

# Digital Transactions: Part Three: Assignment 24

- Outline
- FOSS impact and development
  - FOSS licensing – copyright and trade secret
  - Conceptual framework for FOSS patent provisions
  - Sampling some FOSS patent provisions
  - FOSS in a transactional setting
  - Select other issues from FOSS



# Open Source impact



“Clients, however, presented with the tempting morsels of ready-to-use, tested, free software, and pressed by product release deadlines, do not tend to follow [the advice to not use FOSS] . . . ”

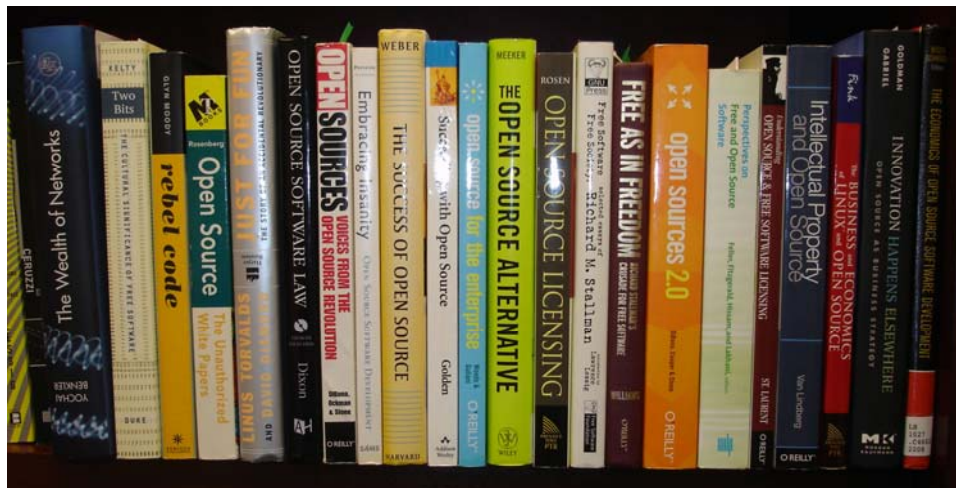
“The law of open source is complex and constantly changing. Those called upon to make decisions about open source will find little to guide them in traditional legal materials. There is virtually no case law on many crucial open source legal issues, and the relevant copyright statutes have barely begun to account for computer software itself, much less open source.”

. . .

“Open source and proprietary software are likely to coexist for decades to come.”

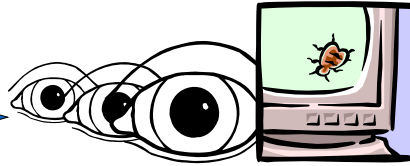
Heather J. Meeker, *The Open Source Alternative: Understanding Risks and Leveraging Opportunities* (2008) at ix-x. See also <http://www.gtlaw.com/People/HeatherJMeeker>; <http://www.heathermeeker.com/>

## FOSS Books . . .



## FOSS Development

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



- Market impact

IBM

A screenshot of the Red Hat Enterprise Linux website. The page features the Red Hat logo, navigation links for Software, Professional Services, Solutions, Support & Docs, Training, and About Red Hat. The main content area displays the Red Hat Enterprise Linux logo and the tagline "The new definition of the business operating system." To the right of the website screenshot is a photograph of several basketball players in blue uniforms running on a court.

