

# Issues Paper – ‘GPL v3 and Australia’ Symposium

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[www.cyberlawcentre.org/gpl/](http://www.cyberlawcentre.org/gpl/)

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## Contents

1. INTRODUCTION .....	1
2. OUTLINE OF GPL V3 LICENCE .....	2
3. INTERNATIONALISATION OF GPL V3 .....	3
4. DRM, SOURCE CODE AND GPL V3.....	6
5. PATENTS .....	8
6. LICENSE COMPATIBILITY .....	10
7. DEFINED INTERFACES.....	12
8. GPL V3 PERMISSIONS - UNINTENDED CONSEQUENCES .....	14
BIBLIOGRAPHY .....	16

## 1. Introduction

This issues paper is to help participants prepare for the ‘GPL v3 and Australia’ symposium 30 November 2006 at UNSW Cyberspace Law and Policy Centre, as part of its Unlocking IP ARC research project. The symposium provides an opportunity for participants to discuss issues that the new license may raise, in order to aid interested parties in making a submission to FSF on issues arising from the final draft licence before its completion.

On 16 January 2006 the Free Software Foundation (FSF) released the 1<sup>st</sup> draft of version 3 of the GNU General Public License.<sup>2</sup> The second discussion draft was released on 27 July 2006 and a third may be due in December 2006. March 2007 has been scheduled as the latest release date of the final GPL v3. (See Bibliography for links dealing with process and debates. In the electronic version of this document, many links are live. See also <http://cyberlawcentre.org/2006/gpl/resources.htm> )

FSF has been guided by several principles to inform discussion on the new license:<sup>3</sup>

1. A global license
2. Protection of existing freedoms
3. Do no harm
4. Consulting the community

NB: While the event’s short title may imply a focus on uniquely Australian issues, in practice it is more like ‘GPL v3 in non-US Jurisdictions - the case of Australia’.

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<sup>1</sup> The authors, researcher and executive director respectively at UNSW’s Cyberspace Law and Policy Centre, acknowledge the contributions to the questions included in this draft by William Uther, Raena-Lea Shannon, Peter Miller and Andrew McRae. Many thanks to Catherine Bond and Ben Bildstein for their comments on the early drafts of this paper.

<sup>2</sup> FSF, “GNU General Public License, Discussion Draft 1 of version 3” (16 January 2006), <http://gplv3.fsf.org/gpl-draft-2006-01-16.html>

<sup>3</sup> FSF, “GPLv3 Process Definition” (15 January 2006) <http://gplv3.fsf.org/process-definition>

The symposium hopes to go beyond generic issues and consider features of the local context of use relevant to GPL v3. We encourage readers to think about how certain issues may be more or less significant in the Australian context, both for their own sake or as a proxy for issues posed in non-US legal jurisdictions generally. (Note that there is also a view that as the GPL is global, local issues are not really significant, and it's the core questions of whether the licence actually works for all its intended users that remain the most critical.)

This paper covers a series of topic areas. In each, there are questions for consideration included at the end in boxes. See [www.cyberlawcentre.org/gpl/](http://www.cyberlawcentre.org/gpl/) for details of the symposium, the latest version of this paper, and links to resources. Please send feedback about this issues paper to Abi Paramaguru [a.paramaguru@unsw.edu.au](mailto:a.paramaguru@unsw.edu.au).

## 2. Outline of GPL v3 Licence

**Preamble:** This section explains the aims of the license and the philosophies that underpin it.

### Terms and Conditions

0. **Definitions:** Contains definitions
1. **Source Code:** Defines source code, object code, system libraries and corresponding source.
2. **Basic Permissions:** License term, coverage and permissions.
3. **No Denying User Rights through Technical Measure:** DRM and TPMs
4. **Verbatim Copying:** Copying and conveying source code.
5. **Conveying modified source versions:** Copying or conveying work based on source code in specified circumstances
6. **Conveying non-source forms:** Copying and conveying work in object code form provided you convey corresponding source in specified ways.
7. **Additional Terms:** Outlines the extra permissions that users may allow (in the form of exceptions to sections of the license) and specified classes of requirements that users are permitted to add.
8. **Termination:** Consequences of violating the license
9. **Acceptance not required for having copies:** Individuals do not have to accept GPL v3 in order to receive and run a copy of a GPL covered program.
10. **Automatic Licensing of Downstream:** Original licensor grants downstream permissions/conditions under GPL v3.
11. **Patents:** Covenant not to assert patents.
12. **No Surrender of Others' Freedom:** Convey freedoms embodied in the license or do not convey at all.
13. **Geographical Limitations:** Permission to include geographical limitations if conveying or use of the program is restricted in certain countries either by patents or by copyrighted interfaces.
14. **Revised versions of this license:** Option of following GPL v3 or any later version if included in license by user.
15. **Requesting Exceptions:** When incorporating part of program into other free programs which are under different licenses users will need to contact author and ask for permission.

