

Austin Intellectual Property Law Association
May 2007 Meeting Program



Some Perspectives on Patent Licensing
Language Appearing in Free & Open
Source (form) Licenses

- Tuesday, May 22, 2007

Greg R. Vetter

Visiting Assistant Professor of Law, University of Texas School of Law
Assistant Professor of Law, University of Houston Law Center (UHLC)
Co-Director - Institute for Intellectual Property & Information Law, UHLC
Office: (512) 471-0574 • Cell: (713) 213-0360
email: gvetter@uh.edu • web site: www.law.uh.edu/faculty/gvetter



INSTITUTE FOR INTELLECTUAL PROPERTY & INFORMATION LAW
University of Houston Law Center
Houston, Texas 77204-6391

UNIVERSITY of HOUSTON

Prof. Greg R. Vetter



FOSS – GPLv2



• **Licensing System:**

- GPL = “General Public License”
- If I take a copy of the software, I can modify and redistribute **if**:

- no royalties	- source code available
- propagate the same terms	- extend terms to “other” software (“infectious”)
- must attribute changes & give notice of terms	- disclaim warranties & liabilities

- Use – “the act of running the program is not restricted”

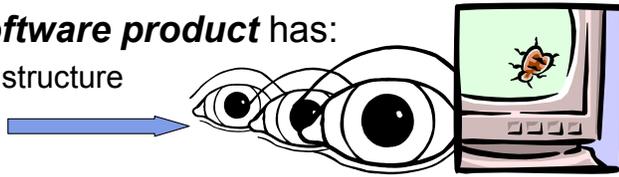
UNIVERSITY of HOUSTON

Prof. Greg R. Vetter



FOSS Development & Impact

- Unique **development process** – “Peer Production” model
- Resulting **software product** has:
 - unique cost structure
 - reliability



Market impact

Red Hat Enterprise Linux
The new definition of the business operating system.

IBM

UNIVERSITY of HOUSTON Prof. Greg R. Vetter

FOSS Licensing Continuum

Issue	Apache or “BSD” style (www.apache.org)	OSD (www.opensource.org)	GPL (www.fsf.org)
source with redistribution?	not required	required	required
royalties?	not prohibited	prohibited	prohibited
extension or “infectious” provision?	implicitly required, effect is minor	no	yes
reapplication of same terms?	implicitly required, effect is minor	must be allowed, not required	required
Notes	Attribution-only	Certification program	First, and most controversial
Most licenses disclaim warranties and liabilities, and some have provisions for anti-discrimination & patents Click-wrap & shrink-wrap issues – often no “I accept” assent			

One popular open source project/product repository is at:
www.sourceforge.net

Camps

Free Software – not free beer



Stallman

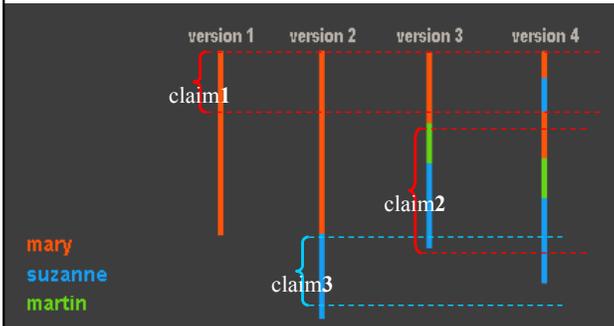
Open Software – good development



Torvalds



Incremental Development and Patent Claim Coverage



Grant* of right to infringe patent claim(s):

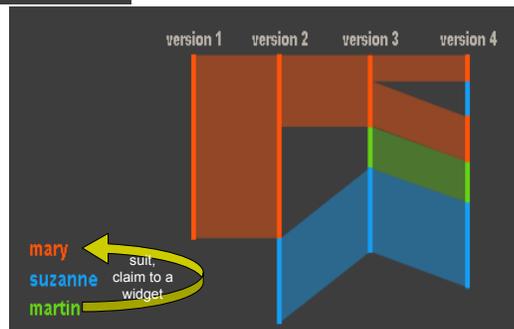
- currently controlled for present version
- currently controlled and controlled in the future for present version
- currently controlled for present and future versions
- currently controlled and controlled in the future for present and future versions

* triggered by what? contribution, distribution, receipt, something else?

