

GPL Version 3: Two Steps Back For Open Source Licensing, Interoperability, And Open Innovation?

By Francis M. Buono and McLean Sieverding

The information technology (“IT”) industry is experiencing the highest level of interoperability in its history and customers today are the direct beneficiaries experiencing an unprecedented level of competition, choice, and innovative solutions. The world has changed considerably in that a key path to achieving interoperability is often the partnering and technical collaborations 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, including Linux, are distributed, contains certain provisions that, if adopted, would threaten not only to drive a major rift among OSS developers seeking to license their products, but also 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.

Interoperability in the IT Industry

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 explicitly designing products and features to achieve interoperability with other products and services right out of the box, by providing and gaining access to technology through the licensing of patents, copyrights, and other intellectual property (IP), and/or by developing industry standards, including open standards, such as TCP/IP, GSM, HTML, 802.11, and XML, and incorporating them into products and services. Increasingly, they also are forging technical collaborations with partners and competitors alike to develop interoperable solutions.²

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1. See Francis M. Buono, “Interoperability,” *Not “Interchangeability”: The Importance of a Proper Approach to Defining and Achieving “Interoperability” to Enhance Competition, Innovation, and Consumer Choice in the Information Technology Marketplace* (Jan. 2005), available at <http://www.metrocorp.counsel.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) (“In order to compete in modern markets, competitors sometimes need to collaborate. 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/ftcdojguidelines.pdf>.

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, including automobiles³ and IT equipment,⁴ perhaps the most unexpected are the collaborations between OSS and proprietary software vendors. The most salient distinctions between OSS and proprietary software relate to the fact that OSS licenses typically allow people to freely access, copy, modify, and redistribute source code, whereas proprietary software licenses may contain restrictions in these areas in order to protect the developer’s investment by preventing third parties from expropriating the software’s economic value without the developer’s authorization. Until recently, these different approaches to IP licensing have kept these camps in a defensive posture. However, both OSS and proprietary software vendors are increasingly driven by a desire to address customer and marketplace interoperability needs created both by (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. As a result, the OSS and proprietary software communities are aggressively pursuing ways to ensure that IP is viewed—and used—less as a barrier and more as a bridge between their respective realms.

For many OSS providers, this new collaborative spirit is seen in the adoption of certain commercial

licensing and business strategies. While many OSS developers create OSS purely for non-commercial reasons (academic researchers and computer hobbyists largely fall into this non-commercial category), OSS has evolved significantly over time, and is now increasingly commercial in nature. 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. An example of this approach is IBM’s WebSphere software that runs on top of the Linux operating system and the Apache Web server, and carries a retail price of roughly \$50,000. Likewise, Apple has deployed a commoditized base of open-source software drawn from the Open BSD flavor of UNIX, but placed on top of it the sophisticated look and feel of a top-quality proprietary graphical user interface.⁵ Similarly, 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, OSS may require significant customization to install, integrate, and interoperate with computer hardware and software, particularly legacy and proprietary systems, as well as ongoing maintenance and training to maximize its usefulness.⁶ Service-oriented companies can earn significant revenues by providing such integration, support, and training services. This has become a significant revenue stream for companies like IBM, Red Hat, and Novell.

The growth in OSS-related revenues has been tremendous. In December 2005, IBM announced that it had surpassed \$1 billion in Linux-related product and service revenues for the third quarter of 2005.⁷ Research firm IDC estimates that

3. See, e.g., *GM, Toyota End Joint Fuel Cell Research*, AP, Mar. 3, 2006, at <http://www.msnbc.msn.com/id/11654151/>; *General Motors Corp., Corporate Info—History*, at http://www.gm.com/company/corp_info/history/gmhis1990.html; *Honda, GM and BMW: Fueling, not Fuel Cells*, Green Car Congress, Aug. 5, 2005, at http://www.greencarcongress.com/2005/08/honda_gm_and_bm.html (1999, General Motors and Toyota working together to develop a hybrid car, fuel cells, and safety-related technologies and energy issues).

