Joint OSI[1] and FSF[2] Position Statement on CPTN Transaction

Summary: The Boards of our respective organizations are concerned that the proposed recipient of Novell's patent portfolio, CPTN, represents a serious threat to the growing use of free/libre and open source software (FLOSS) throughout business, government, academia, and non-profit organizations worldwide. The founders and leaders of CPTN have a long history of opposing and misrepresenting the value of FLOSS, which is at the heart of Web infrastructure and of many of the most widely used software products and services. The sole or leading competition for several products from the CPTN principals are FLOSS, as described below. We urge the regulatory authorities to recognize the significance of FLOSS and to investigate the threat posed to it by the CPTN transaction.

Detail:

1. FLOSS has emerged as one of the most liberating, competitive, and innovative developments of the software industry. In the enterprise, it runs some of the largest websites in the world, including Google, Amazon, Facebook, Twitter, and Wikipedia, as well as some of the largest stock exchanges, including NYSE/Euronext, the Deutsche Börse, and the Tokyo Stock Exchange.

2. As a practical and moral philosophy, a development model, and a way of managing copyrights and mitigating the risks associated with patents, FLOSS has become a first-class citizen in the minds of IT buyers, and a credible competitor to traditional proprietary software, even when such software vendors command monopoly-like market power.

3. Progress has been equally dramatic in the public sector: in its most recent survey, the Center for Strategic & International Studies (CSIS) has cataloged more than 350 governmental policies promoting FLOSS, an increase of nearly 50% in the past two years[3].

4. The proposed CPTN transaction represents a potentially new, and unprecedented threat to software freedom:
    a. CPTN Principals have acknowledged that the GNU/Linux operating system specifically, and FLOSS in general, represents the major competitive force to their business. Microsoft and Oracle both call out FLOSS as a competitive threat in their most recent 10-K filings[4], [5].
    b. CPTN principals have substantial market power in operating systems (Microsoft, Apple, Oracle), middleware (Microsoft, Oracle), and virtualization and network storage (Microsoft, Oracle, EMC)
    c. FLOSS is a substantial competitor in operating systems (GNU/Linux and Android), middleware (Apache, JBoss), and virtualization and network storage (KVM, Xen hypervisor)

5. The acquisition of the patents of a major distributor of GNU/Linux has been shrouded in secrecy. Secrecy is customary in business transactions, but secrecy can also be used to hide nefarious intentions. Given the potential for collusion between these competitors to reduce

competition amongst them and to harm competition that exists in the marketplace today, competition would be better served by the authorities thoroughly investigating the facts and evidence concerning this transaction, rather than giving them the benefit of the commercial doubt:

   a. Will secrecy be used to spread more patent fear, uncertainty, and doubt (FUD)?
   b. Will the CPTN principals decide strategically who will be offered which patents, thereby choosing amongst themselves who will be allowed to compete? And on what terms?
   c. Will the patents be sold to non-practicing entities (NPEs) which can create havoc for FLOSS without risking the adverse reaction of the market if a practicing entity were to sue directly?

6. The creation of CPTN represents a major disruption to the competitive landscape. Whereas Novell was sincere in promoting and participating in FLOSS development and had an incentive to maintain their patent assets as a defensive portfolio, CPTN has all the motives and opportunity to do the opposite. That is, they have no incentive to support FLOSS as a competitive alternative to proprietary software. CPTN creates a cover to launch patent attacks against companies delivering solutions based on FLOSS while creating for each principal a measure of plausible deniability that the patent attack was not their idea.

For all these reasons, we urge the prevailing anti-trust authorities to investigate the CPTN transaction thoroughly and consider appropriate remedies to address the concerns raised above. Both the OSI and the FSF would be happy to lend support or provide any additional information that may be requested.

Appendix – Contextual Primer

A. FLOSS is a real asset representing real investments that deserve fair protection under the law:
   a. Over 1B source lines of code (SLOC) have been created with FLOSS as of 2008[6]
   b. David Wheeler argues that 6.6M SLOC = $1B in development cost, hence
      i. the Linux kernel (over 6.6M SLOC) cost more than $1B[7]
      ii. the Fedora 9 GNU/Linux distribution (205M SLOC[8]) cost more than $31B
      iii. 1B SLOC in 2008 has $150B of imputed cost using conventional methods of production. This is an extremely large economic resource, and one which is free to all in the world who wish to read, modify, share, and commercially redistribute it.
   c. FLOSS was crucial to the development, architecture, and infrastructure of several world-changing technologies, including the Internet, Google, and Facebook
   d. FLOSS is also important to the public sector: when he was President of Brazil, Luiz Inácio Lula da Silva was awarded the highest honor by the ITU for Brazil's progress in solving the digital divide, and in his acceptance speech he credited "software livre" (free/libre and open source software) for that success[9].
   e. FLOSS delivers many tens of billions of IT value in USD and EUR every year[10]
B. FLOSS is not "non-commercial" - rather, it is software where revenues are generated from the delivery of value *around* the software rather than by controlling access *to* the software. This switch away from artificial scarcity as the only means for monetization liberates developers from many places to synchronize overlapping interests and collaborate around a open source

code "commons" to sustain the wealth-creating vehicle they jointly enjoy. This liberty is widely described as one of the attributes of “software freedom”.