Loss† of right to use by asserting patent claim(s):

- assert against Distributor of the FOSS Program
- assert against any Distributor or User of the FOSS Program
- assert against any Distributor or User of any FOSS software
- assert against anyone any claim(s) covering any software
- and so on . . .

† triggered by what? threaten to sue, file suit, judgment, something else?



Graphic Source:
<http://www.research.ibm.com/history/explanation.htm>



GPLv3, March 2007



License	[A] Grant as Developer, Distributor or Contributor	[B] Condition of Use (sometimes with "Retaliation")	[C] Other
GPL 3.0 of 2007	<p>Sec. 0: A party's "essential patent claims" in a work are all patent claims owned or controlled by the party, whether already acquired or hereafter acquired, that would be infringed by some manner, permitted by this License, of making, using, or selling the work, but do not include claims that would be infringed only as a consequence of further modification of the work. For purposes of this definition, "control" includes the right to grant sublicenses in a manner consistent with the requirements of this License.</p> <p>Sec. 11: Each contributor grants you a non-exclusive, worldwide, royalty-free patent license under the contributor's essential patent claims in its contribution, to make, use, sell, offer for sale, import and otherwise run, modify and propagate the contribution.</p> <p>For purposes of the following three paragraphs, a "patent license" means 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.</p> <p>[NONE] If you convey a covered work, knowingly relying on a patent license, . . . then you must either (1) cause the Corresponding Source to be so available, or (2) disclaim the patent license for that particular work, or (3) arrange, in a manner consistent with the requirements of this License, to extend the patent license to downstream recipients.</p>	<p>Sec. 8: . . . If you violate this License, [after notice] the copyright holder may, at any time, terminate the rights (including any patent rights) that the copyright holder has granted to you under this License.</p> <p>Sec. 10: . . . 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 the contribution of any contributor).</p> <p>Sec. 11: . . . [TWO] If, pursuant to or in connection with a single transaction or arrangement, you convey, or propagate by predicable means, a covered work, and you convey a copy of the work that is subject to a patent license providing freedom to use, to any of the parties receiving the copy, then the patent license you grant is extended to all recipients of the copy and works based on it.</p> <p>Nothing in this License shall be construed to exclude or limit any implied warranties, defenses or commitments that may be available to you under applicable law.</p>	<p>Preamble: . . . Finally, every program is threatened constantly by software patents. States should not allow patents to restrict development and use of software on general-purpose computers, but in places where they do, we wish to avoid the special danger that patents applied to a free program could make it effectively proprietary. To prevent this, the GPL assures that patents cannot be used to render the program non-free.</p> <p>Sec. 11: . . . [THREE] 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 with the patent holder.</p>

"essential patent claims" . . . "whether already acquired or hereafter acquired, that would be infringed by . . . making, using, or selling the work . . . but do not include claims that would be infringed only as a consequence of further modification of the work"

grant by a "contributor"

"you may not initiate litigation (including a cross-claim or counterclaim in a lawsuit) alleging that any patent claim is infringed by . . . the Program (or the contribution of any contributor)"

Provisions intended to prevent future arrangements similar to the Microsoft/Novell deal



