ACT Warns of Legal Risk with Latest GPL Draft

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Patent-related proposed amendments to the license could possibly do more harm than good by "selectively overreaching" for third-party patent rights, an ACT lawyer says.

The third discussion draft of the GNU General Public License Version 3, particularly the provisions designed to block patent cooperation agreements like the one between Novell and Microsoft, could potentially expose those developing and using the license to legal risk.

So says Richard Wilder, an attorney at Sidley Austin and the intellectual property counsel for ACT, the Association for Competitive Technology, which has been one of the most vocal critics of the recently released third draft.

Wilder, asked by ACT to give his analysis of the new draft, said the newly added portions designed to block patent cooperation agreements like the one between Novell and Microsoft were included "because they give some Linux users the benefit of a patent covenant not to sue, but not to the extent that the drafters would ideally like," Wilder said in an analysis titled "GPLv3: The Legal Risks of Overreaching for Third-Party Patent Rights," now posted on ACT's Web site.

Wilder advised that "those participating in the drafting and consultation process, or that plan to use GPLv3 once it is issued, should give careful consideration to whether such amendments do more harm than good by selectively overreaching for third-party patent rights."

But ACT, a Washington-based technology lobby group whose membership includes large companies like eBay, Oracle, Orbitz and VeriSign, and which was founded in 1998 in response to the Microsoft antitrust case, is largely dismissed by those in the open-source community as nothing more than a lobby group for the interests of Microsoft and those other large corporations.

Mark Blafkin, ACT's vice president for public affairs, noted to eWEEK that its membership also included some 3,000 small and midsize technology firms from around the world.

While the Free Software Foundation, in Boston, could not be immediately reached for comment and a spokesperson for Novell declined to comment, Richard Stallman, president of the FSF and principal author of the GPL, has said the license is designed to ensure that all users of a program receive the four essential freedoms that define free software.

"The recent patent agreement between Microsoft and Novell aims to undermine these freedoms. In this draft we have worked hard to prevent such deals from making a mockery of free software," he said when the draft was released.

While Horacio Gutierrez, vice president of intellectual property and licensing for Microsoft, in Redmond, Wash., has said he is pleased that the deal with Novell has been "grandfathered" into the latest draft, he is unhappy that the license aims to prevent similar future agreements.

"We note that the draft of the GPLv3 does not tear down the bridge Microsoft and Novell have built for their customers. It is unfortunate, however, that the FSF is attempting to use the GPLv3 to prevent future collaboration among industry leaders to benefit customers," he has said.

Novell, based in Waltham, Mass., has also welcomed the fact that there is nothing in the latest draft of the license that inhibits its ability to include GPL3 technologies in SUSE Linux Enterprise, OpenSUSE and other Novell open-source offerings, now or in the future.

But the company has also acknowledged the reality that this could change by the time the final version of the license is released, expected to be late in the summer of 2007 at the earliest. "If the final version of the GPL3 does potentially impact the agreement we have with Microsoft, we'll address that with Microsoft," spokesperson Bruce Lowry said.

Wilder contends that, at some point, efforts to block patent licenses that were legally entered into and fully consistent with contract law, as well as the intellectual property laws enacted by Congress, "begin to expose those developing and agreeing to GPLv3 to potential defenses and counterclaims."

Efforts by non-parties to force or induce a party to abrogate a validly entered-into contract or forego entering into a prospective contract can give rise to a cause of action for tortious interference, he said. Tortious interference occurs when a person intentionally damages the plaintiff's contractual or other business relationships.

Also, concerted agreements among competing providers of Linux software and associated services to refuse to enter into license agreements with a patent holder, or to refuse to supply Linux software as punishment for any company that does so, can give rise to antitrust liability under a group boycott theory, Wilder said.

In addition, efforts to use copyrights in order to control subject matter such as patent rights, which are outside the scope of statutory copyrights, could give rise to claims for copyright misuse that would block all

enforcement of such copyrights until the misuse is purged, he said.

Wilder also argued in another analysis titled "Legal Analysis: GPLv3 Is a Contract and Why It Matters" that the "threat" of the recent cooperation agreement between Novell and Microsoft, and other agreements like it, is the covenant by Microsoft not to assert its patent rights against customers who have purchased SUSE Linux Enterprise Server or other covered products from Novell.

"The real concern, however, is that Novell and Microsoft have found a way to build bridges between the two worlds of open-source and proprietary software. This was a bridge too far for the FSF," Wilder said.

ACT executive director Morgan Reed also weighed in with a blog posting summarizing that analysis. The FSF had drafted a new paragraph to require the automatic grant of a patent license to all recipients of a covered work if they "convey, or propagate by procuring conveyance of, a covered work," he said.

"But the flaw in this provision is significant," Reed said, noting that this is a contract term, not a license term. "Because Microsoft and companies like them are not parties to the contract, they are not bound by it. What that means is that a non-participant is now part of the agreement; we have transcended a license and moved into the realm of contracts. The third party is not being given any rights, only obligations. Obligations that they haven't agreed to assume," he said.

"The case law on software licensing has not eroded the importance of assent in contract formation. Mutual assent is the bedrock of any agreement to which the law will give force," Reed concluded.

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