

How Will Version 3 of the GPL Affect the Technology Industry?

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About Promontory

- Services
 - CDARS®
 - IND®
 - places about \$1 bn per week in CDs and about \$15 bn in money market accounts
- Alliances
 - The Bank of New York Mellon Corporation
 - American Bankers Association
 - Independent Community Bankers of America



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Certificate of Deposit Account Registry Service®

- More than 1,800 network banks
- Up to \$50 million in FDIC insurance
- Patent-pending matching engine
- Broad range of customers
 - Public funds (36 states) and nonprofits
 - Individuals, businesses, and advisors
 - Socially-motivated investors (e.g., Gulf Challenge, www.gulfchallenge.org)

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GNU General Public License

- GPLv1, 1989
 - About 2,000 words
 - Introduced “copyleft”
- GPLv2, 1991
 - Almost 3,000 words
 - First foray into patents
 - Linux released under GPLv2
- GPLv3, 2007
 - More than 5,500 words
 - Several patent provisions
 - New concepts (e.g., “propagate,” “convey”)

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Why GPLv3?

- To combat three “recent threats”
 - “Tivoization” – preventing users from running modified GPL-licensed software on devices
 - “Laws prohibiting free software” – Digital Millennium Copyright Act (“DMCA”)
 - “Discriminatory patent deals” – collecting royalties for the use of free software
- To enhance ease of use
 - Makes GPL “easier ... to use and understand”
 - Much of it “simply clarifies what GPLv2 said”

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License Proliferation

- Open Source Initiative (“OSI”)
 - 65 approved open source licenses
 - advisory committee on license proliferation
- Free Software Foundation (“FSF”)
 - 34 “compatible” free software licenses
 - 33 “incompatible” free software licenses
 - 24 “often mistaken for free software licenses
- WTFPLv2, 2004 (<http://sam.zoy.org/wtfpl>)
 - Do What the [Heck] You Want to Public License
 - “You just DO WHAT THE [HECK] YOU WANT TO.”

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License Readability

License	Word Count	Flesch Readability	Flesch-Kincaid Grade Level
GPLv1 (1989)	2017	39.75	14.77
GPLv2 (1991)	2925	36.62	15.72
GPLv3 (2007)	5567	33.01	15.34
§ 4 of GPLv2	100	17.34	23.26
MS Windows Vista EULA	5568	45.24	9.55
WTFPL	9	113.10	-0.28

Calculated using an adaptation of the Lingua:EN:Fathom PERL module (at <http://writing.teiru.net/fog/>)

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The Four Freedoms

0. Freedom to run the program
1. Freedom to change the source code
2. Freedom to distribute exact copies
3. Freedom to distribute modified copies

The copyleft or “viral” condition: Modified copies, if distributed, must be distributed under the GPL

The Four Freedoms in v2 and v3

Freedom	GPLv2	GPLv3
0. Freedom to run the program.	Running is not restricted (§ 0).	You have unlimited permission to run (§ 2).
1. Freedom to study and change the source code.	"You may modify your copy or copies of the Program or any portion of it" (§ 2).	"You may . . . propagate covered works that you do not convey, without conditions . . ." (§ 2).
2. Freedom to distribute exact copies.	You may distribute verbatim copies of source code (§ 1) or object code if you also provide source code (§ 3).	You may convey verbatim copies of source code (§ 4) or object code if you also provide source code (§ 4).
3. Freedom to distribute modified copies.	You may distribute your modifications if you do so under the GPL (§ 2).	You may convey "a work based on the Program" or modifications if you do so under the GPL (§ 2).

Express Permission to Modify?

- GPLv3 Preamble:
 - Intent is to "guarantee your freedom" to modify
 - But Preamble is not "operative" (Rosen)
- GPLv3 Terms and Conditions:
 - "You may not propagate or modify a covered work except as expressly provided . . ." (§ 8)
 - "You may . . . propagate covered works that you *do not convey*, without conditions . . ." (§ 2)
 - No express permission to modify covered works that you do convey, with or without conditions.