### No Warranty

16. **Disclaimer of Warranty:** No warranty for GPL covered programs except to the extent permitted by applicable law.
17. **Limitation of Liability:** No liability for damages arising from use or inability to use Program covered by GPL v3.

Should GPLv3 include a boilerplate provision that any provision not upheld by a Court would not render the balance of the GPLv3 invalid? Is this deliberately left up to the law of place it is litigated?

### 3. Internationalisation of GPL v3

See: <http://GPLv3.fsf.org/denationalization-dd2.html>

GPL version 2 was drafted in the context of American law. GPL v3 is an attempt to internationalise the license (and make it compatible with the Berne Copyright Convention).<sup>4</sup> Moglen says that “given that we are all now existing in the Berne universe the right way of internationalising is to come as close to Berne Convention mechanisms as possible”.<sup>5</sup> This is the reason that GPL v3 attempts to depart from language unique to a particular legal system. This theoretically results in generic application of the license. Additionally, for the purposes of internationalisation, GPL v3 defines terms in relation to “underlying copyright law in each individual copyright system”.<sup>6</sup>

Terms that may be of interest in draft 2 of GPL v 3

1. “Everyone is permitted to copy and distribute verbatim copies of this license document, but changing it is not allowed.”

This clause makes it impossible for users to make minor alternations to suit national copyright law.

2. [Preamble] “States should not allow patents to restrict development and use of software...”

Is this appropriate language for GPL v3 to be truly international? Does “State” have different meanings in different countries? Suggested rewording?

3. [Definitions] “A work ‘based on’ another work means any modified version, formation of which requires permission under applicable copyright law.”
4. [Section 0: Definitions] “To ‘propagate’ a work means doing anything with it that requires permission under applicable copyright law, except executing it on a computer, or making modifications that you do not share. Propagation includes copying, distribution (with or without modification), making available to the public, and in some countries other activities as well. ”

The word propagate replaces the controversial use of “distribution” in GPLv2. The definition is designed to get uniform results, described as “anything that copyright law covers, other than running the copy or modifying it.”<sup>7</sup>

Is 'making available to the public' the same as 'communication to the public' under US Law?

<sup>4</sup> Andres Guadamuz, “New Draft on GPL v 3 published,” (July 31 2006) <http://technollama.blogspot.com/2006/07/new-draft-of-gpl-v3-published.html>

<sup>5</sup> Eben Moglen, “Transcript of Eben Moglen at the 2<sup>nd</sup> international GPLv3 Conference” (22 June 2006), <http://fsfeurope.org/projects/gplv3/barcelona-moglen-transcript.en.html> at [0h18m15s]

<sup>6</sup> Moglen, above n 5 at [0h21m19s].

<sup>7</sup> Richard Stallman, “Transcript of Richard Stallman at the 4th international GPLv3 conference” (23 August 2006), <http://fsfeurope.org/projects/gplv3/bangalore-rms-transcript.en.html> at [20:28]

5. [Section 0: Definitions] “To “convey” a work means any kind of propagation that enables other parties to make or receive copies, excluding sublicensing.”

There are two forms of propagation, “the kinds that end up giving other people copies and the kinds that don’t.”<sup>8</sup> If action results in other people having copies then it is considered ‘conveying’.<sup>9</sup>

Regardless of how the law classifies your doing that, whether the law calls it “distribution”, or “communication to the public”, or whatever, that isn’t going to affect the GPL’s conditions.<sup>10</sup>

By using language which is not US copyright language, or anybody else’s copyright language, but by stating only the relationship between licence terms of art and states of fact in the world, we think we can get rid of a large number of problems arising out of national law.<sup>11</sup>

<http://gplv3.fsf.org/comments/gplv3-draft-2.html - gpl3.definitions.p1>

“Convey” in Australia has sense of title or rights passing from transferor to transferee, whereas is not the GPL is a bare licence for no consideration. Is “permit” more accurate to say than “convey”?

