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Robert W. Gomulkiewicz[*]

INTRODUCTION

A decade ago, I observed that licenses were the "unnoticed force" behind free and open source software ("FOSS").[1] Since then, legal scholarship on FOSS licensing has gone from a trickle to a torrent.[2] Likewise, economists,[3] political scientists,[4] and anthropologists[5] (among others) have begun to focus on FOSS licensing, each from their own academic perspectives. FOSS programmers themselves

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1. Robert W. Gomulkiewicz, *How Copyleft Uses License Rights to Succeed in the Open Source Software Revolution and the Implications for Article 2B*, 36 HOUS. L. REV. 179, 185 (1999).

2. *See, e.g.*, Yochai Benkler, *Coase's Penguin, or, Linux and* The Nature of the Firm, 112 YALE L.J. 369 (2002); Brian W. Carver, *Share and Share Alike: Understanding and Enforcing Open Source and Free Software Licenses*, 20 BERKELEY TECH. L.J. 443 (2005); Ronald J. Mann, *Commercializing Open Source Software: Do Property Rights Still Matter?*, 20 HARV. J.L. & TECH. 1 (2006); David McGowan, *Legal Implications of Open-Source Software*, 2001 U. ILL. L. REV. 241; Daniel B. Ravicher, *Facilitating Collaborative Software Development: The Enforceability of Mass-Market Public Software Licenses*, 5 VA. J.L. & TECH. 11 (2000); Greg R. Vetter, *The Collaborative Integrity of Open-Source Software*, 2004 UTAH L. REV. 563; Greg R. Vetter, *"Infectious" Open Source Software: Spreading Incentives or Promoting Resistance?*, 36 RUTGERS L.J. 53 (2004); Jonathan Zittrain, *Normative Principles for Evaluating Free and Proprietary Software*, 71 U. CHI. L. REV. 265 (2004).

3. *See, e.g.*, Josh Lerner & Jean Tirole, *The Scope of Open Source Licensing*, 21 J.L. ECON. & ORG. 20 (2005).

4. *See, e.g.*, STEVEN WEBER, THE SUCCESS OF OPEN SOURCE (2004).

5. *See, e.g.*, CHRISTOPHER M. KELTY, TWO BITS: THE CULTURAL SIGNIFICANCE OF FREE SOFTWARE (2008).

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(known as "hackers" in the FOSS community)[6] have refocused on FOSS licensing,[7] most notably by revising the most venerable FOSS license, the GNU General Public License ("GPL"), for the first time in more than fifteen years.[8]

One prominent issue among hackers[9] and business users[10] (but less noticed by legal scholars)[11] has been "license proliferation."

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6. As I explained in an earlier article:

Software developers who have a passion for programming are called "hackers." THE NEW HACKER'S DICTIONARY 233–34 (3d ed. 1996). Outside the software development community the term "hacker" often refers to a programmer who writes malicious code such as viruses and worms. *See id.* at 130, 234. However, serious programmers use the term "hacker" in a positive sense, as in: "I'm hacking some code to fix that bug." *See id.* at 231. Hackers call malicious programmers "crackers." *Id*. at 234. *See generally* STEVEN LEVY, HACKERS: HEROES OF THE COMPUTER REVOLUTION (1984) (describing hackers in the positive sense of the term).

Robert W. Gomulkiewicz, *General Public License 3.0: Hacking the Free Software Movement's Constitution*, 42 HOUS. L. REV. 1015, 1016 n.3 (2005).

7. *See, e.g.*, Posting of Russ Nelson to Open Source Initiative, User Licenses vs. Contributor Licenses, http://www.opensource.org/node/243 (Jan. 25, 2008, 21:17 PDT) ("I'm starting to think that the dynamics of Open Source production are such that user licenses are crap. Yes, I'm saying that everything that we've put into licenses, all the thought, all the drama, all the durm-und-strang, is wasted. You might wonder why. Why, indeed. Consider that all Open Source licenses are a unilateral grant of privilege. That doesn't reflect the reality of the situation. Yes, somebody can take a code drop, but the advantage of Open Source doesn't exist without community. The value is not in the static code, the value is in the relationships between people. Free Software has never been about freedom (pace RMS). It's been about the community formed around software that is open for community contributions and use. So, it turns out that the part of licensing to which we have paid short shrift, contributor licensing, is the most important. It doesn't really matter what rights the users of the software gets. It matters, instead, what the contributor grants to the project. The relationship between the user and the project is a matter of necessity. If a user gives up that relationship, they lose, so there's no need to control that relationship. Anybody else with me on this? Or am I talkin smack?"). *See generally* LAWRENCE ROSEN, OPEN SOURCE LICENSING: SOFTWARE FREEDOM AND INTELLECTUAL PROPERTY LAW (2004) (discussing open source licensing in a book directed at programmers from the perspective of former OSI General Counsel who is also a programmer).

8. *See* Robert W. Gomulkiewicz, *A First Look at General Public License 3.0*, 24 COMPUTER & INTERNET LAW., Nov. 2007, at 15 [hereinafter Gomulkiewicz, *A First Look*] (describing the terms of the revised GPL); Gomulkiewicz, *supra* note 6 (describing the prelude to the revision of GPLv2); Robert W. Gomulkiewicz, *De-Bugging Open Source Software Licensing*, 64 U. PITT. L. REV. 75 (2002) [hereinafter Gomulkiewicz, *De-Bugging Open Source Software Licensing*] (arguing that a revision of GPLv2 was long overdue).

9. *See, e.g.*, Steven Vaughan-Nichols, *OSI Should Close Open-Source Licenses*, EWEEK, Feb. 16, 2005, http://www.eweek.com/c/a/Linux-and-Open-Source/OSI-Should-Close-Open-Source-Licenses/.

10. Business users have noticed license proliferation. *See Open Source License Proliferation Could Threaten Business IT*, COMPUTERWORLD UK, Aug. 24, 2007, http://www.computerworlduk.com/management/it-business/services-sourcing/news/index.cfm?

"Proliferation" refers to the scores of open source licenses that are now in use, with more being created all the time. The Open Source Initiative ("OSI") has certified more than sixty licenses[12] as conforming to the Open Source Definition,[13] a key measure of whether a license embodies FOSS principles.[14] Hackers believe that license proliferation encumbers and retards the success of FOSS. The OSI has indentified the issue as one of its most strategic matters to address.[15]

The license proliferation issue is particularly interesting because it turns conventional FOSS wisdom on its head. Hackers boast that their widely collaborative "bazaar" model[16] of software development produces higher quality code than code created using so-called proprietary[17] "cathedral" style software development.[18] According to

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newsid=4829; Ken Spencer Brown, *Open Source Serves Baskin-Robbins-Like Choices of Software; But It's a Headache, Not a Treat; So Many Licenses Available, Companies Wrestling with 58 Flavors—and Counting*, INVESTOR'S BUS. DAILY, June 30, 2005, at A04; *see also* HEATHER J. MEEKER, THE OPEN SOURCE ALTERNATIVE: UNDERSTANDING RISKS AND LEVERAGING OPPORTUNITIES 66–70 (2008) (lawyer explaining license proliferation to business audience).

11. *But see* Zachary Katz, *Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing*, 46 IDEA 391 (2006) (discussing license proliferation in the context of Creative Commons licensing); Greg R. Vetter, *Claiming Copyleft in Open Source Software: What if the Free Software Foundation's General Public License (GPL) Had Been Patented?*, 2008 MICH. ST. L. REV. 279, 308–10 (discussing license proliferation in the context of a thought exercise about "what if" the GPL had been patented); Greg R. Vetter, *Exit and Voice in Free and Open Source Software Licensing: Moderating the Rein over Software Users*, 85 OR. L. REV. 183, 216, 264 (2006) [hereinafter Vetter, *Exit and Voice*] (mentioning license proliferation issue).

12. Posting of Michael Tiemann to Open Source Initiative, Licenses by Name, http://www.opensource.org/licenses/alphabetical (Sept. 18, 2006, 12:56 PDT).

13. *See* Posting of Ken Coar to Open Source Initiative, The Open Source Definition, http://www.opensource.org/docs/osd (July 7, 2006, 15:49 PDT).

14. There is debate in the hacker community about whether the term "free software" or "open source software" is more apt. *See* Robert W. Gomulkiewicz, *Conditions and Covenants in License Contracts: Tales from a Test of the Artistic License*, 17 TEX. INTELL. PROP. L.J. 335, 337–38 (2009) (discussing the debate).

