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THE IMPORTANCE OF MAINTAINING THE OPEN SOURCE SOFTWARE VALUE PROPOSITION

What's in a name? When it comes to the meaning of Open Source Software – everything! The Open Source Software (OSS) ecosystem has matured over the last 40-plus years to become a major engine for innovation and economic growth across the breadth of the high-tech industry. OSS is the foundation of many applications, operating systems, cloud services, databases, analytics platforms, and more. As such, the use of OSS is nearly ubiquitous, and it is integrated into or implemented by much of the world's most popular products, services and applications.

The OSS ecosystem thrives, in large part, because it was built on the free and open sharing of code reflecting different ideas, techniques, and solutions, and on the premise that the resulting software and software development acumen would evolve and improve over time. To promote this ideal, the OSS community has, from the very beginning, considered the intellectual property rights (IPR) necessary to make its ecosystem work. The community has continued to hone and refine the language and scope of OSS licenses to address the salient IPR considerations associated with software, as they were understood at the time.[1] Today, the Open Source Initiative[2] (OSI) is the industry's recognized guardian of what OSS means and of the accepted IPR licensing principles under which OSS is distributed and used. It defines OSS licenses as "licenses that comply with the Open Source Definition – in brief, they allow software to be freely used, modified, and shared"[3]. The Open Source Definition contains a total of 10 principles, which are available on the OSI's webpage.[4]

Deviating from the OSI model places innovation at risk. Despite the success of the OSS ecosystem, some companies are advocating for standards-development organizations (SDOs) to host OSS projects under an IPR policy that allows contributors to preserve a proprietary interest in the intellectual property rights of their contributions to the OSS project – allowing those contributors to seek patent royalties from users of the code generated under the project. More specifically, some have suggested that SDOs use a modified version of the OSI-approved BSD license. They propose to alter the BSD license to add language that expressly limits the scope of the license solely to copyrights, with an express indication that any relevant patent rights will be licensed pursuant to the SDO's existing patent license policy (e.g., FRAND licensing terms). Of concern is that the proposal violates core OSI principles of the Open Source Definition, including 1) the license shall not require a royalty or other fee for such sale (point 1), and that 2) the rights attached to the program must apply

[1] It is important to note that the OSS ecosystem developed during a time when the legal understanding of what intellectual property rights were relevant to software inventions was still evolving.
[2] https://opensource.org/osd
[3] https://opensource.org/osd/licenses
[4] https://opensource.org/osd

to all to whom the program is redistributed without the need for execution of an additional license by those parties (point 7).[5] These violations make it clear that the proposed license model is not a true Open Source Software model. Rather, as discussed more fully below, it is more appropriately viewed as a proprietary software development model.

So, what's the problem if it is not true Open Source Software? At best, calling something OSS when it doesn't conform to the OSI principles creates confusion among those in the OSS community that may wish to participate in the project. It may be perceived as a "bait and switch" model, where the SDO invites contributors to provide code for inclusion only to charge the industry, including the contributors, a royalty if they distribute or use the software. If history is a guide, this will create significant confusion among participants regarding the licensing model, likely necessitating a discussion among IP attorneys to debate the ramifications. At worst, over time this confusion may begin to erode the value proposition of OSS development – the ability to quickly stand-up a project and begin development with all participants understanding the terms and conditions involved in OSS development. It also discourages the spirit of collaboration that characterizes open source development efforts, as prospective contributors face the possibility that they will need to pay to use code that contains contributions made by themselves and others. That will inevitably discourage contributions and diminish support for open source working methods in standardization.

From the SDO's perspective, adopting a non-OSI compliant view of OSS also compromises its chances for success. Increasingly, SDO's are competing for mind-share among the development community. To the extent that an SDO adopts a non-compliant OSS policy, those in the OSS community may simply forego that organization's software projects in favor of mainstream OSS projects. Thus, adopting a non-OSI compliant OSS IPR policy may undermine the core benefits associated with hosting an OSS project and, in so doing, the very purpose SDO's have in hosting OSS projects.