6. [Section 2: Basic Permissions] “All rights granted under this License are granted for the term of copyright on the Program, and are irrevocable provided the stated conditions are met.”

A criticism of GPLv2 was the fact that the license stated it was a perpetual license. This was problematic in the context of German copyright law because a license was only valid if the license had a specified term.<sup>12</sup>

7. [Section 2: Basic Permissions] “This License acknowledges your rights of ‘fair use’ or other equivalent, as provided by copyright law.”
8. [Section 3: No Denying Users’ Rights through Technical Measures] “No covered work constitutes part of an effective technological “protection measure under section 1201 of Title 17 of the United States Code. “

If the license wants to be truly international then why not mention an international treaty instead?<sup>13</sup>

9. [Section 7: Additional Terms] “All other additional requirements, including attorney’s fees provisions, choice of law, forum, and venue clauses, arbitration clauses, mandatory contractual acceptance clauses, requirements regarding changes to the name of the work, and terms that require that conveyed copies be governed by a license other than this License, are prohibited.”
10. [Section 7: Additional Terms] “Any additional permissions that are applicable to the entire Program are treated as though they were included in this License, as exceptions to its conditions, to the extent that they are valid under applicable law.”

<sup>8</sup> Stallman, above n 5

<sup>9</sup> Stallman, above n 6

<sup>10</sup> Stallman, above n 6

<sup>11</sup> Moglen, above n 5 at [0h22m12s]

<sup>12</sup> Moglen, above n 5 at [0h18m15s] and [0h21m19s]

<sup>13</sup> Guadamuz, above n 4.

11. [Section 11: Patents] “Nothing in this License shall be construed as excluding or limiting any implied license or other defences to infringement that may otherwise be available to you under applicable patent law.”
12. [Section 13: Geographical Limitations] “If the conveying and/or use of the Program is restricted in certain countries either by patents or by copyrighted interfaces, the original copyright holder who places the Program under this License may add an explicit geographical limitation on conveying, excluding those countries, so that conveying is permitted only in or among countries not thus excluded. In such case, this License incorporates the limitation as if written in the body of this License.”  
<http://gplv3.fsf.org/comments/gplv3-draft-2.html - gpl3.licensingpatents.p2>
13. [Section 16: Disclaimer of warranty] “There is no warranty for the Program, to the extent permitted by applicable law.”
14. [Section 17: Limitation of Liability] “In no event unless required by applicable law or agreed to in writing will any copyright holder, or any other party who may modify and/or convey the Program as permitted above, be liable to you for damages...”

How well does the language of GPL v3 meet the needs of an international license?

While some uses of GPLv3 are for international markets, many uses remain within local markets (such as for governments at the national and state level in a particular country like Australia).

International compatibility may here be less important than a licence that stands up and makes sense under local laws and practices. Governments in particular may be cautious about a generic licence with key provisions not in the legal language of local laws.

Creative Commons licences have apparently responded to this by implementing local versions of the initial US-based licence.

Is there any prospect that GPLv3 could be so adapted for a specific country's statutory terminology or concepts, while implementing the ideas as GPLv3 as closely as possible? If not, why not?

Is GPLv3 written with the expectation that its legal validity will be litigated in many jurisdictions around the world? Or alternatively, that such litigation continues to be so unlikely in practice that attempts at defensive provisions against this prospect are less important than simplicity, compatibility or other matters of substance?

GPLv2 referred to "derivative work", a term in the US copyright law but not in other countries such as Australia, creating potential compatibility issues with local law. GPLv3 now refers instead to works 'based on' another (defined as "any modified version, formation of which requires permission under applicable copyright law").

Does this change away from a US-specific 'term of art' solve this perceived issue in other countries like Australia? Does it create any new problems in US law?

With the (partial) normalisation of copyright law between the USA and Australia due to the A-US Free Trade Agreement, what is the Australian position in regard to the DMCA, and how does this impact code written in Australia under Australian copyright law?

What is the degree and significance of differences between the language in GPL and specific Australian copyright law?

