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**GNU Public License: Contract Law Issues and SCO Litigation**

This paper addresses selected contract law issues raised by the use of the GNU General Public License, the evolution of authority in the open source software community, and the pending litigation between SCO and IBM concerning the distribution of Linux software. This paper has been prepared for presentation at the Software Information Center Symposium 2003, which will consider various aspects of the open source software movement.

**1. GNU General Public License Contract Law Issues**

The fundamental challenge facing anyone thinking about using the GNU GPL is to predict how a court would interpret and enforce its terms. Under US law, a court would try to determine the objective meaning of the terms of a contract. A court would not adopt a meaning suggested by only one party if the other party rejects that interpretation and a reasonable person would not have interpreted the contract that way. Indeed, a term in a written contract generally is construed against the party who drafted it. Because US courts use the interpretation an objective, reasonable person would have given as the basis for finding the meaning of contracts, it seems highly unlikely that Richard Stallman's interpretation of the GPL would control in litigation, even if a licensor that used the GPL claims to share Stallman's interpretation. The ambiguous language of the GPL and Stallman's rather idiosyncratic interpretation of its terms often leads to controversial or problematic outcomes. These issues are discussed more fully in the "Issues for Discussion about Derivative Works in GPL" submitted with this paper, and in Robert W. Gomulkiewicz, *Debugging Open Source Software Licensing*, 64 U. PITT. L. REV. 75 (2002).

**2. Authority over Open Source**

The German sociologist Max Weber identified three "ideal types" of authority that might be recognized as legitimate by members of different societies:

There are three pure types of legitimate authority. The validity of their claims to legitimacy may be based on:

1. Rational grounds—resting on a belief in the 'legality' of patterns of normative rules and the right of those elevated to authority under such rules to issue commands (legal authority).
2. Traditional grounds—resting on an established belief in the sanctity of immemorial traditions and the legitimacy of the status of those exercising authority under them (traditional authority); or finally,

3. Charismatic grounds—resting on devotion to the specific and exceptional sanctity, heroism or exemplary character of an individual person and of the normative patterns or order revealed or ordained by him (charismatic authority).<sup>1</sup>

The open source software movement seems to be either in the midst of a process that Weber describes as the “routinization of charisma,” or in the midst of one form of authority—charismatic—being superceded by another—legal-bureaucratic. This is because the leadership of the movement seems to be passing from Richard Stallman, a charismatic leader, to organizations of various types which are prepared to work within a more overtly legal form of authority in order to achieve their objectives. The board of directors of the Free Software Foundation (FSF) that Stallman founded in 1985 are trying to clarify the relationship between the Foundation as an organization and Stallman as an individual who plays an important role in that organization, in order to create some distance between the Foundation and the man. Important open source software developments that came into being after the FSF are run by legal-bureaucratic organizations such as partnerships (e.g., Apache), for-profit corporations (e.g., SendMail, I.B.M., and RedHat), and non-profit organizations (e.g., Open Source Development Labs and the Open Source Initiative). Although Stallman himself created the FSF, his leadership clearly seems to rest more on his invocation of larger moral and ethical values, such as free association and support for community without regard to market values, than it does on his administration of the Foundation.

The “Free Software” movement started by Richard Stallman and embodied in the GPL was created to challenge the “proprietary” model of software development and distribution. Stallman’s attack on proprietary software development proceeds on at least two levels: at one level, it is an argument about how to improve the quality of software in use; at another level, it is an attack on the idea of “possessive individualism” more generally.<sup>2</sup> Conflating these two objectives has contributed to Stallman’s status as a charismatic leader of the Free Software movement. Stallman’s insistence that programming quality should not be separated from the larger political critique of capitalism is now contributing to his Free Software movement’s being eclipsed by the more ideologically modest “Open Source” movement.