4. See *The Power of Partnering, CEATEC Conference* (Oct. 4, 2005), available at <http://www.kodak.com/US/en/corp/pressCenter/cpqCEATEC.jhtml?pq-path=7934> (Antonio Perez, Eastman Kodak Co. CEO and President, noting that his company often works with competitors, such as Hewlett-Packard, Sony, Canon, Xerox, Fuji and many others to design innovative solutions for customers); Cisco Systems, Inc., *Strategic Alliances and the Interactions Economy* (Oct. 17, 2006), available at http://newsroom.cisco.com/dlls/2006/ts_101706.html?CMP=AF17154&vs_f=News@Cisco:+Top+Stories&vs_p=News@Cisco:+Top+Stories&vs_k=1 (Steve Steinhilber, Cisco Vice President, Strategic Alliances and Corporate Consulting Engineering, noting that Cisco has been collaborating with Motorola on technology to leverage core competencies and help wireless companies implement IP-based access networks to help drive down operational costs).

5. See Julia Hanna, *The Business of Free Software* (Jan. 15, 1997), available at <http://hbswk.hbs.edu/item/5574.html> (“It’s the old saw of the razor/razor blade business model, with many more options for profit. “For IBM, Linux is the razor, and WebSphere software and its related services are the razor blade.” (quoting Harvard Business School professor Marco Iansiti).

6. Martin LaMonica, *Open Source Services Reshaping the Market* (Jan. 10, 2005), at http://www.optaros.com/en/company/news_and_press_releases/open_source_services_resaping_the_market. (“Open source won’t be about the software at all—it will be about the services,” said Julie Giera, an analyst with Forrester Research. “The recognition will dawn on people that this is a services play, not a software play.”)

7. See IBM Corp., *Press Release, IBM Taps Boom in Linux Growth by Expanding Commitment to Partners, Linux and Open Source* (Dec. 14, 2005), available at http://www.marketwire.com/mw/release_html_b1?release_id=104089.

Linux-related revenues will reach almost \$37 billion by 2008.⁸

Likewise, proprietary software companies have embraced OSS. Notably, Microsoft, the world's leading proprietary software company, has made a series of technology collaboration and licensing agreements with OSS companies such as JBoss, SugarCRM, XenSource, and Zend,⁹ and has opened its Linux/Open Source Software Lab to enhance interoperability between Microsoft's products, Linux, and other OSS.¹⁰ 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.¹¹

8. 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, from bundling, to dual licensing structures, to per-seat licensing fees).

9. See, e.g., Dawn Kawamoto, *Microsoft and SugarCRM Partner on Open Source*, Feb. 15, 2006, at http://news.com.com/Microsoft%20and%20SugarCRM%20partner%20on%20open%20source/2100-7344_3-6038966.html?tag=nefd.top; Microsoft Corp., Press Release, *JBoss and Microsoft Outline Interoperability Goals* (Sept. 27, 2005), available at <http://www.microsoft.com/presspass/press/2005/sep05/09-27MSJBossInteropPR.mspx>; Zend Technologies, Press Release, *Microsoft and Zend Technologies Announce Technical Collaboration to Improve Interoperability of PHP on the Windows Server Platform* (Oct. 31, 2006), available at http://www.zend.com/company/zend_news/press_releases/2006/10/microsoft_and_zend_technologies_announce_technical_collaboration_to_improve_interoperability_of_php_on_the_windows_server_platform; Microsoft Corp., Press Release, *Microsoft and XenSource to Develop Interoperability for Windows Server "Longhorn" Virtualization* (July 17, 2006), available at <http://www.microsoft.com/presspass/press/2006/jul06/07-17MSXenSourcePR.mspx>.

10. See Microsoft Corp., PressPass, Q&A: *The Linux/Open Source Software Lab on Microsoft's Redmond Campus* (Aug. 10, 2005) (a question-and-answer session with Microsoft Platform Technology Strategy Director Bill Hilf), available at <http://www.microsoft.com/presspass/features/2005/aug05/08-10OpenSourceLab.mspx>.

