The Open-BPM Architectural Portal

TK3SU1.ZIP Distribution - Complaint Determination Report

Version 1.0 Issued - 30 Mar 09

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The Open-BPM Architectural Portal

Table of Contents

The Open-BPM Architectural Portal

Introduction

Complaint

On the 5 March 2009 the Open-BPM Architectural Portal (Open-BPM) hosted the file TK3SU1.ZIP, a "shadow" update to the Turnkey MVS distribution version 3. This file is a pre-requisite for the OS/380 Project. Open-BPM has an interest in this project because it intends to host a running instance of MVS for public access based on OS/380 31-bit capabilities.

A complaint was received on the same day (see Appendix E) by Phil Roberts, saying that the file should be removed for reasons of copyright infringement.

Paul Edwards is the maintainer/creator of the OS/380 project.

Note: Phil publicly named himself as the complainant and therefore there is no reason to keep his name private. Paul is also known publicly as a key third party involved.

Resolution Approach

It was quickly apparent that this was a complex issues – the ownership of the file was not clear-cut and the impact on its non-availability looked to be an issue for the Turnkey MVS project and the MVS/380 project. Paul and Phil had very different views of the rights and wrongs of the situation.

It was decided to attempt the Open-BPM Resolution Process (see Appendix G) – with a timetable to come to an amicable resolution by the April 5, 2009. On balance it was decided to keep the file available in the meantime because of its wide distribution anyway, the fact that it is an extension to public domain software and its utility to several open source projects.

During the process we managed to provide an agreed summary of Paul's issues (see Appendix D) and perspective, and also resolved some potential GPL distribution non-compliance problems.

However on the 11th March it became clear that Phil did not want to engage in a resolution process. The process was therefore curtailed and Open-BPM considered all information unilaterally to determine the merit of the complaint. The key principle is that the decisions will be focused on protecting & supporting the aims of Open-BPM only – i.e. in supporting the rights of open source projects.

This document is contains the details of this determination. This is not a legal document determining the rights and wrongs with any legal jurisdiction – rather it documents what Open-BPM has decided to do and why. There may be legal

consequences (for Open-BPM) of any decision and clearly any competent authority can insist that Open-BPM changes its actions.

Issues

Issue 1 - GNU GPL Issues

Phil complained that the file contained GNU GPL Licensed material but without the correct license information.

This was reviewed and found to be probably correct.

Resolution: Open-BPM wrapped the archive in TK3SU1-WRAPPER.zip so as to include the required README and license information. In addition we provide TK3SU1-GCC-SOURCE.zip which contains the GCC source used in the TK3SU1 distribution. See Appendix F.

Issue 2 - Distribution Rights

Phil complained that Open-BPM was distributing the file of which he own the copyright and that he had not given permission for distribution.

This is the issue that is at the crux of the complaint and needs some analysis.

Turnkey

Turnkey MVS had produced a CD distribution of MVS 3.8j. MVS 3.8j is an old IBM mainframe operating system that is believed to be in the public domain because it was published before copyright covered software. The CD contained MVS, the Hercules emulator (covered by the the Q PUBLIC LICENSE), and other components with different license and copyright terms.

The CD has a file asserting that its is copyrighted by Volker Bandke, BSP GmbH and gives a license to distribute (see Appendix C).

TK3 Shadow Update

As there had not been an update to the Turnkey distribution (version 3) for some time, Phil released TK3SU1 in Dec 2006. On Oct 2007 Phil ensured that the file was still available by changing its ISP/location (See appendix B).

The file contained updates in the form of shadow disks that only technically work against the original Turnkey Version 3 disk images. Note: These disk images emulate real mainframe DASD. The contents of these images is software which is either in the public domain, GNU GPL Licenses or otherwise licensed for use on TK3.

Unfortunately the file and announcement did not give any information as to copyright, or more importantly licensing. The announcement certainly implies that people could freely use/install the update – but is silent on distribution.

TK3SU1 Withdrawal

In Sept 2008 Phil withdraws the file and states that he does not want it distributed and that he is the copyright owner (see appendix B).

It is not clear why this was done – the stated reason is the lack of license information for the GPL software included. This is easily fixed – and has now been done with the wrapper ZIP files (see Issue 1).

There was a lot of discussion about the implications of GPL software, especially co-existence between GPL, public domain, commercial software. A quick review of the comments (See Yahoo Group turnkey-mvs) imply some misunderstanding of what the implications are by posters - so it may be that the motivation was concern about the GPL license itself.

However the reasons behind the withdrawal are not relevant and it will not be speculated on further except to say that if this was understood a better resolution (for all) would undoubtedly be possible. Open-BPM believe that relationship breakdown between Paul, Phil (and others in the Turnkey project) contributed to the lack of resolution.

It is important to note that the Turnkey project has not complained that this file is withdrawn – presumably they are content that new users will not benefit from it. In any case this is not something that concerns Open-BPM.

The OS/380 project is heavily impacted by this because their distribution is predicated on it and the use of shadow files make it technically difficult (or impossible) for their distribution to be installed if TK3SU is not available to their users. Open-BPM is directly concerned with this as a user (and therefore supporter) of the project. Notwithstanding this, Open-BPM believe that this distribution approach is not effective or sensible for the OS/380 project.

