

The Implied Patent Grant in GPL



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Ways to Convey Permission to Practice Patents

There are several ways for a third party to receive the legal right to practice patented technology

- Express License
- Equity: Laches and Estoppel
- Implied License: “No formal granting of a license is necessary in order to give it effect. **Any language** used by the owner of the patent, **or any conduct** on his part exhibited **to another from which that other may properly infer that the owner consents** to his use of the patent in making or using it, or selling it, upon which the other acts, **constitutes a license.**” *De Forest Radio*, 273 U.S. 236 (1927).

GPL Silence = Implied License

GPL Contains No Express Patent Grant or License

- Does that mean **NO** Patent Permissions are Conveyed?

"Generally, when a seller sells a product without restriction, it in effect promises the purchaser that in exchange for the price paid, it will not interfere with the purchaser's full enjoyment of the product purchased. The buyer has **an implied license under any patents of the seller that dominate the product or any uses of the product to which the parties might reasonably contemplate the product will be put.**" *Hewlett-Packard Co. v. Repeat-O-Type Stencil Mfg. Corp., Inc.*, 123 F.3d 1445 (Fed. Cir. 1997).

Issues for GPL'd Software: "seller" "sells"; "without restriction"; "any uses ... to which the parties might reasonably contemplate."

Law of Implied Patent License Comports with Goals of Free Software

“Unless the parties provide otherwise, the purchaser of a patented article has **an implied license not only to use and sell it, but also to repair it** to enable it to function properly. This **implied license covers** both the original purchaser of the article and **all subsequent purchasers**.” Bottom Line Mgmt., Inc. v. Pan Man, Inc., 228 F.3d 1352 (Fed. Cir. 2000).

➔ Result is a Positive Network Effect: The entire community that participates in GPL'd software improvement benefits from all implied patent licenses made to any member of the community.

Are the Patent Portfolios of GPL Software Distributors Worthless?

Despite Implied License, Patents Remain Valid and Enforceable

- Against any software other than the software licensed by the patent holder under the GPL; and
- Against any party that does not, itself, comply with the GPL in distribution of the patent holder's software.

Is Competitive Advantage Lost by GPL's Implied Patent License?

GPL Ensures Software Avoids Patents

§ 7: “If ... conditions are imposed on you (whether by court order, agreement or otherwise) that contradict the conditions of this License, they do not excuse you from the conditions of this License. ... **[[I]f a patent license would not permit royalty-free redistribution of the Program, ... then the only way you could satisfy both it and this License would be to refrain entirely from distribution of the Program.**”

It is not the purpose of this section to induce you to infringe any patents or other property right claims or to contest validity of any such claims; **this section has the sole purpose of protecting the integrity of the free software distribution system** Many people have made generous contributions to the wide range of software distributed through that system in reliance on consistent application of that system; it is up to the author/donor to decide if he or she is willing to distribute software through any other system and a licensee cannot impose that choice.”

§§ 2(b) and 6: GPL'd software (and derivative works thereof) can only be distributed by you under the GPL ... without any further restrictions.