15. *See* discussion *infra* Part V; *see also* Posting of Acoliver to Open Source Initiative, OSI Board Meeting Minutes, January 9th, 2008, http://opensource.org/minutes20080109 (Mar. 1, 2008, 18:19 PDT) ("Mr. Tiemann [OSI's President] suggests the board consider writing a draft of their priorities for 2008, especially concerning license proliferation. Hopefully license proliferation . . . will be one topic that can be advanced this year.").

16. ERIC S. RAYMOND, THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY 19–64 (2d ed. 2001).

17. As I have discussed elsewhere, the label "proprietary" is problematic because FOSS licensing depends on a proprietary right, namely copyright. The term "commercial" also falls short because many businesses have grown up around FOSS. I prefer to contrast the term "open

hackers, cathedral-developed code is used not because of its quality but because it is just-good-enough legacy code. When it comes to FOSS licenses, however, the tables are turned: the GPL and the BSD license are the entrenched just-good-enough[19] legacy "legal code."[20]

This Article analyzes the license proliferation issue. In general, it examines whether the growing number of FOSS licenses represents hopeless confusion (as many hackers assume) or, instead, helpful diversity. In particular, it discusses why proliferation occurs and the pros and cons of multiple licenses. It points out that the primary culprits of license proliferation are often the loudest critics: those hackers who remain wed to legacy license forms, unwilling to replace outdated, poorly drafted, or legally insufficient licenses with newer versions. This means the FOSS community can only improve licenses by adding new ones. The Article concludes with an analysis of the role that OSI has played and can play to ameliorate the negative effects of so many FOSS licenses. To give the discussion context and color, the Article draws on my experience[21] in submitting the Simple Public License to the OSI for certification.

I. THE SIMPLE PUBLIC LICENSE ("SIMPL"): A CASE STUDY

Linus Torvalds once said: "In many ways, my only gripe with the GPL has been how many words it seems to need to say something very simple."[22] On another occasion he said: "I don't think the GPL

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source" with "binary use." This seems to come closer to the heart of the matter by focusing on what the user gets (source or binary code) and what the user can do with the code that he or she gets (wide open rights versus use-only rights only). *See* Gomulkiewicz, *supra* note 6, at 1020–21.

18. RAYMOND, *supra* note 16, at 19–64; *see also* MEEKER, *supra* note 10, at 26 ("Proponents of the open source software development model posit that it produces better software than the proprietary model. In truth, the jury is probably still out on the question of which produces better products, and the answer may change with time or context.").

19. For a discussion of the buggy state of FOSS licenses, see Gomulkiewicz, *De-bugging Open Source Software Licensing*, *supra* note 8.

20. *See generally* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999) (popularizing the term "legal code").

21. Stories can be a valuable way to help us understand law. *See id.* at 9 ("The law is best understood through stories . . . .").

22. Stephan Shankland, *Torvalds: A Solaris Skeptic*, CNET NEWS, Dec. 21, 2004, http://news.cnet.com/Torvalds-a-Solaris-skeptic/2008-1082_3-5498799.html.

is perfect, and one of my issues has been how verbose it is."[23] The Free Software Foundation ("FSF") acknowledged this critique when it began to rewrite the GPL. The FSF said that it did not intend to simplify the GPL, however, and seemed skeptical that it could be done.[24] It threw out a challenge: If anyone can simplify the GPL and remain true to its objectives, then show us how it can be done.[25]

The SimPL represents a response to that challenge. I published the initial version of the SimPL as an appendix to an article describing the GPL revision process, which was, at that time, in its early stages.[26] I annotated the SimPL much like a programmer annotates source code with comments, to demonstrate how the SimPL matched the intent of GPL version 2.0 ("GPLv2").[27] When the FSF began the GPL revision process and opened up the process for public comments, I submitted the SimPL.[28]

Publication of the SimPL and submission of it to the FSF generated some interest among hackers, but it had no apparent impact on the GPL revision.[29] Hackers liked the license but thought it would not be used very often unless it had the imprimatur of a recognized FOSS organization such as the OSI.[30] Indeed, as mentioned

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23. Peter Gali, *Torvalds: GPL Needs Minor Work*, EWEEK, Nov. 29, 2004, http://www.eweek.com/c/a/Linux-and-Open-Source/Torvalds-GPL-Needs-Minor-Work/.

24. "Anyone can make the simple complicated. Creativity is making the complicated simple." Charles Mingus.

25. *See* Richard Stallman & Eben Moglen, GPL Version 3.0: Background to Adoption (June 9, 2005), http://www.fsf.org/licensing/essays/gpl3-background.html.

26. Gomulkiewicz, *supra* note 6, at 1037.

27. *Id*. at 1038–40. The SimPL matches up with GPL version 2.0, the then-current version and still the preferred version of many, including the key contributors to Linux.

28. The SimPL could be used in any way that FSF found helpful. The license for the SimPL license form was: "You may do anything that you want with it." *Id.* at 1036 n.119.

29. In response to my submission, one commentator exclaimed that the FSF should consider SimPL's approach, but for all intents and purposes the discussion ended there in the context of the GPL revision. Free Software Foundation, Welcome to GPLv3, http://gplv3.fsf.org (last visited Apr. 21, 2009).

30. As Professor McGowan has observed, FOSS licenses work like brands. A choice of licenses signals to other programmers that the licensor believes in software freedom as espoused by the Free Software Foundation (GPL brand) or, alternatively, freedom as articulated by the founders of OSI and the project leaders of various BSD UNIX variants (BSD License brand). *See* David McGowan, *SCO What? Rhetoric, Law, and the Future of F/OSS Production* 2–3, 14–15 (Univ. of Minn. Law Sch., Research Paper No. 04-9, 2004); *see also* Vetter, *Exit and Voice*, *supra* note 11, at 265; Gomulkiewicz, *De-Bugging Open Source Software Licensing*, *supra* note 8, at 82–83, 83 n.57 (discussing how hackers choose licenses).

previously, OSI has a process to certify licenses as conforming to the Open Source Definition. If a license is so certified, then programmers who use the license can use an "OSI certified" logo[31] on their product.[32]

In the spring of 2007, the SimPL[33] was submitted to OSI for certification.[34] The OSI's approval process works as follows: The license author submits the license in HTML format, posts it on a public website, and provides an analysis of how the license conforms to the Open Source Definition. After that, OSI announces the submission of the license on its license-discuss listserv ("List"), initiating public comment on the license.

OSI's License Approval Committee monitors discussion on the

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31.   OSI applied with USPTO for a certification mark for "OSI Certified." U.S. Trademark Application No. 76020694 (filed Apr. 10, 2000). According to USPTO, however, OSI abandoned its certification mark application on Aug. 23, 2002. *Id*. Of course, OSI still can protect the mark under common law. Posting of Nelson to Open Source Initiative, Certification Mark, http://www.opensource.org/docs/certification_mark.html (Mar. 26, 2007, 15:37 PDT). OSI has considered whether to change from a certification to a service mark. This is reflected both in changes OSI made to its Bylaws, *see* Posting of Ken Coar to Open Source Initiative, Bylaws of the Open Source Initiative, http://www.opensource.org/bylaws (July 24, 2006, 23:22 PDT) (reciting an amendment to Article III that deleted the word "certification" from the description of OSI's trademark program); and in an Intent to Use application that OSI filed with the USPTO. *See* U.S. Trademark Registration No. 3514190 (filed Feb. 13, 2006) (registered Oct. 10, 2008).

32.

Open source is a development method for software that harnesses the power of distributed peer review and transparency of process. The promise of open source is better quality, higher reliability, more flexibility, lower cost, and an end to predatory vendor lock-in.

The Open Source Initiative (OSI) is a non-profit corporation formed to educate about and advocate for the benefits of open source and to build bridges among different constituencies in the open-source community.

One of our most important activities is as a standards body, maintaining the Open Source Definition for the good of the community. The Open Source Initiative Approved License trademark and program creates a nexus of trust around which developers, users, corporations, and governments can organize open-source cooperation.

Posting of Esr to Open Source Initiative, Home, http://www.opensource.org/ (Mar. 13, 2007, 19:38 PDT).

33.   Robert W. Gomulkiewicz, Simple Public License (SimPL) 2.0, http://www.law. washington.edu/CASRIP/License/SimplePublicLicense.html (last visited Nov. 14, 2008).

