



Software Association
of Oregon

INTERNET STRATEGY FORUM EXECUTIVE SUMMIT

July 19-20, 2007
Co-Sponsored Event

Legal Implications of the Linux Foundation



By Ariel Rogson, attorney, Marger Johnson & McCollom

According to Diane Peters, general counsel for the Linux Foundation, the overarching mission of the foundation is to promote, protect and standardize Linux. This mission is a combination of the goals of both the Open Source Development Labs and the Free

Software Group; consequently, harmonizing this mission is not a difficult task.

Taking a neutral position

The Linux Foundation chooses to take a neutral position regarding the use of open source licenses such as the GNU General Public License (GPL) provided by the Free Software Foundation. As a result, the Linux Foundation does not plan to advocate that any version of the GPL is good or bad. In fact, the GPL, or any license for that matter, is likely to be good for some uses and bad for others because the usefulness of a license depends on the circumstances surrounding its use. The Linux Foundation aims to ensure that the licenses used by members of the open source community are acceptable and fair to all parties.

The GPL, probably the best-known software license used by the open source community, is now and has been in version 2 since 1991. Version 3 of the GPL is currently being formulated, and, according to Peters, a third discussion draft is expected to be available to the general public by the time this article is published. Currently, many developers of the Linux kernel use version 2 of the GPL. Peters expects that kernel developers will likely continue to use version 2 of the GPL for a while, rather than migrating quickly to version 3, given that there is some established history in terms of the scope and applicability of version 2 of the GPL and the difficulty of changing the kernel license.

Of course, the GPL is not the only license in use as part of the Linux platform. Different licenses are used by developers of different modules that make up the Linux platform. While the Linux Foundation does not advocate one license over another, another goal of the Linux Foundation is to ensure compatibility, to the extent possible, between the various licenses that cover modules of the Linux platform. Compatibility among the various licenses is a benefit to Linux distributors, who need to ensure that the terms of all licenses that apply to modules of the Linux platform are satisfied. The more compatible the licenses, the easier the task for Linux distributors.

A goal of license clarity

Clarity in the licenses is also an important point. For example, version 2 of the GPL was not always clear as to how a licensed package could be used. Could a company develop a proprietary application that uses a package licensed under version 2 of the GPL? The answer often depended on exactly how the licensed package was used. The current view is that the legal interpretation of a derivative work under copyright law determines the boundaries of version 2 of the GPL. (A "derivative work" is, as the name implies, a work "derived" from, or based on, another's work – the right to prepare a derivative work, or authorize another to prepare a derivative work, is reserved to the owner of the copyright in the original work.)

Version 3 of the GPL, like version 2 before it, is expected to omit a definition of a derivative work. While some criticize this choice of the Free Software Foundation, as it means that the boundaries surrounding what is permitted under the GPL are defined by the courts rather than by the GPL itself, the Linux Foundation supports this choice. Peters thinks that this choice is the only way to make the GPL a license of general applicability. But even with the improved clarity that is expected to be inherent in version 3 of the GPL, Peters expects it will take years for users of the license to understand its full scope, much like what occurred with version 2 of the GPL. This is one

SEARCH OUR SITE

Search

SAO EVENT CALENDAR

June 27, 2007
[Applying Technology to Get Above the Sidewalk](#)
CIO/IT Forum

June 28, 2007
[Static v. Dynamic Analysis Tools: Finding the Right Bug Spray](#)
Quality Assurance SIG

July 10, 2007
[Pub Social](#)
Internet Professionals SIG

July 18, 2007
[ITIL Executive Overview](#)
Oregon Training Network

July 19-20, 2007
[Internet Strategy Forum Executive Summit](#)
Co-Sponsored Event

July 23-28, 2007
[ITIL Practitioner Release and Control](#)
Oregon Training Network

July 23-27, 2007
[OSCON 2007 - Open Source Convention](#)
Co-Sponsored Event

[Full Event Calendar](#)



SAO is always looking for new members and volunteers. Check out the [Membership](#) section of our site to see how to become an SAO Member. Or, click [here](#) to see how to become an SAO Volunteer

SAO NEWSLETTER SIGN-UP

Sign-up

[SAO Newsletter Archive](#)

[Home](#)

[About SAO](#)

[News](#)

[Events and Programs](#)

[Membership](#)

[Sponsorship](#)

[Chapters](#)

[Oregon Training Network](#)

[Techstart Education Foundation](#)

[Resource Center](#)

reason why version 2 of the GPL is not likely to be dropped quickly – everyone needs time to understand the implications of version 3.