Will the approach to internationalisation taken in GPL v3 make litigation unnecessarily complex as parties will have to argue *lex loci*, *lex juris* and *lex fori*?

Should GPLv3 include a boiler plate provision that any provision not upheld by a Court would not render the balance of the GPLv3 invalid? Is this deliberately left up to the law of place it is litigated?

Should the FSF include a disclaimer from liability for implied duty of care to developers relying on the GPL in event any provision is found unenforceable?

#### 4. DRM, Source Code and GPL v3

The approach in GPL v3 toward digital rights management (DRM) has been the subject of significant controversy. Section 3 was called “digital restrictions management” in the original draft but has since been changed to “no denying users’ rights through technical measures” in draft 2. The section has undergone substantial changes.<sup>14</sup> It will be interesting to note what changes occur in the next draft.

Section 1 requires the release of keys where the modified work is encrypted.<sup>15</sup> Draft 2 attempted to make the wording clearer however, the section is still being criticised. Stallman speaking on the approach to DRM in GPL v3 states:

Because of these various laws that have been adopted or proposed in various countries, making it illegal to modify the software to bypass these conspiracies, we've put in another clause - actually a pair - which were designed to overcome that. There's one thing which is designed for the US law, and there's another with is designed for the European directive, and in both cases they say: "if you distribute a GPL covered program as part of the technical means of restricting the users, then you're also giving the users permission to bypass those restrictions".

So, yeh, you can write restrictions into the code and distribute that, but you can't cite the restrictions in the GPL covered program as a basis for prohibiting the user's other software which is designed to escape from the restrictions you put on it.<sup>16</sup>

The FSF has attempted to prohibit technical evasion of any of the core freedoms granted by the license.

Terms that may be of interest in draft 2 of GPL v 3

<sup>14</sup> FSF, “GPLv3 Second Discussion Draft Rationale,”(27 July 2006), <http://gplv3.fsf.org/rationale>, at p 10

<sup>15</sup> Guadamuz, above n 4.

<sup>16</sup> Stallman, above n 5, at [45.10]

[Section 1] ...The Corresponding Source also includes any encryption or authorization keys necessary to install and/or execute modified versions from source code in the recommended or principal context of use, such that they can implement all the same functionality in the same range of circumstances. (For instance, if the work is a DVD player and can play certain DVDs, it must be possible for modified versions to play those DVDs. If the work communicates with an online service, it must be possible for modified versions to communicate with the same online service in the same way such that the service cannot distinguish.)

[Section 3] 3. No Denying Users' Rights through Technical Measures.

Regardless of any other provision of this License, no permission is given for modes of conveying that deny users that run covered works the full exercise of the legal rights granted by this License.

No covered work constitutes part of an effective technological "protection" measure under section 1201 of Title 17 of the United States Code. When you convey a covered work, you waive any legal power to forbid circumvention of technical measures that include use of the covered work, and you disclaim any intention to limit operation or modification of the work as a means of enforcing the legal rights of third parties against the work's users.

These sections have been criticised for several reasons:

- "That would mean that any kernel licensed under GPL v3 cannot be used where DRM is required for a secure environment."<sup>17</sup>
- Not all DRM is bad.<sup>18</sup>
- DRM is not something that should fall inside a software license<sup>19</sup>
- The fact that there is DRM abuse does not excuse curtailing freedom.<sup>20</sup>
- DRM provisions are included for purely political ends.<sup>21</sup>

Further, the FSF's attempts at drafting and re-drafting these provisions have shown them to be a nasty minefield which keeps ensnaring innocent and beneficial uses of encryption and DRM technologies so, on such demonstrated pragmatic ground, these clauses are likewise dangerous and difficult to get right and should have no place in a well drafted update to GPLv2.<sup>22</sup>

What problems does the approach to DRM in GPL v3 pose in Australia?

<sup>17</sup> Edward Macnaghten, "Views on the GPLv3 hoo-har" (29/09/06)

<http://www.freesoftwaremagazine.com/node/1777>

<sup>18</sup> Macnaghten, above n 13.

<sup>19</sup> Macnaghten, above n 13.