What are the legal implications associated with a non-OSI compliant OSS IPR policy? Proposals to artificially limit the IPR rights typically associated with an OSI-approved OSS license purport to create a "gap" in the patent licensing obligation of OSS contributors. According to the common norms and practices of the OSS ecosystem, the patent rights held by contributors that are related to their OSS contributions are either expressly licensed (e.g., Apache 2.0), or arguably licensed by implication in an OSI compliant license (often, an OSI-approved license).

In the standards ecosystem, SDO's commonly adopt a policy that any patents deemed *essential* to implementing a standard (or, standard-essential patents (SEPs)) are subject to a reasonable and non-discriminatory (RAND) licensing obligation. There is no such licensing commitment or obligations placed on SDO participants for non-standard essential patents (non-SEPs). OSS deliverables are not typically a normative element of a standard, however, and even if the relevant OSS deliverable were to fully implement a standard (e.g., as a "reference implementation" of that standard) the OSS implementation would also necessarily include other, *non-standard-essential* technological elements that may be covered by non-SEPs. Altering an OSI license as described above would result in contributor-licensors having no commitment of any type and, by extension, OSS implementers having no protection from contributor-licensors, for the non-SEPs that may be relevant to the OSS deliverable. OSI has established an OSS license approval process[6] that was designed, in

[5] https://opensource.org/osd
[6] https://opensource.org/approval; see also, https://opensource.org/faq#variant-licenses.

part, to ensure that newly proposed OSS licenses were properly considered to avoid the introduction of IPR risks such as these.

What are the practical implications of this "patent license gap"? To fully appreciate the concern raised by the patent license gap, one must consider that SDO-developed reference implementations are likely to carry great weight/consideration within the industry. Consequently, the adoption of a modified OSI license could result in the primary – and perhaps only – reference implementation available for a given standard being subject to this patent license gap.

The patent license gap could well be unfairly and unreasonably exploited by those standards members and other OSS contributors who seek to monetize their patents as an element of a broader business strategy. Examples of this practice abound in the standards ecosystem, where the reward for including one's technology in an emerging standard is 10+ years of patent licensing royalties based on the owner's SEPs on that technology. Exploitation of this patent license gap also provides a licensor with the ability to seek an injunction on the reference implementation of a standard without the limitations on patent enforcement inherent to SEPs (e.g. the limitations on the ability to obtain injunctive relief under the European Court of Justice's Decision Huawei/ZTE[7]), and thereby wield the negotiation leverage that the threat of injunction creates. As such, a software reference implementation developed according to the proposed model could feasibly be used as an unencumbered proxy for the standard itself - a Trojan Horse employed to obtain quick and easy injunctions, perhaps even against other contributors to the project.

Standards organizations have a decision to make. OSS is not the only software development model available to organizations, of course. Many SDOs and businesses thrive by developing software under proprietary software licensing models. Our concern here is about the confusion that may be created and the attendant loss of value that OSS provides to the global economy if the definition of OSS is eroded in the manner described above.

Thus, if the OSI principles are not contemplated by an SDO's IPR policy, then the SDO is left with two choices, either: (a) modify its IPR policy to accommodate the OSI principles for its OSS projects, or (b) adopt a proprietary licensing model for the software development project that reflects its interests. Any attempt to limit the scope of an OSI-approved license is inconsistent with the express requirements of OSI and would result in the project deliverable not meeting the recognized definition of OSS.

This is precisely why, in the view of the Fair Standards Alliance, any proposal that would seek to undermine the OSI principles that define OSS should be rejected. Simply stated, we should not call something Open Source Software if it isn't.

NOTE: The positions and statements presented in this paper do not necessarily reflect the detailed individual corporate positions of each member.

[7] Case C-170/13