11. See Novell, Inc., News Release, *Novell & Microsoft Collaborate—Customers Win* (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.mspx>.

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."¹² 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.¹³

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. ..."¹⁴

According to Professor Chesbrough, the Open Innovation approach leverages internal and external sources of ideas and IP; it inspires companies to find

12. See Microsoft Corp., Press Release, *Customers Strongly Endorse New Microsoft-Novell Deal* (Dec. 11, 2006) (discussing the results of the survey, jointly commissioned by Microsoft and Novell and conducted by Penn, Schoen & Berland Associates Inc., a highly respected and independent market research firm), available at <http://www.microsoft.com/presspass/press/2006/dec06/12-11SurveyResultsPR.mspx>.

13. See Gartner, Inc., News Release, *Microsoft Makes Strong Financial Commitment to Novell's Linux* (Nov. 8, 2006), available at http://gartner.com/DisplayDocument?doc_cd=144678&ref=g_homelink; IDC Insight, *Microsoft and Novell Reach Sweeping Agreement on Windows/SUSE Linux Enterprise Coexistence* (Nov. 2006), available at <http://www.novell.com/linux/microsoft/204252.pdf>.

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

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.¹⁵ Many successful business models have emerged recently that embrace the benefits of Open Innovation. These business models are all based on the fact that there is a burgeoning market for IP,¹⁶ and most firms are unable to fully monetize their IP assets on their own. For example, some companies are seeking to extract greater returns on their own technology assets through broader licensing of their IP, including to competitors. Other companies are seeking to make use (or better use) of their own innovations by supplementing them with external IP. Most companies, however, now see IP travel in both directions because if a firm cannot capitalize on its own IP assets, it is likely that another firm can. 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.¹⁷

GPLv3: Two Steps Back?

Unfortunately, these significant pro-consumer developments are now under attack. At the same time that OSS and proprietary software vendors are forging collaborations and aggressively pursuing mutually beneficial licensing arrangements that respond to customer's needs and that rightly embrace Chesbrough's Open Innovation model, recent proposed revisions to the GPL by the Free Software Foundation ("FSF") threaten to derail this progress by preventing such collaborations.¹⁸

15. *Ibid.* at XXXI.

16. Indeed, annual estimates of trade through U.S. and foreign affiliates of multinational companies indicate that receipts for royalties and licensing fees have more than doubled since 1995, and now amount to more than \$62 billion. See U.S. International Services: Cross-Border Trade 1986-2005, and Sales Through Affiliates, 1986-2004, available at <http://www.bea.gov/international/intlserv.htm>.

17. See *Chesbrough supra* n. 15 at 155-176.

18. 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/>.

The original version of the GPL was released in 1989. The current GPL version 2 ("GPLv2") was released two years later and has governed a substantial majority of all large-scale OSS projects, including most notably the Linux kernel, the GCC compiler, the Samba file server software, and the MySQL database. Indeed, the GPLv2 currently governs more than two-thirds of the open source projects listed in the SourceForge open source repository. Thus, in its tenure as the default software license for the OSS community,¹⁹ it is hard to argue that the GPLv2 has been anything other than an extraordinary success. Despite this strong track record, however, in January 2006, the FSF released a draft of the third version of the GPL ("GPLv3").²⁰ The FSF identified a number of issues that it sought to address through revisions to the license. Specifically, FSF wanted to: (1) internationalize the license to ensure compliance with a broader array of national copyright laws; (2) account for the fact that the GPL has become an international standard for the OSS industry; and (3) respond to changing circumstances and perceived threats, such as the patentability of software and digital rights management, among others.²¹

In July, 2006, a second discussion draft of the GPLv3 was released by the FSF. Each of these initial drafts of the GPLv3 has given rise to a considerable amount of controversy—both from within and external to the broader OSS community. Part of the contention has stemmed from the very nature of the FSF process that is driving the revisions. Some feel that the discussion committees charged with soliciting and implementing comments on the drafts so that key issues can be identified, analyzed, and resolved, are inherently biased and dominated by powerful corporate interests that mute opposing viewpoints. Others contend that Richard Stallman and its attorney, Eben Moglen, have asserted near-autocratic control over the GPLv3 revision process, such that dissenting positions are simply

19. See Guadamuz, Andres L., "GNU General Public License v3: A Legal Analysis." SCRIPT-ed, Vol. 3, No. 2, at 131 2006 (available at SSRN: <http://ssrn.com/abstract=909780>).

