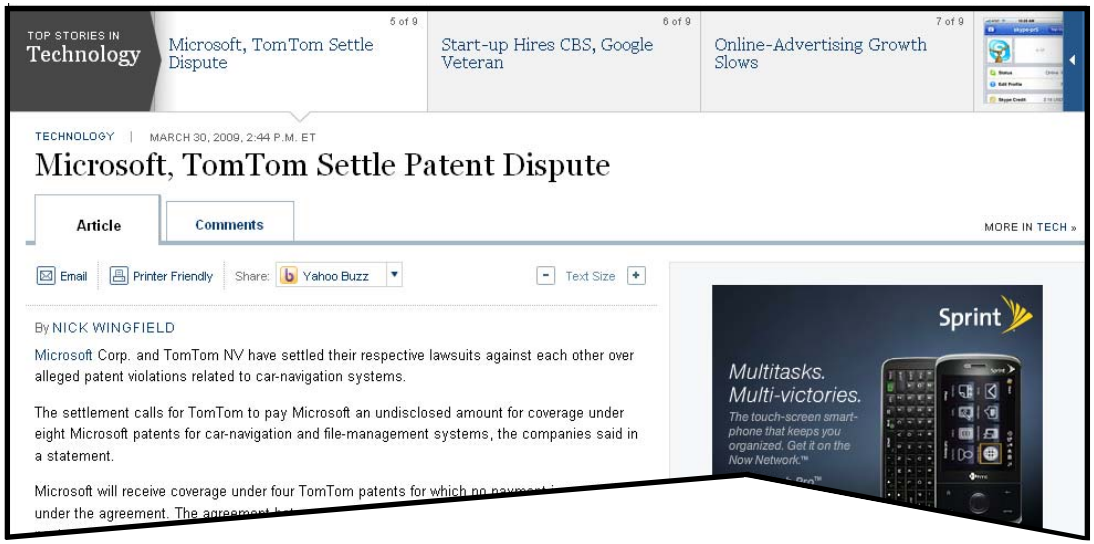
- OIN is a patent-sharing coalition including IBM, Sony, Philips, Novell, Red Hat, Google, Oracle, and others
- Members agree to not assert their own patents against the Linux software "ecosystem"
- In return, receive royalty-free licenses for patents contributed to the OIN by other members

Patent Aggression

Patents Are Nothing New to Open Source

- March 30, 2009 – Microsoft and TomTom settle all issues



- Specific financial terms not disclosed
- TomTom to pay Microsoft an undisclosed amount for coverage under eight Microsoft patents for car-navigation and file-management systems
- Microsoft to receive coverage under four TomTom patents (no payment required by Microsoft)

Patent Aggression

Patents Are Nothing New to Open Source

- Five-year term
- Covers both past and future U.S. sales of the relevant products
- Purports to be open source compliant:

  The agreement includes patent coverage for Microsoft's three file management systems patents provided in a manner that is fully compliant with TomTom's obligations under the General Public License Version 2 (GPLv2).

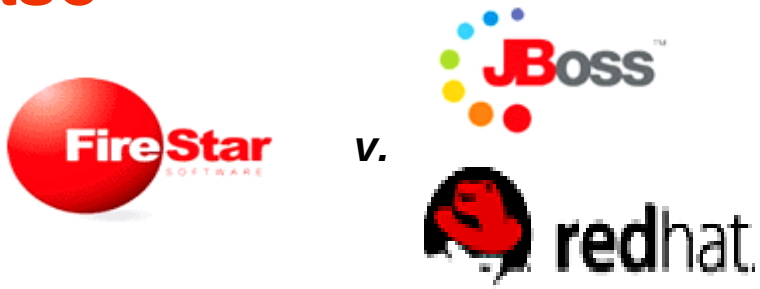
- TomTom will drop FAT-patented parts of its products:

  TomTom will remove from its products the functionality related to two file management system patents (the 'FAT LFN patents'), which enables efficient naming, organizing, storing and accessing of file data. TomTom will remove this functionality within two years, and the agreement provides for coverage directly to TomTom's end customers under these patents during that time.

- Microsoft is passing patent protection to TomTom's 'end customers'
- Similar to the scheme of the Microsoft-Novell patent agreement
- Suit may be over, but issues live on. . .

Patent Aggression

The Firestar Case



Firestar Software, Inc v. Red Hat, Inc et al
(Case No.: 2:06cv258)

- Firestar sued Red Hat on June 28, 2006
- Eastern District of Texas
- Alleged that the JBoss Hibernate 3.0 technology infringed U.S. Patent No. 6,101,502 directed to “a method of interfacing an object oriented software application with a relational database.”
- Patent was later assigned to patent holding company DataTern (and its parent company Amphion Innovations)
- First patent infringement suit targeting an open source project
- Settlement reached before much activity took place

Patent Aggression

The Firestar Settlement

- Settlement terms are now public: http://www.redhat.com/f/pdf/blog/patent_settlement_agreement.pdf
- Very broad:
  - All software licensed under the Red Hat brand (whether developed by Red Hat or third parties)
  - Derivative works of Red Hat branded products and combinations of software including Red Hat branded products
  - Upstream developers as well as predecessor products of Red Hat branded products
  - Distributors, customers, and everyone
  - All patents owned by DataTern and Amphion
- Model for open source patent infringement settlements?

Patent Aggression

Other Activity Still Ongoing

IP Innovation, LLC et al v. Red Hat Inc. et al
(Case No.: 2:2007cv00447)

- Both plaintiffs are subsidiaries of Acacia Research
- Suits filed on October 12, 2007 in the Eastern District of Texas
- Directed against the desktop and server versions of the Linux operating system distributed by Red Hat and Novell
- Based on U.S. patent No. 5,072,412 for a “User Interface with Multiple Workspaces for Sharing Display System Objects” issued on Dec. 10, 1991 (also named two other similar patents).
- Patents originally owned by Xerox PARC, now assigned to Acacia
- First patent infringement suits directly targeting Linux

Thank You.

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Attorneys at Law

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