Copyright Implications

Reviewing the legal information (Appendix A), Open-BPM believe that *if* Phil does own the copyright of the file he probably has the exclusive right to distribute it. The file and its announcement does not contain any license information. We can probably infer from the announcement that Phil provided a license that people are free to **use** it but not necessarily to distribute it.

So if he has copyright ownership he is likely within his rights to withhold permission to distribute it or indeed use it, even if this is years after the event, because there is not a clear license agreement in place.

It can be seen then that it is very foolish for anyone to use work distributed in this way - to contribute to the project, to develop their own project based on it, or indeed

perhaps to use the work. This may see unfair – but this is the reason that clear licenses should be provided and asked for or that copyright be assigned to projects with clear terms of reference and governance.

This impacts the OS/380 project and possibly the Turnkey project itself.

TK3SU1_Build

Before discussing ownership – we need to visit a second file TK3SU1_Build.ZIP (Phil also refers to it as tk3tk4su.zip). This was made available in Sept 2008.

His announcement notes "I have pruned out all the GPL pollution …[but] since this is or was a BETA I have set the file to 'self-destruct' from the web hosting site in 1 month. Get it now, if you want it".

In his e-mail to me (Appendix E) he notes "all the contents in TK3SU1, except the GPL covered items, were distributed at a later date in tk3tk4su.zip which is not copyrighted by myself".

This raises two important questions.

- Given the essentially same content (and presumably the fact that the scripts in the second file produced the first file) how can Phil believe he has copyright to one but not the other? They seem one and the same – in terms of ownership – to me. So he must be wrong one way or the other, but we are not sure which way!

- There is no copyright or licensing information with this file either – so how can we be sure that Phil wont choose to withdraw this file – in fact he has already indicated that he wants to do this because of his 1 month "self destruct" comment and because of the fact he was disinclined to send it to me. It would be very foolish indeed to base future work on this file without its copyright and license provisions being fully understood, agreed and documented.

Who Owns the Copyright?

Reviewing the legal information (appendix A) the following point should be noted.

1. It is clear that the contents of the archive (i.e. the included software) remain in the public domain (or with the original ownership) notwithstanding the collection produced by Phil.
2. The idea of using shadow files for distribution cannot be copyrighted – because you can't copyright an idea.
3. A key test to determine if it can be copyrighted is if there is anything "substantive and discrete" created by Phil about the archive. For example is a Hercules configuration file substantive or is it in any case commonplace in the industry?
4. The file clearly is a derivative work on Turnkey - a derivative work must be original relative to the underlying work on which it is based. Otherwise, it cannot enjoy copyright protection and copying it will not be copyright infringement. Is this work original bearing in mind we have to set aside the contents (point 1) and the idea of the use of shadow files (point 2)? It should also be noted that what was included in the file was defined by a Turnkey version 4 wish list – which was in the public domain (and certainly not owned by Phil).
5. An author may choose to release a computer program to the public domain if he can arrange for it to become popular and widely disseminated. Did Phil choose to do this by publishing on the Yahoo turnkey-mvs Group? If he did he certainly changed his mind later.

From this it can be seen why Open-BPM has real doubts as to the accuracy of Phil's assertion relating to his copyright claim, especially as he does not feel he has copyright to a later very similar file.

Work and costs would be needed to determine the right and wrongs of this – something that Open-BPM does not wish to support or fund, and bearing in mind what Open-BPM plan to do relating to this file anyway (see Conclusions) are probably pointless so far as Phil (but perhaps not Paul) is concerned.

Distribution and Enforcement

Even if copyright does belong to Phil – has an infringement taken place and what can be done about it?

- Fair Use – using the file for OS/380 is clearly fair use, but is distributing it to OS/380 users?
- Making Available - It has been held that "Merely making a copy available does not constitute distribution....The statute provides copyright holders with the exclusive right to distribute "copies" of their works to the public "by sale

or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. ...106(3). Unless a copy of the work changes hands in one of the designated ways, a "distribution" under ...106(3) has not taken place." Therefore making the file available is not distribution – and may not infringe Phil's possible rights.

• Practically, in a case of international copyright infringement, enforcement is complex and expensive. Is there any reason to fund this when there has been no monitory loss as a basis for compensation anyway?

However, for the avoidance of doubt, **if** Open-BPM believed that Phil had copyright to this file (and if no distribution license exists) Open-BPM would immediately remove the file from its web site. There is no question of the need for enforcement.

A bona fide independent view from a competent lawyer made after reviewing this document which concludes that on balance Phil did have copyright ownership and that no relevant distribution license exists would be accepted.

Open-BPM Discretion

Open-BPM has discretion here. Open-BPM can choose not to make the file available without reference to anyone else. It might do this, for example, because of cost questions.

Turnkey
In relationship with the Turnkey project, Open-BPM interests would be for the project to start releasing updated versions under clear copyright and license conditions that could be used by other projects. Open-BPM notes that the Turnkey project has no problems making its files available, and also notes that the project members are not interested in having this update file available. Therefore Open-BPM sees no reason to make available the file for the Turnkey project.

Moreover not having the file available might cause the project to produce a new release, or indeed motivate others to produce a more up to date distribution – both outcomes would be positive.