In terms of Weber’s ideal types, traditional authority is found in tribal and monarchical societies. The legitimacy of a traditional order is based on the belief that powers of control “have always existed.” In a society governed by elders, those who are most familiar with the sacred traditions govern collectively. Eric Raymond’s description of the behavior and culture of computer hackers strongly suggests that the early days of computer programming in the US were characterized by a tribal culture with a traditional form of authority.<sup>3</sup>

This very loose and informal form of authority seems to have been strongly influenced by the charismatic authority exercised by Richard Stallman. Weber used the term “charismatic” to describe the leadership style of individuals who believe they have a calling or duty to exercise authority, and are able to persuade others to follow them. In traditional societies, charismatic leaders include prophets and shamans; in modern societies, they include demagogues and spiritual

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<sup>1</sup> Max Weber, *The Theory of Social and Economic Organization*, translated by A. M. Henderson and Talcott Parsons, 1947 at 328.

<sup>2</sup> C. B. Macpherson, *The Political Theory of Possessive Individualism*, Oxford University Press (1962).

<sup>3</sup> Eric S. Raymond, *The Cathedral and the Bazaar* (1999).

leaders such as the Pope and Dalai Lama. Weber could have been describing the Free Software movement when he said “[t]he corporate group which is subject to charismatic authority is based on an emotional form of communal relationship.”<sup>4</sup> Charismatic authority is opposed to the banal and routine, and as such, is markedly different to both the traditional form of authority that often precedes it, and the legal-bureaucratic form of authority that often succeeds it.

Stallman articulated a powerful theoretical and moral justification for the continued growth and development of the Free Software community when he established the FSF in 1985. Although not all members of the Free Software community might subscribe whole-heartedly to every element of Stallman’s vision, Stallman succeeded in giving the community a self-consciousness and direction it might never have developed if it had remained a “tribal” organization. However, one key to Stallman’s charismatic authority is the fact that he combines a more modest project, namely changing what is considered “normal” in the world of software development, with a larger project, namely challenging the entire idea of “intellectual property.”<sup>5</sup> While this radical rejection of the role of property rights in modern liberal democratic society may have galvanized many followers, it makes it hard for Stallman to institutionalize his views beyond the FSF. His ambivalence about legal forms of authority generally undermines the effectiveness of the GPL as a standard form contract and also undermines his ability to lead the broader software development community.

The Free Software movement now faces a challenge described by Weber as the “routinization of charisma.” The charismatic form of authority, by its nature, is intensely subjective and personal in a way that is foreign to routine. If a charismatic form of authority is to survive, a mechanism must be found to perpetuate the personal authority of a charismatic leader with predictability. This can be done on the basis of searching for another individual with the same charismatic traits, which is the process whereby a new Dalai Lama is chosen. A charismatic leader can designate his own successor, or the staff of a charismatic leader can elect a new leader, which is the process whereby a new Pope is chosen. However, as Weber notes, “[f]or charisma to be transformed into a permanent routine structure, it is necessary that its anti-economic character should be altered.”<sup>6</sup>

What appears to be happening in the software development community is not so much the routinization of Stallman’s charismatic leadership of the Free Software movement, but rather the emergence of a legal-bureaucratic form of authority that will ultimately exercise more influence and have a more lasting impact on the way software is produced. Linus Torvalds exercises a leadership style that draws on both of charismatic and legal-bureaucratic forms of authority, thus providing a

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<sup>4</sup> Max Weber, *The Theory of Social and Economic Organization*, translated by A. M. Henderson and Talcott Parsons, 1947 at 360.

<sup>5</sup> Eben Moglen, general counsel to the FSF and a Columbia Law School professor, stated this point most clearly in January 2003 in the *DotCommunist Manifesto* when he said that one of the goals of the Free Software movement was “abolition of all forms of private property in ideas.” Available at <http://emoglen.law.columbia.edu/publications/dcm.html>. Stallman makes similar points less bluntly in essays such as “Why Software Should Not Have Owners” and “Why Software Should Be Free” available at [www.gnu.org](http://www.gnu.org). See, e.g., Richard Stallman, *Reject IP Enforcement Directive* (“Even using the term “intellectual property” is a point of weakness, because this is a propaganda term for those who aim to restrict the public.”) available at <http://www.gnu.org/philosophy/ipjustice.html>.

