

GPL, Version 3: The Perils Of Ideological Extremism

By Francis M. Buono & McLean Sieverding

On June 29, 2007, following more than a year and a half of contentious debate and controversy surrounding numerous proposed revisions to the General Public License (“GPL”), the Free Software Foundation (“FSF”) released the final text of the third version of the GPL (“GPLv3”).² For those developers that choose to adopt it, GPLv3 will replace the second version of the GPL (“GPLv2”), which, since 1991, has governed a substantial majority of all large-scale open source software (“OSS”) projects, including most notably the Linux kernel, the GCC compiler, the Samba file server software, and the MySQL database, and which has facilitated the evolution of OSS from a hobby of academics and independent developers to a multi-billion dollar a year revenue-generating business platform. This article follows up on an article published in the June 2007 issue of *les Nouvelles* calling on the members of the committee participating in the GPLv3 revision process to reconsider certain draconian provisions designed specifically to limit the ability of OSS and proprietary software companies to use intellectual property (“IP”) licensing and other collaborative endeavors to bridge their technical differences in order to respond to growing consumer demands for greater interoperability, innovation, and choice in the IT marketplace.³ Unfortunately, as described below, the ideological extremism motivating the principal authors of GPLv3 leads to a license that not only fails to achieve the FSF’s primary legal and philosophical objective of undoing the 2006 interoperability collaboration between Microsoft and Novell, but actually gives rise to a number of unintended adverse consequences for the very community it

was designed to serve and to the IT marketplace more broadly.

I. Today’s Pro-Customer Collaborations Between Open Source and Proprietary Software

As we had noted in our prior article on GPLv3, the IT marketplace is experiencing an unprecedented level of collaboration between OSS and proprietary software companies. Today, more than ever before, OSS and proprietary software vendors are driven by a desire to address customer and marketplace interoperability needs created by both (1) the heterogeneous nature of the IT systems customers are deploying, and (2) the related desire of customers to run the best of breed products from OSS and proprietary software side-by-side.

One increasingly common way that software and IT vendors are addressing these interoperability needs is by forging technical collaborations and IP sharing arrangements with partners and competitors alike. This new approach, which Professor Henry Chesbrough calls “Open Innovation,” leverages internal and external sources of ideas and IP; it inspires companies to find the most appropriate business model to commercialize a new offering, whether that model exists within a firm or must be sought through external licensing or technical collaborations.⁴ By looking outward and seeking these mutually beneficial licensing and collaboration arrangements, significant efficiencies and greater profits are realized—both through increased royalties as well as improved product offerings—and customers benefit from greater innovation, interoperability, and choice.⁵

A recent example of such interoperability-enhancing collaborations that we previously highlighted is the

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1. The FSF is a non-profit corporation, founded in 1985 by Richard Stallman, that is dedicated to promoting computer users’ rights to use, study, copy, modify, and redistribute computer programs. In addition to managing the GNU operating system (which is used widely in its GNU/Linux variant), among other projects, the FSF is the primary sponsor of the ongoing efforts to revise the GPL. For more details regarding the FSF, including its philosophies on IP licensing, see <http://www.fsf.org/>.

2. See GNU General Public License Version 3 (June 29, 2007), available at <http://www.gnu.org/licenses/gpl-3.0.html> (hereinafter GNU GPL v3).

3. See Francis M. Buono & McLean Sieverding, “GPL Version 3: Two Steps Back for Open Source Licensing, Interoperability, and Open Innovation?,” *les Nouvelles* (June 2007).

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

5. *Id.* at 155-176.

