

# Perens Lashes Out at Claims GPL 3 Brings Legal Risks

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Open-source luminary Bruce Perens scathingly dismisses claims by a lawyer for the Association for Competitive Technology that the latest draft of the GNU GPL Version 3 brings legal risks.

Open-source developer and evangelist Bruce Perens has scathingly dismissed claims by a lawyer for the Association for Competitive Technology that the latest draft of Version 3 of the GNU General Public License brings legal risks.

"Let's make it clear that - ACT - is Microsoft's lobbying front and that they are going to paint as negative a picture as they can," Perens told eWEEK in an interview.

"Obviously, GPL software is displacing Microsoft enough to have them concerned, and it's doing it at customers who are important to them. A lawyer's job is to scare the other side if they can - because they know it's cheaper than winning a case in court," he said.

Perens pointed out that IBM, Hewlett-Packard, Red Hat and a couple dozen corporate attorneys have seats on the GPL 3 committees and are constantly evaluating any potential legal risk introduced by the drafts.

The Free Software Foundation declined to comment on ACT's legal assessment.

Richard Wilder, an attorney at Sidley Austin and the intellectual

property counsel for ACT, wrote an analysis titled "GPLv3: The Legal Risks of Overreaching for Third-Party Patent Rights."

In his analysis Wilder claimed 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."

Perens dismissed that as nothing more than words designed to create the impression that the Free Software Foundation is going against the law, violating existing contracts and even running afoul of Congress, all without stating any facts to back up the assertion.

With regard to Wilder's contention that "efforts by non-parties to force or induce a party to abrogate a validly entered-into contract or forgo entering into a prospective contract can give rise to a cause of action for tortious interference," Perens said that he cannot see how providing a new version of software under a new license - when another version under another acceptable license like GPL 2 exists - could ever be considered to be tortious interference.

"Nobody, not even a Linux distribution, will be forced to use software licensed under GPL 3. Nobody is ever owed the assistance of the GPL 3 developers - who of course they haven't hired. And nobody will ever be denied the right to use the software licensed under GPL 3 in compliance with that license," he said. "GPL 3 is not the only license in the world containing terms that are mutually exclusive with other possible agreements: Almost all contracts and licenses are that way."

GPL 3 does not prohibit anyone from taking a patent license; it only affects the way such licenses can be passed on to others, and only when that license is applied to the specific copyrighted property that was

licensed under GPL 3.

With regard to Wilder's argument that 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, could give rise to antitrust liability under a group boycott theory, Perens said that a group boycott is an agreement among competitors not to deal with another competitor.

"GPL 3 makes no such agreement. We dealt with antitrust in *Daniel Wallace versus the FSF*. That was not only dismissed, the judge compelled Wallace, the plaintiff, to pay FSF's court costs. It is relevant because GPL 2 also has patent language requiring that patent licenses conveyed with the GPL 2 software must apply to all possible users of that software - or you can't distribute it at all," he said.

Also, GPL 3 developers do not owe anyone the right to use their software, so Wilder's "refusal to supply" argument is bogus, Perens said, adding that the software is downloadable via the Internet and may be employed by anyone who complies with the license.

Perens is equally dismissive of Wilder's contention that efforts to use copyrights to control subject matter such as patent rights that are outside the scope of statutory copyrights could give rise to claims of copyright misuse that would block all enforcement of such copyrights until the misuse is purged.

"GPL 3 gives conditions regarding how you must convey patent licenses that apply to the software, if you convey them at all," he said. "GPL 3 is designed not to take away from you any rights that you would otherwise have had. But you would never have had any right to distribute the software at all without GPL 3. The default in the law is 'all rights

reserved,' and thus you would never have had the right to convey a patent license with the software until GPL 3 gave you that right."

Wilder, according to Perens, is also "really off base" with his claim that the FSF's real concern is that Novell and Microsoft find a way to build bridges between the two worlds of open-source and proprietary software, which is, essentially, a bridge too far for the FSF.

"It is now, and always has been, legal to make proprietary software that runs on a GNU/Linux system," Perens said. "Oracle does it with no problem, for example. That's not a bridge between the proprietary and open-source world? Why is that legal? Because the FSF made it so."

The key library that Oracle was required to link to was the GNU C library, otherwise known as GLIBC, or just libc, on Linux. "That is licensed under the LGPL, a license that the Free Software Foundation created so that anyone could bridge free software libraries with proprietary software," he said.

"So, what we really are hearing here is a representative for the world's biggest closed software company trying to make a case that the Free Software Foundation isn't open enough for them, when of course Microsoft does not give people anything close to the rights that FSF grants on every bit of software that they own," he said.

ACT Executive Director Morgan Reed has also said that the text in the third draft 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" is flawed as this is a contract term, not a license term, and because Microsoft and companies like them are not parties to the contract, they are not bound by it.

"What that means is that a nonparticipant is now part of the agreement;

we have transcended a license and moved into the realm of contracts," Reed said. "The third party is not being given any rights, only obligations. Obligations that they haven't agreed to assume. 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."

But, to Perens, the fact that Microsoft is currently giving to customers coupons that can be redeemed for a copy of SUSE Linux indicates that these coupons are intended to be redeemed for a copy of the copyrighted GPL 2 software.

"So, Microsoft is actively participating in distribution of the GPL2 software today, and must have assented to GPL 2 to do that, because any distribution without assent to GPL2 would be infringement. Under GPL 2, they have already given away the rights to use Microsoft patents that are applied in the Novell distribution, for any use in any GPL software, by anyone, forever," Perens said.

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