<sup>6</sup> Weber at 369.

bridge between the more radical early days of the Free Software movement and its more moderate current manifestations, exemplified first by his affiliation with Transmeta corporation and more recently the Open Source Development Labs. Weber identified the following characteristics of the legal-bureaucratic form of authority:

- Continuous organization of official functions bound by rules;
- Administrative organs with specified spheres of competence;
- Hierarchical form of organization administered by officials;
- Separation of ownership of resources and the administration of those resources;
- Tenure of officials based on objective criteria of competence; and
- Written records of administrative acts, decisions and rules.<sup>7</sup>

Organizations such as Apache, RedHat, the Open Source Development Labs and the Open Source Initiative seem to exercise a form of legal-bureaucratic authority both because they more readily accept the fundamental legitimacy of ideas of property, contract and markets, and because their organizations are fundamentally bureaucratic rather than charismatic.

### **3. Litigation between SCO and IBM and Actions Against Linux Users**

SCO Group is the owner of many of the intellectual property rights in the Unix operating system, and between 1995 and 2001, worked on a joint venture with IBM code named “Monterey” to run the Unix operating system on a new 64 bit processor. The joint venture ultimately was not successful because IBM decided to go forward using Linux, not Unix, as an operating system.

In March 2003, SCO filed suit against IBM for misappropriation of trade secrets, unfair competition, breach of contract and tortious interference with SCO’s business. SCO is claiming that parts of its proprietary Unix code have shown up as Linux open source code, and that it has the right to revoke IBM’s license to ship its version of Unix. From the outset, many observers have been skeptical of the merits of SCO’s claims,<sup>8</sup> though others have observed that the lax code checking practices of open source developments make SCO’s claims plausible. IBM defended itself on the grounds that SCO had itself shipped Linux code under an open-source license, and counterclaimed that SCO is violating its patents.

In principle, SCO could bring suit against any other user of Linux and by obtaining injunctive relief, prevent them from using the software. After suing I.B.M., SCO mailed letters to information technology managers of companies using Linux, warning them that using Linux exposed them to liability for intellectual property infringement lawsuits and offering them an opportunity to pay license fees to SCO to avoid potential liability. Hewlett Packard, seeking to

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<sup>7</sup> Weber at 330-332.

<sup>8</sup>Stephen Shankland, *SCO sues Big Blue over Unix, Linux*, News.com March 6, 2003 (“Analysts saw the move as a desperate one for SCO, a company that hasn't been profitable in its current incarnation. “It's a fairly end-of-life move for the stockholders and managers of that company,” said Jonathan Eunice, an Illuminata analyst. “Really what beat SCO is not any problem with what IBM did; it's what the market decided. This is a way of salvaging value out of the SCO franchise they can't get by winning in the marketplace.”” Available at [http://news.com.com/2100-1016\\_3-991464.html?tag=st\\_rn](http://news.com.com/2100-1016_3-991464.html?tag=st_rn)

woo Linux customers from I.B.M. and other Linux distribution companies, announced that it would indemnify users of copies of Linux they obtained from HP for any losses they suffer as a result of SCO's claims.

SCO's allegations in the litigation have varied from reasonable to far-fetched. When SCO points out that the open source community lacks an appropriate mechanism for screening the code that is included in open source projects, the point is well taken. When SCO claims that GPL violates the US Constitution, its argument is simply silly. While SCO may succeed on the merits of its claims, the relief to which it would be entitled may be relatively modest, particularly if the open source community quickly re-writes any infringing code (as it surely will). However, the lawsuit serves the larger and more important function of raising several broader issues:

1. Will companies profiting from open source software stand behind the software or will they expect customers to bear the risk of infringement litigation?
2. Will open source development communities change their development practices to avoid using infringing code?
3. Will companies who have patents that read on open source software seek a share of monies received by companies that are profiting from open source software?