34.   The SimPL has been approved by OSI. Posting of Michael Tiemann to Open Source Initiative, *supra* note 12.

List. When the Committee thinks that consensus has been reached on the List, it recommends approval or rejection to the full OSI board, or it may provide feedback to the author about what needs to be done to secure approval.

A. Vetting the SimPL on the List

Discussion on the List is the main event.[35] Anyone can join in. Comments come in colorful, caustic, often cynical, and sometimes snide e-mail messages.[36] Most comments begin or end with the pronouncement "IANAL" (I am not a lawyer), but generally it is clear that the commentators consider themselves to be experts on FOSS licensing and licensing law.[37]

Some List commentators pointed out ways that the SimPL could hew closer to the intent of GPLv2. These comments often unearthed understandings of the GPL that are part of the hacker community's custom but are not necessarily reflected in the words of the GPL. Other comments pointed out important nuances of the GPL's terms or particularly sensitive scenarios that they were addressing.

Other commentators argued that the SimPL contributed needlessly to license proliferation. According to these commentators, the GPL exists, so why would the FOSS community need another license that captures the same terms? One copyleft license is enough, they argued, particularly when the GPL has such a large user base.

Other commentators argued that a short license (the SimPL fits on one law review-sized page) written in plain English could not be legally enforceable. Others seemed to question the intelligence of potential users of the SimPL, suggesting that perhaps they were not clever enough to understand the complex GPL. One commentator, for instance, called the SimPL a GPL with "training wheels."[38]

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35. All of the references in this part to comments on the SimPL can be found in the archives on the OSI website. Open Source Initiative Mailing Lists, http://www.opensource.org/lists/ (last visited Nov. 6, 2008).

36. In a private e-mail, one participant warned me to "put on your asbestos underwear." E-mail from McCoy Smith to Robert W. Gomulkiewicz, Professor of Law, Univ. of Wash. Sch. of Law (Mar. 16, 2007, 12:32) (on file with author).

37. Some lawyers also participate but most only lurk, ALAS (A Lawyer Afraid of Suit).

38. Email from Michael Tiemann to Matthew Flaschen (Sept. 26, 2007, 20:37) (on file with author).

Other commentators seemed to question the motives behind the creation and submission of the SimPL—what was the *real* reason the SimPL was being put forward?[39] This line of comments probably reflected suspicion based on the author's former employment at Microsoft.[40] Some hackers view Microsoft as their most hated enemy, so they are on constant guard against its actions.

B. Responding to Comments from the List

We[41] replied to comments from the List in a series of e-mails that restated the comments and provided our responses. To comments about hewing closer to the GPL, we either proposed revisions to the SimPL that would better capture the intent of the GPL, or pointed out how the SimPL did in fact reflect the GPL's intent. To comments about the legal sufficiency of the SimPL, we explained that the SimPL had been vetted by several experienced licensing lawyers. To concerns about the SimPL being too simple, we pointed out that license length and complexity do not assure enforceability—in fact the opposite is often true. As to comments challenging the need for another copyleft license, we pointed to statements from Linus Torvalds and others complaining about the GPL's complexity and yearning for a simpler form,[42] as well as the OSI's own policy that encourages simple, plain-language licenses.

Replying to the "motive" comments was difficult because these issues lay below the surface. The List commentators seemed concerned that the SimPL had been created to interfere with the GPL rewrite.[43] We reiterated that the SimPL responded to real and publicly acknowledged shortcomings with FOSS licensing. We pointed out that many hackers, including Torvalds, wanted a better written GPL.

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39. *See* Posting of Chris DiBona, to List email (Mar. 11, 2008) (on file with author) (prominent person in FOSS community, employed by Google, referring to the SimPL's "simplified license" objective as a "pretext").

40. Gomulkiewicz, *supra* note 11, at 1018 n.15 (highlighting my former affiliation with Microsoft).

41. My student Jim Sfekas submitted the license on my behalf and provided invaluable assistance throughout the early stages of the process.

42. *See supra* notes 22–23 and accompanying text.

43. Microsoft has been accused of creating FUD in response to competitive challenges—fear, uncertainty, and doubt.

We also pointed out that the SimPL had not been created underground. It had been published in advance of the GPLv3 revision process, submitted to FSF for its use, and ignored in the GPLv3 revision process. We also added a Preamble clearly stating that the SimPL's purpose is the same as the GPLv2 and that if anyone wonders about interpreting the meaning of the SimPL, it means the same thing as the GPL.[44]

   Addressing the license proliferation critique presented a unique challenge. The OSI will not approve a license unless it serves a different purpose than a previously approved license. On the one hand, the SimPL, by design, serves exactly the same purpose as the GPL: to provide a copyleft license. On the other hand, it serves a distinct purpose: to provide a license form that is comprehensible by the average programmer.[45] In an important and fundamental respect, the purpose of the SimPL is entirely unique: to provide programmers with the choice of higher quality copyleft "legal code" than the GPL provides.

C. OSI Votes on the SimPL: Round 1

   By April, comments on the List about the SimPL had tapered off. In May, the License Approval Committee recommended approval of the SimPL, which moved the decision to the full OSI Board. The OSI Board, however, did not approve the SimPL on this first pass. Instead, it came back with a question for the author: Was SimPL-licensed code compatible with GPL-licensed code? In other words, could code licensed under the SimPL then be re-licensed under the GPL? This question seemed out of place because the issue had been raised and revisions had been made to the SimPL to the satisfaction of the List.

   When the Board's decision about the SimPL was announced on the List, one commentator quickly pointed out that the Board's issue already had been resolved. It turned out, according to the chair of the License Approval Committee, that the Board members had been looking at an older (wrong) version of the SimPL. There had been a

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44. Gomulkiewicz, *supra* note 33.
45. It also provides a form that may be more enforceable and legally up-to-date.

disconnect, and the purported issue was a non-issue. The chair of the License Approval Committee promised to take the SimPL back to the OSI Board.[46] Despite repeated inquiries, however, neither the License Approval Committee nor the OSI Board reported any further action on SimPL until August. In all likelihood that was because, in the meantime, a "perfect storm" in FOSS licensing was brewing.

D. A FOSS Licensing Perfect Storm

Several months after submission of the SimPL to OSI, the newly released GPLv3 was submitted to OSI for approval. In the same timeframe, Microsoft submitted two licenses for approval from its Shared Source initiative. In addition, three FOSS-related litigation matters were in play. One challenged the GPL as a violation of antitrust law.[47] Another focused on the meaning of the Artistic License.[48] And, most visibly, SCO had sued IBM over its distribution of Linux.[49] All of these events coincided to create a FOSS licensing "perfect storm."

E. GPLv3

GPLv3 represents the first update to the venerable GPL since 1991.[50] Its creation was a significant event in the hacker community.

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46. According to an e-mail from Russ Nelson to the List:

I did a once-over on the two and they seemed to match, however, I didn't read it carefully enough, because the latter says "Licensing any Derived Work under the SimPL," which caused us to reject the license. That's obviously not GPL compatible, however the license in the revised submission says "Licensing it to everyone under SimPL, or substantially similar terms (such as GPL 2.0);" which clearly intends to be GPL compatible. I'll bring this back to the board.

Posting of Russ Nelson, nelson@crynwr.com, to license-discuss@opensource.org (June 12, 2007, 02:10 PDT), *available at* http://www.crynwr.com/cgi-bin/ezmlm-cgi?3:mss:12841:200706:ilpbhelnldefjkjmpjeh.

47. Wallace v. Int'l Bus. Mach. Corp., 467 F.3d 1104, 1105 (7th Cir. 2006).

48. Jacobsen v. Katzer, 535 F.3d 1373, 1380–82 (Fed. Cir. 2008). *See generally* Gomulkiewicz, *supra* note 14 (discussing the *Jacobsen* case and its lessons).

49. SCO Group, Inc. v. Int'l Bus. Mach. Corp. No. 2:03CV294, 2006 U.S. Dist. LEXIS 62980 (D. Utah Sept. 1, 2006).

50. Stallman & Moglen, *supra* note 25. Richard Stallman is the primary author of the GPL: "Stallman remains the GPL's author, with as much right to preserve its integrity as a work representative of his intentions as any other author . . . ."

