

GPL Version 3: Posing A Threat To Interoperability, Open Innovation, And Customer Choice

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The information technology ("IT") industry is experiencing the highest level of interoperability in its history. A key path to achieving interoperability is often the collaboration among otherwise ardent competitors. This unprecedented level of cooperation has led to significant technological developments and innovations that serve customers well. Unfortunately, the latest proposed revision to the "General Public License" ("GPL"), the principal license under which hundreds of open source software ("OSS") products are distributed, contains certain provisions that, if ultimately adopted, would threaten to upend such interoperability-enhancing collaborations and chill innovation and customer choice. Hopefully, the authors of this proposed revision – dubbed "GPLv3" – will reconsider this close-minded approach to promoting open source software.

The IT Industry Is Operating At A High Level Of Interoperability

At its infancy a little more than two decades ago, the IT industry was almost completely vertically integrated. While there was a choice of vendors, once one was selected, there was little option but to rely upon that one vendor to meet most, if not all, of a customer's IT needs. In these early days, technical interoperability – the ability of disparate IT products and services to exchange and use data and information in order to function together in a networked environment, *i.e.*, to "talk"¹ – was achievable, but generally only by deploying an end-to-end solution from the same company *e.g.*, DEC, IBM, Wang, Digital, etc. Times have changed. Today, IT managers and procurement officers are able to pursue the best solution by acquiring hardware and software products from any of a number of vendors based on the specific needs of the project. Fortunately, the IT industry has risen to the challenge to maintain and increase the level of interoperability among heterogeneous products.

Vendors achieve interoperability in various complementary ways, including by designing products that meet customer interoperability needs right out of the box, by licensing intellectual property, and/or by incorporating technical standards into their products. Increasingly, they also are forging technical collaborations with partners and competitors alike to develop interoperable solutions.²

Collaborating To Achieve Interoperability And Foster The "Open Innovation" Model

While collaborations among competitors to achieve interoperability and other customer goals have arisen in various industry sectors, perhaps the most unexpected are the collaborations between OSS and proprietary software vendors.³ For many OSS providers, this new collaborative spirit is seen in the adoption of certain commercial licensing and business strategies. For example, many large companies, such as IBM, Oracle, and Sun, support Linux development as a primary means to

increase sales of their own proprietary enterprise application software running on Linux.⁴ Moreover, to attract buyers, hardware vendors may bundle no-cost OSS on their hardware as an additional purchase incentive and to increase their margins on the hardware sale. Finally, service and network integration companies can earn significant revenues by providing installation and support services for OSS onto legacy systems. This has become an integral revenue stream for companies like IBM, Red Hat, and Novell. The growth in OSS-related revenues has been tremendous. Linux-related revenues are expected to reach almost \$37 billion by 2008.⁵

Likewise, proprietary software companies have embraced OSS. Notably, Microsoft, the world's leading proprietary software company, has made a series of technology collaboration agreements with OSS companies such as JBoss, SugarCRM, XenSource, and Zend,⁶ and has opened its Linux/Open Source Software Lab to enhance interoperability between Microsoft's products, Linux, and other OSS.⁷ The latest example of such interoperability-enhancing collaborations is the 2006 partnership between Novell, an OSS proponent whose products are primarily licensed under the GPL, and Microsoft. Four key areas of this collaboration include: (1) allowing Novell's Linux to run as a guest on Windows server and vice versa; (2) simplifying customers' ability to manage mixed Windows Linux Enterprise environments; (3) improving interoperability between OpenXML and OpenDocument formats; and (4) providing the other company's customers with patent protection for their respective products.⁸

A recent survey of more than 200 IT executives found that "more than 90 percent of respondents approve of the Microsoft-Novell collaboration, believing it will benefit IT customers and increase interoperability of IT systems."⁹ Several independent research firms – including Gartner and IDC – have also hailed the deal as a successful effort by two competitors to bring higher levels of interoperability and a less threatening IP climate for deployments of Windows and Linux.¹⁰

Viewed in another light, the Novell-Microsoft arrangement and the other collaborations described above epitomize what Professor Henry Chesbrough has dubbed the new "Open Innovation" model that is transforming today's IT industry:

