montavista VISION 2008

EMBEDDED LINUX DEVELOPERS CONFERENCE

Open Source Legal 101

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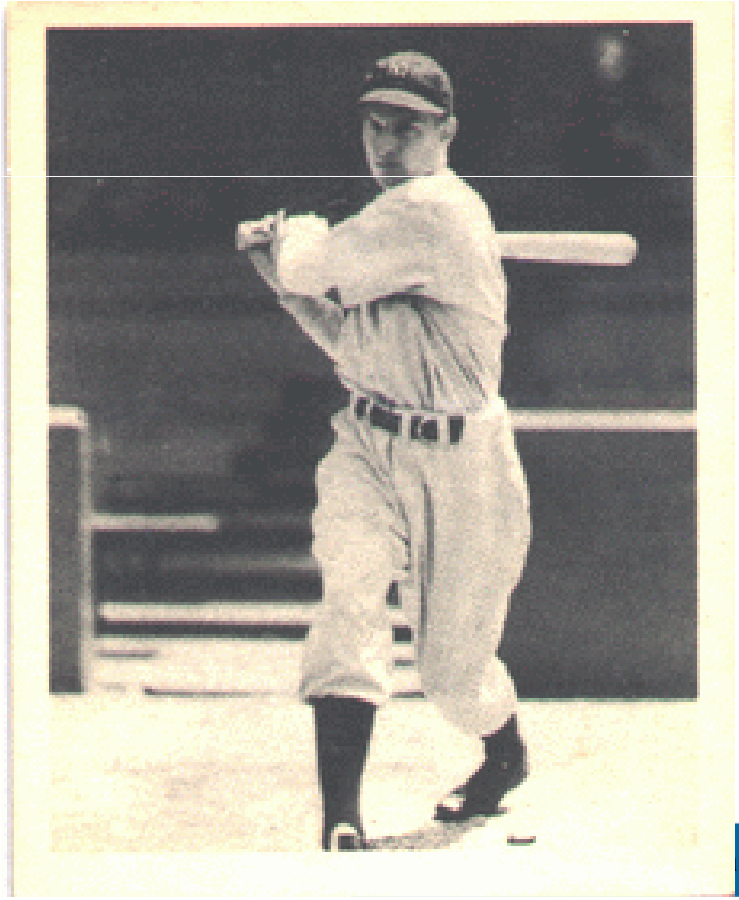
"Catching a fly ball is pleasure, but knowing what to do with it after you catch it is a business."



Tommy Henrich
New York Yankees outfielder
1937 - 1950

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So how do I make it into a business?

- This is where a trusted vendor, who really knows something about open source, is vital.

- And this is not just about engineering:
  - It's not just about the kernel not being commercial grade (as pointed out by Andrew Morton) (though part of knowing what to do with that "fly ball" is ensuring that you have commercial grade code).
  - It's not just about support, updates, upgrades, etc. (though, yes, that's part of the equation, too).

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It's also about the legal issues

- It's about understanding the legal "ballpark" in which you're playing.
- There is a multilayered, nuanced licensing scheme out there.
  - Which, by the way, is also complicated in the proprietary world. But everyone is used to buying from, and trusting, commercial vendors in that world.
- The "Max's" conundrum

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What are currently the "big" legal issues in the Linux/GPL world?

Narrowed down to three, they are:

- Derivative works
  - Though this is also a technical issue, where engineers provide great value
- GPL v3
- Lawsuits
  - "Jacobsen v. Katzer"; Verizon, et. al.

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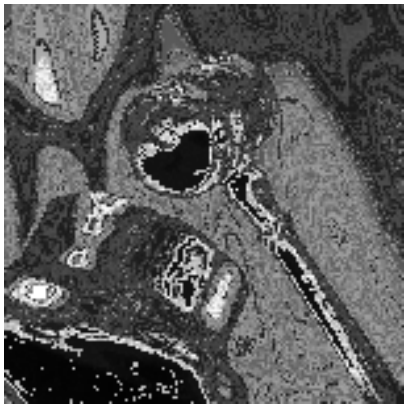
3 different, but connected, background concepts



THE LAW

Commercial Code; the Copyright Act; etc.