To Convey Is Not to Modify

- You may “convey” modified works
 - in source (§ 5) or object code with source (§ 6)
- But this is not permission to modify
 - “conveying” is propagation “that enables other parties to make or receive copies” (§ 0)
 - modifying a work does not, in and of itself, enable others to make or receive copies
- Copyright Act requires both permissions
 - right to distribute copies of works to the public, 17 U.S.C. § 106(3), is separate from
 - right to prepare derivative works based on the copyrighted work, 17 U.S.C. § 106(2)

Effects of Less-Than-Clear Drafting

- More work for technology lawyers
 - Complex new concepts
 - Few actual GPL decisions as it is
 - Progress v. MySQL (D. Mass. 2002)
 - Welte v. Sitecom (Munich 2004)
 - Wallace v. IBM (7th Cir. 2006)
- Higher transaction costs
 - Complicates mainstream use
 - Creates additional opening for competing free and open source licenses

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“Tivoization”

- TiVo DVR is a computer with an operating system
 - Runs modified Linux kernel and other GNU/Linux software
- TiVo provides source code for modifications
 - Satisfies a condition of GPLv2
 - User can modify the source code
- But TiVo device checks for a digital signature
 - Will not run user-modified code without this key
 - FSF: “dangerous attempt to curtail users’ freedom”
 - Device manufacturers: assures quality control, preserves ability to charge fees for service and implement DRM required for content deals

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“Anti-tivoization”

- If conveying works in “User Products,” provide “Installation Information” (§ 6)
 - “User Product” means a “consumer product” or something “for incorporation into a dwelling”
 - “Installation Information” includes keys required to run modified code in that User Product
- TiVo (form 10-K risk factors section):
 - “may be unable to incorporate future [GNU/Linux] enhancements ... into our software”
 - could “adversely affect our business”
- Possible effects
 - more open consumer devices ... or
 - less free software in consumer devices

DRM

- FSF: DMCA “prohibit[s] free software”
 - slight overstatement
 - DMCA does not *require* use of effective technological measures
- GPLv3 language shows different focus
 - DMCA prohibits use of *any* software to circumvent ETMs
 - GPLv3 seeks to reverse that prohibition when GPL-licensed software is used to implement the ETM

Anti-DRM

- “No covered work shall be deemed part of an [ETM] under [DMCA-like laws]” (§ 3)
- Conveying covered work “waive[s] any legal power to forbid circumvention”
- Are third-party copyright owners and government bound?
 - May not be a GPL licensee
 - But can GPL-implemented DRM be “effective”?
- Possible effects
 - Encourage hacking of GPL-implemented DRM
 - Discourage use of GPL software for DRM

Patents

- Multiple patent provisions in GPLv3
 - see DEP paper and Anne Kelley presentation for background and details
- James Bond has a “license to kill”
 - without a license, killing is generally frowned upon by the criminal law
- Software users have software licenses
 - without a license, use and other acts may violate IP law
- Prof. Eben Moglen:
 - a license is “unilateral permission”
 - the GPL is not a contract

GPL Patent Provisions

- GPLv1 – none; copyright-based
- GPLv2
 - you may not accept a patent license that does not permit royalty-free distribution by downstream licensees (§ 7)
- GPLv3
 - patent retaliation (§ 10) and contributor license (§ 11)
 - reliance on patent license (§ 11)
 - “procuring conveyance” (the “gotcha” clause) (§ 11)
 - discriminatory patent licenses (§ 11)

“Gotcha”?

- If ... 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 ..., then the patent license you grant is automatically extended to all recipients of the covered work and works based on it” (§ 11)
- “by modifying or propagating a covered work, you indicate your acceptance of this License to do so” (§ 9)

“Automatic Expansion”

- How can a unilateral permission change a licensee’s legal relations with third parties?
- Not clear GPL is irrevocable even by licensor
 - consideration is necessary to render a nonexclusive license irrevocable (3-10 Nimmer on Copyright § 10.03[A][8])
- Automatic expansion clauses addresses “you,” the licensee
- At most imposes condition of licensee’s GPL permissions
- Not clear even functions as condition

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