20. 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).

21. See <http://www.fsf.org/news/gpl3.html>.

disregarded with little or consideration.²²

Although the revision process itself has been somewhat opaque, the FSF has made absolutely clear from the beginning that a key goal 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.²³ Eben Moglen stated at the outset that “[o]ur strategy is 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.”²⁴

On March 28, 2007, the third discussion draft of the GPLv3 was released, and it remains clear that this strategy continues to drive the revision process.²⁵ Below is the key text from GPLv3 in this regard—Section 11, paragraphs 4 and 5:

“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 providing freedom to use, propagate, modify or convey a specific copy of the covered work to any of the parties receiving the covered work, then the patent license you grant is automatically extended to all recipients of the covered work and works based on it.

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 license 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, or that patent license was granted, prior to March 28, 2007].”²⁶

The above provisions and much of the rest of GPLv3 have been criticized for adding substantial complexity and ambiguity even beyond what exists with GPLv2.²⁷ In the foregoing provisions, for example, what does it mean to “propagate by procuring conveyance of a covered work” or to make payment based on the “extent of your activity of conveying the work?” When is an entity deemed to be in the “business of distributing software” and why do the restrictions in the second paragraph above appear to apply solely to such software distributors? Does this narrow focus on software distributors mean, for example, that a person can enter a limited or narrowly targeted patent license with a “patent troll” (a non-product licensing entity) but not with a patent holder that distributes software products?

Putting aside these ambiguities, the focus of both these paragraphs is the FSF making good on its threat to preclude OSS and proprietary software companies from working together.

With respect to the fourth paragraph of Section 11, the FSF’s “Explanatory Document” clarifies that this provision applies when a patent holder “enters a transaction or arrangement that involves two acts: (1) conveying a GPLv3-covered work, and (2) offering to some, but not all, of the work’s eventual users a patent license for particular activities using specific copies of the covered work.” Under such circumstances, the patent holder’s patent license

22. Bruce Byfield, *Why Torvalds is sitting out the GPLv3 process*, linux.com, Sept. 26, 2006, at <http://www.linux.com/article.pl?sid=06/09/25/2311215> (quoting Linus Torvalds, the father of Linux, criticizing the GPLv3 committees because they “were actually set up to be more insidious than they sometimes are ... largely window dressing, organized so that the FSF could claim it was all done in the open. The process wasn’t open at all. The committees were not allowed to talk about the drafts before they were released, and none of the notes or discussions were ever released afterwards. If you want to have an open process, you put the cards on the table, and you allow open and free discussion in public.”)

23. See James V. DeLong, *Opening up an Open-source Roadblock*, c/net News.com, Feb. 21, 2007, at http://news.com.com/2010-7344_3-6160824.html (“[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.”)

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

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

26. *Ibid.* § 11, paragraphs 4 and 5.

27. Jim DeLong, *Delusions of Grandeur: GPLv3 Is A License That Thinks It’s a Regulation* (Mar. 28, 2007), at http://weblog.ipcentral.info/archives/2007/03/delusions_of_gr.html (“GPLv3 bears the marks of such a process of deliberately crafted ambiguity, designed to enable future surprises, and not pleasant ones for the regulatees. Virtually every important provision is subject to multiple interpretations.”)