OS/380
Open-BPM believe that the way the OS/380 project distribute MVS/380 as shadow disks on top of TK3SU is unsatisfactory. Rather OS/380 should produce scripts/instructions that allow the 31-bit updates (and indeed the GCCMVS compiler) to be applied to any MVS/3.8j distribution – these scripts may take a long time to run, therefore in addition additional files could provide "pre-built" extensions to TK3, TK3SU1 and other distributions. This would allow these changes to be applied to the MVS system to be hosted by Open-BPM, which may very well not be based on Turnkey.

The Open-BPM Architectural Portal

Open-BPM does not want to slow down or interrupt OS/380 progress – but does want to wean the project off the use of TK3SU1, and the shadow file distribution mechanism that exclusively works on TK3SU1.

Therefore Open-BPM will set a date from which time it will not make the TK3SU1 file available – but volunteer to provide file sharing, code repository and build facilities to OS/380 to allow new better distribution solutions.

Conclusions

Open-BPM concludes that it is far from certain that Phil has copyright ownership of the TK3SU1.ZIP archive. However if ownership was confirmed by competent legal opinion Open-BPM would immediately remove the file from its web site.

Notwithstanding this – it is in Open-BPM's interests to limit the amount of time that the file is available – hopefully this will allow the two projects to move forward.

Therefore the file will remain available for 3 months – to the 15 June 2009.

The time limit on distribution also meets our obligation to Phil in the sense that if in fact he owns the copyright our possible infringement would be limited and have a clear closure date. I am still very surprised that a file would be distributed freely but afterwards someone would want to withdraw it.

From feedback it should be noted that Paul feels that as the file was distributed to the world and cannot be withdrawn, and is also concerned that a new distribution will not be available by 15 June.

Actions for Open-BPM

- The TK3SU1 file should be wrapped in a archive to ensure the correct license terms are documented and met. Source of GCCMVS needs to be available for that version. Both these actions have been completed.
- Open-BPM will have the TK3SU1 file available on its web site until 15 June 2009 by which time it is hoped that OS/380 users will not longer need it.
- Open-BPM volunteer to provide file sharing, code repository and build facilities to OS/380 to allow new better distribution solutions. The following conditions apply:
    - This facility is intended to be available for the foreseeable future – and in any case 12 months notice of removal will be given by Open-BPM.
    - All code and distributions must have clear copyright and license conditions – Open-BPM recommends the use of GNU GPL.

Recommendations for Other Projects

Open-BPM hopes that projects learn the lesson here – all files and code distributed should have clear copyright and license conditions - what is allowed (and for how long) and what is not allowed. People change their minds and if they own the copyright they can certainly cause a lot of issues for others who may have based extensive work on top of this unclearly licensed work.

The Open-BPM Architectural Portal

Care is needed about putting work in the public domain – it is not clear what the correct procedure is to do this - and losing all control may not be what you really want.

Open-BPM recommends GNU GPL – unless there are clear issues with people wanting to use their work in commercial software as well, in which case parallel licensing is might be appropriate. LGPL should also be considered.

Appendix A - Legal Review

This section is a summary / analysis of information sourced the "Wikipedia, the free encyclopedia", see

- http://en.wikipedia.org/wiki/Copyright
- http://en.wikipedia.org/wiki/Public_domain
- http://en.wikipedia.org/wiki/Derivative_work
- http://en.wikipedia.org/wiki/File_sharing_and_the_law
- http://en.wikipedia.org/wiki/Implied_license

Key sections have been copied from the above source.

Note: I have no legal training and this analysis/collection is entirely for my own benefit to help me decide on how I should respond to this complaint. It is included here as it may be assistance for others trying to understand the implications of cases like this one.

Copyright

"Copyright is a form of intellectual property which gives the creator of an original work exclusive rights for a certain time period in relation to that work, including its publication, distribution and adaptation; after which time the work is said to enter the public domain. Copyright applies to any expressible form of an idea or information that is substantive and discrete.

"The 1886 Berne Convention first established recognition of copyrights among sovereign nations, rather than merely bilaterally. Under the Berne Convention, copyrights for creative works do not have to be asserted or declared, as they are automatically in force at creation … there is no requirement for an author to "register" or "apply for" a copyright, or to mark his or her works with a copyright symbol or other legend. As soon as a work is "fixed", that is, written or recorded on some physical medium, its author is automatically entitled to all copyrights in the work, and to any derivative works unless and until the author explicitly disclaims them, or until the copyright expires.

Exclusive rights

"Several exclusive rights typically attach to the holder of a copyright:

- to produce copies or reproductions of the work and to sell those copies (mechanical rights; including, sometimes, electronic copies: distribution rights)

- to import or export the work
- to create derivative works (works that adapt the original work)
- to perform or display the work publicly (performance rights)
- to sell or assign these rights to others
- to transmit or display by radio or video (broadcasting rights)

"The phrase "exclusive right" means that only the copyright holder is free to exercise those rights, and others are prohibited from using the work without the holders permission.

First-sale doctrine and Exhaustion of rights

"Copyright law does not restrict the owner of a copy from reselling legitimately obtained copies of copyrighted works, provided that those copies were originally produced by or with the permission of the copyright holder.