2006 partnership between Novell, an OSS proponent whose products are primarily licensed under the GPL, and Microsoft. The Microsoft-Novell agreement provides that each company shall covenant not to sue the other company's customers for patent infringement on account of the customer's use of certain products. Microsoft makes an upfront payment to Novell of \$240 million for SUSE Linux Enterprise Server ("SLES") subscription certificates (also called "coupons" by some), which Microsoft may use, resell or otherwise distribute over the term of the agreement, allowing the certificate holder to redeem single or multi-year subscriptions for SLES support from Novell, entitling the certificate holder to upgrades, updates and technical support.⁶ In short, this agreement protects the customers, but does not protect either company from a lawsuit by the other.⁷ The result is a novel arrangement that allows customers like Wal-Mart and McDonalds to integrate leading OSS and proprietary software into their network environments with confidence that these products will interoperate and will not trigger thorny patent infringement claims for the customer.⁸

Throughout the GPLv3 revision process, the FSF has repeatedly acknowledged that the Microsoft-Novell collaboration does not violate the GPLv2.⁹ Yet, it made absolutely clear from the beginning that a key strategy in revising the GPL was "to use GPL 3

against the deal—we're not going to vary that strategy. We're going to make the deal not tenable and we urge Microsoft to back away as gracefully and as quickly as possible from a deal that won't work."¹⁰

Why have the GPLv3 authors put up such road blocks? A leading expert on copyright law, Professor Raymond T. Nimmer, recently offered this possible explanation: "It is not clear to me that the reason is anything other than a visceral dislike of Microsoft as epitomizing the so-called proprietary software realm and the fact that this arrangement allows Microsoft to participate more in the open source without adopting all premises set out by FSF."¹¹

Other commentators have made even clearer that the driving force behind the GPLv3 is the FSF's fervent and out-of-touch ideological antipathy towards intellectual property: the "FSF... regards proprietary software as immoral, patents as the work of the devil...and markets for intellectual creations as undesirable or irrelevant."¹²

Unfortunately for the FSF, GPLv3 fails to achieve the FSF's key legal or philosophical objectives, yet it will cause industry and customers considerable consternation and harm.

II.GPLv3 Does Not Achieve its Key Legal Objective—to "Get Microsoft"

In attempts to make good on its threat to "Get Microsoft," and to ensure that collaborations between OSS and proprietary software vendors—like the Microsoft-Novell deal and others—are prevented in the future, the FSF inserted language in GPLv3 that would, according to the FSF, force the accession of Microsoft to the license, thereby causing Microsoft to accept and abide by its terms.¹³ Section 11, paragraph 6 of GPLv3 states:

10. See Andrew Orlowski, Moglen: "How we'll Kill the Microsoft-Novell Deal," *The Register*, Nov. 20, 2006, available at http://www.channelregister.co.uk/2006/11/20/eben_moglen_on_microsoft_novell/.

11. See Raymond T. Nimmer, "GPL 3.0 and Third Party Patent Owners," *Contemporary Intellectual Property, Licensing & Information Law*, July 8, 2007, available at <http://www.ipinfoblog.com/archives/licensing-law-issues-gpl-30-and-third-party-patent-owners.html>.

12. See James V. DeLong, "Opening up an Open-source Roadblock," *c/netNews.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.")

13. See James V. De Long, *supra* ("[T]he Free Software Foundation wants to use the ongoing revision of the General Public License that controls Linux and other major open-source programs to hamstring this deal and to prevent other software distributors, whether proprietary or open-source, from adopting anything similar.")

6. Novell has publicly released some of the details of its patent deal with Microsoft in a recent SEC filing. See Novell SEC Form 8-K Current Report (Nov. 2, 2006), at http://www.sec.gov/Archives/edgar/data/758004/000075800406000109/novl-8k_110706.htm.

7. See Novell, Inc., News Release, *Microsoft & Novell Announce Broad Collaboration on Windows and Linux Interoperability and Support* (Nov. 2, 2006), available at <http://www.novell.com/linux/microsoft/>; Microsoft Corp., Interoperability, Microsoft & Novell Interoperability Collaboration (Nov. 2, 2006), at <http://www.microsoft.com/interop/msnovellcollab/default.aspx>.