C. A 2008 survey funded by the US Department of Homeland Security analyzed 250 FLOSS programs[11] and found that on average, FOSS had 60 times lower defect density than the industry average. In 2009, surveying 280 FOSS programs[12], the survey found a 33% reduction of defect density, increasing the quality to 80 times lower defect density than the industry average.

D. Quality problems remain a major reason why on average the global $3.5T/year cost of IT includes $1T/year of project write-offs and remediation, and why the $1.5T enterprise IT market includes $500B of project write-offs and remediation. Whereas "lower cost" had been the #1 reason for adopting FLOSS in the enterprise for the past four years, quality compared to proprietary software was the #1 reason given for choosing FLOSS[13].

E. One leading firm that provides industry analysis has predicted that more than 80% of all enterprise IT organizations will use FLOSS by 2012[14], and a leading enterprise IT practitioner has already measured a 78% adoption rate within their customer base[15]. Measured by revenue, its market share remains very small compared with the revenues of proprietary software (or compared with Principals of the CPTN for that matter). However, the fact that it is being evaluated and adopted on a very widespread basis, and that its growth rate compared to the software industry average proves that it is presently thriving as a competitor in the marketplace today.

F. A paper presented at ACM ICSE (Association for Computational Machinery International Conference on Software Engineering) in 2000 that was judged “Most Influential Paper 10 Years Later”[16] argued that the "long tail" of FLOSS helped explain why projects like the Apache web server could "deliver sooner, with fewer bugs, that themselves were fixed more rapidly". By its nature, and in contrast to proprietary software, it encourages universal participation and unfettered innovation. Its developers rarely hold back features to gain strategic advantage (because it is so easy for other community developers to simply add such features themselves). Thus, the very purpose of asserting a software patent is contradictory to achieving the kind of quality and innovation seen in FLOSS. Many argue that for this reason alone--the provable point that patents deter rather than encourage innovation--is reason enough to disallow them in the field of software, or at least to disallow their assertion against FLOSS.

G. There are programmers (and institutions) who care more about absolute quality and security of software than relative profitability or competitive market share. Many programmers who participate in free and open source software communities say they do so because they believe that the development model is simply the best and most innovative in the world.[17] For them, patent assertions (especially vague patent assertions) are a disincentive to participate in FLOSS development.

H. There are programmers (and institutions) who care more about software freedom than relative profitability or competitive market share. Many programmers who participate in free and open source software communities say they do so because they are deeply committed to the moral principle that a person should be free to share the fruits of their labors with their community, and that productive work protected by copyrights should not be subject to rescission based on patents.[18] For them, patent assertions (especially vague patent assertions) are a disincentive to participate in FLOSS development.

[1]The Open Source Initiative (OSI) is a non-profit corporation formed to educate about and advocate for the benefits of open source software and to build bridges among different constituencies in the open source community, which span commercial, academic, governmental, and non-governmental institutions and organizations. More than 10 years ago, the OSI ratified the Open Source Definition (OSD), a standard upon which more than 70 open source licenses are based, and which in turn cover more than 1 billion lines of source code.

[2]The Free Software Foundation, founded in 1985, is dedicated to promoting computer users' right to use, study, copy, modify, and redistribute computer programs. The FSF promotes the development and use of free (as in freedom) software---particularly the GNU operating system (used widely today in its GNU/Linux variant)--- and free documentation. The FSF also helps to spread awareness of the ethical and political issues of freedom in the use of software.

[3]http://www.opensource.org/node/549

[4]http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=7382799-65374-96303&type=sect&dcn=0001193125-10-171791

[5]http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=7340030-83041-151589&type=sect&dcn=0001193125-10-151896

[6]http://dirkriehle.com/publications/2008/the-total-growth-of-open-source/

[7]http://www.dwheeler.com/essays/linux-kernel-cost.html

[8]http://blogs.computerworld.com/204_5_million_lines_of_code_equals_one_great_linux_distribution

[9]http://www.opensource.org/node/443

[10]http://blogs.computerworlduk.com/open-enterprise/2010/06/why-no-billiondollar-open-source-companies/index.htm

[11]scan.coverity.com/report/Coverity_White_Paper-Scan_Open_Source_Report_2008.pdf

[12]scan.coverity.com/report/Coverity_White_Paper-Scan_Open_Source_Report_2009.pdf

[13]http://opensource.com/business/10/6/integral-innovation

[14]http://arstechnica.com/open-source/news/2008/02/gartner-80-percent-of-commercial-software-programs-will-include-open-source-by-2012.ars

[15]http://newsroom.accenture.com/article_display.cfm?article_id=5045

[16]http://roy.gbiv.com/untangled/2010/icse-most-influential-paper-award

[17]http://www.dwheeler.com/oss_fs_why.html

[18]http://www.dwheeler.com/oss_fs_why.html