Fair-Use

"Copyright does not prohibit all copying or replication. In the United States, the fair use doctrine, permits some copying and distribution without permission of the copyright holder or payment to same. The statute does not clearly define fair use, but instead gives four non-exclusive factors to consider in a fair use analysis. Those factors are:

- the purpose and character of the use;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

"In Lewis Galoob Toys, Inc. v. Nintendo of America, Inc., the appellate court held that it was a fair use for owners of copies of video games, such as Super Mario Bros., to use Galoob's product the Game Genie to customize the difficulty or other characteristics of the game by granting a character more strength, speed, or endurance. Nintendo strongly opposed Galoob's product, allegedly because it interfered with the maintenance of the "Nintendo Culture," which Nintendo claimed was important to its marketing program. The court held, among other things, that the fair use defense shielded Galoob's conduct. The court said that "a party who distributes a copyrighted work cannot dictate how that work is to be enjoyed.

"In Sega Enterprises, Ltd. v. Accolade, Inc., the court excused Accolade from copyright infringement liability on fair use grounds. Nintendo and Sega produced video game consoles for playing video games. Each stored the games in plastic

cartridges that provided game data to the consoles. By way of analogy, the Sega hardware console's "platform" differed from Nintendo's, as a Macintosh platform differs from that of a "PC." Hence, a video game cartridge that works on one system does not work on the other. Sega and Nintendo sought to "license" access to their hardware platforms, and each company developed software "locks" to keep out cartridges that did not have the proper "key." Accolade sought a license from Sega for its key, but negotiations broke down over price. Accolade then decided to reverse engineer Sega's lock and key system. To do so, it had to download (copy) all of the computer code from Sega's product and disassemble it (translate it from 1s and 0s to a human-intelligible format). Accolade succeeded and began to market new video games that it independently wrote, which were capable of being operated in Sega consoles. This led to copyright infringement litigation, in which Sega alleged that the downloading was improper copying (reproduction) of Sega's code. The court held that Sega was trying to use the copyright in its computer code to maintain a monopoly over the sale of video games, to which it was not legally entitled. Accolade downloaded the computer code only to ascertain how the lock worked, so that it could make a key that would permit its games to work in Sega consoles. The court held that such a use was fair use: "We conclude that where disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly is a fair use of the copyrighted work, as a matter of law."

Transfer and licensing

"A copyright, or aspects of it, may be assigned or transferred from one party to another.

"Under the U.S. Copyright Act, a transfer of ownership in copyright must be memorialized in a writing signed by the transferor. For that purpose, ownership in copyright includes exclusive licenses of rights. Thus exclusive licenses, to be effective, must be granted in a written instrument signed by the grantor

"Non-exclusive grants (often called non-exclusive licenses) need not be in writing under U.S. law. They can be oral or even implied by the behaviour of the parties.

Public Domain

"A creative work is said to be in the public domain if there are no laws which restrict its use by the public at large.

"It is axiomatic that material in the public domain is not protected by copyright, even when incorporated into a copyrighted work."

Disclaimer of interest

"Although copyright law generally does not provide any statutory means to "abandon" copyright so that a work can enter the public domain, this does not mean that it is impossible or even difficult, only that the law is somewhat unclear.

"Although there is support in the statutes for allowing work to be dedicated to the public domain, there cannot be an unlimited right to dedicate work to the public domain because of a quirk of U.S. copyright law which grants the author of a work the right to cancel "the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright" thirty-five years later, unless the work was originally a work for hire.

This may imply that "An author may release his own work into the public domain … but a company which has purchased a copyright from an author cannot".

"Another form of support comes from the seminal case Computer Associates Int'l v. Altai, 982 F.2d 693. This case set the standard for determining copyright infringement of computer software and is still followed today.

"This decision holds that computer software may enter the public domain through "freely accessible program exchanges and the like," or by becoming "commonplace in the computer industry." Relying only on this decision, it is unclear whether an author can dedicate his work to the public domain simply by labeling it as such, or whether dedication to the public domain requires widespread dissemination.

"An author may choose to release a computer program to the public domain if he can arrange for it to become popular and widely disseminated.

"Although Computer Associates only mentioned the issue in passing, Nimmer observes that the public domain is particularly rich and valuable for computer programs. He seems to say that a computer program author who wishes to release his work into the public domain may either include it in a book as example code or post it on a "bulletin board" and encourage sharing and distribution. (Nimmer is the treatise most widely cited in copyright opinions, and is generally authoritative.)

Derivative Work

"The musical, West Side Story, is a derivative work based on Shakespeare's Romeo and Juliet.

17 U.S.C. § 103(b) provides:

"The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting

material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

"For copyright protection to attach to a later, allegedly derivative work, it must display some originality of its own. It cannot be a rote, uncreative variation on the earlier, underlying work. The later work must contain sufficient new expression, over and above that embodied in the earlier work for the later work to satisfy copyright law's requirement of originality.

"The Second Circuit held that a derivative work must be original relative to the underlying work on which it is based. Otherwise, it cannot enjoy copyright protection and copying it will not be copyright infringement.

