

Carol A. Kunze, Esq.
901 Cape Cod Ct
Napa, CA 94558
707.966.5211
707.371.1807 (fax)
ckunze@ix.netcom.com

September 8, 2000

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Transmitted electronically to:
software-comments@ftc.gov
Registered hardcopy mailed

Re: **High-Tech Warranty Project – Request for Representation at the Public Forum and Comments, P994413**

Dear Sirs/Mesdames:

1. I am writing on behalf of companies and organizations involved with the promotion, development, distribution and support of open source and free software products, including Red Hat, Inc.,¹ the Open Source Initiative², TurboLinux, Inc.,³ Crynwr Software,⁴ and MandrakeSoft, Inc.⁵

Open Source Interests Should be Represented at the Public Forum

2. Response to question 6 in the FTC Initial Notice⁶ regarding what interests should be represented at the public forum: Open source and free software involves development and distribution methods that are dramatically different from those practiced by traditional software companies. Business models based on these methods are a relatively new phenomenon. There is as yet limited public understanding of how these models work and of the vital role that the ability to disclaim warranties plays in the continued health of the open source and free software movement.

¹ <<http://www.redhat.com/>>.

² <<http://www.opensource.org/>>.

³ <<http://www.turbolinux.com/>>.

⁴ <<http://www.crynwr.com/>>.

⁵ <<http://www.mandrakesoft.com/>>; <<http://www.linux-mandrake.com/>>.

⁶ <<http://www.ftc.gov/os/2000/05/hightechforum.htm>>.

3. The organizations on whose behalf these comments are written would face unique concerns from warranty risk and believe that it is critically important that their interests be represented at the public forum on "Warranty Protection for High-Tech Products and Services" to take place October 26-27, 2000.

Comments

I. Open Source and Free Software

A. What is it?

4. The open source/free software⁷ movement represents a different paradigm⁸ for both developing and distributing computer programs than the traditional forms of creating and distributing software. This software is generally distributed without the payment of license fees,⁹ and its source code is publicly available, allowing others to review the code, and make improvements, resulting in the release of new versions.

5. Users are also free to modify the software (in copyright terms to make a derivative work), and to copy and redistribute the software either in its original form or as a derivative work without paying copyright license fees. Finally, the licenses for open source and free software are public documents.

6. Open source and free software provide numerous benefits. First, the open process of creating the software results in more stable (fewer "crashes"), high-quality programs. The collaborative nature of the process results in bugs being identified more rapidly and fixed earlier, a natural consequence being that for any given release, a higher overall percentage of bugs will have been identified and eliminated.

⁷ "Open source software" and "free software" each have specific, although largely similar requirements.

The Open Source Definition <<http://www.opensource.org/osd.html>>, maintained by the Open Source Initiative <<http://www.opensource.org>> is based upon the earlier Debian Social Contract and the Debian Free Software Guidelines <http://www.debian.org/social_contract>.

The definition of "free software" is found on the website of the Free Software Foundation <<http://www.fsf.org/fsf/fsf.html>> at <<http://www.fsf.org/philosophy/free-sw.html>>. "'Free software' refers to the users' freedom to run, copy, distribute, study, change and improve the software." *Id.*

The Free Software Foundation sponsors the GNU project which represents numerous free software programs, including the GNU/Linux operating system. GNU software is licensed under the GNU General Public License, which uses the copyleft principle. "[C]opyleft (very simply stated) is the rule that when redistributing the program, you cannot add restrictions to deny other people the central freedoms. This rule does not conflict with the central freedoms; rather it protects them." *Id.*

⁸ In fact, it is actually a return to the early days of software when source code was freely shared amongst groups of programmers who all contributed to its development and distributed free with the computer.

⁹ A typical open source license from the copyright owner does not require the payment of copyright license royalty fees for copying, modification or redistribution of the software.

7. Second, users are free to modify the program to meet their specific needs, giving the user substantial control over the software. This also means that users have the necessary source code to diagnose and remedy problems, and are authorized by the license to do so. Modifications that are distributed to others follow the same pattern. They can be distributed without paying a license fee, the source code is public, and everyone else is free to adopt and improve on those modifications. Eventually, widely-accepted modifications will be adopted into a new official version of the product.

8. Third, because the source code is publicly available, everyone has an equal opportunity to write companion software (*e.g.*, application software for an operating system such as Linux,¹⁰ the most well-known example of this type of software, or software which needs to interface with an open source or free software program).