UNIVERSITY of HOUSTON LAW CENTER  
Institute for Intellectual Property & Information Law

Greg R. Vetter • www.gregvetter.org  
Digital Transactions, Fall 2015

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## Strands/camps in FOSS licensing & the movement

Typically GPL-type  
copyleft licensing

Free Software – not free beer –  
computing self-determinism



Stallman

- Often BSD-type (attribution-  
only) licensing  
- Inbound assignments or  
licenses of greater necessity

Open Software – good development



Torvalds

Exclusive Rights in © Works - § 106

- Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
  - (1) to **reproduce** the copyrighted work in copies or phonorecords [material object in which sound is fixated . . .];
  - (2) to prepare **derivative works** based upon the copyrighted work;
  - (3) to **distribute** copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
  - (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to **perform** the copyrighted work publicly;
  - (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to **display** the copyrighted work publicly; and
  - (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission

GPLv2 (& later GPLv3)

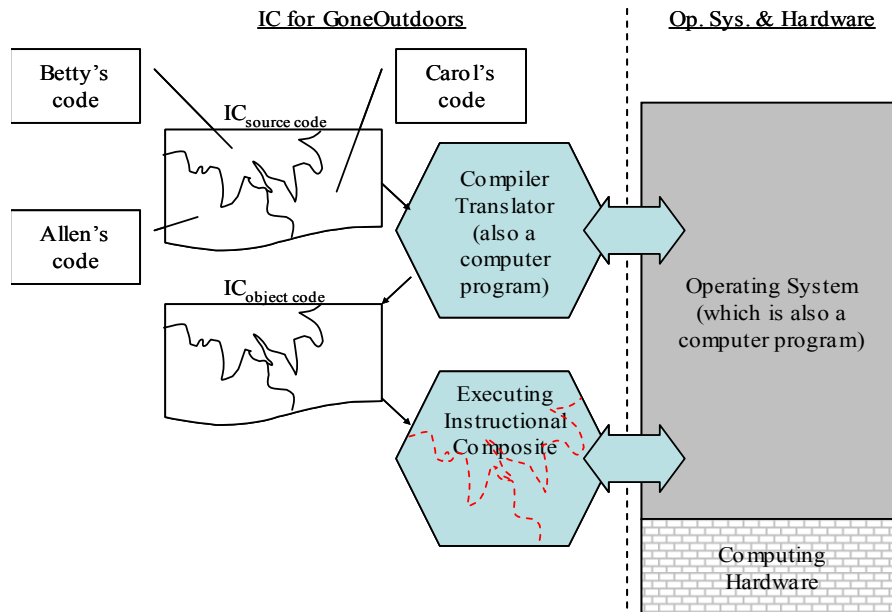
• **Licensing System:**

- 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 without distribution – “the act of running the program is not restricted”

## Contributed Code for a Hypothetical Application

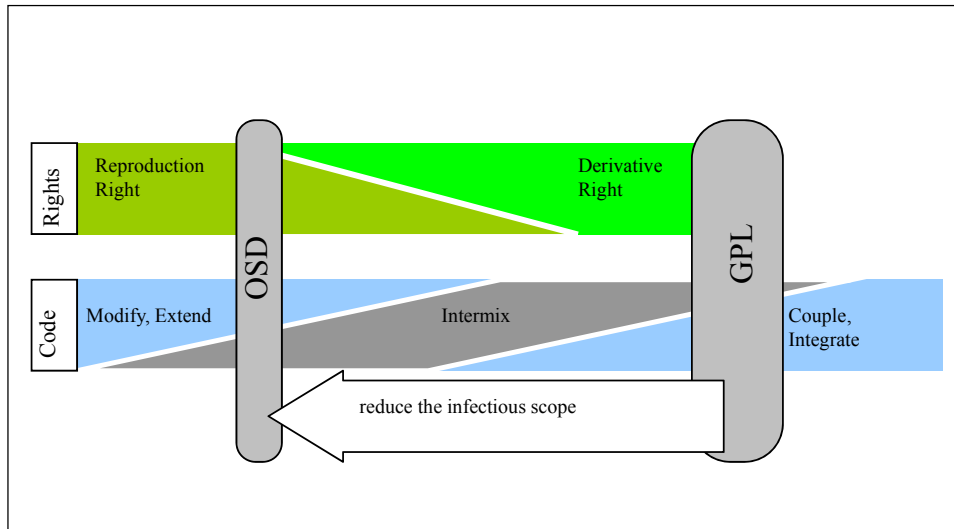


## FOSS Licensing Continuum

Issue	Attribution or "BSD" style (www.apache.org)	OSD (www.opensource.org)	GPLv2 (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		