<sup>20</sup> James E.J. Bottomley, Mauro Carvalho Chehab, Thomas Gleixner Christoph Hellwig, Dave Jones, Greg Kroah-Hartman, Tony Luck, Andrew Morton, Trond Myklebust and David Woodhouse, "The Dangers and Problems with GPLv3 – Kernel Developers Position of GPLv3" (15 September 2006) <http://lwn.net/Articles/200422/>

<sup>21</sup> Kernel Developers, above n 16

<sup>22</sup> Kernel Developers, above n 16

The DRM measures in GPLv3 do not appear to adhere to the general philosophy of limiting fields of endeavour. By introducing potentially unenforceable terms, do we not risk the entire license? (We aren't including terms like "may not be used in a cruise missile", "may not be used in an intensive care humidity-crib", "may not be used in an electric drill used to torture prisoners in Iraq", "may not be used in the navigation systems of a whaling ship" ... so why are we limiting these fields of endeavour?)

Are there better ways to combat/ advocate/ lobby for DRM reform [than having the DRM provisions in v3]?

The next generation of consumer entertainment content (movies, pop songs, games) is likely to be protected by DRMs; content player software and/or devices will thus need to have DRM decoders; bypassing DRM or Technological Protection Measures (TPMs) is increasingly criminalised.

Do the DRM provisions in GPLv3 mean that general purpose media devices will not be viable under it, hence locking out the great majority of potential ordinary desktop computer or media player users?

If, as appears possible, the popular distributions of what is commonly called 'Linux' remain under GPLv2 (with no DRM restrictions), will this mean that 'Linux on the Desktop' or 'Linux on media player' will still be able to support DRM-controlled content? (And thus the DRM provisions will have limited effect?)

For embedded devices, their operating system kernel must often deal in kernel mode with other device driver software which provide a direct interface with proprietary IP in chips etc., in ways which are considered to expose that IP to potential 'infection' by a viral OS licence like GPL; this means it is less likely that, for example, phone handset makers will feel able to use a GPL'd OS.

Will GPL v3 make this situation better or worse?

## 5. Patents

By making specific reference to patents in GPL v3 Stallman wants to ensure that if a person permits someone to use and distribute a program they can't be sued for patent infringement. The changes are to make this position clear in other countries which don't have the same laws as the US.<sup>23</sup>

Furthermore, the license utilises patent retaliation. The kind of patent retaliation employed in the GPL v3 targets individuals who make modifications but do not release them. If someone else makes similar modifications and if the patent owner sues this user the patent owner loses the right to modify the program further.

The one who does this kind of patent law suit loses the right to modify the program any further. Which means he effectively can't maintain it, which means it's effectively not usable for his business because, for a business to be using a program that can't be maintained is a very precarious situation.

<sup>23</sup> Mayank Sharma, "Report on the Fourth Annual GPLv3 Conference" (September 5, 2006) <http://www.linux.com/article.pl?sid=06/09/01/200229>



It's written this way because we didn't really want to try to take away that persons right to run the program, not explicitly. We felt that would be going too far, both legally and ethically. So, instead, just retaliating by taking away the right to modify the program ought to be just as effective in practice, unless some business wants to be running a program they're not allowed to maintain. Which would be not practical. In effect, they can't feasibly run it for their business anymore. We hope that will do the job.<sup>24</sup>

Terms that may be of interest in draft 2 of GPL v 3

[Preamble] Finally, every program is threatened constantly by software patents. States should not allow patents to restrict development and use of software on general-purpose computers, but in places where they do, we wish to avoid the special danger that redistributors of a free program will individually obtain patent licenses, in effect making the program proprietary. To prevent this, the GPL assures that patents cannot be used to render the program non-free.

[Definitions] A party's "essential patent claims" in a work are all patent claims that the party can give permission to practice, whether already acquired or to be acquired, that would be infringed by making, using, or selling the work.

[Section 2] This License permits you to make and run privately modified versions of the Program, or have others make and run them on your behalf. However, this permission terminates, as to all such versions, if you bring suit against anyone for patent infringement of any of your essential patent claims in any such version, for making, using, selling or otherwise conveying a work based on the Program in compliance with this License.

