

IP Strategy and Management



- Open Source and Free Software (OSFS)
 - Alternative Acronyms:
 - FOSS
 - OSS
 - FLOSS



Outline



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



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 OSFS] . . . ”

“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 statues have barely begun to account for computer software itself, much less open source.”

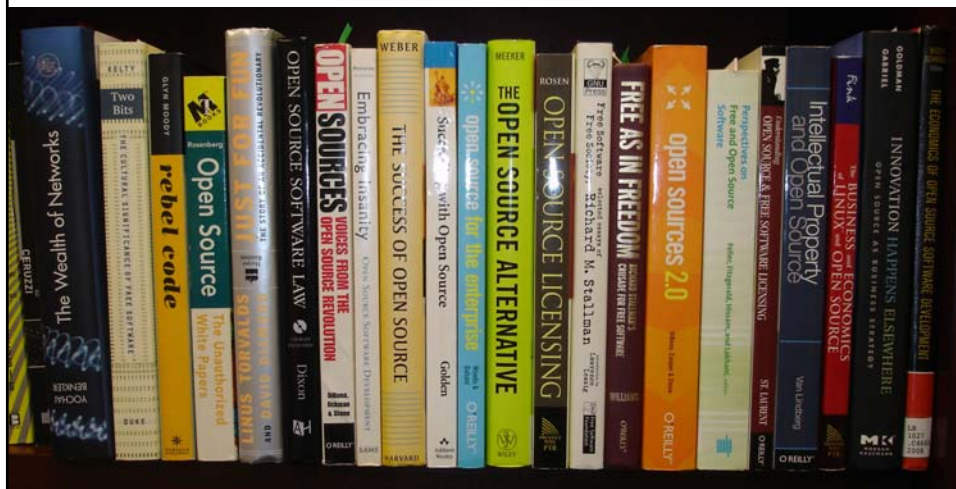
. . .

“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/>

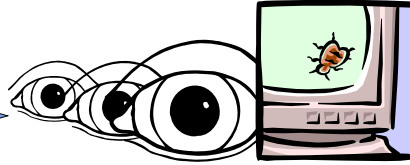


OSFS Books . . .



OSFS Development

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



Market impact

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 text "Red Hat Enterprise Linux The new definition of the business operating system." To the right, there is a photograph of several basketball players in blue jerseys with "INFRA" on them. The IBM logo is visible in the top right corner of the screenshot. The University of Houston logo is in the bottom left, and a small red diamond logo is in the bottom right.

Strands/camps in OSFS licensing & the movement

Typically GPL-type copyleft licensing

Free Software – not free beer – computing self-determinism

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

Open Software – good development



Stallman



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)



