Opinion on Denationalization of Terminology

Introduction

Like most free software licenses, GPLv2 was drafted with specific attention to details of United States law. In the case of the GPL, at least, this simply reflected the historical and geographic origins of the free software movement.

International use of GPLv2 has revealed variations in copyright laws that lead to differences among countries in the effective requirements and consequences of the license. We aim in GPLv3 to minimize these differences, without weakening the GPL as a protection for users' freedom. Moreover, we wish to avoid application of the vocabulary of one legal system to the rest of the world.

Draft 1 took important steps towards internationalization of the GPL, but it continued to use some terms that were taken from US law. In response to comments on Draft 1, we have revised the license draft to isolate further the ways in which the GPL depends on details of national copyright law.

Propagation and Conveying

Practical experience with GPLv2 revealed the awkwardness of using the term "distribution" in a license intended for global use. In some, but not all, legal systems, distribution is a copyright law term of art. Distribution is also well-established as a non-legal term describing commercial transfers of software. Even within a single country and language, the term distribution may be ambiguous; as a legal term of art, distribution varies significantly in meaning among those countries that recognize it. For example, we have been told that in at least one country distribution may not include network transfers of software but may include interdepartmental transfers of physical copies within an organization. In many countries the term "making available to the public" or "communicating to the public" is the closest counterpart to the generalized notion of distribution that exists under US law.

It was with such concerns in mind that we defined the term "propagate" in Draft 1. Propagation is defined by behavior, and not by categories drawn from some particular national copyright statute. We believe that such factually-based terminology has the added advantage of being easily understood and applied by individual developers and users having limited access to legal counsel. Draft 1 provided specific examples of propagation that included distribution but did not include any non-US copyright law terms. In section 2, propagation having the effect of enabling other parties to make or receive copies was permitted as "distribution" under the conditions of sections 4–6 (corresponding to the key sections 1–3 of GPLv2). Sections 4–6, as well as other sections of the draft, continued to use the term "distribution."

Our intention in preserving the use of "distribution" was to minimize the textual differences between GPLv2 and GPLv3. This meant, however, that our efforts to generalize and denationalize concepts such as copying and distribution went only halfway. Some readers found this confusing. For example, references to distribution in sections 4–6 could be read to include activities other than propagation to others, and the meaning of distribution in other sections of the license document was unclear.

In Draft 2 we have further internationalized the license by removing references to distribution and replacing them with a new factually-based term, "conveying." Conveying is defined to include activities that constitute propagation of copies to others. With these changes, GPLv3 addresses transfers of copies of software in behavioral rather than statutory terms. At the same time, we have acknowledged the use of "making available to the public" in jurisdictions outside the US by adding it as a specific example in the definition of "propagate." We decided to leave the precise definition of an organizational licensee, and the line drawn between licensees and other parties, for determination under local law.

Works Based On Other Works

Although the definition of "work based on the Program" made use of a legal term of art, "derivative work," peculiar to US copyright law, we did not believe that this presented difficulties as significant as those associated with the use of the term "distribution." After all, differently-labeled concepts corresponding to the derivative work are recognized in all copyright law systems. That these counterpart concepts might differ to some degree in scope and breadth from the US derivative work was simply a consequence of varying national treatment of the right of altering a copyrighted work.

Ironically, the criticism we have received regarding the use of US-specific legal terminology in the "work based on the Program" definition has come not primarily from readers outside the US, but from those within it, and particularly from members of the technology licensing bar. They have argued that the definition of "work based on the Program" effectively misstates what a derivative work is under US law, and they have contended that it attempts, by indirect means, to extend the scope of copyleft in ways they consider undesirable. They have also asserted that it confounds the concepts of derivative and collective works, two terms of art that they assume, questionably, to be neatly disjoint under US law.

We do not agree with these views, and we were long puzzled by the energy with which they were expressed, given the existence of many other, more difficult legal issues implicated by the GPL. Nevertheless, we realized that here, too, we can eliminate usage of local copyright terminology to good effect. Discussion of GPLv3 will be improved by the avoidance of parochial debates over the construction of terms in one imperfectly-drafted copyright statute. Interpretation of the license in all countries will be made easier by replacement of those terms with neutral terminology rooted in description of behavior.

Draft 2 therefore takes the task of internationalizing the license further by removing references to derivative works and by providing a more globally useful definition of a work "based on" another work. We return to the basic principles of users' freedom and the common elements of copyright law. Copyright holders of works of software have the exclusive right to form new works by modification of the original, a right that may be expressed in various ways in different legal systems. The GPL operates to grant this right to successive generations of users, particularly through the copyleft conditions set forth in section 5 of GPLv3, which applies to the conveying of works based on the Program. In section 0 we simply define a work based on another work to mean "any modified version for which permission is necessary under applicable copyright law," without further qualifying the nature of that permission, though we make clear that modification includes the addition of material.[1]

Rejection of Choice of Law Clauses

Some have asked us to address the difficulties of internationalization by including, or permitting the inclusion of, a choice of law provision. We maintain that this is the wrong approach. Free software licenses should not contain choice of law clauses, for both legal and pragmatic reasons. Choice of law clauses are creatures of contract, but the substantive rights granted by the GPL are defined under applicable local copyright law. Contractual free software licenses can operate only to diminish these rights. Choice of law clauses also raise complex questions of interpretation when works of software are created by combination and extension. There is also the real

[1] We have also removed the paragraph in section 5 that makes reference to "derivative or collective works based on the Program."

danger that a choice of law clause will specify a jurisdiction that is hostile to free software principles.

Our revised version of section 7 makes explicit our view that the inclusion of a choice of law clause by a licensee is the imposition of an additional requirement in violation of the GPL. Moreover, if a program author or copyright holder purports to supplement the GPL with a choice of law clause, section 7 now permits any licensee to remove that clause.

Conclusion

Draft 2 of GPLv3 presents a truly global copyright license, even though the effects of the GPL can never be perfectly uniform from country to country. We have substantially advanced the internationalization of the license by removing US localisms. We wish to make clear, particularly to our critics in the US legal profession, that, with the special exception of the second paragraph of section 3,[2] any remaining similarities in the words of the license to any of the terminology of the US copyright statute are incidental to the use of ordinary, factually-based wording to describe basic concepts of using, modifying, copying, and sharing software.

[2] See GPLv3 Second Discussion Draft Rationale, n. 39.