[Section 7] terms that wholly or partially terminate, or allow termination of, permission for use of the material they cover, for a user who files a software patent lawsuit (that is, a lawsuit alleging that some software infringes a patent) not filed in retaliation or defense against the earlier filing of another software patent lawsuit, or in which the allegedly infringing software includes some of the covered material, possibly in combination with other software; or

[Section 11] You receive the Program with a covenant from each author and conveyor of the Program, and of any material, conveyed under this License, on which the Program is based, that the covenanting party will not assert (or cause others to assert) any of the party's essential patent claims in the material that the party conveyed, against you, arising from your exercise of rights under this License. If you convey a covered work, you similarly covenant to all recipients, including recipients of works based on the covered work, not to assert any of your essential patent claims in the covered work.<sup>87</sup>

If you convey a covered work, knowingly relying on a non-sublicensable patent license that is not generally available to all, you must either (1) act to shield downstream users against the possible patent infringement claims from which your license protects you, or (2) ensure that anyone can copy the Corresponding Source of the covered work, free of charge and under the terms of this License, through a publicly available network server or other readily accessible means.

Nothing in this License shall be construed as excluding or limiting any implied license or other defences to infringement that may otherwise be available to you under applicable patent law.

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<sup>24</sup> Stallman, above n 5, at [27:50]

Explaining the changes in draft 2:

Our revised wording also explains more clearly that a licensee's patent infringement suit will activate the clause only if certain specific circumstances are present. First, the suit must allege infringement of one of the licensee's essential patent claims (as now defined in section 0) in one of the licensee's privately modified versions of the Program. Second, the alleged infringing activity must include making, using, or conveying a work based on the Program in compliance with GPL v3.<sup>25</sup>

Many of the initial criticisms relating to patent provisions related to confusing wording, which the FSF attempted to rectify in the second draft.<sup>26</sup> Fear and hesitation still surround the implementation of patent retaliation provisions.

As drafted, this currently looks like it would potentially jeopardise the entire patent portfolio of a company simply by the act of placing a GPL v3 licensed programme on their website. Since the Linux software ecosystem relies on these type of contributions from companies who have lawyers who will take the broadest possible interpretation when assessing liability, we find this clause unacceptable because of the chilling effect it will have on the necessary corporate input to our innovation stream.

Further, some companies who also act as current distributors of Linux have significant patent portfolios; thus this clause represents another barrier to their distributing Linux and as such is unacceptable under section 2 because of the critical reliance our ecosystem has on these distributions.<sup>27</sup>

Is this approach to patents workable in Australia?

Are patent retaliation provisions a calculated risk of policy over prudence in so far as it may give aggressive litigators an opportunity to use anti-competition provisions. (ie By seeking to restrict Trade Mark Rights it may be argued that this restricts right to market in patents)?

How does the recent Novell MS patent deal impact upon GPL v3? Is it possible for GPL v3 to avoid such lockout? Will Novell be placed in a no win position where if it protects down stream licensees it will be in breach of its patent deal with MS?

## 6. License Compatibility

Under section 7c it is possible (with appropriate copyright permission) to allow extra permissions or add requirements to GPL v3. GPL v3 explicitly states that you are allowed to add as many extra *permissions* as you would like to the license.

Can the additional permissions in section 7 override section 3, or is this prevented by the "regardless of any other provisions" written at the beginning of section 3?

<sup>25</sup> Free Software Foundation, "Opinion on Patent Retaliation" (3 August 2006) <http://gplv3.fsf.org/patent-dd2.html>

<sup>26</sup> FSF, above n 21.

<sup>27</sup> Kernal Developers, above n 16

The new draft of GPL v3 also has several categories of additional requirements that you are allowed to add to the license listed under section 7 (this section was formerly titled 'license compatibility' but is now known as 'additional terms'). The categories include:

- Terms that require "preservation of specified reasonable legal notices or author attributions"
- Origin of material not misrepresented and modifications marked.
- Warranty or liability disclaimers
- Publicity surrounding authors or trademarks etc.
- Terms that require modified versions to make corresponding source code available through network sessions.
- Terms permitting termination of permission of use in cases where users commence software patent lawsuit.
- Terms equivalent in 'type and extent' to existing requirements and permissions in the license.

Of these categories Stallman states that some are trivial and others are not. The non trivial ones "increase the range of existing licences which are compatible with the GPL."<sup>28</sup>

There are some licences which say: "as a condition for doing things under the copyright on the code, you have to obey our trademark requirements". That's different, that does conflict with the GNU GPL in version two, but in version three we have explicitly given permission to add this kind of requirement.