8. Microsoft has since forged other patent and technical collaboration agreements with other OSS companies, including LG Electronics, Xandros and Linspire, to give these companies' customers some assurance that they would not be liable for patent infringement for using Linux. See Paul McDougall, "Microsoft Strikes Linux Patent Deal With LG Electronics," *InformationWeek*, June 7, 2007, at <http://www.informationweek.com/news/showArticle.jhtml?articleID=199902101>; Xandros, Inc., Press Release, "Microsoft, Xandros Broad Collaboration Agreement Extends Bridge Between Commercial Open Source and Microsoft Software," June 4, 2007, at http://www.xandros.com/news/press_releases/xandros_microsoft_collaborate.html; and Todd Bishop, "Microsoft and Linspire Find Peace in Patents," *Seattle Post-Intelligencer*, June 13, 2007, available at http://seattlepi.nwsource.com/business/319728_msftlinspire14.html.

9. See Tom Sanders, *Novell Opens Legal Books to GPL Pundits*, Nov. 8, 2006, at <http://www.vnunet.com/vnunet/news/2168151/novells-opens-microsoft>.

If, pursuant to or in connection with a single transaction or arrangement, you convey, or propagate by procuring conveyance of, a covered work, and grant a patent license to some of the parties receiving the covered work authorizing them to use, propagate, modify or convey a specific copy of the covered work, then the patent license you grant is automatically extended to all recipients of the covered work and works based on it.¹⁴

This paragraph is what FSF lead attorney Eben Moglen says will result in Microsoft's patents being licensed to the free software community against Microsoft's will. The FSF apparently believes that if Novell adopts GPLv3, then Microsoft, by issuing certificates for SUSE Linux Enterprise Server support services, including the download of updates, patches, upgrades, etc., will have "conveyed" or at a minimum "procure[ed] the conveyance of" the GPL software by giving such certificates to its customers and a patent waiver to Novell customers, thus falling within the provisions of paragraph 6.¹⁵

Through its ongoing distribution of coupons [or certificates as Microsoft calls them], Microsoft will have procured the distribution of GPLv3-covered programs as soon as they are included in Novell SLES distributions, thereby extending patent defenses to all downstream recipients of that software by operation of (Section 11) paragraph 6.¹⁶

Of course, in order to find this conclusion credible in any way, one would have to accept the untenable legal proposition that a patent owner could be compelled to grant a license without its permission through a legal instrument it neither agreed to nor receives any benefit from. There is no valid basis for this conclusion under contract, intellectual property, or any other law.

The GPLv3 defines "propagate" as doing "anything with [a work] that, without permission, would make you directly or secondarily liable for infringement under applicable copyright law [including copying,

distribution (with or without modification), and making available to the public], except executing it on a computer or modifying a private copy."¹⁷

"Conveyance" is defined as "any kind of propagation that enables other parties to make or receive copies."¹⁸ "Procuring" is not defined. The ordinary meaning of the word "procure" is "to cause to happen or be done; bring about."¹⁹ Whether or not the word "procuring" covers Microsoft's actions does not matter, however, because (1) Microsoft has not agreed to be bound by GPLv3, and (2) therefore, Microsoft's distribution of SLES certificates would only invoke the GPLv3 provision if this act would, without permission, make it "directly or secondarily liable for infringement" under copyright law.

There is no doubt that Microsoft is issuing SLES certificates to the public, but these certificates do not themselves contain a copy of GPL covered software.²⁰ It is thus irrelevant whether the certificates may or may not be considered "procuring the conveyance of" Novell Linux; what matters is whether Microsoft is distributing or offering to distribute the covered work by way of the certificates. Unlike the music sharers who have been held to infringe by listing copyrighted songs, or the library catalog, Microsoft does not have a copy of the covered work which it is offering to the public. The certificates are offering *Novell's* distribution of the covered work, not *Microsoft's* distribution, therefore Microsoft cannot be directly liable for copyright infringement and Section 11, paragraph 6 is a non-event with respect to Microsoft's patents implicated by the Microsoft-Novell deal or otherwise.