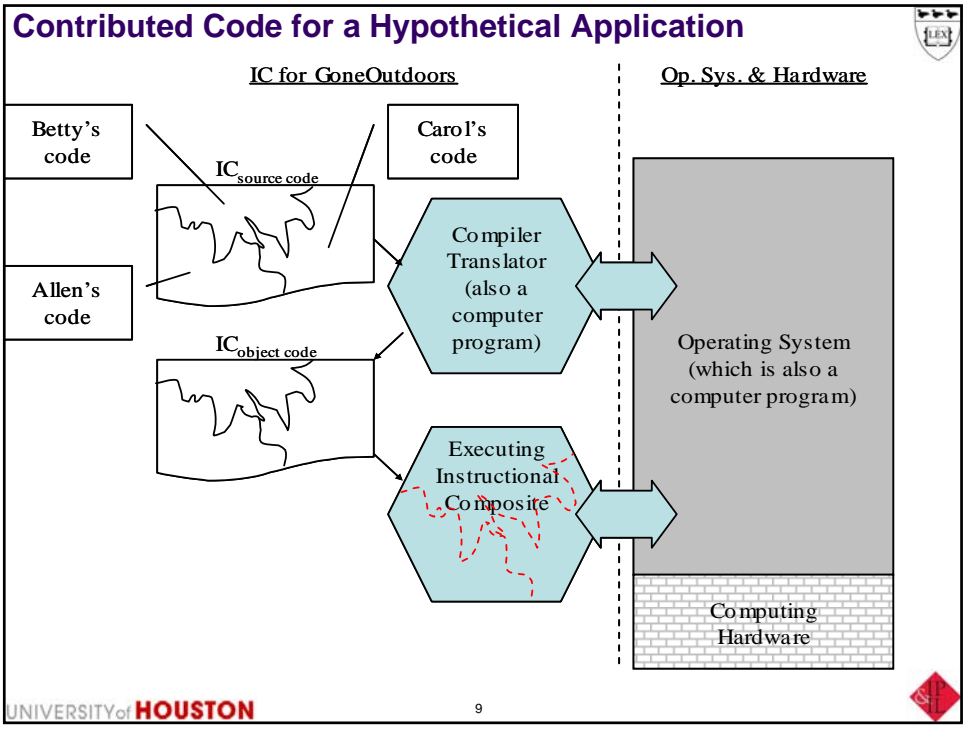
• **Licensing System:**

- 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”



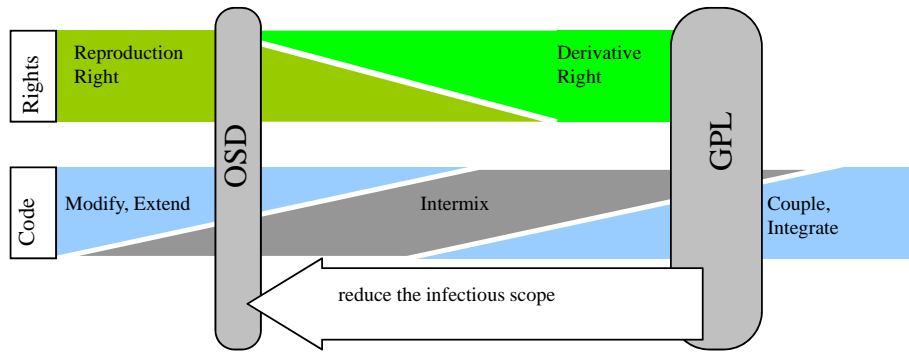


OSFS Licensing Continuum

Issue	Attribution or "BSD" style <small>(www.apache.org)</small>	OSD <small>(www.opensource.org)</small>	GPLV2 <small>(www.fsf.org)</small>
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			

UNIVERSITYof **HOUSTON** 10

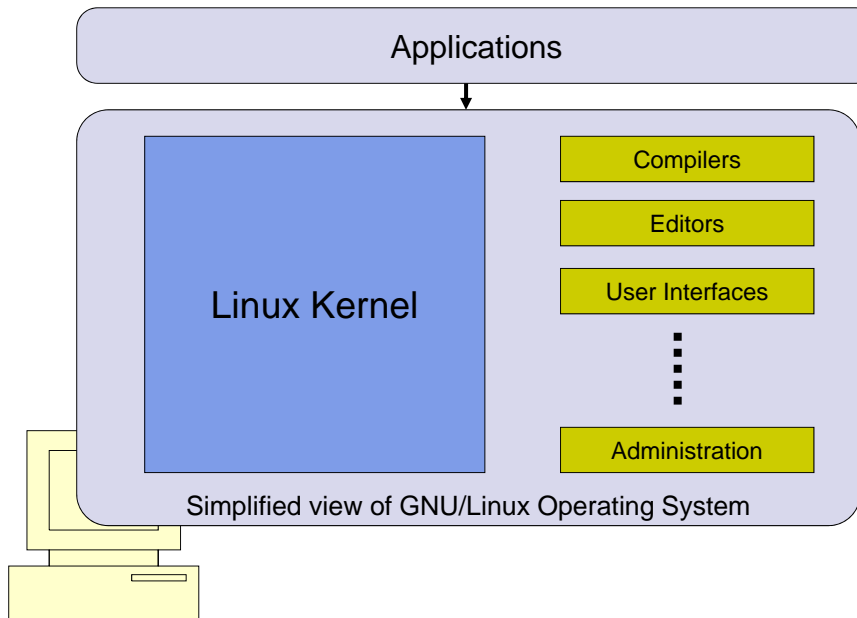
OSFS – GPLv2 – Infectious Terms



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



OSFS – GNU/Linux



Jacobsen v. Katzer (Fed. Cir. 2008)