THE LICENSE (for IP transactions)

A document used by a copyright holder to grant – or restrict – rights that the law says the copyright holder can control

THE COMMERCIAL AGREEMENT

An agreement – not a license – that sets out negotiable commercial terms (e.g. for delivery of code)

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"License" does not equal "ownership"

- The license agreement (including the GPL) does not determine the ownership of code.
- Before any license applies: first we have to get through "the law".
- Step one: the developer
  - Somebody writes a piece of code.
- Step two: the law protects that code and gives certain rights to the developer.
- In the U.S., the relevant law is the Copyright Act.
  - Immediate protection; ability to control whether others can copy, modify, or redistribute a copyrighted work

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So what does the license agreement do?

- The law allows the owner to control lots of important rights
- The license agreement says "I know I control all these rights in my work. That being true, here are the rights I'm granting you (or restricting you from exercising) related to my work."
  - Copy? Modify? Redistribute? Use on only one computer? Pay a royalty? No reverse engineering? Promise to provide source? The possibilities are almost endless.
- If you are the copyright holder, you pretty much always get to choose the license terms you want.
  - Unless you've created a "derivative work"; more on that later

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And, btw, you can't just look at "a license"

- It can be a complicated legal landscape
  - RPMs vs. programs; nested licenses

… and have somebody who knows what they're doing help you prepare.

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What is the GPL?

- The GPL is just one example of a license agreement.
  - It's not the "law"; it's not just a "concept" (like "copyleft").
- GPLv2 governs copying, modification, and redistribution of code … and nothing else.
- Good news: it's really a simple license that's more developer-friendly than most proprietary licenses. Bad news: that wasn't good enough for RMS. Good news: you may never really have to worry about that….
- So when does the GPL apply?
  - If you choose to have it apply, or if you create… a derivative work!

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So what is a derivative work?

- There is no “bright line” test.
  - The GPL refers to a derivative work, but doesn’t define it. The FSF says “we defer to copyright law.”
  - Copyrights are codified in the U.S. under the Copyright Act. The Act was not designed for commercial software, though.
  - In the 12 U.S. Circuit courts, there exist at least 4 different tests; at least 2 Circuits have no test.
- “Viral” Schmiral: the test is exactly the same whether the code is open source or proprietary.
- So: follow generally accepted practices; and get input from someone who really knows this stuff.

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Things that don't always go together?

GPL/open source/free software + commercial software??

Actually, these concepts DO go together perfectly.

Commercially, companies understand this:

More than 20% of all software investment in Europe and the U.S. is in open source (European Commission study).

At least 80% of commercial software will contain "free software" by 2011, and more than 90% of enterprises will use free software by 2012 (Gartner).

Technically, companies understand this:

An increasing number of users believe open source to be "more secure, better quality and more reliable" than traditional "commercial" counterparts (Standish Group report).

Legally, companies are beginning to understand this:

Open source licenses foster commercial development in a manner never allowed by proprietary licenses.

Issues surrounding derivative works are often more easily addressed in open source than with proprietary software.

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GPL v3

- Officially released as of June 29, 2007
- The Linux “world” has not become GPLv3.
  - Though several thousand open source projects have moved to GPLv3, this is a minority of Linux projects worldwide.
  - Most major Linux projects remain v2, and the Linux kernel remains v2.
  - You can track adoption at:
    - http://gpl3.palamida.com
    - http://www.blackducksoftware.com/oss
  - Expectations: broad adoption will be slow; the kernel will probably not roll; the embedded world is expected to be one of the most resistant to v3.

