Opinion on Patent Retaliation

We have rewritten the patent retaliation clause of section 2 with clearer and more carefully circumscribed wording. We stand by this clause, for the sake of defending the entire free software community.

Concerns expressed in the public comments on the patent retaliation clause in section 2 arose largely from interpretations that we had not intended. In Draft 1 the clause referred to "permission to privately modify and run the Program." Many readers seem to have assumed from this wording that the clause terminated the right to run the unmodified Program (the Program as received from the upstream licensor or distributor). In Draft 2 we have clarified that what is terminated is the right to make privately modified versions of the Program. The right to run the unmodified Program is a core freedom that is not limited in any way by the existing GPL, and GPLv3 does not alter this.

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 GPLv3.

It may be helpful to explain again why we included this provision. Many in the free software community have focused attention on those who run modified versions of free software designed for public use on network servers without sharing their improvements with the community. This itself is acceptable, in our view. In GPLv3 we have chosen not to require release of the source code of these modified versions, instead allowing certain such requirements to be introduced as additional terms under section 7.

The analysis changes when that server operator sues others for patent infringement to prevent them from, or punish them for, using and sharing their own improved versions of the same GPL-covered program. Because the patent aggressor and the sued party are not in a distribution relationship, sections 10 and 11 of GPLv3 offer no protection to the victim. We believe that our license ought to take action against this form of aggression. We also believe that this form of aggression is actually susceptible to deterrence. The commercial viability of the patent aggressor's modified version depends on the ability to maintain it and make further modifications. Our patent retaliation provision therefore targets this aggression by terminating permission to modify. Our revised draft also makes clear that the aggressor cannot avoid the effects of retaliation by contracting development of modified versions to a third party.

Some have argued that our patent retaliation clause will be cited, with distortion and misrepresentation, as a basis for “fear, uncertainty, and doubt.” Perhaps that is so, but we must not create real flaws to avoid imaginary ones.

Having revised the patent retaliation clause for clarity and having explained our rationale for it, we invite the public and all those involved in our discussion process to propose any further modifications to tailor the provision as closely as possible to its aims.