So this just means that there are certain licence provisions that are actually in use which no longer will create an incompatibility. People will be able to merge GPL covered code and Apache code, for instance. That'll be quite useful.<sup>29</sup> ...

what this increased compatibility does is it makes copyleft a little bit looser. Now, when you change a GPL covered program, the licence of your version doesn't have to be exactly the same. There is a certain limited and precisely defined range, within which you can change it.<sup>30</sup>

The question of if the current version of GPL v3 is compatible with GPLv2 remains unresolved.

It is premature to comment, in my view, on the relation between GPLv2-licensed code and GPL v3-licensed code until the final provisions of GPL v3 are known, but this at any rate does not strike me as an issue.<sup>31</sup>

Is software under GPLv2 compatible with that under GPLv3? Which specific provisions are problematic? If it is not compatible, what will happen when v2 and v3 software has to work together - or is this not viable?

The license expressly prohibits additional terms relating to:

- Attorney's fees
- Choice of law, forum, and venue clauses

<sup>28</sup> Stallman, above n 4 at [49:40].

<sup>29</sup> Stallman, above n 4 at [49:40].

<sup>30</sup> Stallman, above n 4 at [56:27].

<sup>31</sup> Eben Moglen quoted on 'News.com,' article by Steven Shankland, "Linux Lab: GPL Clarification needed ASAP" (20 September 2006)

[http://news.com.com/Linux+lab+GPL+clarification+needed+ASAP/2100-7344\\_3-6117785.html](http://news.com.com/Linux+lab+GPL+clarification+needed+ASAP/2100-7344_3-6117785.html)

- Arbitration clauses
- Mandatory contractual acceptance clauses
- Requirements regarding changes to the name of the work
- Terms that require that conveyed copies be governed by a license other than this License

While the possibility of additional requirements and permissions may make GPL v3 more compatible with other licenses it has also been the subject of criticism. Some feel that there are already too many open source licenses:

The additional restrictions section in the current draft makes GPL v3 a pick and choose soup of possible restrictions which is going to be a nightmare for our distributions to sort out legally and get right. Thus, it represents a significant and unacceptable retrograde step over GPLv2 and its no additional restrictions clause.<sup>32</sup>

These additional requirements may also prove problematic and oppose compatibility because of the possibility of “fragmentation” which could make it difficult to combine and distribute licenses.<sup>33</sup>

How would the license compatibility issues in the current draft of GPL v3 affect Australian developers and users?

The FSF has said that it will shift all of its works to GPLv3 once the license is settled. If sufficiently many developers object strongly enough, there seems the possibility of a code fork. What is the FSF doing to make a fork unlikely?

Does the entire FSF code base HAVE to move to GPLv3? Is the 'move code base to GPLv3' schedule too aggressive? Are the terms of reference too wide?

Is the FSF abusing the communities' trust by switching their contributions to a license they may not want? Is there a risk that if there is a PERCEPTION that FSF abused the communities' trust, new software projects will use non-FSF licenses in future?

Is it intended that projects that did not adopt GPL v2 due to lack of flexibility and misconceptions about source code obligations will now adopt GPL v3? If so will these be mostly BSD licensed, FOSS Licensees or proprietary projects?

What are some examples of terms that are expected to most commonly be used in Clause 7 "additional requirements" and 'additional permissions'?

## 7. Defined Interfaces

This section is based on research contributed by Dr William Uther, senior researcher, NICTA.

<sup>32</sup> Kernal Developers, above n 15

<sup>33</sup> Kernal Developers, above n 15

For more information please see “GPL v3 and defined interfaces: Mere aggregation, LGPL, Tivoisation, DRM, plugins, FUD, viral licensing and additional terms,” at <http://www.cse.unsw.edu.au/~willu/GPL3-interfaces.html>.

The [current GPLv3 draft](#) says that:

The "Corresponding Source" for a work in object code form means all the source code needed to generate, install, and (for an executable work) run the object code and to modify the work, except its System Libraries, and except general-purpose tools or generally available free programs which are used unmodified in performing those activities but which are not part of the work. ....

You may copy and convey a covered work in object code form under the terms of sections 4 and 5, provided that you also convey the machine-readable Corresponding Source under the terms of this License, in one of these ways: [mechanisms removed]

Should people who want to write commercial programs for Linux validly fear that they'll have to release their source?