9. Fourth, the software can generally be obtained for free. While a CD-ROM version may be available for a price, it competes with the version that is available for free by downloading it from the Internet.¹¹

B. Developing Open Source and Free Software

10. Open source and free software is created through a collaborative effort. Initial code for a program is written and available for review by information on the project circulating through postings on websites, listserves, email messages to interest groups, newsgroups, *etc.* Interested programmers study the code and start making suggestions and providing code to the original programmer who oftentimes becomes the manager of the collaborative project. Bugs will be identified and code supplied to fix the problem.

11. All suggestions and proffered code are reviewed and tested. Those changes that are accepted are incorporated into the program and eventually the software is released by the project manager in an official version. This does not signal the end of the effort; it is merely an important step in an ongoing project. Those contributing to the project begin reviewing the code for the released version and the software continues to be improved and developed. Programmers may leave the project and new programmers will join as time goes on.

¹⁰ Linux is a trademark of Linus Torvalds.

¹¹ See *e.g.*, the Standard Red Hat Linux operating system available by download for free <<http://www.redhat.com/apps/download/>>, and available for purchase on CD-ROMs <<http://www.redhat.com/apps/commerce/redhatlinux.html>>, the latter version accompanied by a period of free software updates and installation support. Open source non-profit organizations often finance at least a portion of their operations by distributing for a price CD-ROMs of open source and free software products. See *e.g.*, <<http://www.gnu.org/order/order.html>>.

12. Many of these projects are originated, developed and released from well-known websites maintained by non-profit organizations¹² and other sites which act as centers for open source and free software development.¹³

13. More recently, traditional software companies are beginning to adopt the publicly collaborative open process by re-releasing software developed previously by the company along with its source code.¹⁴

14. Countless websites, online and print journals¹⁵ now cater to this market of users and developers, further helping to publicize the released products and the ongoing projects available.

C. The Licenses

15. Open source and free software licenses are public documents, known by name¹⁶ and reused for many different products from different sources, the most popular by far being the GNU General Public License, known as the GPL.¹⁷

16. The terms of the different licenses are publicly available from multiple locations on the Internet.¹⁸ Both the Open Source Initiative and the Free Software Foundation maintain webpages with links to the terms of various licenses.¹⁹ The benefits and detriments of the various provisions are vigorously discussed and debated on the Internet, and compared and contrasted in books, news groups, websites and listserves.

¹² See *e.g.*, the Debian website <<http://www.debian.org>> and its non-profit sponsor, Software in the Public Interest <<http://www.spi-inc.org>> and the GNU website <<http://www.gnu.org>>, sponsored by the non-profit Free Software Foundation <<http://www.fsf.org/fsf/fsf.html>>.

¹³ *E.g.*, Freshmeat.net <<http://www.freshmeat.net>>, sourceXchange <<http://www.sourceXchange.com>>, Cosource.com <<http://www.cosource.com>>, Open Source Development Network <<http://osdn.com>>, and Red Hat Developer Network <<http://www.redhat.com/devnet>>, just to name a few.

¹⁴ The most well-known example is the release of the source code for Netscape's browser software. More recently, Sun decided to release StarOffice under the GPL <<http://www.sun.com/openoffice>>.

¹⁵ *E.g.*, Slashdot <<http://www.slashdot.org>>, SourceForge <<http://sourceforge.net/>>, Linux.com <<http://www.linux.com>>, Linux Journal <<http://www2.linuxjournal.com>>, and Linux Magazine <<http://www.linuxmagazine.com>>, to name a few.

¹⁶ *E.g.*, the GPL <<http://www.gnu.org/copyleft/gpl.txt>>, BSD <<http://opensource.org/licenses/bsd-license.html>>, Artistic <<http://www.perl.com/language/misc/Artistic.html>>, Mozilla <<http://www.mozilla.org/MPL/MPL-1.0.html>>.

¹⁷ One survey revealed that in 1999 more than 60% of the more than 5000 open source software products available from a specific open source website <freshmeat.net> were released under the GPL <http://freeworldlicence.org/other_licences.shtml>.

¹⁸ It is a common practice for an open source software website, even if it uses its own unique license to distribute its products, to maintain a webpage with links to other common open source licenses. See *e.g.*, lists of open source software licenses at <http://freeworldlicence.org/other_licences.shtml> and <<http://www.gnu.org/philosophy/license-list.html>>.