Many questions still exist about the ultimate impact of GPLv3. Stallman, in a document entitled *Why Upgrade to GPL Version 3*,[51] counsels that "GPL version 2 will remain a valid license," that "upgrading is a choice," and that the reason to upgrade is "because of the existing problems which GPLv3 will address."[52] The primary "problems" that Stallman outlines involve issues such as "Tivoization,"[53] discouraging use of digital rights management code,[54] and patent licensing/assertion issues.[55]

So far, the primary authors of the Linux kernel have said that they do not intend to adopt GPLv3.[56] FSF, of course, will use it for its software. How many other projects will adopt it remains to be seen.

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51. Richard Stallman, Why Upgrade to GPL Version 3 (2007), http://gplv3.fsf.org/rms-why.html.

52. *Id.*

53. GPLv2 requires those who make and distribute derivative works of GPL-licensed code to make source code available and grant the right to make further derivatives of it. The creators of the television record/replay product called TiVo use GPL-licensed Linux in their product. TiVo dutifully publishes and re-licenses its modifications of Linux under GPL 2.0. TiVo's hardware system, however, will shut down if it detects a version of Linux that is different from the version created by TiVo. In other words, a user has the means and the legal right to modify TiVo's version of Linux, but the user's modified version will not run on TiVo hardware. The FSF believes that this practice threatens software freedom: "The manufacturers of these computers take advantage of the freedom that free software provides, but they don't let you do likewise." *Id.* GPLv3 deals with this issue by conditioning "the right to convey object code in a defined class of 'User Products' . . . on providing whatever information is required to enable a recipient to replace the object code with a functioning modified version." FREE SOFTWARE FOUNDATION, GPLv3 THIRD DISCUSSION DRAFT RATIONALE 9 (2007), *available at* http://www.gplv3.fsf.org/rationale.

54. Stallman, *supra* note 51. GPLv3 attempts to accomplish this objective by use of two mechanisms. First, the license provides that "No covered work shall be deemed part of an effective technological measure under [the DMCA or similar laws stemming from the 1996 WIPO copyright treaty]." GNU, General Public License version 3 § 3, ¶ 1 (June 29, 2007), http://www.gnu.org/licenses/gpl-3.0.html [hereinafter GPLv3]. This language seems directed at the language in the DMCA providing that circumvention is only prohibited for "effective" technological measures. In other words, if the parties agree that a licensed work is not part of an *effective* technological measure, then the user may be free to circumvent it. *See* 17 U.S.C. § 1201(a)–(c) (2006). Second, the GPL uses the notions of waiver and disclaimer—in GPLv3, the licensor waives and disclaims his or her right to forbid circumvention under the DMCA (or similar law). GPLv3 § 3, ¶ 2. *See also* FREE SOFTWARE FOUNDATION, GPLv3 SECOND DISCUSSION DRAFT RATIONALE 11 n.39 (2006), *available at* http://www.gplv3.fsf.org/gpl3-dd1to2-markup-rationale.pdf; FREE SOFTWARE FOUNDATION, *supra* note 53, at 44.

55. *See* Gomulkiewicz, *A First Look*, *supra* note 8, at 17–19 (describing the issues and GPLv3's approach to them).

56. *See* Steven J. Vaughan-Nichols, *Forget About Linux Going GPLv3*, LINUX-WATCH, June 13, 2007, http://www.linux-watch.com/news/NS3385486460.html.

Several weeks after FSF released the final version of GPLv3, the license was submitted to OSI for its approval.[57] It is not clear whether this was done as an official act of the FSF. In many respects, FSF and OSI are rivals; Eric S. Raymond and others created OSI as a counterpoint to FSF—as a less ideological,[58] more business-friendly voice for FOSS.[59] There is no doubt this was a critique of FSF's approach, so it is doubtful that FSF believed it needed OSI's imprimatur on its new license. Nonetheless, OSI's approval of the license served some objectives for each organization.

For OSI, the request to approve the license provided proof of the organization's stature in the FOSS community. In other words, if OSI did not "matter," then no one would have bothered to ask its approval of GPLv3. FSF benefited as well. By the time of the final release of GPLv3, it was clear that the FOSS community was not going to adopt the new license quickly on a significant scale.[60] Given the skepticism surrounding GPLv3, FSF needed to surround it with as much legitimacy and support as possible.

Several themes emerged as the List began to discuss GPLv3. First, many commentators said that GPLv3 did not need to abide by OSI's normal license approval process. This issue arose because the submitter of GPLv3 did not follow the standard operating procedure for submitting a license. In particular, he did not submit the required analysis of how the license conformed to the Open Source Definition or how the license was distinctive. Some on the List argued, essentially, that the OSI should take judicial notice of the GPLv3 revision process and the GPL's stature in the hacker community.

Others offered strong objections to this. Some complained that allowing special treatment diminished the credibility of OSI. If OSI wanted to be known as more that just a rag tag collection of

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57. The license was submitted by Chris DiBona, a prominent hacker who works for Google. DiBona has edited two books about open source software: OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION (Chris DiBona et al. eds., 1999); and OPEN SOURCES 2.0: THE CONTINUING EVOLUTION (Chris DiBona et al. eds., 2006).

58. For example, Stallman has said that developing software under the GPL is the only ethically satisfactory form of software development. Stallman & Moglen, *supra* note 25.

59. *See* Posting of Michael Tiemann to Open Source Initiative, History of the OSI, http://www.opensource.org/history (Sept. 19, 2006, 03:12 PDT).

60. *See* Stephen Shankland, *Torvalds: No GPL 3 for Linux*, CNET NEWS, Jan. 26, 2006, http://news.cnet.com/Torvalds-No-GPL-3-for-Linux/2100-7344_3-6031504.html.

programmers, they argued, then it needed to run its organization in a professional manner.

Others argued that GPLv3 should not be approved because they disagreed with its substantive terms. The plaintiff in *Wallace v. International Business Machines Corp.*[61] and one of his supporters were two of the main commentators in this vein. Discussion of the GPL's substantive terms covered a host of topics that have been circulating in the FOSS community for years, including the classic debates about whether the licensing model represented by the GPL or BSD License embodies the purest form of software freedom, whether the GPL is a "pure license" or a contract,[62] and whether the GPL's terms are a misuse of copyright.[63] These debates raged over the course of hundreds of e-mail exchanges.

Members of OSI on the List began to tire of the debate. They labeled several of the dissenters as "trolls," hoping to discourage them from further comment. When this did not work, OSI (after several unsuccessful attempts) blocked their access to the List.

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61.   467 F.3d 1104 (7th Cir. 2006).

62.   *See* Gomulkiewicz, *supra* note 14, at 345–47; Rosen, *supra* note 7, at 51–71; Jason B. Wacha, *Taking the Case: Is the GPL Enforceable?*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 451, 481–83 (2005).

63.   *See* Christian H. Nadan, *Open Source Licensing: Virus or Virtue?*, 10 TEX. INTELL. PROP. L.J. 349, 367–70 (2002).

Less than a month after its submission, the OSI approved GPLv3.

F. Microsoft's Shared Source Licenses

Microsoft submitted two of its Shared Source licenses for OSI approval. Microsoft created its Shared Source initiative in response to the success of the open source movement. Microsoft learned from the open source revolution that it had been too restrained in its licensing of source code. The Shared Source project seeks to license source code in areas where Microsoft thinks there is both programmer interest and strategic benefit to Microsoft.[64]

Many commentators on the List were openly hostile to approval of these licenses, including OSI founder and past president, Eric S. Raymond.[65] Raymond argued that because Microsoft and the FOSS community were in sharp disagreement over the way standards organizations should approach so-called open standards, Microsoft should not be rewarded with OSI's imprimatur. Other commentators were even less flattering, saying that Microsoft was the major enemy of FOSS, so OSI should not do anything to assist an enemy.

Other List members demurred. They argued that OSI should be evenhanded, favoring neither FSF nor Microsoft. This approach, they argued, was in the best interest of OSI itself. If OSI did not prove to be evenhanded, it would lose credibility, which some thought was an open and alive issue in FOSS circles and beyond. In addition, to the extent OSI's license approval process is tied to its certification mark, discrimination is not permissible.[66]

Other commentators on the List focused on the substance of the licenses. Microsoft responded to these comments either by pointing out how their licenses complied with the Open Source Definition or

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64. For information on Microsoft's Shared Source Initiative, see Microsoft Shared Source Initiative Home Page, http://www.microsoft.com/resources/sharedsource/default.mspx (last visited Nov. 16, 2008).