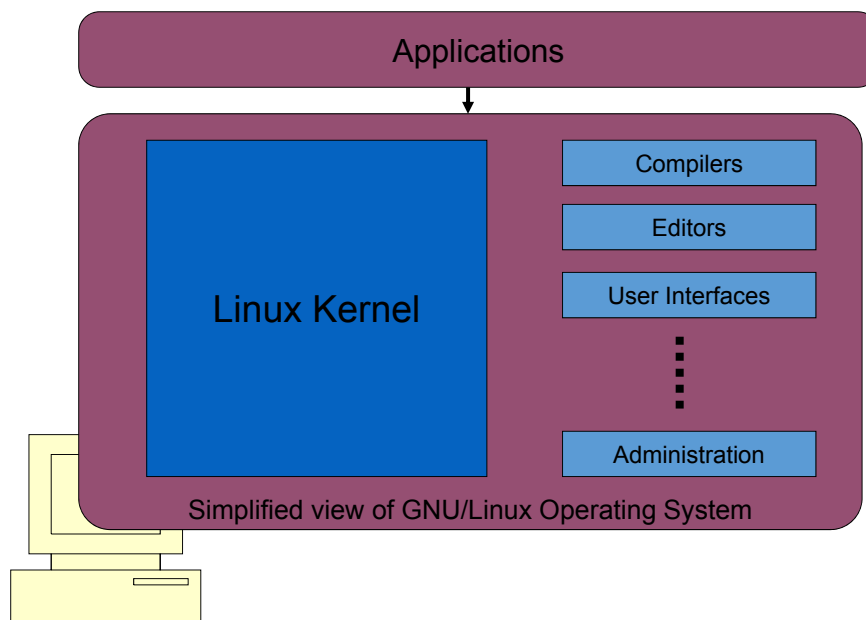
One popular open source project/product repository is at: [www.sourceforge.net](http://www.sourceforge.net)

## FOSS – GPLv2 – Infectious Terms



- GPLv2 safe harbors from infectious scope
  - mere aggregation
  - identifiably independent and separate

## FOSS – GNU/Linux



# Jacobsen v. Katzer (Fed. Cir. 2008)



- Jacobsen decl. J action to invalidate Katzer patent
  - Later addition of copyright claims by Jacobsen
  - Artistic License – attribution requirements
- District court concluded Katzer was within scope of license; attribution requirement is a separate covenant
  - No injunction
- Federal Circuit
  - Evaluate under © as conditions
  - Artistic license used language of condition



“Copyright licenses are designed to support the right to exclude: monetary damages alone do not support or enforce that right. The choice to exact consideration in the form of compliance with the open source requirements of disclosure and explanation of changes rather than as a dollar-denominated fee, is entitled to no less legal recognition.”

## CPL 1.0 / EPL 1.0

~~... patent litigation against a Contributor with respect to a patent applicable to software ... In addition, 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)~~

Removed for EPL

License	(A) Grant as Developer, Distributor or Contributor	Condition of Use (s)	(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.	§ 7.52. 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 that Recipient under this license 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 of any third party. Recipient will be responsible for obtaining any necessary third party licenses (other than those held by or for Recipient) to make, use, sell, offer to sell, import and otherwise transfer the Contribution of such Contributor. 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.

"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.

