Free Software Matters: Enforcing the GPL, I

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August 12, 2001

Microsoft's anti-GPL offensive this summer has sparked renewed speculation about whether the GPL is "enforceable." This particular example of "FUD" (fear, uncertainty and doubt) is always a little amusing to me. I'm the only lawyer on earth who can say this, I suppose, but it makes me wonder what everyone's wondering about: Enforcing the GPL is something that I do all the time.

Because free software is an unorthodox concept in contemporary society, people tend to assume that such an atypical goal must be pursued using unusually ingenious, and therefore fragile, legal machinery. But the assumption is faulty. The goal of the Free Software Foundation in designing and publishing the GPL, *is* unfortunately unusual: we're reshaping how programs are made in order to give everyone the right to understand, repair, improve, and redistribute the best-quality software on earth. This is a transformative enterprise; it shows how in the new, networked society traditional ways of doing business can be displaced by completely different models of production and distribution. But the GPL, the legal device that makes everything else possible, is a very robust machine precisely because it is made of the simplest working parts.

The essence of copyright law, like other systems of property rules, is the power to exclude. The copyright holder is legally empowered to exclude all others from copying, distributing, and making derivative works.

This right to exclude implies an equally large power to license—that is, to grant permission to do what would otherwise be forbidden. Licenses are not contracts: the work's user is obliged to remain within the bounds of the

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license not because she voluntarily promised, but because she doesn't have any right to act at all except as the license permits.

But most proprietary software companies want more power than copyright alone gives them . These companies say their software is "licensed" to consumers, but the license contains obligations that copyright law knows nothing about. Software you're not allowed to understand, for example, often requires you to agree not to decompile it. Copyright law doesn't prohibit decompilation, the prohibition is just a contract term you agree to as a condition of getting the software when you buy the product under shrink wrap in a store, or accept a "clickwrap license" on line. Copyright is just leverage for taking even more away from users.

The GPL, on the other hand, subtracts from copyright rather than adding to it. The license doesn't have to be complicated, because we try to control users as little as possible. Copyright grants publishers power to forbid users to exercise rights to copy, modify, and distribute that we believe all users should have; the GPL thus relaxes almost all the restrictions of the copyright system. The only thing we absolutely require is that anyone distributing GPL'd works or works made from GPL'd works distribute in turn under GPL. That condition is a very minor restriction, from the copyright point of view. Much more restrictive licenses are routinely held enforceable: every license involved in every single copyright lawsuit is more restrictive than the GPL.

Because there's nothing complex or controversial about the license's substantive provisions, I have never even seen a serious argument that the GPL exceeds a licensor's powers. But it is sometimes said that the GPL can't be enforced because users haven't "accepted" it.

This claim is based on a misunderstanding. The license does not require anyone to accept it in order to acquire, install, use, inspect, or even experimentally modify GPL'd software. All of those activities are either forbidden or controlled by proprietary software firms, so they require you to accept a license, including contractual provisions outside the reach of copyright, before you can use their works. The free software movement thinks all those activities are rights, which all users ought to have; we don't even *want* to cover those activities by license. Almost everyone who uses GPL'd software from day to day needs no license, and accepts none. The GPL only obliges you if you distribute software made from GPL'd code, and only needs to be accepted when redistribution occurs. And because no one can ever redistribute without a license, we can safely presume that anyone redistributing GPL'd software intended to accept the GPL. After all, the GPL requires each copy of covered software to include the license text, so everyone is fully informed.

Despite the FUD, as a copyright license the GPL is absolutely solid. That's why I've been able to enforce it dozens of times over nearly ten years, without ever going to court. Next month, I'll explain how enforcement is really done.