65. *See* Posting of Esr to Open Source Initiative, My Resolve to Treat Microsoft Like Any Other License Submitter Is Being Sorely Tested, http://opensource.org/node/192 (Aug. 31, 2007, 03:25 PDT).

66. *See* 15 U.S.C. §§ 1063–1064 (2006) (providing that denial of use to a qualifying party can lead to cancellation of the mark). Perhaps it is this feature of certification marks that has led OSI to explore the possibility of using a service mark instead. *See* U.S. Trademark Registration No. 3514190 (filed Feb. 13, 2006) (registered Oct. 10, 2008) (OSI's service mark registration).

by revising them. The titles of the licenses also provoked extensive commentary. Many thought the titles caused confusion by misusing terms of art in the FOSS community. In response to these comments and using suggested new names offered on the List, Microsoft agreed to change the license names.

The OSI Board took up the Microsoft licenses in October.[67] After the meeting, the chair of the License Approval Committee, Russ Nelson, announced in his blog:

> In a board meeting held October 10th, and announced today, the Open Source Initiative approved two of Microsoft's software licenses: the Microsoft Reciprocal License and the Microsoft Public License. These licenses are refreshingly short and clean, compared to, say, the GPLv3 and the Sun CDDL. Like Larry Rosen's pair of licenses (the Academic Free License and Open Software License), they share a patent peace clause, a no-trademark-license clause, and they differ between each other only in the essential clause of reciprocation.
>
> Of course, Microsoft is not widely trusted in the Open Source world, and their motives have been called into question during the approval discussions. How can they be attacking Open Source projects on one hand, and seeking not only to use open source methods, but use of the OSI Approved Open Source trademark? Nobody knows for sure except for Microsoft. But if you are confident that Open Source is the best way to develop software (as we at the Open Source Initiative are), then you can see why Microsoft would both attack Open Source and seek to use it at the same time. It is both their salvation and their enemy.[68]

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67. *See* Posting of Michael Tiemann to Open Source Initiative, George Clooney, Princess Diana, and Microsoft, http://www.opensource.org/node/208 (Oct. 16, 2007, 08:49 PDT).

68. Posting of Nelson to Open Source Initiative, OSI Approves Microsoft Licenses, http://www.opensource.org/node/209 (Oct. 16, 2007, 17:23 PDT).

G. The Rest of the Story About the SimPL

In September 2007, the chair of the License Approval Committee, Russ Nelson, reported on the August actions of the OSI Board: "Title: Simple Public License (SimPL): Status: The board wants to know what the plan is with respect to the GPLv3. In the interest of preserving as much compatibility between licenses, it would be nice if the SimPL allowed promotion to either the GPLv2 or GPLv3."[69]

Promptly I responded in an e-mail to Russ Nelson: Yes, the SimPL allows re-licensing under either GPLv2 or GPLv3.[70] Nelson promised to take the SimPL back to the OSI Board at the "next available opportunity."[71]

October passed with the news of OSI's approval of the Microsoft licenses. Finally, in November, OSI reported that the SimPL had been approved.[72] Russ Nelson blogged:

> After a lengthy consideration, the Simple Public License (SimPL) has been added to the list of approved licenses. The concern was that because the SimPL is a reciprocal license, it could create its own ghetto of code unusable by any other project. However, because it contains language that allows relicensing under the GPL v2.0 or v3.0, this will not happen. That should give developers the confidence to adopt the SimPL without fear of marginalization.[73]

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69. Email from Russ Nelson to Robert W. Gomulkiewicz (Sept. 6, 2007, 21:32) (on file with author).

70. I also told the List that I intended to create a SimPL 3.0 which would be a plain language rendering of GPLv3. E-mail from Robert W. Gomulkiewicz to Russ Nelson (Sept. 7, 2007, 15:43 PDT) (on file with author).

71. E-mail from Russ Nelson to Robert W. Gomulkiewicz (Sept. 9, 2007, 13:04) (on file with author).

72. "[A]ll are agreed that the SimPL doesn't merely comply with the Open Source Definition, it also does not contribute to license proliferation. Well done! I've added it to the list of approved licenses . . . ." E-mail from Russ Nelson to Robert W. Gomulkiewicz (Nov. 7, 2007, 16:57 PDT) (on file with author).

73. Posting of Nelson to Open Source Initiative, Simple Public License (SimPL) Approved, http://www.opensource.org/node/228 (Nov. 7, 2007, 22:06 PDT).

H. SimPL Lessons Learned

There are a number of lessons that the SimPL license approval story teaches about FOSS licenses and license proliferation: (1) Influential, established players such as FSF strongly influence what can be done about license proliferation because their licenses are given status as the presumptive incumbent, and probably even irreplaceable, licenses; (2) OSI is tempted constantly to use its power to punish perceived enemies of the FOSS movement; (3) OSI is a resource-constrained volunteer organization[74] that struggles to operate in an efficient, professional manner; and (4) OSI labors to simultaneously fulfill its goals of not approving duplicative FOSS licenses and of encouraging clearly written, simple, understandable FOSS licenses. These lessons and their implications will be discussed in the parts that follow.

II. LICENSE PROLIFERATION: ITS CAUSES

"License proliferation" can be defined as the creation of more and different FOSS licenses over time. How do we know this is occurring? Judging from discussions in hacker forums, the FOSS community certainly believes license proliferation is occurring;[75] strong proof is that OSI has approved over sixty licenses since its inception.[76]

What provoked this outpouring of licenses? Some hackers attribute license proliferation to author vanity. Many call new FOSS licenses "vanity licenses." They claim that many license authors create new licenses to satisfy their pet peeves about wording and style. New licenses, they say, do not add anything of substance. At most, it is a matter of lawyers (or programmers acting as their own lawyers) quibbling over esoteric legal issues that have little or no

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74. To get a flavor of this, see Posting of Zak to Open Source Initiative, Zak Greant's OSI Weekly Report 2008 Weeks 15–20, http://www.opensource.org/node/336 (May 25, 2008, 03:18 PDT).

75. *See* Posting of Ken Coar to Open Source Initiative, The License Proliferation Project, http://www.opensource.org/proliferation (July 24, 2006, 21:54 PDT).

76. Posting of Michael Tiemann to Open Source Initiative, *supra* note 12.

significance. Perhaps some license proliferation can be explained in this manner, but there are deeper reasons.

License quality (or the lack thereof) is an important driver. Programmers served as the primary authors of many of the early FOSS licenses, including the GPL and the Artistic License.[77] Even those licenses written by institutional authors, such as the BSD License, do not appear to be works of skillful drafting.[78] In short, these licenses represent poor to mediocre legal documents. On that basis alone one could credibly argue for new or at least new versions of many FOSS licenses.[79]

Many fail to appreciate that FOSS licenses describe software development, distribution, and use licensing all in one document. These multifaceted FOSS licenses cover more ground than a typical mass-market software license, which focuses primarily on use rights. The GPL, for example, defines a programmer's right to modify Linux, what Linus Torvalds can do with such modifications, the Linux distribution rights of a PC manufacturer, and what an end user can do with Linux for either commercial or non-commercial purposes.[80]

The bottom line is that FOSS licenses often describe relatively complex, nuanced licensing arrangements. To be comfortable using the license, a programmer should be comfortable with its goals and the methods of achieving those goals. Any variance means that the license is not the right fit. In other words, a new license usually meets a new need. This is not mere vanity; this is mere necessity.

Ironically, the main culprits of license proliferation may be the loudest critics: those programmers who remain wed to outdated licenses. If programmers were willing to replace outdated, poorly drafted, or legally insufficient licenses with newer versions, the problem would be less severe. Many FOSS programmers, however, insist on the tried and true, which means the FOSS community can

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77. *See* Gomulkiewicz, *supra* note 6, at 1024–27 (describing Stallman's authorship of the GPL).

78. *See* Gomulkiewicz, *De-Bugging Open Source Software Licensing*, *supra* note 8, at 80–96.

79. *Id*. at 99–103.

80. *See* GPLv3, *supra* note 54; Email from Robert W. Gomulkiewicz to Russ Nelson (Sept. 7, 2007, 15:43:20 PDT).

never shed older licenses. There is never a net reduction, only a net gain.[81]

III. LICENSE PROLIFERATION: PROS AND CONS

A. Pros

I have already alluded to one major advantage of license proliferation, that new licenses often fix old problems. As mentioned, sometimes the problem might be that the old license does not comply with current law, or sometimes the old license has proven to be ambiguous, difficult to understand, or lacking an important term or condition. Whatever the bug, taking steps to fix the license makes sense even if it generates a "new" license.

