

Microsoft Claims Open-Source Technology Violates 235 of Its Patents

The software maker is using the threat of patent violations to try to further muddy the waters around GPLv3.

Microsoft is using the threat of patent violations by the free and open-source software community to try to drive enterprise customers to SUSE Enterprise Linux and to further muddy the waters around the next version of the upcoming GNU General Public License.

As part of this latest strategy, Microsoft has, for the first time, put an actual figure on the number of its patents being violated by free and open-source software.

In an interview with Fortune, Brad Smith, Microsoft's general counsel, claims that the Linux kernel violates 42 of its patents, the Linux graphical user interfaces run afoul of another 65, the Open Office suite of programs infringes 45 more, e-mail programs violate 15, while other assorted free and open-source programs allegedly transgress 68.

Some commentators, such as Microsoft Watch Editor Joe Wilcox, believe that Microsoft could use the "tacit threat of a patent-related lawsuit as means of keeping in line customers already committed to swap out Office or Windows for open-source alternatives."

"Microsoft has 235 patents that read on open-source technology," a company spokesman confirmed to eWEEK May 13.

He also provided eWEEK with a prepared statement from Horacio Gutierrez, Microsoft's vice president of intellectual property and licensing, in which Gutierrez said: "Even the founder of the Free Software Foundation, Richard Stallman, noted last year that Linux infringes well over 200 patents from multiple companies. The real question is not whether there exist substantial patent infringement issues, but what to do about them.

"Microsoft and Novell have already developed a solution that meets the needs of customers, furthers interoperability, and advances the interests of the industry as a whole. Any customer that is concerned about Linux IP - intellectual property - issues needs only to obtain their open-source subscriptions from Novell," Gutierrez said.

Hewlett-Packard, Novell and Red Hat, however, have all moved to protect their enterprise Linux customers. HP was the first to do so, announcing in September 2004 that it will indemnify its customers against any legal liability from the use of Linux.

Red Hat's Open Source Assurance Plan is designed to protect customers' Linux investments and ensure that they are legally able to continue to run Red Hat Enterprise Linux without any interruption.

Novell has set up a Linux Indemnification Program for its SUSE Enterprise Linux customers to protect, under certain conditions, against IP challenges to Linux and help reduce the barriers to Linux adoption in the enterprise.

And, in November 2005, a group of companies set up the Open Invention Network, to acquire Linux-related patents and share them royalty-free with any organization that agrees not to assert its patents against Linux or its applications. Members include IBM, Sony, Red Hat, Novell, Oracle and Canonical.

Microsoft is not yet saying exactly what it plans to do about these violations. "The company's longstanding preference is to license rather than litigate, and Microsoft's work over the past three years to build a bridge with open source is a result of that commitment. The November agreement with Novell addresses the IP issues in open source while meeting both the distributor's needs and, more importantly, the needs of the customer," the spokesman told eWEEK.

But what is clear is that Microsoft has the third, and latest, draft of GPLv3 in its sights, accusing the draft license of trying to "tear down the bridge between proprietary and open-source technology that Microsoft has worked to build with the industry and customers," the spokesman said.

Microsoft is discussing the patent issue more directly now, and providing specific patent numbers and areas of infringement, in response to continued industry questions and concern over the GPLv3's adoption, he said.

"Unfortunately, for customers, the Free Software Foundation's efforts with GPLv3, while not harming existing contracts, can harm the desired interoperability and open exchange that we have increasingly seen between proprietary and open source over the past several years," the spokesman said.

The third draft of GPLv3 includes new patent requirements that prevent distributors from colluding with patent holders to provide discriminatory protection from patents, like that covered in the controversial Microsoft-Novell deal.

Customers want their interoperability issues addressed by both proprietary and open-source vendors, the Microsoft spokesman said, referring to a survey that found that some 90 percent of customers support the Novell agreement as addressing this need for vendor interoperability and cooperation.

"Microsoft has also made other efforts to advance open-source interoperability and encourage pragmatic open-source development with our intellectual property. These include the covenant not to sue open-source hobbyist developers as part of the Novell agreement, and the Open Specification Promise," he said.

The patent issue with open source is not new, the spokesman said, pointing out that it was, in fact, first raised by various leaders in the free and open-source community.

"According to its August 2004 announcement, the Open Source Risk Management group stated that Linux could be in violation of 283 patents and, as such, could expose customers to undetermined licensing costs," he said.

Richard Stallman further validated this in late November 2006, when he noted that a thorough study found that the Linux kernel infringed 283 software patents, and that's just in the United States. "Of course, by now the number is probably different and might be higher," the spokesman said.

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