¹⁹ See <<http://www.opensource.org/licenses/>> and <<http://www.gnu.org/philosophy/license-list.html>>.

17. The Free Software Foundation reviews licenses for consistency with its definition of free software and maintains a webpage which explains the “Categories of Free and Non-Free Software”²⁰ as well as a webpage which lists and explains which licenses are compatible with the GNU GPL.²¹

18. In 1999, the Open Source Initiative,²² a non-profit organization dedicated to, among other things, promoting a common understanding of the meaning of “open source” software, began a certification program for software. Suppliers whose software license meets the OSI’s Open Source Definition²³ may then indicate that the software is OSI certified as “Open Source.”

19. Thus, many open source and free software licensors who wish to draft a new license instead of using an existing license, will submit their terms to the OSI for certification, often having modeled their terms after provisions which have already been accepted. While it is the OSI Board which makes certification decisions, the OSI has established a listserv on which the license terms are made available and publicly discussed by the Board members and anyone who wishes to subscribe to the listserv. Some of the more traditional enterprises which have decided to release the source code for a product, have adopted a well-known already certified license,²⁴ others have drafted their own and submitted them for certification.²⁵

20. In some cases software will be distributed under more than one license.²⁶ This may occur as a result of feedback from users and developers who seek the ability to use the code in a way the original license does not grant. Rather than simply add the new provision, which would mean that the well-known name of the license could no longer be used to signal what rights were granted, the product may simply be released under another well-known license that grants the requested right.²⁷

D. Open Source and Free Software in the Business World - Service, Not Sales

²⁰ <<http://www.gnu.org/philosophy/categories.html>>.

²¹ <<http://www.gnu.org/philosophy/license-list.html>>.

²² <<http://www.opensource.org>>.

²³ < <http://www.opensource.org/osd.html>>.

²⁴ Such as Sun’s release of StarOffice under the GPL <<http://www.sun.com/openoffice>>.

²⁵ When Netscape decided to convert its browser software to an open source product by releasing the source code to the public, it consulted extensively with members of the open source community on acceptable license terms for the Netscape Public License <<http://www.mozilla.org/MPL/NPL-1.1.html>>. IBM, the Mitre Corp., and Ricoh Silicon Valley, Inc. have had software accepted for certification. See <<http://opensource.org/licenses>>.

²⁶ For instance, Perl is distributed both under the Artistic license and the GPL and it has recently been announced that Mozilla, which is distributed under its own open source license, will also be available under the GPL.

²⁷ The other primary benefit is that one need not apply for a new OSI certification if the new license has already been certified. See discussion *infra*.

21. The challenge for entrepreneurs interested in open source and free software, was how to create a profitable enterprise around the distribution of software for which the business does not collect license fees.²⁸ The solution was simple: sell service and support instead of software.

22. Thus, businesses have sprung up which collect the various software products, integrate them into a package, test all the components to ensure they work together, and provide that tested package to the user.²⁹ There are no license fees for the software. The price of the package is based on the value added by the business and the convenience value of obtaining the product on a disk or CD-ROM instead of downloading it from the Internet. To the extent there are any improvements or modifications to any of the software itself, those changes are made freely available for anyone else to adopt as the source code is, as generally required by the license, made public.

23. Similarly, service arrangements are offered to assist in installation, integrate a new product with existing software or hardware, and provide ongoing support. For example, as demand has grown for the operating system Linux, hardware manufacturers have needed assistance and ongoing support in integrating the program into their computer hardware.³⁰ Services are also being offered to customize software, which allows a product to be tailored to specific business needs. Of course, there is also a growing market for training, as well as books, guides and other printed documentation on how to use the various software products.

24. Some recently formed businesses focus on putting open source and free software developers together with those who need a specific software product. In this case programming services will be paid for, and the parties will agree which public license the ultimate product will be distributed under. The business may provide a manager for the project, and take a percentage.

III. The Ubiquitous Warranty Disclaimer

25. Well-known open source and free software licenses universally disclaim warranties - LOUDLY and publicly.

26. Briefly glance through an open source or free software license on paper or on screen and the capital letters (widely considered to be the electronic equivalent of shouting) of the ubiquitous warranty disclaimers will catch your eye. The universal disclaimer of warranties in the common licenses, added to the fact that license terms are public

²⁸ As noted in the text *supra*, CD-ROM versions of a product may be distributed for a fee, but they must compete with free download versions.

²⁹ Some examples are Red Hat Inc., TurboLinux Inc., SuSE Inc., Caldera Systems, Inc., and MandrakeSoft, Inc.