"I called the old paradigm Closed Innovation. It is a view that says *successful innovation requires control*. Companies must generate their own ideas and then develop them, build them, market them, distribute them, service them, finance them, and support them on their own. This paradigm counsels firms to be strongly self-reliant, because one cannot be sure of the quality, availability, and capability of others' ideas.... In [certain] situations [such as in the IT industry], Closed Innovation is no longer sustainable. For these situations, a new approach, which I call Open Innovation, is emerging in place of Closed Innovation. Open Innovation is a paradigm that assumes that firms can and should use external ideas as well as internal ideas, and internal and external paths to market, as the firm looks to advance their technology...."¹¹

GPLv3: Two Steps Back?

Unfortunately, these significant pro-consumer developments are now under attack. At the same time that OSS and pro-

proprietary software vendors are forging collaborations that respond to customer's needs and that rightly embrace Chesbrough's Open Innovation model, recent proposed revisions to the GPLv3 threaten to derail this progress by preventing such collaborations.

Since its release in 1991, the GPL version 2 ("GPLv2") has governed a substantial majority of all large-scale OSS projects, including most notably the Linux kernel. Despite the strong track record of the GPLv2, in January 2006, the Free Software Foundation ("FSF") released a draft of the third version of the GPL ("GPLv3").¹² A modified version of the GPLv3 was released on March 28.¹³ A key goal of the FSF in revising the GPL is to ensure that collaborations between OSS and proprietary software vendors like the Microsoft/Novell deal are prevented in the future. The FSF's attorney, Eben Moglen, initially made clear that "[o]ur strategy is to use GPL 3 against the deal – we're not going to vary that strategy."¹⁴ The latest GPLv3 draft and the accompanying explanatory document¹⁵ is even more explicit that it is designed to thwart the Microsoft/Novell deal and to prevent similar OSS-proprietary software collaborations in the future (with a possible exception for deals entered prior to March 28, 2007, which may be grandfathered). While the particular language at issue – Section 11, paragraphs 4 and 5 of the GPLv3 – is very complex and ambiguous, the explanatory document (at p. 25) makes clear that "[t]he fourth and fifth paragraphs of section 11 embody our response to the sort of threat represented by the Microsoft/Novell deal, and are designed to protect users from such deals, and prevent or deter the making of such deals."

Why are the GPLv3 authors proposing such road blocks? Simply put, because the "FSF ... regards proprietary software as immoral, patents as the work of the devil ... and markets for intellectual creations as undesirable or irrelevant."¹⁶ But regardless of one's philosophical views on software patents, it is hardly logical or pro-consumer for the FSF to press for changes in the GPLv3 that would prevent the types of collaborations described above that are allowing OSS and proprietary software vendors to build bridges and work together to meet customer needs.

Any such attempt by GPLv3 to prevent such collaborations raises legal issues across a broad spectrum, including whether the attempted preclusion of commercial collaborations between OSS and proprietary software companies amounts to a prohibited boycott under the antitrust laws or tortious interference with various parties' business models, and whether the GPLv3 patent provisions are even enforceable as they seek to impose unbounded licensing obligations on entities that are not even a party to the license. However, even putting aside these legal risks, the GPLv3 draft suffers from a more profound flaw: It is completely out of step with the current pro-consumer marketplace realities discussed above and would threaten to take the IT industry backwards to a world of silos where closed innovation is the norm and where customers have less choice and less flexibility in designing their IT systems.

Conclusion

The latest GPLv3 draft is living in the past. The modern IT industry and customer realities are predicated on a healthy coexistence of the OSS and proprietary software models and collaborations between each

camp in response to customer demands for increased interoperability. It is ironic that the Free Software Foundation, which prides itself on promoting "openness" in software development, distribution, and use is now seeking – with GPLv3 – to reverse the current marketplace paradigm of "Open Innovation" and to force a return to closed systems and divisiveness between OSS and proprietary software. Fortunately, many parties have spoken out against the GPLv3, including prominent OSS supporters such as Linus Torvalds, the developer of the Linux kernel.¹⁷ Hopefully, the members of the committee overseeing the GPLv3 revision process will come to appreciate these concerns and abandon this approach before the final version of GPLv3 is released and adopted, so that the healthy, pro-consumer, pro-innovation collaborations that are occurring between OSS and proprietary software will continue to take hold and drive even greater interoperability and choice in the IT marketplace.