"In the Batlin case, one maker of "Uncle Sam" toy banks sued another for copying its coin-operated bank, which was based on toy banks sold in this country since at least the 1880s. (These toys have Uncle Sam's extended arm and outstretched hand adapted to receive a coin; when the user presses a lever, Uncle Sam appears to put the coin into a carpet bag.) The plaintiff's bank was so similar to the 19th Century toys, differing from them only in the changes needed to permit a plastic molding to be made, that it lacked any original expression. Therefore, even though the defendant's bank was very similar to the plaintiff's, the plaintiff's was not entitled to any copyright protection. "To extend copyrightability to minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work."

File Sharing and the Law

"At this time the development of the law in this area is in its infancy.

"In the United States, for example, a record industry trade association, the RIAA, on behalf of the four (4) largest worldwide record companies, has launched an estimated 30,000 cases over a 4-year period, all against people whose internet access accounts have, according to the plaintiffs, been associated with peer-to-peer file sharing accounts using FastTrack technology… At the core of these cases is the allegation that the defendants "made available for distribution" the song files in a shared files folder.

...

"The Court held that "Merely making a copy available does not constitute distribution....The statute provides copyright holders with the exclusive right to distribute "copies" of their works to the public "by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. ...106(3). Unless a copy of the work

changes hands in one of the designated ways, a "distribution" under ...106(3) has not taken place." The Court also expressly rejected the 'offer to distribute' theory suggested in Barker, holding that "An offer to distribute does not constitute distribution".[30]

Implied license

"An implied license is an unwritten license which permits a party (the licensee) to do something that requires permission of another party (licensor), and which arises by operation of law from actions by the licensor which lead the licensee to believe that it has the necessary permission. Implied licenses often arise where the licensee uses the intellectual property of the licensor, particularly where the licensee purchased a physical embodiment of that intellectual property, or paid for its creation, but did not pay a licensing fee for its use. Because a license is simply a contract, the usual rules of contract law apply to implied licenses.

"Usually implied licenses are considered to be of two kinds. Either they are considered to reflect the intention of the parties, which is inferred from a fact-specific inquiry into the surrounding circumstances, or else they are constructive agreements, in which case the intention of the parties is likely to be immaterial (and the question is one of law for the court). In fact, there is more of a continuum and it may at times be difficult to determine whether the license or contract in question is one which the law implies, irrespective of any protests by the unwilling licensor, or instead one inferred from the whole pattern of factual circumstances including the evidence of intent.

Appendix B – Time Line

The TK3 Shadow File was announced

Dec 7 2006 by Phil Roberts – (Yahoo Group "turnkey-mvs" message 3124)

```
TK3 Shadow Update Available

We have been working a little recently to bring you a
fairly large
update to the MVS TK3 system. The list of things included
are numerous:

All of the items 1 - 32 at:

www.bsp-gmbh.com/turnkey/tk4wish.html

with updates of RPF and IND$FILE to even more recent
versions and a
bug fix for the XMIT/RECV package.

…

So without further ramblings, you can obtain the update
zip file at:

www.box.net/public/at0xixe608#main

It is slightly less than 63 Mb.

It should be applied to a fresh or clean install of the
TK3 base
system. You don't have to have all the packs installed.
If you
selected to leave the CBT, SRC, SMP and starter system
packs
uninstalled, this update should still work with your MVS
environment.

…

If it all works, it's the effort of many people, if it's
broken, blame me.
```

```
Phil - a space blanket, that's what I need - they'll
never find me in
space
```

Phil Roberts republishes the file

Oct 3 2007 - (Yahoo Group "turnkey-mvs" message 3751)

```
TK3 Shadow Update Available - Again

I have uploaded the TK3SU1.zip file again. It should stay
online this
time around until I get another update out the door.

You can download it currently from:

www.classiccmp.org/softlib/TK4Beta
...
```

Paul Edwards asked Volker some questions

Sept 2 2008 (Yahoo Group "turnkey-mvs" message 4689)

Paul Edwards asked Volker Bandke some very good questions which, unfortunately, were unanswered.

```
...
2. Does your licence allow modification of the
product (for non-profit)?

3. Do you consider shadow file updates containing
unrelated code to be subject to any licence?

4. Your website says that there is no company-copyrighted
code on it that you know of, and a lot of it comes
from others. So which particular bit are you claiming
copyright over that is thus subject to the licence
condition on your CD?
```

Phil Roberts withdraws the file

Sep 6, 2008 (Yahoo Group "turnkey-mvs")

```
Hi Folks,

As you all know there has been a lot of traffic lately
about this,
```

that and the other thing.

We have discovered a possible GPL problem with software
included in
the Shadow File Update and have therefore temporarily
removed it.

Further updates to come as I can correspond with FSF
compliance folks.

Phil - newbie

Phil Roberts first declaration of copyright ownership

Sept 6, 2008 - (Yahoo Group "turnkey-mvs" message 4777)

However due to other circumstances, as copyright holder
for the work
know as TK3SU1 Shadow File Update, I request you take
down the posted
guide in the files section as I no longer grant the right
to use my
copyrighted work in this manner.

Phil - Thanks

Phil Roberts clarifies that source was not a key issue

Sept 7 (Yahoo Group "turnkey-mvs" message 4784)

No it wasn't taken down due to missing source. We have a
concern over
the proper disclaimers and so forth provided with the
update.