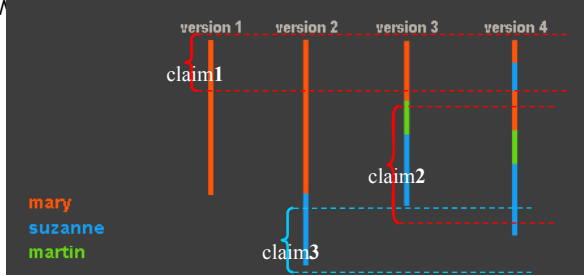
MPL 1.1

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.	§ 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. . . .	§ 3.4(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
	§ 2.1: Under Patents Claims infringed by the making or using of Original Code, to make, have, use, practice, sell, and offer for sale, and otherwise dispose of the Original Code (or any portion thereof).	§ 3.2: If You initiate litigation by asserting a patent infringement claim (excluding declaratory judgment actions) against Initial Developer or a Contributor ["Participants"] . . . alleging that . . .	

... 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 . . .

A framework for . . .



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

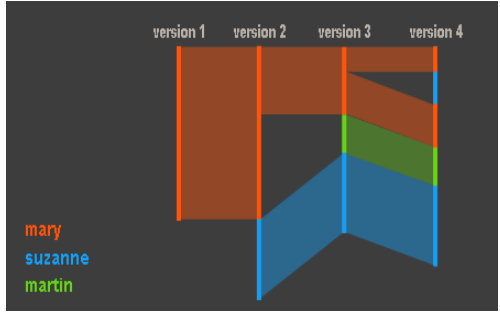
- currently controlled for present version
- currently controlled and controlled in the future for present version
- currently controlled for present and future versions
- currently controlled and controlled in the future for present and future versions

\* 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?





GPLv2

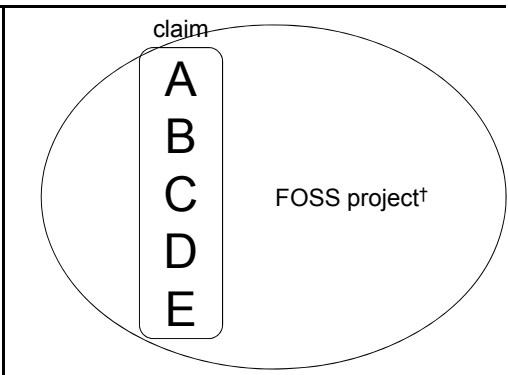
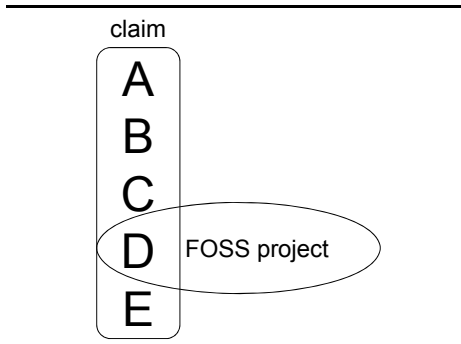
License	[A] Grant as Developer, Distributor or Contributor	[B] Condition of Use (sometimes with "Retaliation")	[C] Other
GPL 2.0	"implied" § 7. if a patent license would not permit royalty-free redistribution of the Program by all those who receive copies directly or indirectly through you, then the only way you could satisfy both it and this License would be to refrain entirely from distribution of the Program.		Preamble: We wish to avoid the danger that redistributors of a free program will individually obtain patent licenses ... any patent must be licensed for everyone's free use or not licensed at all.

refrain entirely from distribution

“any patent must be licensed for everyone’s free use or not licensed at all”

Implied license in patent law

- Hypothetical vendor-supported FOSS project where the vendor has patent(s) and uses some proprietary software appropriability techniques
  - Inbound patent licenses from contributors to FOSS
  - BSD-type license without patent clauses for FOSS users
  - Express repudiation of implied license for any party’s patents in that BSD-type license
- Claim scope scenarios



## FOSS in Transactions

- Triggering events
  - Financing
  - Major license
  - Software development
  - Channel arrangement
  - M&A / Diligence Requests
  - Stock offering
- FOSS as third party software
  - Similarities / Differences / What matters & Why
- Some markets need an open source strategy
- Preemptive diligence & automation of such
  - [www.blackducksoftware.com](http://www.blackducksoftware.com)