Professor Nimmer—a leading and well-respected voice in copyright and IP licensing circles for decades—nicely summed up these fundamental legal principles:

But this language is in GPL 3.0—arguably a contractual document, but certainly not a body of law good against the world. If I am not bound by that contract, I am not bound by that provision (in GPL 3.0, Section 11, paragraph 6). Look at this

14. *GNU GPLv3*, *supra* note 3, § 11. Patents, ¶ 6.

15. See Groklaw, *FSF's Brett Smith Answers Your GPLv3 Questions*, May 1, 2007 ("Our lawyers have seen the terms of the deal under NDA—unfortunately, they're still secret—but they're confident that Microsoft is already conveying GPLed software under this agreement."), at <http://www.groklaw.net/article.php?story=20070501092619462>.

16. Free Software Foundation, *GPLv3 Final Discussion Draft Rationale*, at 10 (May 31, 2007), available at <http://gplv3.fsf.org/rationale> (hereinafter *Rationale*); Todd Bishop, "Free Software Lawyer Discusses Microsoft Patent Claims," *Seattle Post-Intelligencer*, May 17, 2007, available at <http://blog.seattlepi.nwsource.com/microsoft/archives/115505.asp>.

17. *GNU GPLv3*, *supra* note 3, § 0. Definitions.

18. *Id.*

19. See *Webster's Third New Int'l Dictionary* 1809 (1981) (Procure: "to cause to happen or be done: bring about.").

20. This means that the certificates are also not derivative works of GPL'd software, as derivative works must "incorporate a protected work in some concrete or permanent form." *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 967 (9th Cir. 1992).

from Microsoft's perspective. It never agreed to GPL 3.0 in a transaction for a product covered by the Novell-Microsoft agreement. There is a debate about whether GPL creates a contract at all, but if GPL does, the contract is solely between the parties who agreed to it. That is one of the most basic tenets of contract law. ...The GPL method for obtaining agreement is that the party agrees to the license by modifying or "propagating" the program....Microsoft neither modifies nor propagates in the type of transaction we are discussing. The customers who receive the Microsoft covenant not to sue are customers of Novell. ...Microsoft (or any other party in a similar arrangement) is not bound by the excessively broad requirement in paragraph 6, even if its contracting partner decides to use GPL 3.0 for its own customers. If GPL does not create a contract, the situation is even more clear. Non-contractual purported restrictions on the use of a transferred copy may not even bind the transferee. They certainly do not bind a third party.²¹

Moreover, because the final GPLv3 exempts Novell from liability for the Microsoft-Novell arrangement through the grandfathering provision of Section 11, paragraph 7,²² a fortiori, Microsoft cannot be held secondarily liable either. In other words, FSF has conceded that Novell itself is not infringing someone's copyright by its distribution of software covered by the Microsoft-Novell arrangement, so Microsoft cannot be indirectly liable for infringement either.²³

Nevertheless, notwithstanding Microsoft's clear public statements that none of its patents or activities in connection with the Novell deal are subject to

the GPLv3,²⁴ in order to quell the FSF's attempts to elicit fear, uncertainty and doubt from both within and outside the OSS community, Microsoft issued the following statement on July 5, 2007:

At this point in time, in order to avoid any doubt or legal debate on this issue, Microsoft has decided that the Novell support certificates that we distribute to customers will not entitle the recipient to receive from Novell, or any other party, any subscription for support and updates relating to any code licensed under GPLv3.²⁵

Going forward, the certificates will cover GPLv2-licensed distributions by Novell and will entitle the holder to all the benefits provided under the certificate. And while Microsoft has stated that it will continue to examine the impact of GPLv3 and potentially add GPLv3 software to the Novell alliance at a later date, the company has made clear that "the patent covenants offered by Microsoft and Novell to each other's customers are unchanged, and will continue to apply in the same way they did previously."²⁶ In short, in addition to the fact that Section 11, paragraph 6 is legally ineffectual with respect to companies such as Microsoft which are not themselves a party to the license and which are not themselves distributing GPLv3 code, Microsoft's express public disavowal of the GPLv3 and limitation of the Novell support certificates for pre-GPLv3 code further insulates Microsoft from any claim that it must forfeit all its rights to assert its patents against any SLES users/recipients.