“is automatically extended to all recipients of the covered work and works based on it.”²⁸ In other words, under the GPLv3, a patent holder would not be permitted to extend a patent license just to a certain group of users or developers in exchange for specified value from such users/developers. Rather, once the patent holder extends its patent license with respect to a GPLv3-covered work to **some**, it essentially forfeits its patent rights to **all**, without any assurance of receiving additional value back from the new-comers in return. In essence, the provision requires the patent holder to donate its patent rights to all parties (both with respect to the covered work and “works based on it”) with no assurance of a quid pro quo. Even assuming such a provision were enforceable (a point that some have legitimately questioned, as noted below), it is hard to see how it would provide any incentive for a patent holder to work with or distribute software covered by the GPLv3 unless it is willing to donate its patents to the public domain. The result is no doubt the one the FSF wishes to see—proprietary software and OSS providers will retreat to their respective camps and never the twain shall meet.

The same is true with respect to the fifth paragraph of Section 11. Specifically, it indicates that a licensee of software covered by the GPLv3 loses its right to “convey” such software if such licensee enters into “an arrangement with a third party that is in the business of distributing software” and such third party is unwilling to waive all of its patent rights with respect to all recipients of the software (i.e., the third party’s patent license will be deemed deficient and thereby trigger the forfeiture of all of the licensee’s rights under the GPLv3 if such patent license “does not cover, prohibits the exercise of, or is conditioned on the non-exercise of any of the [incredibly broad] rights that are specifically granted to recipients of the covered work under this License”). Stated more simply, entering into an agreement with a third party that provides a patent license with more restrictions than that allowed by the GPLv3 causes the licensee to forfeit its rights under GPLv3.²⁹ Since proprietary software providers typically include field of use, non-sublicensing,

28. See <http://gplv3.fsf.org/gpl3-dd3-guide> (“GPLv3 Explanatory Document”) (p. 24). The GPLv3 defines “patent license” to include “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.”

29. See GPLv3 Explanatory Document at p. 24 (“Unlike the fourth paragraph, which creates a legal defense for targets of patent aggression, the consequence for violation of the fifth paragraph is termination of GPL permissions for the distributor.”)

anti-modification, and similar restrictions in their patent licenses to developers and other users of their software in order to protect their significant investment in the software, the above GPLv3 language would challenge the ability of proprietary software and OSS providers to enter patent licenses or collaborations such as those pursued in the Microsoft-Novell deal without potentially tripping over the above restrictions, thereby terminating the license.

The FSF’s Explanatory Document is even more direct about the objective of paragraphs four and five:

The business, technical and patent cooperation agreement between Microsoft and Novell announced in November 2006 has significantly affected the development of Draft 3. The 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. ... In addition to the present deal, however, GPLv3 must act to deter similar future arrangements, and it cannot be assumed that all future arrangements by Microsoft or other potential patent aggressors will involve procuring the conveyance of the program by the party that grants the discriminatory promises of patent safety. Therefore, we need the fifth paragraph as well, which is aimed at parties that play the Novell role in a different range of possible deals.”³⁰

30. GPLv3 Explanatory Document at pp. 25-26. See also *Ibid.* at 27 (“Novell expected to gain commercial advantage from its patent deal with Microsoft; the effects of the fourth paragraph in undoing the harm of that deal will necessarily be visited upon Novell.”). While the bracketed sentence of Section 11, paragraph 5 contains a grandfathering provision for arrangements entered into before March 28, 2007, it is not clear whether this language will ultimately be retained. See *Ibid.* at pp. 26-27. In any event, while such language, if retained, might give a reprieve for deals that are done, it would have the same deleterious effects on future collaborations between OSS and proprietary software providers. See Thomas Claburn, *New Draft Of GPLv3 Is Published, Extends Reach To More Than Software* (May 29, 2007), at http://www.informationweek.com/windows/showArticle.jhtml?articleID=198700928&cid=RSSfeed_IWK_News (“[The latest GPLv3 draft] includes a grandfather clause that would permit Novell’s deal. The clause is in brackets, which means its presence in the final draft of the new GPL is not certain. Radcliffe said this is referred to as negotiation by punctuation. The grandfather clause could be very important to Novell because it would mean that Novell wouldn’t have to modify its deal with Microsoft, added Radcliffe. The absence of this clause from the final version could mean that Novell would lose the right to distribute GCC, the GNU Compiler Collection, a critical development tool, and generally complicate Novell’s ability to distribute software covered by GPLv3.”)