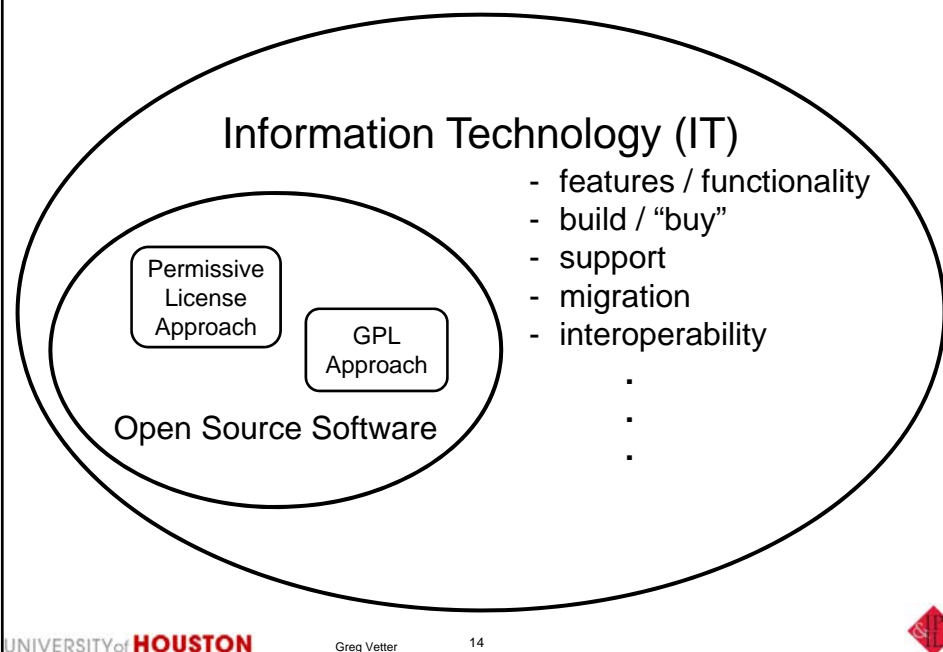


- Jacobsen decl. J action to invalidate Katzer patent
 - Later addition of copyright claims by Jacobsen
 - Artistic License – attribution requirements
- District court concluded Katzer was within scope of license; attribution requirement is a separate covenant
 - No injunction
- Federal Circuit
 - Evaluate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



Open Source Software within the ecology of IT



Selection influences on the Open Source Software method



- Use and value of the software
- Technology lifecycle considerations
- Motivations and Models

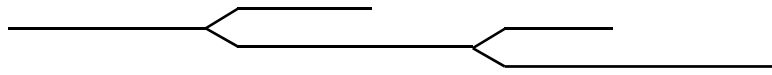
Motivations	Models
Fun	Complements
Fame	Platforms
Community	Standards
Identity	Openness
Career concerns	Interoperability
The "movement"	Branding
\$\$\$	Disruption



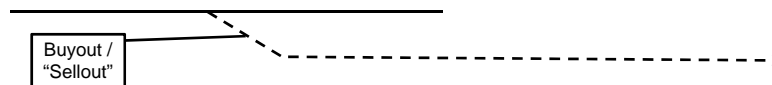
Open Source Software pathways



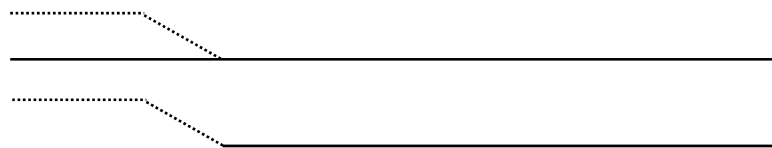
Forked GPL Project Pathway



Buyout / "Sellout" GPL Project Pathway



Small Project Startup Pathway(s)



Key: GPL = solid line; Permissive = dotted; Proprietary = dashed



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	(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 the Contribution alone or when combined with the Contribution.	§ 2.2. If Recipient institutes patent litigation against a Contributor (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.	§ 2.1(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 any patent owned by a third party. Recipient understands that if it does commence a patent infringement suit against a Contributor it may, nevertheless, incur the costs or damages incurred in defending the Contributor against such a patent infringement suit.