III. Unintended Consequences of GPLv3

While it is clear that the FSF has failed in its legal efforts to unilaterally bind Microsoft and to expose its patent portfolio via Section 11, paragraph 6, it ironically and unfortunately will create additional costs and uncertainty for the OSS community itself and for the IT industry generally, as well as for their respective customers. Here are just a few of the real-world negative implications of this new OSS license:

- Several OSS leaders, including the maintainers of the Linux kernel, have already said that they

21. See Nimmer, *supra* note 12 (emphasis in original).

22. Under this grandfathering, the anti-discrimination provision in Section 11, paragraph 7 (originally targeted at Novell) will not apply to deals entered into before March 28, 2007, thereby allowing Novell to continue to distribute covered works notwithstanding the Microsoft deal. See Rationale, *supra* note 17, at 10 ("We believe we can do more to protect the community by allowing Novell to use software under GPL version 3 than by forbidding it to do so.").

23. See Nimmer, *supra* note 12 ("[P]aragraph 7 of § 11 ... states that a party who has software covered by GPL 3.0 cannot convey the software to another person if that party is part of an arrangement defined specifically to track the Microsoft-Novell arrangement where the patent license agreed to is "discriminatory" (e.g., does not give or conditions the rights available under GPL). GPL 3.0 provides that this non-conveyance rule only applies to arrangements made after March, 2007. The Microsoft-Novell agreement is thus excluded to "tactical" reasons – that is, FSF wants Novell to shift to GPL 3.0 and believes that Microsoft is caught up within paragraph 6 for any GPL 3.0 product. But as we have seen, they are not.

24. See Microsoft Corp., *Microsoft Statement About GPS v3* (July 5, 2007), at <http://www.microsoft.com/presspass/misc/07-05statement.msp> ("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.").

25. *Id.*

26. *Id.*

will not transition to the new license, and have alluded to the potential for a “forking” that would “inflict massive collateral damage upon our entire ecosystem and jeopardize the very utility and survival of Open Source.”²⁷

- Because the FSF has made clear that GPLv2 and GPLv3 are incompatible,²⁸ the prospect of multiple licenses governing various elements of individual OSS projects is very real and this could significantly hamper the ways in which OSS is currently developed.
- As many in the broader software community have expressed, including prominent OSS supporters such as Linus Torvalds, the developer of the Linux kernel, GPLv3 is out of touch with the realities of the current IT marketplace and, more specifically, with how OSS vendors currently seek to develop and commercialize their products and services to meet customers’ demands. Indeed, the revised license is so out of step that, according to Torvalds, it is unlikely that GPLv3 will ever be adopted for the Linux kernel.²⁹
- Torvalds recently opined that GPLv3 was an effort by the FSF leadership to further infuse its own personal morality into the legal constructs governing OSS.³⁰ “Only religious fanatics and totalitarian

states equate ‘morality’ with ‘legality.’”³¹ Torvalds added that software developers that adopt GPLv3 “in the name of ‘freedom,’ while you’re at the same time trying to argue that I don’t have the ‘freedom’ to make my own choice,” are “hypocritical.”³² Not exactly a ringing endorsement from one of the principal architects of the OSS community.

- Other key OSS developers have been equally harsh in their criticism of GPLv3. For example, some of the maintainers of the Linux Kernel have noted:

“(S)ince the FSF is proposing to shift all of its projects to GPLv3 and apply pressure to every other GPL licensed project to move, we foresee the release of GPLv3 portends the Balkanisation of the entire Open Source Universe upon which we rely. This Balkanisation, which will be manifested by distributions being forced to fork various packages in order to get consistent licences, has the potential to inflict massive collateral damage upon our entire ecosystem and jeopardise the very utility and survival of Open Source. Since we can see nothing of sufficient value in the current drafts of the GPLv3 to justify this terrible cost, we can only assume the FSF is unaware of the current potential for disaster of the course on which it has embarked. Therefore, we implore the FSF to re-examine the consequences of its actions and to abandon the current GPLv3