## FOSS in Transactions . . .

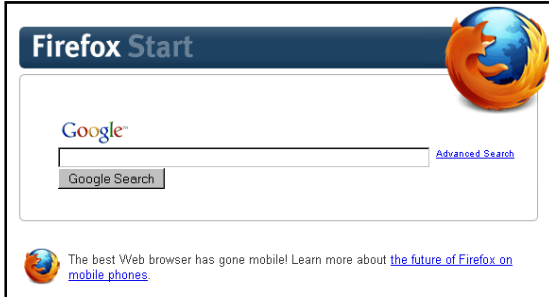
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# FOSS in Transactions . . .

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# FOSS Trademark Issues



<b>Description</b>	Official Iceweasel Icon, used in Debian Package
<b>Date</b>	22 June 2007
<b>Source</b>	Debian Packages, Iceweasel <a href="#">↗</a>
<b>Author</b>	Ricardo Fernandez Fuentes, copyright 2006-2007
<b>Permission</b> (Reusing this file)	Tri-licensed under Gnu GPL, Gnu LGPL, and Mozilla Public License
<b>Other versions</b>	

# FOSS Trademark Issues

The screenshot shows a web browser window displaying the Linux Mark Institute website. The URL is [http://www.linuxmark.org/linux\\_sublicense.php](http://www.linuxmark.org/linux_sublicense.php). The page features the Linux Foundation logo and a navigation menu with links for About, Join, Linux Standard Base, Workgroups, Linux Protection, Collaboration Forum, and Developer Services. The main heading is "Linux Mark Institute" with the tagline "Protecting The Linux® Trademark For The Open Source Community". The page is titled "The Linux Sublicense Agreement" and "Version 2.0". The text states: "THIS LINUX SUBLICENSURE AGREEMENT (the 'Sublicense') is between LMI Oregon, located in Beaverton, Oregon (herein 'LMI'), and Sublicensee, as identified on the Application Approval Statement (defined below) along with address and other contact information. This Sublicense is effective as of the Issuance Date specified on the Application Approval Statement (the 'Effective Date')." Below this, there is a section for "RECITALS" and a "WHEREAS" clause: "WHEREAS, Linus Torvalds ('Mr. Torvalds') has certain trademark rights to the Linux mark (the 'Trademark'), including goodwill stemming from his first use and association with the Trademark, formal registrations, and common law rights, and". On the right side, there are links for "Contacting LMI:" including "Ask Us Questions", "Apply For a Sublicense", and "Report Abuse", and "More Information:" including "Linux Mark Home", "Frequently Asked Questions", "Trademark Attribution", "Forms of the Mark", "Who Needs a Sublicense?", "The Linux Sublicense Agreement", "How Do I Get Rights to Tux the Penguin?", and "About LMI".

## Commercial Open Source & appropriability

- FOSS benefits for proprietary software
  - Direct incorporation of BSD-type licensed code
  - Learning from source code
  - Use of collaborative practices
  - Extension of network value via FOSS interoperability
- Hybridized FOSS and proprietary software
  - Complements
  - Incorporation (easier with BSD-licensed software)
  - Dual-licensing
- Competitor-exclusionary appropriability strategies and patent law

## Facilitators for FOSS-Disfavoring software markets

- Safe Harbors for Anti-Collaboration and Anti-Tinkering Law
- Licensing
  - Proprietary / FOSS Layering
  - Dual Licensing
  - Contractor Channeling
- Other Facilitators
  - Service Markets
  - Active Attributions
  - Subsidies

### FOSS-Disfavoring Software Markets

- Low Technical Aptitude
- High Work Flow Differentiation
- Minimal Complementary Effects
- Dispassionate Computing Agendas
- Entrenched Proprietary Competitors
- Regulatory and Bureaucratic Pressures

## Assignment Twenty-Four Problems

- 24.1 to 24.3
- 24.5
- 24.4