When is it legal to distribute a non-GPL plugin for a GPL program? When is it legal to distribute a plugin for a non-GPL program under the GPL?

Can the Tivoisation debate be made moot with an LGPL-like solution?

Questions such as the ones above deal with the interface between GPL software and the surrounding environment.

There are problematic cases regarding the interaction of GPL and non-GPL code. These revolve around plugins, Tivoisation, the Classpath exceptions, etc. It is possible that the default GPLv3 cannot be used in a number of situations where the GPLv2 was used. One example of this is writing a GPL'd Photoshop plugin.

In order to make the system of additional permissions workable, it may be necessary to adopt a system similar to the [creative commons](#) Deed system, where standard additional permissions (interface definitions) are selectable. As a result, licensors would utilise the same sets of additional permissions while ensuring licensees understand the different forms of the license. The new LGPL is already of a similar form.

Should standard sets of 'additional permissions' should be included, (like creative commons deeds)?

The following is a suggested set of 'standard additional permissions':

- Additional permissions allowing a GPL library to be used in proprietary software. This already exists as the draft LGPL.
- Additional permissions allowing a GPL plugin to be used in proprietary software. The LGPL is possible here, but purely for marketing purposes, it might be worth having a second set of permissions.
- Additional permissions allowing a GPL program to have proprietary plug-ins.
- Additional permissions allowing a GPL environment to contain and execute proprietary software. This would allow proprietary programs to run on the Linux kernel, and on the GNU Classpath set of libraries.

- Additional permissions allowing a GPL program to run in a signed environment so that it cannot be modified. This should not be the default, but it could be extremely useful in legal environments where modified code needs to be certified in some way (radios, medical devices, nuclear power plants, voting machines, etc). It would allow as much of the open nature of the code as possible given the legal environment. Environments like these that need certification could REALLY benefit from the sunlight free software provides.

One might also want to consider including something like the "Or later version" text in the GPL Additional Permissions deed so that sub-licenses can be upgraded as necessary without having to upgrade the entire GPL (as the current LGPL does).

## 8. GPL v3 Permissions - Unintended Consequences

It is noted above that section 7 permits you to make certain permissions and add particular categories of requirements intended to assist in making different licenses compatible with GPL v3. Does this section have unintended consequences?

[Section 7] You may have received the Program, or parts of it, under terms that supplement the terms of this License. These additional terms may include additional permissions, as provided in subsection 7a, and additional requirements, as provided in subsection 7b.

a. Additional Permissions.

**Additional permissions make exceptions from one or more of the requirements of this License.** A license document containing a clause that permits relicensing or conveying under this License shall be treated as a list of additional permissions, provided that the license document makes clear that no requirement in it survives such relicensing or conveying.

**Any additional permissions that are applicable to the entire Program are treated as though they were included in this License, as exceptions to its conditions, to the extent that they are valid under applicable law.** If additional permissions apply only to part of the Program, that part may be used separately under those permissions, but the entire Program remains governed by this License without regard to the additional terms.

...

c. ...**You may place additional permissions, or additional requirements as allowed by subsection 7b,** on material, added by you to a covered work, for which you have or can give appropriate copyright permission. Adding requirements not allowed by subsection 7b is a violation of this License that may lead to termination of your rights under section 8.

This section may offer copyright owners an opportunity to modify the license and, for example, remove the obligations that make the license viral.

5.[2] Conveying Modified Source Versions.

You may copy and convey a work based on the Program, or the modifications to produce it from the Program, in the form of source code under the terms of section 4 above, provided that you also meet all of these conditions:

a) The modified work must carry prominent notices stating that you changed the work and the date of any change.

**b) You must license the entire work, as a whole, under this License to anyone who comes into possession of a copy. This License must apply, unmodified except as permitted by section 7 below, to the whole of the work, and all its parts, regardless of how they are packaged. This License gives no permission to license the work in any other way, but it does not invalidate such permission if you have separately received it.**

Using the power given in section 7 to allow additional permissions as exceptions to one or more of the requirements of this license a copyright owner may be able to do away with b) completely.

This provides users with the opportunity to change the spirit of the license completely. What problems may this present?

Is it possible for people to 'pass off' licenses as GPL v3 where the terms of the license are nothing like the GPL v3? Is this a problem?
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