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Re: Principles of the Law of Software Contracts

Dear Professor Hillman, Dean O'Rourke, and Professor Liebman:

Microsoft and the Linux Foundation are jointly sending this letter to request that the American Law Institute (ALI) delay adoption of its Principles of the Law of Software Contracts (the "Principles") in order to allow for wider consultation with affected parties, including developers and distributors of software. We commend the ALI for its diligent work on the Principles, which contain many useful elements. Unfortunately, as currently structured, we believe that the Principles could lead to disruption of the well-functioning software market, increased uncertainty for software developers, and increased litigation risk.

This joint letter reflects the fact that our concerns cut across both traditional and open source licensing and business models. Notwithstanding our varying approaches to the licensing and distribution of software, we share a common desire for a sound, effective commercial law framework for software contracts that reflects business and community realities. Such a framework will ultimately increase the variety and functionality of software available, benefitting both businesses and consumers.

A sound, effective commercial law framework for software contracts must have several key elements. Foremost among these is flexibility. Software licensing and business models are continually evolving – some companies charge directly for their software, others charge for services and support, and yet

others rely on funding from advertising. A static framework – for example, one that assumes most software will be delivered in packaged form rather than over the Internet – will rapidly become outmoded. Another key element is freedom of contract. Parties should be able to choose the rules that best suit their needs, as they have the most knowledge about their particular transaction. That is not to say that certain protections – for example, in the business-to-consumer context – are not warranted. But even in today’s common law approach to software contracts, there is no great failure in terms of substandard quality or unmet expectations that would justify imposition of new mandatory rules, particularly given existing remedies under misrepresentation and consumer protection law.

We believe that notwithstanding the hard work of the ALI, the current draft of the Principles does not yet meet this standard. We have particular concerns with § 3.05(b), which establishes an implied warranty of no material hidden defects that is non-disclaimable. This warranty does not reflect existing commercial law: no similar warranty appears in the Uniform Commercial Code (UCC), and no explanation is given in the commentary for treating software contracts differently from sales of goods on this point. Nor is it a restatement of the law of fraudulent concealment: the warranty contains no requirement that the transferor have intended to mislead the recipient of the software, and moreover it specifically states that it does not displace actions for misrepresentation. The warranty overlaps with the implied warranty of merchantability in § 3.03 – software that has a material defect is most likely not fit for the ordinary purposes for which it is used. Finally, the inability to disclaim the warranty does not reflect existing law or public policy: the UCC permits disclaimer of all implied warranties, provided requisite steps are taken.

In our view, the exclusion from this warranty for software provided free-of-charge does not address these concerns vis-à-vis open source software. The Linux Foundation would note that while much open source software is provided free-of-charge, the concept of “free” embodied in the term “free software” reflects freedom to review, modify, and redistribute the software code, not an inability under open source licenses to obtain payment. For example, one can download an Ubuntu distribution free-of-charge over the Internet. But one can also buy Ubuntu on a CD or DVD. Thus, the warranty may or may not apply to the exact same software distribution depending upon how the recipient obtains it.

Moreover, the exclusion discriminates among business models. Software provided free-of-charge, but for which the provider receives revenue via related delivery of advertising, appears to benefit from the exclusion. Meanwhile, it is unclear under the Principles whether a company that does not charge for the software itself but for related services and support is deemed to have received payment for the software – the commentary is silent on this point. And, of course, software for which a license fee is charged is definitely subject to the warranty. The net result is to emphasize form over function – in all of these cases, software is driving the realization of revenue.¹

¹ We note that the same analysis applies to the exclusion from the implied indemnity for intellectual property infringement for software provided free-of-charge (§ 3.01(a)).

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For this reason, we agree that a far better way to address this concern is to make the implied warranty of no material hidden defects disclaimable. This would be consistent both with existing commercial law as reflected by the UCC and with the other warranties and implied indemnities in the Principles. It would cover individual contributors to open source projects, as most open source licenses disclaim warranties and indicate that the software code is provided "as is". It would allow universities to continue to release code broadly where they felt it desirable to do so. And companies engaged in the for-profit distribution of software under whatever business model would be free to offer or disclaim the warranties, consistent with the requirement of adequate notice to the recipient.

We believe that the ALI would be well-served to delay adoption of the Principles, to allow more time for comment from interested parties reflecting the wide range of software developers and users. Such a delay, combined with wider consultation and appropriate adjustments to the Principles, would help ensure a more favorable reaction by businesses, users, and others to the final text.

We appreciate the ALI providing us the opportunity to comment on the Principles. We would be grateful if you would provide this letter to the members of the Advisory Committee as well as participants in the Annual Meeting. Please do not hesitate to contact us if you would like further information about our concerns.

Best regards,



Karen Copenhaver

Choate, Hall & Stewart LLP

Counsel to the Linux Foundation



Horacio Gutiérrez

Corporate Vice President and Deputy General Counsel

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