MPL 1.0



License	[A] Grant as Developer, Distributor or Contributor	[B] Condition of Use (sometimes with "Retaliation")	[C] Other
MPL 1.0	<p>§ 2.1(b): under patents now or hereafter owned or controlled by Initial Developer, to make, have made, use and sell ("Utilize") the Original Code (or portions thereof), but solely to the extent that any such patent is reasonably necessary to enable You to Utilize the Original Code (or portions thereof) and not to any greater extent that may be necessary to Utilize further Modifications or combinations.</p> <p>2.2(a): under patents now or hereafter owned or controlled by Contributor, to Utilize the Contributor Version (or portions thereof), but solely to the extent that any such patent is reasonably necessary to enable You to Utilize the Contributor Version (or portions thereof) and not to any greater extent that may be necessary to Utilize further Modifications or combinations.</p>	<p>§ 3.1: The Modifications which You create or to which You contribute are governed by the terms of this License, including without limitation Section 2.2 . . .</p>	<p>§ 3.4(a): If You have knowledge that a party claims an intellectual property right in particular functionality or code (or its utilization under this License), you must include a text file with the source code distribution titled "LEGAL" which describes the claim and the party making the claim in sufficient detail that a recipient will know whom to contact.</p>

. . . patents now or hereafter owned or controlled by Initial Developer [Contributor] . . . solely to the extent that any such patent is reasonably necessary to enable You to Utilize the Original Code [Contributor Version] (or portions thereof) and not to any greater extent that may be necessary to Utilize further Modifications or combinations

If You have knowledge that a party claims an intellectual property right in particular functionality or code (or its utilization under this License), you must include a text file with the source code distribution titled "LEGAL" which describes the claim and the party making the claim in sufficient detail that a recipient will know whom to contact.



MPL 1.1

License	(A) Grant as Developer, Distributor or Contributor	(B) Condition of Use (sometimes with "Retaliation")	(C) Other
MPL 1.1	"Patent Claims" means any patent claim(s), now owned or hereafter acquired, including without limitation, method, process, and apparatus claims, in any patent Licensable by grantor. § 2. If You create or modify a Contribution which includes: 1) for code that You delete from the Original Code; 2) separate from the Original Code; or 3) for any other part of the Contribution that You use in or with the Original Code, and that in any other way is combined with the Original Code or with any other part of the Contribution, You must cause, for each such part, the applicable copyright notice to be modified in the following way: You must insert, or have inserted, the text "Based on [particular] version(s) of [name] released by [name], licensed under the MPL 1.1 License" immediately before the copyright notice for that part. You must delete all other notices for that part. § 3.1. The Modifications which You create or to which You contribute are governed by the terms of this License, including without limitation Section 2.2. § 3.2. If You initiate litigation by asserting a patent infringement claim (excluding declaratory judgment actions and counterclaims) against Initial Developer or a Contributor, and a Contributor who has made a Contribution to You, then any and all rights granted by such Contributor to You under Sections 2.1 and/or 2.2 of this License shall, upon 60 days notice from Participant terminate prospectively, unless [RAND license or withdraw suit] § 3.3. If You initiate litigation by asserting a patent infringement claim (excluding declaratory judgment actions and counterclaims) against a Contributor, then any rights granted by You to such Contributor under Sections 2.1(b) and 2.2(b) are revoked . . .	§ 3.1. The Modifications which You create or to which You contribute are governed by the terms of this License, including without limitation Section 2.2. § 3.2. If You initiate litigation by asserting a patent infringement claim (excluding declaratory judgment actions and counterclaims) against Initial Developer or a Contributor, and a Contributor who has made a Contribution to You, then any and all rights granted by such Contributor to You under Sections 2.1 and/or 2.2 of this License shall, upon 60 days notice from Participant terminate prospectively, unless [RAND license or withdraw suit] § 3.3. If You initiate litigation by asserting a patent infringement claim (excluding declaratory judgment actions and counterclaims) against a Contributor, then any rights granted by You to such Contributor under Sections 2.1(b) and 2.2(b) are revoked . . .	§ 3.4(a). If Contributor has knowledge that a license under a third party's intellectual property rights is required to exercise the rights granted by such Contributor under Sections 2.1 or 2.2, Contributor must include a text file with the Source Code distribution titled "LEGAL" which describes the claim and the party making the claim in sufficient detail that a recipient