The above GPLv3 provisions raise serious legal questions, such as whether the attempted preclusion of commercial collaborations between OSS and proprietary software amount to a prohibited boycott under the Antitrust laws or tortious interference with various parties' business models, whether the attempt to use the copyright restrictions of the GPLv3 to extract an unbounded grant of patent rights from all third parties constitutes copyright misuse, and whether the attempt by the above provisions to impose obligations and restrictions upon entities that are not even a party to the GPLv3 license is even enforceable given the lack of contractual privity between the licensor and such entities.³¹

But even putting aside all these significant legal risks, the GPLv3 suffers from a more profound flaw: It is completely out of step with the current and very pro-consumer marketplace realities and would threaten to undo the significant progress and innovations that have been driven by the very collaborations that the GPLv3 seeks to stifle. Its attempts to limit the ability of proprietary and OSS organizations to use IP licensing and other collaborative endeavors to bridge their technical differences would 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.

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."³² 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. In addition, the 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. In fact, several OSS leaders, including the maintainers of the Linux kernel, 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."³³

Thus, interested parties on all points of the OSS/proprietary software spectrum should recognize the potential for harm to both the software industry and the IT industry at large, and voice their opinions on the direction that FSF is taking GPLv3.

According to the FSF, here is the proposed process going forward before final adoption of GPLv3: The third discussion draft of the GPLv3 will be open for comment for sixty days (concluding on May 27, 2007). Based on the feedback received during this window, the FSF has left open the possibility of publishing new language from time to time for additional review. Such changes will be announced on the GPLv3 Web site, <http://gplv3.fsf.org/>, and via the FSF's GPL-related mailing list. After this discussion period is over, the FSF will publish a "last call" draft. That draft will be open for comment for thirty days, and the final license is expected to be published shortly thereafter.³⁴ Any party wishing to comment on the GPLv3 during these final stages of the revision process can do so by visiting <http://gplv3.fsf.org/comments>.

31. For a further discussion of these and other legal risks, see "The Legal Risks of Overreaching for Third Party Patent Rights," by Richard Wilder, at <http://www.actonline.org/documents/ACT-GPLv3-Legal-Risks.pdf>. See also Thomas Claburn, *New Draft Of GPLv3 Is Published, Extends Reach To More Than Software* (May 29, 2007), at http://www.informationweek.com/windows/show-Article.jhtml?articleID=198700928&cid=RSSfeed_IWK_News ("The new language attempts to make covenants like the Microsoft-Novell agreement apply to all GPL users rather than just to those using a specific Linux distribution. 'How enforceable that is, it's difficult to say, because obviously Microsoft is not a party to the contract'") (quoting Mark Radcliffe, attorney at DLA Piper and general counsel of the Open Source Initiative).

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

33. Stacey Cowley, *Intelligent Enterprise, GPL 3: An Open Source Earthquake?*, January 2007, at http://www.intelligententerprise.com/print_article.jhtml?articleID=197001053; Bill Weinberg, *Will GPLv3 energize Free Software, or marginalize the FSF?* February 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.")

34. See <http://gplv3.fsf.org/process-definition>.

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 par-

ties have spoken out against the GPLv3, including prominent OSS supporters such as Linus Torvalds, the developer of the Linux kernel, who does not wish to see Linux used as a weapon in an ideological battle.³⁵ Hopefully, the members of the committee participating in the GPLv3 revision process, as well as other interested parties, will come to appreciate these concerns and cause the FSF to abandon this approach before the final version of GPLv3 is released and adopted, so that the healthy pro-innovation collaborations that are occurring between OSS and proprietary software will continue to take hold and drive even greater interoperability, innovation, and consumer choice in the IT marketplace. ■

35. See, e.g., Stephen Shankland, *Torvalds Critical of New GPL Draft*, c/net 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*, c/net 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>; Stacey Cowley, *Intelligent Enterprise, GPL 3: An Open Source Earthquake?*, January 2007, at http://www.intelligententerprise.com/print_article.jhtml?articleID=197001053.