New licenses also can be useful because they describe new or different ways of doing things. One of the most important characteristics of licenses is that they foster both technological and business model innovation in the information economy.[82] Licenses contribute to technological innovation because they provide the mechanism for technology producers to collaborate and share ideas, works, and inventions in a variety of creative ways. Licenses contribute to business model innovation by providing the basis for technology producers to distribute their products to users through a wide range of useful mechanisms and channels.[83] In other words, to the extent licenses support new ways of innovating, the production of new licenses represents helpful diversity.[84]

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81. *See* Posting of Acoliver to Open Source Initiative, OSI Board Meeting Minutes, Wednesday, August 8, 2007, http://www.opensource.org/minutes20070808 (Mar. 1, 2008, 21:00 PDT) ("Discussion about the inherent tension between approval of all licenses that match the OSD and desire to reduce overall number of licenses").

82. *See* XUAN-THAO N. NGUYEN, ROBERT W. GOMULKIEWICZ & DANIELLE CONWAY-JONES, INTELLECTUAL PROPERTY, SOFTWARE, AND INFORMATION LICENSING: LAW AND PRACTICE 2 (2006).

83. *See* Robert W. Gomulkiewicz, *The Federal Circuit's Licensing Law Jurisprudence: Its Nature and Influence*, 84 WASH. L. REV. 199 (2009) (describing how licensing supports innovation in the creation of products, customer solutions, distribution methods, and offers users a variety of products at various price points).

84. *See generally* Mann, *supra* note 2, at 39 ("Thus, the important question for open source communities is whether they can develop the institutional structures to modify the [open source] contracts successfully . . . .").

B. Cons

The existence of multiple FOSS licenses creates difficulties, however, which is why the FOSS community usually condemns license proliferation. Programmers, distributors, and users of FOSS software all suffer negative effects.

Programmers face two primary issues. First, a programmer faces the challenge of understanding the wide variety of licenses[85] that accompany code that he or she would like to modify or include in his or her software (creating derivative works under copyright law).[86] Different licenses provide different rights to do so, often with particular nuances or conditions attached. A programmer has little margin for error in understanding the right to create and distribute derivative works, and a misstep may infringe a copyright with the unpleasant possibility of an injunction and damages.[87] Using code licensed a particular way also affects the license that the programmer can use for his or her own code.[88]

Second, a programmer faces the issue of what derivative works rights he or she wants to grant to other programmers.[89] Does the programmer want to grant the right to create any type of derivative work? For any context? Does the programmer want to permit both commercial and non-commercial rights on similar terms? Does the programmer require attribution or provide warranties? Does he or she want to require others to "share alike?" Does he or she want the copyright license to continue if patent rights are asserted? These and many other choices confront the programmer as he or she selects a license.[90] The programmer, often with little or no legal counsel,

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85. This issue of confusion over "license fit" also exists for Creative Commons licenses used by artists and authors. *See* Katz, *supra* note 11, at 392–94.

86. *See* Posting of Ken Coar to Open Source Initiative, Report of License Proliferation Committee and Draft FAQ, ¶ 1, http://www.opensource.org/proliferation-report (July 31, 2006, 16:01 PDT) ("[S]ome open source licenses do not inter-operate well with other open source licenses.").

87. Companies such as BlackDuck have developed software tools to try to address this difficulty.

88. *See* MEEKER, *supra* note 10, at 53–70.

89. *See* Posting of Ken Coar, *supra* note 86, ¶ 1 ("[T]oo many different licenses makes it difficult for licensors to choose.").

90. *Se*e Lawrence Rosen & Michael B. Einshlag, Which Open Source License Should I Use, http://www.rosenlaw.com/lj5.htm (last visited Oct. 29, 2008) (Mr. Rosen is the former

confronts the hopelessly confusing question: Which of the sixty-plus OSI-approved licenses meet my particular objectives?

Distributors face issues, too. They often put together packages of programs that will be useful to users. When the component programs come with a variety of licenses, the distributor faces the often-complex task of determining whether the licenses permit the code to be combined in the package and which rights and obligations must be passed downstream. If the distributor does not take care in this process, it can be liable for copyright infringement.

Finally, multiple licenses make life complicated for software end users.[91] In one sense the license does not matter much. FOSS licenses permit users to run and use the software for end use without restriction. Many users of FOSS software, however, want to modify it, often to add new features, to add functionality, or to fix bugs. Indeed, access to source code and the right to change the code draws many sophisticated users to FOSS. Often this end user-revised software becomes part of the infrastructure that gives the end user a comparative advantage in the market. In creating these derivatives, the end user must face the issue of whether the FOSS licenses require the user to re-license derivatives in ways that may be detrimental to the user's strategic objectives.

Confusion and potential liability are negative aspects of license proliferation. Another significant issue comes with the label "license incompatibility."[92] This means that one license encumbers what can be done with code licensed under another license.[93] For example, GPLv2 says that if a programmer makes and distributes a derivative work of GPL-licensed code, then the programmer must license that derivative under the terms of GPLv2. The programmer cannot choose to license the derivative under the BSD License, Mozilla License, or even GPLv3.[94] Only GPLv2 will do.

General Counsel for OSI).

91.   *See* Posting of Ken Coar, *supra* note 86, ¶ 1 ("[T]oo many licenses makes it difficult to understand what you are agreeing to in a multi-license distribution.").

92.   *See id.*

93.   *See* Robert W. Gomulkiewicz, *Entrepreneurial Open Source Hackers: MySQL and Its Dual Licensing*, 9 COMP. L. REV. & TECH. J. 203 (2004) (describing FOSS license compatibility issues faced by MySQL AB).

94.   *See* Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed*

Incompatibility also arises when a programmer combines code licensed under licenses that require the programmer to re-license on mutually exclusive or contradictory terms. If one license says "attribution always required," for instance, and the other license says "attribution can never be required," then the programmer faces an impossible mission. GPLv2 creates this issue because it does not permit programmers to add additional conditions to the GPLv2-licensed code. If the programmer wants to add an additional attribution requirement or a provision concerning patent indemnification, the GPLv2 does not permit this. If another license requires the attribution or patent indemnification, then the code cannot be combined because of the license incompatibilities. GPLv3 addresses this, but only to a limited degree.[95]

IV. LICENSE PROLIFERATION: JUST SAY "NO"

The FOSS community has proposed several solutions to the problems caused by license proliferation. The primary approach to date has been simple: discourage everyone from creating new licenses. The power of this approach should not be underestimated. Cultural norms carry significant weight in the FOSS community. Programmers do not ignore lightly the dictates of the FOSS leaders, particularly when there is consensus on a subject.

FOSS community peer pressure uses three primary techniques: chastisement, denigration, and self-deprecation. First, hackers chastise those who create new FOSS licenses. This is done in general pronouncements by FOSS leaders that new licenses are unwelcome and then, when a new license is proposed, by directing disapproval at the license-creator. A typical epitaph is that someone merely has created a vanity license. Second, hackers denigrate the new license. They belittle its new features and harp on any perceived flaw. The

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Commons, 70 LAW & CONTEMP. PROBS. 23, 47–48 (2007).

95.   GPLv3, *supra* note 54, § 7. GPLv3 allows licensors to add additional permissions, but downstream re-licensors may remove these when they re-license. *Id.* Beyond that, GPLv3 permits added warranty disclaimers, legal notices, prohibitions on misrepresentation of origin, limits on use of author's name for publicity, declining rights under trademark, and indemnification. *Id.*; *see* Gomulkiewicz, *A First Look*, *supra* note 8, at 19 (summarizing provisions of GPLv3).

basic theme is that the new license is no better (and probably worse) than some other FOSS license. Third, if the FOSS community made an impact on the license-creator through chastisement and denigration, then occasionally the license-creator will deprecate its own license, thus winning praise from the FOSS community. Self-deprecation does not happen frequently. When it does, it often comes from license-creators who are attempting to establish their credentials in the FOSS community, such as Intel and Sun Microsystems.[96]

Despite strong and repeated warnings about the ills of license proliferation, programmers continue to create new or revised licenses.[97] The compelling reasons to do so seem to be overshadowing the admonitions of the FOSS elders. Cultural cowing alone does not seem to be potent enough to turn back the tide.