... patent claim(s), now owned or hereafter acquired
 ... no patent license is granted: 1) for code that You delete from the Original Code; 2) separate from the Original Code; or 3) for infringements caused by: i) the modification of the Original Code or ii) the combination of the Original Code with other software or devices

If You initiate litigation by asserting a patent infringement claim (excluding declaratory judgment actions) against Initial Developer or a Contributor ["Participants"]. . . alleging that . . .
 (a) such Participant's Contributor Version directly or indirectly infringes any patent, then any and all rights granted by such Participant to You under Sections 2.1 and/or 2.2 of this License shall, upon 60 days notice from Participant terminate prospectively, unless [RAND license or withdraw suit]
 (b) any software, hardware, or device, other than such Participant's Contributor Version, directly or indirectly infringes any patent, then any rights granted to You by such Participant under Sections 2.1(b) and 2.2(b) are revoked . . .



CPL 1.0 / EPL 1.0

License	(A) Grant as Developer, Distributor or Contributor	(B) Condition of Use (sometimes with "Retaliation")	(C) Other
CPL 1.0	"Licensed Patents" mean patent claims licensable by a Contributor which are necessarily infringed by the use or sale of its Contribution alone or when combined with the Program. § 2(c). Recipient understands that although each Contributor grants the licenses to its Contributions set forth herein, no assurances are provided by any Contributor that the Program does not infringe the patent or other intellectual property rights of any third party. It is the recipient's responsibility to ensure that its use of the Program does not infringe any third party's patent or other intellectual property rights. § 7.2. If Recipient institutes patent litigation against a Contributor with respect to a patent applicable to software (including a cross-claim or counterclaim in a lawsuit), then any patent licenses granted by that Contributor to such Recipient under this License shall terminate as of the date such litigation is filed. § 7.3. If Recipient institutes patent litigation against any entity (including a cross-claim or counterclaim in a lawsuit) alleging that the Program itself (excluding combinations of the Program with other software or hardware) infringes such Recipient's patent(s), then such Recipient's rights granted under Section 2(b) shall terminate as of the date such litigation is filed.	§ 7.2. If Recipient institutes patent litigation against a Contributor with respect to a patent applicable to software (including a cross-claim or counterclaim in a lawsuit), then any patent licenses granted by that Contributor to such Recipient under this License shall terminate as of the date such litigation is filed. § 7.3. If Recipient institutes patent litigation against any entity (including a cross-claim or counterclaim in a lawsuit) alleging that the Program itself (excluding combinations of the Program with other software or hardware) infringes such Recipient's patent(s), then such Recipient's rights granted under Section 2(b) shall terminate as of the date such litigation is filed.	§ 2(c). Recipient understands that although each Contributor grants the licenses to its Contributions set forth herein, no assurances are provided by any Contributor that the Program does not infringe the patent or other intellectual property rights of any third party. It is the recipient's responsibility to ensure that its use of the Program does not infringe any third party's patent or other intellectual property rights.

"Licensed Patents" mean patent claims licensable by a Contributor which are necessarily infringed by the use or sale of its Contribution alone or when combined with the Program.
 ... each Contributor hereby grants Recipient a non-exclusive, worldwide, royalty-free patent license under Licensed Patents to make, use, sell, offer to sell, import and otherwise transfer the Contribution of such Contributor . . . The patent license shall not apply to any other combinations which include the Contribution. No hardware per se is licensed hereunder.

If Recipient institutes patent litigation against any entity (including a cross-claim or counterclaim in a lawsuit) alleging that the Program itself (excluding combinations of the Program with other software or hardware) infringes such Recipient's patent(s), then such Recipient's rights granted under Section 2(b) shall terminate as of the date such litigation is filed.