27. See, e.g., Stacey Cowley, GPL 3: “An Open Source Earthquake?,” *Intelligent Enterprise*, Jan. 2007, at http://www.intelligententerprise.com/print_article.jhtml?articleID=197001053; Bill Weinberg, *Will GPLv3 Energize Free Software, or Marginalize the FSF*, Feb. 2, 2007, at <http://www.linux-watch.com/news/NS7495518790.html> (“The Linux kernel will remain GPLv2. Some amount of user space software, especially GNU projectware, will move to GPLv3 with no great impact on broader adoption except that that code will get left out of commercial deployments (e.g., on consumer products and phones) to sidestep GPLv3. If the same strictures impact LGPLv3 in its final form, then key libraries like glibc will fork along license lines or already-waiting substitutes will be inserted in their places. Adoption will trump a narrow view of Freedom. The FSF role will shrink to marginal proportions, and GPLv3 will become, sadly, just another license.”).

28. See Richard Stallman, Free Software Foundation, *Why Upgrade to GPL Version 3*, May 21, 2007, at <http://gplv3.fsf.org/rms-why.html> (“When we say that GPLv2 and GPLv3 are incompatible, it means there is no legal way to combine code under GPLv2 with code under GPLv3 in a single program. This is because both GPLv2 and GPLv3 are copyleft licenses: each of them says, ‘If you include code under this license in a larger program, the larger program must be under this license too.’ There is no way to make them compatible. We could add a GPLv2-compatibility clause to GPLv3, but it wouldn’t do the job, because GPLv2 would need a similar clause.”).

29. See, e.g., Steven J. Vaughan-Nichols, “Forget about Linux going GPLv3,” *linux-watch.com*, June 13, 2007, at <http://www.linux-watch.com/news/NS3385486460.html> (“If anyone out there still thinks that the main Linux kernel might change to the [GPLv3] anytime soon, you can forget about it. At the Linux Foundation Collaboration Summit at the Googleplex, five of the leading Linux kernel developers said that they couldn’t see anything like a good enough reason to switch to the forthcoming free software license.”); Matt Asay, “Conversions to GPLv3 from Version 2 Moving Slowly,” *c/net News.com*, July 9, 2007, at http://news.com.com/8301-10784_3-9741324-7.html?part=rs&tag=feed&subj=NewsBlog (“Palamida has been tracking the movement of open-source projects from GPLv2 to GPLv3 and estimates that 119 projects have converted (to GPL/LGPLv3), which represents less than 1 percent of projects using the General Public License, or GPL. Nothing to write home about, in other words.”).

30. See Paul McDougall, “Linux Creator Calls GPLv3 Authors ‘Hypocrites’ As Open Source Debate Turns Nasty,” *Information Week*, July 10, 2007, at http://www.informationweek.com/blog/main/archives/2007/07/linux_creator_c.html.

31. See Linus Torvalds, “Re: Dual-Licensing Linux Kernel with GPL V2 and GPL V3,” June 20, 2007, at <http://www.ussg.iu.edu/hypermail/linux/kernel/0706.2/1928.html> (Linux Kernel blog).

32. *Id.*

process before it becomes too late.”³³

“If the Linux kernel stays under GPL 2, other programs commonly associated with Linux probably will too. The many components of Linux that come from the GNU project, however, will presumably move to GPL 3. If a single Linux distribution has both GPL 2 and GPL 3 components, Linux software development will gain a legal complexity it has not previously had.”³⁴ GPLv3 could end up devastating the very community it seeks to protect if a significant number of key OSS projects simply refuse to adopt the new version and, instead, retain the licensing terms presently imposed by GPLv2.”