V. OSI's LICENSE PROLIFERATION PROJECT

OSI did what any self-respecting organization would do when confronted with a significant issue: it appointed a committee.[98] The License Proliferation Committee ("LP Committee") drew on many prominent figures in the FOSS community, including Eric S. Raymond as well as several lawyers. The LP Committee received input via a special e-mail discussion list.[99] The OSI Board accepted[100] the LP Committee's report ("LP Report") in 2006.

Under the heading "What the OSI Can Do About License Proliferation," the LP Report states that the first thing that OSI must do to solve the ills of license proliferation "is to make sure that licenses calling themselves 'open source' truly meet the Open Source

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96. Posting of Ken Coar, *supra* note 86, ¶ 4 (noting that Intel voluntarily retired the Intel Open Source License and Sun the Sun Industry Standards Source License).

97. A well reasoned, practical admonition was published by Larry Rosen in 2005. *See* Lawrence Rosen, License Proliferation (2005), http://www.rosenlaw.com/LicenseProliferation. pdf.

98. *See* Posting of Ken Coar, *supra* note 86. The LP Committee began its work in 2004. *Id.*

99. The archive of that discussion can be found on the OSI website. Open Source Initiative, Mailing Lists, http://www.opensource.org/lists (last visited Nov. 12, 2008).

100. Comment of DrErnie to Posting of Ken Coar to Open Source Initiative, The License Proliferation Project, http://opensource.org/proliferation-report (Dec. 12, 2007, 17:37 PDT) ("The OSI Board accepted the Report of the License Proliferation Committee in 2006, so this is now 'final.'").

Definition."[101] The LP Report points out that the LP Committee suggested three guidelines to determine whether licenses should be OSI-approved: "[(1)] the license must not be duplicative[; (2)] the license must be clearly written, simple, and understandable[; and (3)] the license must be reusable."[102] As discussed below, these guidelines may neither stem license proliferation[103] nor add any clarity to whether licenses "truly meet the Open Source Definition."[104] The non-duplicative requirement may also be inconsistent with use of an OSI-Certified certification mark, which, by law,[105] must be available to all who meet the standard, in this case, the Open Source Definition.

The LP Report made two major recommendations. First, it recommended that OSI create a web-based license selection "wizard." This software tool would assist new licensors in finding and choosing licenses that meet their goals. "We hope that being able to generate a list of existing licenses that meet defined goals will lessen the need for people to create their own new licenses."[106]

Second, the LP Report suggested that OSI divide OSI-approved licenses into various categories. The LP Committee began with bold plans to label certain licenses as "recommended" and others as "non-recommended." The Committee, however, backed away from that approach because any such normative characterization would be a "policy matter for the OSI Board to decide."[107] The LP Committee apparently did not believe that it even had the authority to make recommendations to the OSI Board along these lines. Or perhaps it

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101.   Posting of Ken Coar, *supra* note 86, ¶ 2.

102.   *Id.*

103.   *See infra* Part VI. There may be an inherent inconsistency between a goal of creating clear, simple, and understandable licenses and a goal of creating fewer licenses when nothing is done to pare back poorly written legacy licenses.

104.   *See infra* Part VI. OSI is already committed to making sure approved licenses meet the Definition. That never seems to have been in doubt, so it is unclear how the LP Report adds anything to that mandate. Indeed, OSI cannot legally license its OSI-compliant mark unless it accurately certifies compliance with the Definition.

105.   15 U.S.C. § 1064(5) (2006).

106.   Posting of Ken Coar, *supra* note 86, ¶ 3. According to the LP Report, law students from USC and engineering students from San Francisco State have begun work on this project. *Id.*

107.   *Id.* ¶ 4.

discovered that this task would be too perilous from a political standpoint and so was not worth attempting.

Instead, the LP Committee divided licenses into "descriptive categories." The categories are: (1) "popular and widely used or with strong communities"; (2) special purpose licenses (e.g., academic, government); (3) "redundant with more popular licenses"; (4) "non-reusable" licenses; (5) "other/miscellaneous"; (6) superseded; and (7) voluntarily retired. The LP Reports lists nine licenses as "popular" and nine licenses as "redundant."[108]

The LP Committee stated that the main purpose of these categories was to encourage use of the most popular licenses.[109] It acknowledged that license popularity "at first sight might not seem appropriate" as a measuring stick but justified its approach by saying:

> [P]opular and long-established licenses have an important thing going for them: the existence of an established interpretive tradition and a well-developed set of expectations about correct behavior with respect to them. This is significant in reducing confusion and (especially in common-law countries) is even likely to condition judicial interpretation of the licenses."[110]

VI. LP REPORT: A STEP SIDEWAYS (AND MAYBE BACKWARD)

At best, the LP Report represents a step sideways. The Report's first recommendation, to make sure that licenses calling themselves "open source" meet the Open Source Definition, breaks no new ground. One of OSI's primary missions is to do just that. OSI, in fact, spends a great deal of time and energy on that core mission (as

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108. *Id.*
109. *Id.*
110. Posting of Ken Coar, *supra* note 86, ¶ 4. This conclusion may or may not be accurate. The touchstone of contract interpretation is the intent of the parties, not the intent of a drafter of a standard form (e.g., the FSF in the case of the GPL) or "interpretive tradition." To the extent that the particular parties to a FOSS license have knowledge of and/or intend to adopt the FOSS community's interpretative tradition, this tradition may come into the contract by reference, or the tradition may be applied if a court needs to rely on industry custom to construe an ambiguous license. *See* NGUYEN, GOMULKIEWICZ & CONWAY-JONES, *supra* note 82, at 528–29; Gomulkiewicz, *supra* note 14, at 337–38.

illustrated by the SimPL case study). Nothing in the LP Report improves OSI's approach to that assignment.[111]

The Report's second recommendation, to create a license selection wizard, seems to be a useful idea. Creative Commons, for example, employs this type of technology to help users pick best-fit license terms for their works of authorship. As described in the LP Report, however, the wizard seems to have only minor utility. The wizard will generate a list of licenses that "meet (or almost meet)"[112] the hacker's criteria. After the wizard generates the list, the hacker faces the hardest task—deciding which of the choices is most appropriate. The wizard provides no advice on this choice other than, perhaps, to inform the hacker that certain choices are "popular" and others are "redundant."

The Report's third recommendation, to create various descriptive license categories, seems to add little to the current state of play. Most hackers already know which licenses are the most popular. It comes as no surprise that the first six licenses listed as "popular" are the Apache License 2.0, the BSD License (new version), GPLv2, LGPLv2, MIT License, and the Mozilla Public License.[113] Most hackers already select licenses based primarily on the notoriety of the license (which is why the GPL is the most-used[114] license on hacker websites such as SourceForge and Freshmeat).[115] Interestingly, as of October 2008, both the SimPL and GPLv3 were placed in a category called "Uncategorized Licenses."[116]

Arguably, the LP Report's approach is even worse than a step sideways. In some respects it is a step backward. In attempting to direct hackers to "popular" licenses, OSI may not be directing

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111. Lately, OSI has reorganized its discussion lists in an attempt to streamline the license approval process and to create a general forum to discuss FOSS licensing-related issues.

112. Posting of Ken Coar, *supra* note 86, ¶ 3.

113. *Id.* ¶ 4; *see also* ROSEN, *supra* note 7, at 73–225 (discussing all of these licenses); Gomulkiewicz, *De-Bugging Open Source Software Licensing*, *supra* note 8, at 83 (mentioning most of these licenses and pointing out that the GPL and BSD License are most popular).

114. *See* Freshmeat, Statistics and Top 20, http://freshmeat.net/stats/rating (last visited Oct. 28, 2008); SourceForge, Software Map, http://sourceforge.net/softwaremap/ (last visited Nov. 6, 2008).

115. *See* Gomulkiewicz, *De-Bugging Open Source Software Licensing*, *supra* note 8, at 82–83, 83 n.57; McGowan, *supra* note 30, at 2–3, 14–15; Vetter, *Exit and Voice*, *supra* note 11.