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GPL v3

- No forced back-licensing
  - It's the law: if you have code under v2, the licensor cannot force you to move to v3.
  - If the license doesn't say "v2 or later version", the licensee can't even *choose* to move to v3.
- Who is the licensor?
  - Only the copyright holder can choose to relicense (going forward, not backward) his or her program. If there are multiple copyright holders, all must agree.
  - It's a program-by-program analysis, not a package-level or OS-level analysis.
- Consequently, the FSF/SFLC:
  - Cannot re-license any program on which they do not hold the copyright.
  - Cannot change a licensee's rights with respect to the use, copying, modification and/or redistribution of any program on which they *do* hold the copyright to the extent that the program is already out there under v2.

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GPL v3

- "User Products" (aka the "TiVo" provision)
  - Requires a distributor to provide not only source code, but also "installation information" for the software, including authorization keys and other information required to install and execute modified versions of the software
- DRM
  - Conveyance of a covered work operates as a waiver of legal power to forbid circumvention.
- Patents
  - Express patent license and promise not to sue over essential patent claims by any contributor (someone who licenses works under v3)
- The "Microsoft" provisions
  - Applies if you do a deal with a company "that is in the business of distribution software". If you convey – or cause someone else to convey – a covered work, and as a part of that you grant a patent license to anybody receiving that work, then you grant a license to everyone who receives that work (and works based on that work).

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GPL v3

- Broadened scope
  - Applicable not just to software, but to any copyrightable work
    - mask works (semiconductor design); music; etc.
- Copyright owner can add additional restrictions
  - E.g.: disclaimers; attribution limitations; indemnification
- Distribution
  - “propagate” (not tied to any statutory language) vs. “distribute”
  - Use of contractors not considered a propagation/distribution
- Web Services/ASPs
  - Allows linking of code to the Affero license (the Affero license effectively equates on-line access with distribution, triggering application of “copyleft” requirements). When works are combined under both licenses, Affero license applies to the combined work.
- Automatic termination and reinstatement provisions

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Jacobsen v. Katzer

- Summary of issues
  - Violation of a license (in particular an open source license) can cause damages addressable under copyright law, not just under contract law.
  - Under contract law, you can (more or less) just sue for proven money damages. With a breach of copyright, you can get injunctive relief (i.e., a court can tell a defendant to stop doing something, such as “stop redistributing software”) and you can get “statutory damages” (i.e., you can get money even if you can’t prove specific losses).
- Summary of impact on open source
  - This is a good decision for the open source community. It clarifies the law. It validates broader rights of copyright holders to enforce their licenses (if the license contains certain language, that is). And it helps commercial software developers to refine their open source software policies and practices.

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The BusyBox cases (aka “Verizon”)

- Summary of issues:

  - Defendant (Verizon; Monsoon Media; Xterasys; High-Gain Antennas) distributed BusyBox software without complying with the GPL (without offering to provide source code, thus infringing BusyBox’s copyright).

  - All cases were settled out of court under similar terms (appoint a compliance officer, publish source code; pay some damages).

- Summary of impact on open source:

  - None, really, other than better awareness (which is a good thing).

  - All of these cases focused on compliance, where everyone agreed the GPL applied. None of these cases had anything to do with derivative works or a so called “viral” effect.

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Some practical suggestions

- It may not be your job to know all the answers, but it should be your job to ask questions.
- Follow processes that include a broad input base (engineering; legal; business strategists).
- Develop a knowledge community to help you keep up with changes, not just in the code base, but in community practices and on the “legal frontier”.
  - If you don’t have the expertise in-house, find someone (vendor; outside counsel) whom you trust.

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And finally…

Bad news for all you rebels:

"The open source movement is no longer the anti-software establishment … open source is the software establishment."

-- The Standish Group, April 2008

Open source has "grown up." And as you grow your commercial Linux product offerings alongside it, whether you're talking about code (the kind you wizards write) or code (the kind we lawyers write), MontaVista will be there for our customers to guide you from conceptualization to commercialization.

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