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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, in 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.	§ 3.2(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 ...

A framework for patent grant & “patent peace” clauses



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

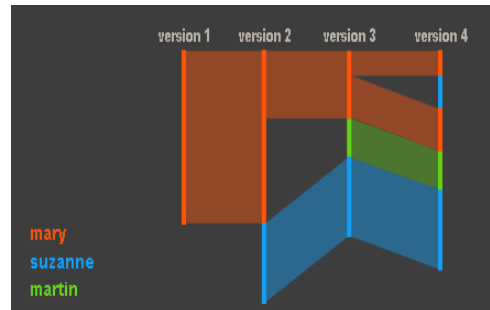
- currently controlled for present version
- currently controlled and controlled in the future for present version
- currently controlled for present and future versions
- currently controlled and controlled in the future for present and future versions

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

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

- assert against Distributor of the OSFS Program
- assert against any Distributor or User of the OSFS Program
- assert against any Distributor or User of any OSFS 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>

GPLv2



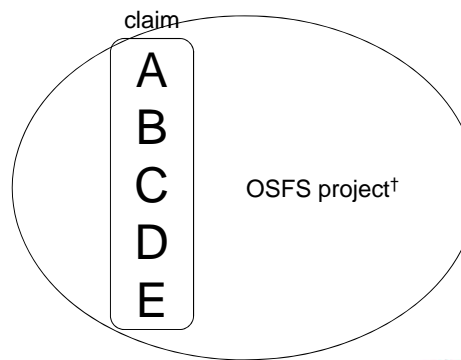
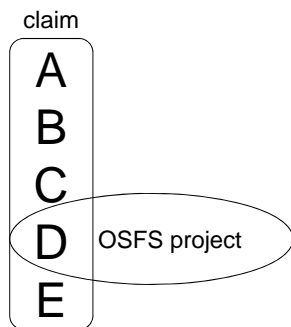
License	(A) Grant as Developer, Distributor or Contributor	(B) Condition of Use (sometimes with "Retaliation")	(C) Other
GPL 2.0	"implied"		<i>Preamble:</i> We wish to avoid the danger that re-distributors of a free program will individually obtain patent licenses ... any patent must be licensed for 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 OSFS project where the vendor has patent(s) and uses some proprietary software appropriability techniques
 - Inbound patent licenses from contributors to OSFS
 - BSD-type license without patent clauses for OSFS users
 - Express repudiation of implied license for any party's patents in that BSD-type license
- Claim scope scenarios



OSFS in Transactions

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

OSFS in Transactions . . .



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OSFS in Transactions . . .



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OSFS Trademark Issues



Firefox Start



Google

Advanced Search

Google Search



The best Web browser has gone mobile! Learn more about [the future of Firefox on mobile phones](#).

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



OSFS Trademark Issues



Browser address bar: http://www.linuxmark.org/linux_sublicense.php

Browser tabs: Most Visited, Getting Started, Latest Headlines, <http://www.google.com/>, <https://addons.mozilla.org/>, LINUX MARK INSTIT..., LINUX MARK INST..., Linux Standard Base..., Legal Programs | Th..., Linux Defenders

THE LINUX FOUNDATION

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The Linux Sublicense Agreement

The Linux Sublicense Agreement
Version 2.0

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- [Who Needs a Sublicense?](#)
- [The Linux Sublicense Agreement](#)
- [How Do I Get Rights to Tux the Penguin?](#)
- [About LMI](#)



Commercial Open Source & appropriability



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



Facilitators for OSFS-Disfavoring software markets



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

OSFS-Disfavoring Software Markets

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

