

License FUD

by Lawrence Rosen

A few proprietary software vendors argue that there is something almost un-American about free software and the GPL. Microsoft has been one of the loudest voices in that chorus of fear. That company's website describes it this way:

"The GNU General Public License (GPL) ... poses a significant threat to the IP base of companies seeking to build a business around GPL-covered software. Even businesses who may believe they are 'mere users' of GPL software are threatened since they combine what they believe to be separate applications with GPL code. This licensing model has the effect of foreclosing a business's choice of what IP to share with the community and on what terms." (www.microsoft.com/business/licensing/ssfaq.asp)

I've already argued elsewhere (see www.rosenlaw.com/html/GPL.PDF) that this supposed GPL threat is hogwash. But there's a deeper irony to this: Microsoft's own shared source license is an even greater threat to the software development community. That license is a Trojan horse license that can destroy your open source and proprietary software unless you are very careful.

The simplest version of Microsoft's shared source licenses is the one they use to distribute their Windows CE 3.0 source code. That license states, in its second paragraph, "You can use this Software for any non-commercial purpose, including distributing derivatives." The license then makes it clear that running your business operations "would not be considered non-commercial."

It would take a wild imagination to conjure up an important non-commercial purpose for using or distributing derivative versions of Windows CE source code. Certainly casual use of software by typical end-users does not usually involve the preparation of derivative works, and home users don't usually give a damn about source code.

Commercial users -- and I consider most open source software developers to be in that category -- must look farther in the license to determine the restrictions on use that apply to them. The third paragraph of the license conveys the bad news:

"For commercial purposes, you can reference this software solely to assist in developing and testing your own software and hardware for the Windows CE platform. You may not distribute this software in source or object form for commercial purposes under any circumstances."

Note that Microsoft has not given you permission to copy their code or to incorporate it into your own software in a derivative work. Your use of their software for commercial purposes is limited to reference purposes only.

Obviously, you can agree not to make a copy of any portion of the Microsoft software or to use it to create derivative works. But what happens if you later, independently and without consciously remembering what you saw in Microsoft's code, create something substantially the same as their code? Can you still be liable for infringement?

That's where the Trojan horse comes into play. The courts have made it clear that, under copyright law, proof of substantial similarity between your work and another work, along with proof of access to the other work, may be enough to prove infringement, even when you don't realize that you're making a copy.

How easy is it to forget something important that you read? A copyright infringement case from the 1970s will illustrate the problem.

In 1976, George Harrison's music company was sued for copyright infringement. A music publisher claimed that Harrison plagiarized his successful song, My Sweet Lord, from an earlier successful song, He's So Fine.

In order to prove copyright infringement, the publisher of He's So Fine had to prove not only that there was "striking similarity" between the two songs, but that Harrison had copied the original song when composing My Sweet Lord. Harrison admitted that he was familiar with the original song. He claimed, however, that while he was working on My Sweet Lord he wasn't conscious of the fact that he was using the He's So Fine theme.

The court concluded that, "in seeking musical materials to clothe his thoughts,... there came to the surface of [Harrison's] mind a particular combination that pleased him.... Did Harrison deliberately use the music of He's So Fine? I do not believe he did so deliberately. Nevertheless, it is clear that My Sweet Lord is the very same song as He's So Fine with different words, and Harrison had access to He's So Fine. This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished." *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F.Supp. 177 (S.D.N.Y. 1976).

Subsequently, Harrison's music company was found liable for some \$1.6 million in damages.

Anyone familiar with the art of computer programming will recognize that, as with music, there are rather standard ways to express certain thoughts. Having once seen Microsoft's code, will an expert programmer be able to erase that example from his mind? Even if he consciously attempts to forget and does not intend to copy, will his subconscious memories be expressed in his later code with sufficient similarity that a court will find copyright infringement has occurred?

I encourage open source programmers to avoid that risk. DON'T look at source code licensed under Microsoft's shared source licenses unless you're one of the rare breed of human who can control his subconscious.

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