³⁰ Compaq, Sun Microsystems, Dell, IBM and Hewlett-Packard are just some of the companies who now provide hardware with Linux already installed.

documents, means that licensees are well aware that the norm is for no warranty to accompany open source and free software products.

27. The lack of warranties makes sense for a number of reasons. As noted, license fees are not charged and many of the authors donate their programming services. What's more, a complex software product may contain thousands of code segments written by different authors, making a warranty, including any warranty of non-infringement of intellectual property rights, infeasible.³¹

28. Warranties do not carry the same critical importance because the user has the necessary source code to investigate and fix bugs or interface problems that are discovered, and the authorization to do so. As the code is public, a fix for the problem may well be freely available by the time the user discovers it.

29. Thus, the universal norm in the open source and free software world is that the software is available for free, without any warranties.

IV. The Dangers of Warranty Risk

30. The ability to disclaim warranties *with a minimum of risk* is fundamental to open source and free software. Without this ability, the open source and free software development and distribution models simply don't work.

31. Thus, warranty risk can pose a threat not just to the individuals in the open source/free software community and the growing number of companies which support such software, *but to the open source/free software model itself.*

32. That threat is manifest because of the risk of liability to individuals who write the software, the fact that income is not generated to cover warranty risk, and two important characteristics of open source and free software that allow strangers outside the control of the original supplier to freely redistribute the product, and to make and freely distribute modified versions of the product. These concerns are further discussed below.

33. The most serious threat stems from the potential impact on the open source/free software community if an individual should be called upon to answer to a warranty claim or defend a software program in court. Recently, Bruce Perens, the author of the Debian Social Contract and the Open Source Definition, and a co-founder the Open Source Initiative, wrote:

If free-software authors lose the right to disclaim all warranties and find themselves getting sued over the performance of the programs they've written,

³¹ In some cases a company may offer a warranty of non-infringement, but only for the small, incremental portion of code that the company itself wrote.

they'll stop contributing free software to the world. *It's to our advantage as users to help the author protect this right.*

Bruce Perens, *Open Sources: Voices from the Open Source Revolution* 181 (1999) (emphasis added).

34. The harder and more complex it is to disclaim warranties, the greater the risk. If the price of contributing free software is financial and legal risk, open source and free software will simply cease to be.

35. The second critical point is that, because license fees are not paid for this software, its distribution does not generate an income stream to finance the creation and administration of a warranty system, the purchase of liability insurance, or a legal defense.

36. Third, as has been said, open source and free software, including the commercial products, can be freely copied and redistributed. This has two consequences. First, a supplier will have no way of knowing how many of its products are on the market. Second, and more importantly, as permission is not needed, the software is going to be copied and redistributed by parties uncontrolled, and even entirely unknown to the supplier.

37. Due to the redistribution right, relying on unknown persons to effectively disclaim, or to not impair a warranty disclaimer, is unavoidable. Increasing that risk could threaten to turn the free copy and redistribution right into a dangerous liability.³²

38. Finally, as discussed, open source and free software licenses grant the right to make and distribute derivative works. A derivative work *should* be documented as such, but again, there will be no way to ensure than any specific unknown programmer complies. Thus, added to the concern that unknown persons must be relied upon not to impair a product warranty disclaimer is the fact that they will also be distributing modified versions of the product.

IV. Conclusion

39. Warranty disclaimers by open source and free software licensors are ubiquitous and the terms of those disclaimers are publicly available. In essence, open source and free software eschew warranties in favor of free programs. In fact, this choice is a fundamental

³² Support contracts do not present the same risk. The original supplier is free to offer separate service arrangements to its direct customers or through authorized distributors, without fear that an unknown third party can, without its permission, bind it to a support contract. In fact, it is not uncommon for very inexpensive (sometimes as low as \$3) CD-ROM copies of the major branded Linux programs to be distributed without support on the same site which offers the official version, including the standard support package, for a higher price.

part of, and necessary to the healthy functioning of both the commercial and non-commercial development and distribution of this software.

40. It is critically important that the open source/free software movement's ability to make this choice effectively, not be impaired.

Sincerely,

Carol A. Kunze

electronic ccs: Daniel Salsburg (dsalsburg@ftc.gov)
April Major (amajor@ftc.gov)
Carole Danielson (cdanielson@ftc.gov)

09/25/00 8:25 AM
ltrtoFTC9-8.doc