116. Posting of Nelson to Open Source Initiative, Open Source Licenses by Category, http://www.opensource.org/licenses/category (Sept. 19, 2006, 08:43 PDT).

hackers to the best licenses.[117] It acknowledged that several "redundant" licenses were "excellent" and "had their own following." Several of the popular licenses have many known bugs.[118]

OSI justified its actions out of a perceived need to "prune licenses." OSI did not actually prune any licenses, however. It tried to do so indirectly by putting the licenses in a category with a pejorative name: "redundant." In other words, it attempted pruning by deprecation—the branch was never cut off but only bruised and marred to make it look unattractive.[119]

Furthermore, directing hackers to popular but buggy licenses runs counter to OSI's stated objective of promoting licenses that are "clearly written, simple, and understandable."[120] If OSI does nothing more than encourage hackers to use the same old licenses, it is nearly impossible to help them use better legal code.[121] This seems ironic. One of OSI's signature claims is that the process for creating open source software assures that it will be of higher quality than so-called proprietary software. By contrast, OSI's process for picking licenses seems to ensure that legacy legal code will survive, no matter how buggy or outmoded.[122] This creates a contradiction between OSI's

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117. *See* E-mail from Chris Travers, chris.travers@gmail.com, to License Discuss, license-discuss@opensource.org (Oct. 11, 2007 08:58) (pointing out that OSI license categories are "largely useless" and tilt the playing field against using well drafted licenses such as the AFL 3.0 drafted by Larry Rosen).

118. Eric Steven Raymond & Catherine Olanich Raymond, Licensing HOWTO (Nov. 9, 2002), http://www.catb.org/~esr/Licensing-HOWTO.html (describing the Apache, BSD, and MIT licenses as "Obsolete. Still popular" and the LGPL as "Not recommended").

119. Picking up on this "redundant" label, one hacker criticized former OSI General Counsel Larry Rosen's suggestion to use his AFL 3.0: "Why would he want to switch to an unpopular license that the OSI lists as redundant? I realize you wrote it, but it hasn't done anything to help with license proliferation. You wrote the license you thought people should use, rather than the license people wanted to use." E-mail from Donovan Hawkins, Hawkins@cephira.com, to License Discuss, license-discuss@opensource.org (Oct. 16, 2007 14:00).

120. Posting of Ken Coar to Open Source Initiative, *supra* note 86.

121. Raymond & Raymond, *supra* note 118 ("In the past, we've had a strong tendency to organize our sub-communities around licenses; Perl people think of the Artistic License as part of their subcultural identity, BSDers are attached to the BSD license, and Free Software Foundation partisans can't imagine life without the GPL. The problem is that in the new high-threat legal environment we now face, all these licenses are *broken*, or at least less than the best license technology available.").

122. *Id*. ("[W]e need to stop treating project licenses as immutable sacred texts, ideological banners, or territory, and start thinking of them as *functional software*—which, like all

goals of a license not being "duplicative" and a license being clear-simple-understandable unless OSI allows legacy licenses to be replaced by newer ones that do the same thing, only better.

VII. OSI AND LICENSE PROLIFERATION: THREE BOLDER STEPS FORWARD

The LP Report attempted to put a crimp in the troublesome aspects of license proliferation, but its recommendations do not seem bold enough to have a significant impact. If anything, they could represent a step backward because the LP Report makes such a strong push to promote the use of "popular" licenses, no matter how outmoded. This part proposes three bolder steps that could make a greater impact.

A. A Wizzier Wizzard

The LP Report proposes a license selection wizard that does little more than narrow down the list of potential licenses to the same set of licenses that a hacker likely would consider anyway. A license selection wizard could be engineered to do much more than that. The Creative Commons wizard, for example, walks authors through a series of queries that tease out the author's objectives and then generates a license to match.[123] The OSI license wizard could provide a programmer with a series of queries to help the programmer think through the laundry list of choices that go into selecting a FOSS license. The wizard could provide links to explanatory information that might be useful for the programmer to better understand complex issues (such as what the GPL means by "work based on a program"). The wizard could even offer the programmer the choice of "popular" and "redundant" licenses and explain the pros and cons of choosing one over the other.

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software, needs periodic upgrading."); *see* Gomulkiewicz, *supra* note 6, at 1016, 1027 (describing how the FSF views the GPL as free software's "constitution").

123. Creative Commons: Choose a License, http://creativecommons.org/license/ (last visited Oct. 31, 2008).

B. Best Practices and Legacy Licenses

The boldest step would be for OSI to select and promote a collection of licenses that it thinks represent FOSS licensing best practices. OSI backed away from this once before but it should consider the following proposal: Periodically, OSI could send out a Request For Proposals ("RFP"). The RFP would specify the types of license forms that OSI considers useful, such as copyleft and permissive, and features that it would like the licenses to have, such as warranty disclaimers or the ability to be used internationally. These license types and useful features would evolve over time as technology, business practices, and the licensing law progress. Every new best practice license would contain a backward compatibility feature to assure that software licensed under superseded licenses could still be used in projects using new best practices licenses.

From the licenses submitted in response to the RFP, OSI would designate certain licenses as its "best practices" licenses within various categories (e.g., best practice license in the GPLv2 tradition, in the BSD License tradition, or in the Mozilla License tradition).[124] OSI would promote those licenses as the preferred licenses for hackers to use. A special best practices logo could be created for use with software employing these licenses.[125]

This proposal, of course, might lead to tension between FSF and OSI if OSI does not choose the GPL as a "best practice" license. Perhaps this tension could be eased by creation of another category of license: Legacy Licenses. OSI would define this category as licenses to be chosen by programmers who are selecting a license primarily because of alliance to a certain group, such as FSF, Perl, or a BSD distribution. This is a legitimate choice; many programmers trust the leaders of these groups in all matters relating to FOSS, including licensing. OSI, however, would be providing a clearer choice for

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124. The "best practices" nomenclature is commonly used in the business world. *See* David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 308 (2006). The label has been suggested for use with open source licenses. *See* Raymond & Raymond, *supra* note 118 (labeling certain licenses as "best practice" and urging hackers to pick a "best practice" license).

125. OSI's Bylaw revision of March 2005 opens up this possibility. *See* Open Source Initiative, OSI Board Meeting Minutes, March 7, 2005, http://opensource.org/minutes20050307 (last visited Apr. 21, 2009).

those hackers who do not care to choose a license primarily for symbolic or group membership purposes. If the number of licenses could be pared down to Best Practices and Legacy Licenses, then OSI would have made significant progress in rolling back the negative aspects of license proliferation.

C. More Legal Services for Hackers

Even with a wizzier wizard than the LP Report proposes and the promotion of "Best Practice" licenses, OSI could provide more services to help hackers intelligently select a license. OSI could take steps to increase hackers' access to legal services[126] that would help them choose. First, OSI could commission an analysis of OSI-approved licenses. This analysis could be turned into a document that provides a hacker-friendly description of the attributes of each OSI-approved license.

Second, OSI could work with law school clinics to provide pre-legal advice—advice that will empower the hacker to have a constructive, focused session with legal counsel.[127] The main objective of such a clinic would be to get the hacker to focus on the relevant questions, identify the universe of relevant licenses, and begin to think through the trade-offs.[128] The hacker would make a final decision after consulting with a legal expert or decide no legal advice is necessary.[129]

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126. OSI may be considering a program to enlist pro bono assistance. *See* Posting of Acoliver to Open Source Initiative, OSI Board Meeting Minutes, Monday, March 3, 2008, http://opensource.org/minutes20080303 (Mar. 20, 2008, 18:45 PDT).

127. *See* Sean M. O'Connor, *Teaching IP from an Entrepreneurial Counseling and Transactional Perspective*, 52 ST. LOUIS U. L.J. 877 (2008).

128. FSF recently has significantly ramped up its legal services. Columbia Law School hosts the Software Freedom Law Center ("SFLC") which provides advice related to the GPL as well as enforcement. The Center has a full-time paid staff. SFLC also has a "for profit" affiliate law firm, Moglen Ravicher, that is fully owned by the SFLC. *See* Steven J. Vaughan-Nichols, *SFLC Announces a For-Profit, Open Source Law Firm*, LINUX-WATCH, Mar. 27, 2008, http://www.linux-watch.com/NS5468493767.html.

129. *See* Steven J. Vaughan-Nichols, *Finding the Right Open Source Savvy Lawyer*, LINUX-WATCH, Apr. 6, 2008, http://www.linux-watch.com/news/NS9923280341.html.

CONCLUSION

FOSS license proliferation represents both helpful diversity and hopeless confusion. The FOSS hacker community has identified the negative aspects of license proliferation, but its approach to address proliferation has been largely ineffective. This Article proposes three bolder steps that could make a meaningful impact and, as a consequence, improve the climate for the success of FOSS.