Continued improvement in licenses

Peters also noted that there are new open source licenses being submitted for approval on a regular basis. Peters worked on the Open Source Initiative license proliferation committee in 2006, sorting through numerous existing and new proposed licenses. One of the committee's goals was to identify the licenses that were "best" in terms of clarity of drafting, applicability of terms and widespread adoption, and to encourage the Open Source Initiative to consider those as a preferred class of licenses. The Linux Foundation will continue to encourage the Open Source Initiative to reduce the number of licenses used by the open source community. Again, this would benefit developers responsible for aggregating, compiling and shipping Linux distributions, because with fewer licenses to review, it is easier to ensure the licenses are compatible. But even among this reduced set of licenses, developers are beginning to suggest that some of these licenses are in need of update. Peters thinks that such review is also a good thing. While there is an advantage in using a license whose terms are known, it is better that the licenses be updated when appropriate to take into account new business considerations, rather than remaining stagnant.

Thus, while the Linux Foundation encourages developers to adopt existing licenses, the Linux Foundation also encourages developers to choose license terms that best suit their needs, even if that means deviating from established licenses where appropriate. However, as the licenses themselves are literary works and can be subject to copyright, such modifications need to be within the extent permissible under the copyright owned by the steward. Some stewards have not asserted copyright, or have encouraged others to freely modify their licenses. Others, such as the Free Software Foundation – steward of the GPL – assert copyright in the text of the license and no derivative works can be made without approval of the steward.

One way in which version 2 of the GPL is unique among licenses is that it permits downstream developers to re-license the code under a later version of the GPL if the licensor has indicated that action is permissible. This means that pieces of code might be licensed under different versions of the GPL as distributed through different developers. But applications developed under later versions of the license cannot be re-licensed under version 2.

Improving patent quality and use

Aside from the overall standardization and marketing functions of the Linux Foundation, Peters identified two main components of its legal function. The first component is to identify and pursue programs that reduce legal risks associated with the environment in which Linux and open source software is created, distributed and used. This will include initiatives to improve patent quality, as developers generally do not have the resources to investigate or fight patents that might be asserted against them.

The Linux Foundation views unenforceable software patents as problematic for both proprietary and open source projects. The Linux Foundation wants to improve access to open source code as it becomes published electronically in repository sites. To that end, open source code should be tagged so that the U.S. Patent & Trademark Office can find code that could be applicable as prior art. The hope is that such tagging will help reduce the number of problematic patents allowed by the U.S. Patent & Trademark Office and help narrow the scope of those patents that are issued, so that only valid, truly enforceable software patents are issued. By helping to improve the quality of issued patents, the Linux Foundation can help mitigate developer concerns about issued patents that are not enforceable. And perhaps the U.S. Patent & Trademark Office can also tag patents in some way that would enable open source developers to identify patents about which the developers should be aware.

Another Linux Foundation project this year is a patent comments project, which encourages companies to use intellectual property in ways other than monetization. For example, companies could use patents to encourage technology to grow in an area that is not part of the core business of the company. The project encourages companies to pledge that they will not assert their patents against certain areas of technology.

The second component of the legal function of the Linux Foundation is to advocate and support key Linux-related projects. For example, the kernel remains an important part of Linux, and the Linux Foundation will provide the legal support – when requested – for maintenance and development of the kernel. The Linux Foundation also has a technical advisory board that comprises key Linux-kernel

maintainers. There also is a plan to expand the technical advisory board to represent other projects. This board acts as an input mechanism to identify technical issues that must be addressed, projects that need support, and other such tasks.

About the author

Ariel Rogson is an attorney at Marger Johnson & McCollom, PC, a full-service intellectual property law firm headquartered in Portland. A former software developer, he continues to serve clients in software and high-tech industries. He can be reached at (503) 222-3613 or ariel.rogson@techlaw.com. The above article is general information, not legal advice. Regarding a specific situation, seek competent intellectual property legal counsel.