The relationship breakdown is evident

Sept 6, 2008 (Yahoo Group "turnkey-mvs" message 4773)

Someone sent me this as an excerpt from a newly opened
forum in the
Hercules community.

"Let's be clear. I have ****NO**** intention of
violating IBM's or anyone else's copyright."

It was attributed to Paul.

If this is the case, it's too late as you have already modified my
work over which I have copyright regarding TK3SU1.

Phil - care to cease and desist ?

A possible solution seemed?

8 Sept (Yahoo Group "turnkey-mvs" message 4799)

Re: Copyright or Copy-wrong

> Mike Schwab wrote:

> The installation way the TK3SU1 author gives leaves their files as
> distinct shadow file, and I would assume he would want users to
> create user shadow files. For a first step in resolving this
> dispute, Paul, why don't you try re-installing the three products,
> but instead of MERGING the shadow files, keep them separate and
> CREATE your own shadow files. Hercules is designed to work with 8
> levels of shadows files, so it should work fine. If it does, update
> your instructions to include this change.

This would not infringe as far as I can tell.

Nether would adding all the pieces and parts which comprise the
updates from the various places they are found.

It doesn't address license and copyright issues of individual works
within the compilation.

Phil - aye, there's the rub

Phil Roberts announce alternative scripts

Sept 08, 2008 (Yahoo Group "turnkey-mvs" message 4869)

```
It has been suggested that the TK3 to TK3SU1 build
scripts be posted
for folks to 'roll their own'. The scripts and the files
which they
load, XMIT, tape and other files amounts to a little over
60MB of
zipped data.

They are CYGWIN style scripts the same as the TK3
install. Perhaps
not everyone has the 'CYGWIN build' environment installed
on their
system. When MSVC versions of Hercules came along CYGWIN
builds
started to decline.

Volker has already stated in the BETA group that CYGWIN
scripts would
not be utilized for the TK4 build so this is a dead end
on that score.

Let me hear from you as to whether you folks want yet
another
'bunch-o-stuff' to download to your hard drives.

Phil - that's all folks, see ya later
```

The alternative scripts are published for 1 month

Sept 24, 2008 (Yahoo Group "turnkey-mvs" message 4891)

```
Alright folks, I have pruned out all the GPL pollution
and looked them
over a little. Remember they haven't been used in almost
2 years.
Updates were made to them after SU1 hit the web so I
believe those
mods were to back in the fixpack changes.

To utilize them in the manner for which they were
designed you must
```

have CYGWIN installed in the windows environment or a
Linux
environment as the windows bat files call the bash
scripts to perform
the function.

For those who want to attempt anything with this the
starting point
should be in the DOC folder, Herc Upgrade Win CYGWIN text
file and
then the minimal installation guide file.

Since this is or was a BETA I have set the file to 'self-
destruct'
from the web hosting site in 1 month. Get it now, if you
want it.

http://drop.io/TK3SU1_Build

WARNING, WARNING:

There is no support for these scripts and the accompaning
product
installs are older versions currently.

Any damage you may inflect upon your host operating
environment or MVS
operating environment by attempting to utilize them is
entirely your
own responsibility. They may not work correctly, build
TK3SU1
completely or correctly and contain nothing about how to
build the
shadow files or structure.

Phil - Use them at your own risk.

Appendix C – Turnkey 3 Copyrite (sic) File.

The MVS Tur(n)key CD is copyright (c) by Volker Bandke, BSP GmbH.
You may freely create copies of this CD, and redistribute those copies, as long as this is done in a non-profit effort, i.e. as long as you don't charge more than production and distribution of the CD costs you.

Permission is granted to Sam Golob and Sam Knutson, maintainers of the CBT tape (see http://www.cbttape.org) to redistribute this CD in any way they see fit.

Appendix D – Paul Edwards Concerns

Paul is working on a project OS/380 and the heavily related GCCMVS and have certain aims.

This was based on TK3SU1 because folks were already using it and expected whatever software was already in there to continue to be there and not be regressed to TK3 levels. And in the original releases of MVS/380, it was available and not in dispute.

Paul does do not aim to provide a MVS distribution (not interested in doing this) he just wanted to add the enhancements to an existing one.

Paul can't host the entire OS at sourceforge - so that is why you need to provide an enhancement to an existing one. Sourceforge nearly rejected the project, but he promised them it was all a minor change, no CD required etc.

The use of shadow file mechanism to provide the patch makes it very difficult (or impossible) to change the base images.

Appendix E – Phil Roberts E-mail Dialogue

5 March 2009 – From Phil to Adrian

Hello,

It has come to my attention you have hosted a copyrighted file, TK3SU1.zip, for download on your website, open-bpm.org . The specific link is:

http://www.open-bpm.org/index.php/mainframes.html?
file=tl_files/downloads/hercules/TK3SU1.zip

This file contains GPL licensed software without the proper licenses included. That is why it was removed from availability some time back. As original publisher of the TK3SU1.zip, I also have copyright over the file.

Please remove TK3SU1.zip from your site as I have withdrawn copyright for any redistribution some time ago.

Phil Roberts

ps - all the contents in TK3SU1, except the GPL covered items, were distributed at a later date in tk3tk4su.zip which is not copyrighted by myself

5 March 2009 – From Adrian to Phil

Hi Phil

Thanks for your e-mail.