- OSS as well as commercial companies (such as Novell, Red Hat, IBM, HP, etc.) which themselves distribute software under the new license now need to be concerned about their own IP portfolios because Section 11, paragraph 6 has, by its terms, exposed the patent portfolios of any company that chooses to distribute GPLv3 code, even if that company is only distributing “verbatim copies.” In essence, Section 11, paragraph 6 applies to any party that in a single transaction (1) “convey[s]” a covered work and (2) grants a patent license. Based on the broad definition of “patent license” in Section 11, paragraph 3, a party that itself distributes pursuant to GPLv3 automatically meets the two prong test (i.e., conveyance & granting a patent license), as Section 10, paragraph 3 requires that any distributor “not impose a license fee, royalty, or other charge for exercise of rights granted under this License, and 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 any portion of it.”³⁵ In short, companies that have been to date sitting on the sidelines assuming that all the potential negative consequences of the GPLv3 applied solely to Microsoft may be rudely awakened to find that their own patent portfolios are at significant risk.

- As evidenced by the abundance of speculation over the legal impact of GPLv3, the confu-

sion facing developers, vendors, and customers will certainly limit the ways in which industry participants seek to use IP licensing and other collaborative endeavors to bridge their technical differences. This unfortunate reality could, even if temporarily, 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. While innovative OSS and proprietary software vendors will no doubt find new ways to collaborate and meet the interoperability needs of customers, the impact of uncertain legal boundaries and IP concerns spawned by GPLv3 will make such arrangements more cumbersome and costly. The fact that Microsoft felt compelled recently to modify the certificates related to its Novell deal in order to eliminate customer confusion is but one example of such hurdles, uncertainty and costs.

- Meanwhile, customers of OSS and/or proprietary software will also face new uncertainties as to whether GPLv3-based products they purchase and use will cause them to be the targets of infringement claims.

In the end, the FSF has set itself apart as a fringe movement whose ideological extremism has clouded its sense of marketplace realities and what is most important to the constituents and customers it is purporting to serve. Consequently, the GPLv3—which Nimmer characterized as “a complex eleven page legal document that contains complicated definitions and terminology and will take months if not years for lawyers to understand”³⁶—does not accomplish its key objectives, makes no significant improvements over GPLv2 and in fact has introduced new hurdles, costs

33. James E. J. Bottomley et al., “The Dangers and Problems with GPLv3,” *Abstract* (Sept. 15, 2006), available at <http://thread.gmane.org/gmane.linux.kernel/448894/focus=448894> (Linux Kernel newsgroup posting by James Bottomley (Sept. 22, 2006)).

34. Peter Glaskowsky, “GPL 3 – A Bridge Too Far?,” *c/net News.com*, July 3, 2007, at http://news.com.com/8301-10784_3-9738466-7.html.

35. See also James E. J. Bottomley et al., *supra* note 34 (“As drafted, this currently looks like it would potentially jeopardise the entire patent portfolio of a company simply by the act of placing a GPLv3 licensed programme on their website. Since the Linux software ecosystem relies on these type of contributions from companies who have lawyers who will take the broadest possible interpretation when assessing liability, we find this clause unacceptable because of the chilling effect it will have on the necessary corporate input to our innovation stream.); Nimmer, *supra* note 12 (“The situation for Novell (or similarly situated party) is less clear as to its own patents. Novell may choose to both agree to GPL 3.0 and to grant a patent license for its own patents to its transferees. If it does so, then the broad paragraph 6 undertaking may apply. But Novell does not and cannot grant patent licenses to Microsoft patents. Indeed, the Microsoft-Novell agreement seems to assume that Microsoft commits to a patent enforcement waiver only for a defined group of Novell customers.”)

36. See Nimmer, *supra* note 12.

and uncertainty that will serve no one and will simply make it more difficult for the OSS and proprietary software communities to collaborate, interoperate and serve customer needs. One commentor recently summed up what the FSF has “achieved” with the GPLv3 as follows:

Now it’s time to add another phrase to the [FSF] list [of freedoms it claims to promote]: “free as

in free software,” meaning the freedom to make adversaries of potential partners—the kind of freedom one has when one’s work must be carefully excluded from other people’s projects. It seems to me that one of the world’s biggest opponents of copyrights and patents has simply found another way to achieve the same results.³⁷

Indeed. ■

37. See Peter Glaskowsky, *supra* note 35.