¹ See Francis M. Buono, "Interoperability," Not "Interchangeability," available at <http://www.metroccpcounsel.com/current.php?artType=view&artMonth=February&artYear=2007&EntryNo=73>.

² See Antitrust Guidelines for Collaborations Among Competitors, Issued by the Federal Trade Commission and the U.S. Department of Justice 1 (2000) ("Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs. Such collaborations often are not only benign but procompetitive."), available at <http://www.ftc.gov/os/2000/04/ftcguidelines.pdf>.

³ OSS licenses typically allow people to freely access, copy, modify, and redistribute source code, whereas proprietary software licenses may contain restrictions in these areas to prevent third parties from expropriating the software's economic value without the developer's authorization.

⁴ See Julia Hanna, The Business of Free Software (Jan. 15, 1997), available at <http://hbswk.hbs.edu/item/5574.htm>.

⁵ Ieuan G. Mahony & Edward J. Naughton, Open Source Software Monetized: Out of the Bazaar and into Big Business, *COMPUTER & INTERNET LAW*, (Oct. 2004) (describing various business models and methods of integration adopted and pursued by OSS and proprietary software companies).

⁶ See *e.g.*, <http://www.microsoft.com/presspass/press/2005/sep05/09-27MSBossInteropPR.mspx>.

⁷ See <http://www.microsoft.com/presspass/features/2005/aug05/08-10OpenSourceLab.mspx>.

⁸ See <http://www.microsoft.com/interop/msnovellcollab/default.mspx>.

⁹ See Microsoft Corp., Press Release, Customers Strongly Endorse New Microsoft-Novell Deal (Dec. 11, 2006), available at <http://www.microsoft.com/presspass/press/2006/dec06/12-11SurveyResultSPR.mspx>.

¹⁰ See http://gartner.com/DisplayDocument?doc_cd=144678&ref=home&link=IDC%20Insight, <http://www.novell.com/linuix/microsoft/204252.pdf>.

¹¹ Henry W. Chesbrough, Open Innovation: The New Imperative for Creating and Profiting from Technology *xx*, xxiv, 56 (Harv. Bus. Sch. Press 2006).

¹² See Richard Stallman & Eben Moglen, GPL Version 3: Background to Adoption, Free Software Foundation, Inc. (June 9, 2005), available at <http://www.fsf.org/news/gpl3.html> (setting forth the goals of the GPLv3 revision).

¹³ See <http://gplv3.fsf.org/gpl-draft-2007-03-28.html>.

¹⁴ See Andrew Orlovski, Moglen: How We'll Kill the Microsoft-Novell Deal, *The Register*, Nov. 20, 2006, available at http://www.theregister.com.uk/2006/11/20/eben_moglen_on_microsoft_novell/.

¹⁵ See <http://gplv3.fsf.org/gpl3-draft3-guide> ("GPLv3 Explanatory Document") (pp. 23-27).

¹⁶ See James V. DeLong, Opening up an Open-source Roadblock, *cnet News.com*, Feb. 21, 2007, at http://news.com.com/2010-7344_3-6160824.html; GPLv3 Explanatory Document at 23 ("A software patent forbids the use of a technique or algorithm, and its existence is a threat to all software developers and users.")

¹⁷ See, *e.g.*, Stephen Shankland, Torvalds Critical of New GPL Draft, *cnet News.com*, Feb. 13, 2007, at http://news.com.com/Torvalds+critical+of+new+GPL+draft/2100-7344_3-6099475.html; Stephen Shankland, HP Balks at Patent Provision in GPL Update, *cnet News.com*, Aug. 3, 2006, at http://news.com.com/HP+balks+at+patent+provision+in+GPL+update/2100-7344_3-6101381.html; Joe "Zonker" Brockmeier, Kernel Developers Declare GPLv3 Dangerous, *linux.com*, Sept. 22, 2006, at <http://applications.linux.com/article.pl?sid=06/09/22/2340202&tid=51>.

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