I hope you don't mind if I play back your points and ask some questions?

1. You believe that some of the contents of this zip file is covered by the GNU GPL license - but there is no notice.

I can't see an notice but there may be one on the dasd images - do you know?

Who are the copyright owners for this GPL work (presumably Volker Bandke is one)?

In the short term, I will add some text to the download page explaining this.

2. You originally published the file and therefore feel that you have some intellectual rights - like copyright - over it.

Do you feel that this covers some of the content of the archive file - files that you have created or altered - or of the act of archiving it up itself?

When you published it was your contribution covered by GPL? And were you adding to existing work or creating something completely new do you think?

In the short term, I will make it clear on the site that you created this archive.

3. You no longer wish for this file to be distributed.

I guess this is the crux of the matter. Can I ask why you don't want it to be re-distributed?

Is it perhaps because third parties have complained (e.g. because of the lack of GPL notice) - if so do you mind giving me their contact details so I can contact them and understand their issues?

Or have you decided better than having your work freely available (using GPL language)? In this case is there any specific concerns that we can sort out - perhaps concerning its use, your association with it, your employer, or some commercial questions? Does these concerns cover everything you feel you own in this file or just parts of it?

Again I will highlight your wishes on the web site.

Could you please e-mail me the tk3tk4su.zip file - or if too big - skype or something?

Obviously a bit of time is needed to work through these questions. I'm sure we can get to a point we are all happy with, so I am going to do (to show good will) is put notices with the file as mentioned above, which will at least cover the GPL questions for 3rd parties - while we work through this.

If need be I guess a community effort will be needed to create a new distribution, and agree ownership of the different bits. I know that there are some yahoo groups covering Turnkey - if we need to go to the community which group is most appropriate do you think?

Cheers

Adrian

The Open-BPM Architectural Portal

5 March 2009 – From Phil to Adrian

Hello,

1. Since I created and published the archive I know there are no GPL notices embedded in the DASD files. GCC is the problem as the executable is included.

2. Until I hear otherwise from my U.S. copyright filing, yes I have copyright over the TK3SU1.zip file and the sole right to distribute it.

3. Several issues in addition to the GPL violation, the archive was a BETA version of an update, more recent versions of software which were pre-packaged in it are now available, and anyone who downloaded tk3tk4su.zip can incorporate those more recent versions in it's process. The GNU folks did respond to my concerns and upon their response was when TK3SU1.zip was withdrawn. The GPL violation covers not only lack of license file, but the source of GCC itself is not in accetable form according to their email. You are welcome to join the groups which discuss the Turnkey, but believe you might have a hard time getting anyone to actually produce an updated version of it. The tk3tk4su.zip, able to provide a turnkey system, was made available back in September 2008 yet it seems no one is willing to produce one.

The only acceptable remedy I can see is for you to abide by international copyright agreements and remove TK3SU1.zip from distribution as I have not granted any permission for you to make it available after I withdrew it.

RAPIDSHARE, a German sharing service, didn't hesitate for a moment in removing TK3SU1.zip after being contacted. Neither did another file sharing site before RAPIDSHARE.

Phil

ps - regarding availability of tk3tk4su.zip, where did you obtain a copy of TK3SU1.zip ? Perhaps tk3tk4su.zip can be obtained from the same place.

---

5 March 2009 – From Adrian to Phil

Hi Phil

I thought I would update you on where I am up to - and check I have fully understood your concerns.

BTW - Where are you based? Depending on time zones perhaps I can phone you?

The Open-BPM Architectural Portal

What I am suggesting is that we go through a process to [attempt to] come to a amicable solution that everyone - including you of course - are happy with. We need to time box this because I don't want anyone to think this is just a stalling tactic. I have suggested 5 April (1 month from your complaint), but in reality I think it wont take anywhere near that long to either come to a solution or realise that we wont ever.

There are 3 simple phases.

Discovery - make sure that everyone fully understands the root issues that every one has.
Solutioning - proposing and discussion options that might meet every ones concerns.
Realisation - negotiating the the minor details round the agreed option - and announcing the agreement!

This has been a long running issue I think - and you did collaborate with Paul for 4 years - (4 years - that is a marriage! :-)) - would you be happy to go through this process with myself in the middle (if you see what I mean) and Paul?

I honestly believe that there are solutions which would please yourself, Paul, myself and other users.

Carefully reading your e-mails and posts - can I just make sure I have got your points? If we are going to come to a good solution we need to fully understand first.

- You created the zip file (and it was hard work to do this) so you can allow its distribution or not.

I get this - but I want to make sure I understand why you don't want it distributed.

- It contains GPL software but the license is not stated and the source not available.

Can I understand (one of your old posts implied this) do you "just" care about the violation (which after all is a third parties issue) and/or have you issues with having GPL software in the distribution at all (i.e. maybe because of its viral nature).

- The release is BETA and some of the software is now older than that currently available. You also mentioned this on the post announcing the newer release you mentioned (BTW Paul kindly sent me a copy, so you don't need to thanks). It would time out after a month because it is a BETA.

I don't quite get this concern - can you please explain/help me here. Normally you might define some kind of road map - (e.g. this release is supported for 3 months after the next version is released) - is this where you are coming from, I still don't fully understand.

