

Open Source Software

Edmund J. Walsh, Esq.
Shareholder
Wolf Greenfield
ewalsh@wolfgreenfield.com

BOSTON ENTREPRENEURS' NETWORK

January 2, 2007

Legal Issues for Startups

What is Open Source?

- **Broad rights**
- **No warranties**
- **If you distribute, you must propagate the open source terms**

Are These Good Things?

- **Broad rights**
 - **GOOD:** Largely, you can do what you want
- **No warranties**
 - **A CONCERN: IP Infringement**
 - **A TRADEOFF**
- **If you distribute, you must propagate the open source terms**
 - **THE BIGGEST RISK: Loss of IP rights**



RISK: Infringement of IP

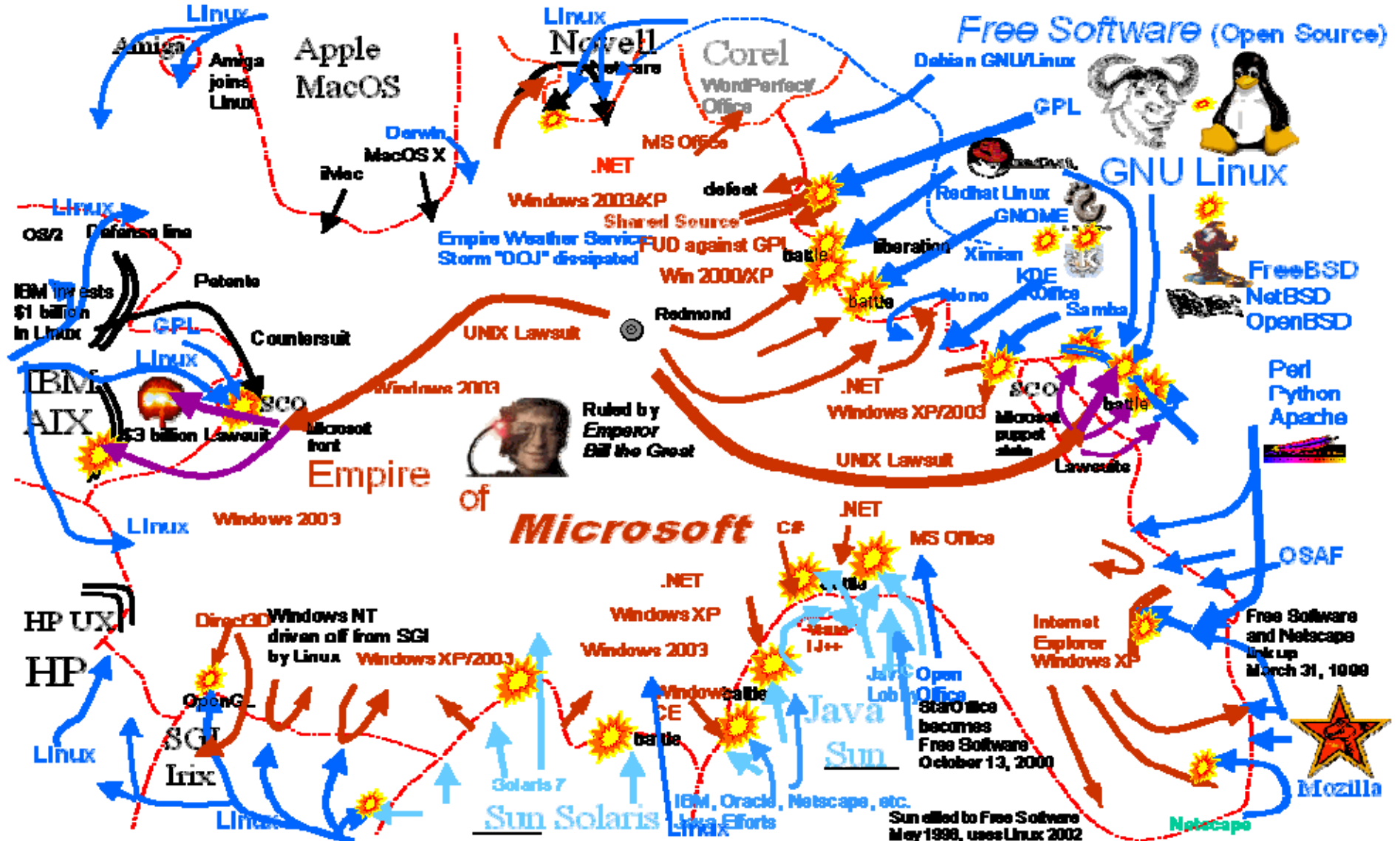
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Last modified August 10, 2003

<http://www.atal.org/softwarewar.png>

Software Wars

Empire Strikes Back



RISK: Loss of IP Rights



- **Express license**
 - **Have to pass on open source terms**
 - Must reveal source
 - No
 - revenue opportunities from redistribution
 - control over redistribution
 - basis for other deals
- **Implied licenses**
 - **Patents**
 - Uncertainty about what is licensed and to whom
 - **Losing trade secret status is like giving a license**
- **Patent Shredding**

Is the Risk Real or Theoretical?



Who would care?

- Individuals?
- Commercial developers?
- Free Software Foundation and other advocates?
- Your competitors?
 - *Computer Assoc. v. Quest*
- ***Investors***

How Are Rights Lost?



- “Mixing” proprietary and Open Source works
- Depends on license terms
 - **GPLv2:**
 - Form of interface matters
 - **Mozilla:**
 - Safe harbor for code in separate files
 - **GPLv3:**
 - More opportunities to lose rights



JANUARY TO MARCH 2007

GPLv3

- **Fix “problems” with GPLv2**
 - **DRM (Digital Restriction Management)**
 - **Patents**
 - **Definitional changes**
 - Internationalization
 - “Clarify”
 - **License compatibility**
 - **Enforceability**

DRM

- **The “TiVo Problem”**
- **Source code must include keys**
 - To unlock software
 - To unlock hardware
- **Precludes cryptographic means to sell upgrades or optional hardware features**
- **Open question:**
 - **Is this forked up?**

Patents

- “Essential patent claims”
 - any patent licensable
 - *includes later acquired patents*
 - *License applies to all downstream users* once you distribute a single copy
- If you can't grant a license to a patent you know about
 - get others a license; OR
 - make sure source is publicly available

Definitional Changes

- “Clarify”
 - You can charge to distribute
- *What source has to be provided*
 - “System libraries” are excluded
 - “*Work based on*” = To the full extent of copyright law (could vary from country to country)
 - *Shared libraries and dynamically linked subprograms a work is specifically designed to require (as evidenced by complex data communication or control flow)*
- Internationalization
 - “Propagate”
 - “Convey”
 - No choice of law

License Compatibility

- **Additional permissions [to deviate from a model of “Free” software]**
 - Plan is for LGPL to disappear and be dealt with as additional permissions
 - *Permissions don't have to be propagated*
- **Additional requirements [that software remains “Free”]**
 - *make source available if it interacts with users on a server*
 - *patent shredding*
- **Additional permissions and requirements *may be* part of a license**
 - *Different parts of code licensed under GPL could have different terms*

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