- You also mentioned other licensed software which may not be distributable - but have had permission from most. This needs sorting, I agree,- but do you think this is probably easily resolved assuming your other issues are?

One other thing - clearly private e-mails makes the process easier at times - but I get the impression that you want our progress to be tracked by posts on the turnkey yahoo forum. Is this right or would you prefer to keep discussions private (which I think would be sensible but we can make either way work)?

Thanks

Adrian

Appendix F – Added "Readme" files

TK3SU1 Turnkey BETA Wrapper README

This archive contains the TK3SU1 Archive, wrapped with license information. TK3SU1 is BETA.

This is an extension of Turnkey (http://www.bsp-gmbh.com/turnkey/). The original creator of the Turnkey distribution is Volker Bandke. The creator of the TK3SU1.ZIP archive file is Phil Roberts.

The archive contains some GPL software (GCCMVS a derived work (port) of the GNU GCC compiler - see http://gccmvs.sourceforge.net and http://gcc.gnu.org/) for more information and source code. In addition a separate archive exists with the source code used for this version hosted at open-bpm.org - the file is called TK3SU1-GCC-SOURCE.ZIP.

GCC (and therefor the portion of GCCMVS which is derived from GCC) are licensed with GNU General Public License (GPL), see the GCC 3.2.3 README & COPYING files included. The creator of GCCMVS is Paul Edwards and others.

GCCMVS also includes the C run time library PDPCLIB which is Public Domain.

Adrian Sutherland (adrian@sutherlandonline.org)
9 March 2009

TK3SU1-GCC-SOURCE.ZIP README

This archive contains the source code of GCCMVS used in the TK3SU1 Turnkey BETA distribution of Turnkey (http://www.bsp-gmbh.com/turnkey/). The original creator of the Turnkey distribution is Volker Bandke. The creator of the TK3SU1.ZIP archive file is Phil Roberts.

GCC (and therefor the portion of GCCMVS which is derived from GCC) are licensed with GNU General Public License (GPL), see the GCC 3.2.3 README & COPYING files included. The creator of GCCMVS is Paul Edwards and others.

GCCMVS also includes the C run time library PDPCLIB which is Public Domain.

The GCCMVS code in TK3SU1 Turnkey BETA is version/stage 115, with the exception of the JCL which is at version/stage 114. Both files are included. These are patch files (diff) that need to be applied to GNU GCC version 3.2.3 (included).

The Open-BPM Architectural Portal

The C run time library PDPCLIB is version/stage 2, I have included this and version/stage 1 for completeness. Note: this is not licensed with GPL but is included for completeness, see source for license/copyright information

The source of GNU GCC is included for version 3.2.3. See source for license/copyright information.

Adrian Sutherland (adrian@sutherlandonline.org)
9 March 2009

MVS/380 0.9 Single Archive README

This zip is a zip file of the DASD and config files created created after following the MVS/380 (http://mvs380.sourceforge.net/) instructions.
This is an extension of Turnkey (http://www.bsp-gmbh.com/turnkey/). The original creator of the Turnkey distribution is Volker Bandke. The maintainer of the TK3SU1 BETA update to Turnkey TK3 version is Phil Roberts. The creator of MVS/380 is Paul Edwards and others.

The archive contains some GPL software (GCCMVS a derived work (port) of the GNU GCC compiler - see http://gccmvs.sourceforge.net and http://gcc.gnu.org/) for more information and source code. The creator of GCCMVS is Paul Edwards and others.

The version of GCCMVS included is "GCC 3.2.3 MVS 6.0" which is based on GCC version "3.2.3".

GCC (and therefor the portion of GCCMVS which is derived from GCC) are licensed with GNU General Public License (GPL), see the GCC 3.2.3 README & COPYING files included.

GCCMVS also includes the C run time library PDPCLIB which is Public Domain.

Notes

- The root directory of this is in uppercase (as are corresponding config files automatically generated) - this may cause problems. Paul Edwards recommends using lower case. Although this seems to work on Windows and Linux, in future versions of this file I will use lower case.

- I have provided this in good faith but it has only been tested by me!

Adrian Sutherland (adrian@sutherlandonline.org)
9 March 2009

Appendix G – Resolution Process

The aim of the process is to negotiate round the issue/complaint to produce a "win-win" solution. This could involve technical solutioning, providing facilities and in terms of the resolution process itself like possibly bringing in a third party to adjudicate.

The resolution process required engagement from all parties for Open-BPM support and will be time boxed to one month.

There are 3 simple phases of the resolution process.

- Discovery - make sure that everyone fully understands the root issues that everyone has.
- Solutioning - proposing and discussion options that might meet everyones concerns.
- Realisation - negotiating the minor details round the agreed option - and announcing the agreement!

Where it is not possible to come to an agreement Open-BPM will determine the merit of any complaint unilaterally. This decision will be focused on protecting & supporting the aims of Open-BPM only – i.e. in supporting the rights of open source projects.

A summary of the issue & conclusions, any actions (so far as Open-BPM is concerned) and recommendations (for other projects) will be drafted. This will be published as draft on the Open-BPM web site for one week, for e-mail (only) comments.

After this the findings may be updated because of comments received; it will then be published as final, any actions executed and the complaint will be closed.