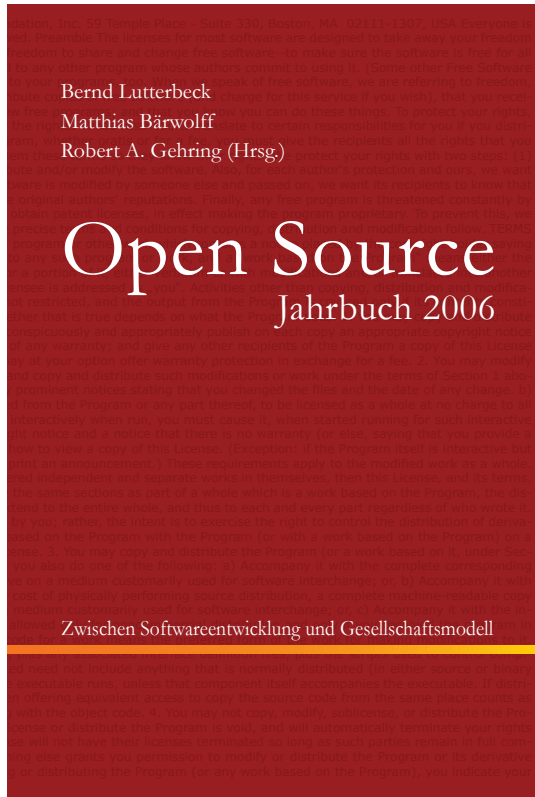This article has originally been published in German as part of the

available at www.opensourcejahrbuch.de.

The *Open Source Jahrbuch 2006* is an extensive compendium dealing with the various aspects of open source software and beyond. Whilst most articles have been written in German, this is one of the articles that have originally been written in English and subsequently been translated into German. Refer to our website for more English articles as well as our translation wiki.

GPLv3 From the Outset

Eben Moglen

The GPLv3 process of the Free Software Foundation began on Jan 16, with the publication of the first discussion draft. While it is premature to discuss the substance of the public comments, some reflections on the social situation seem appropriate at the outset.

The first discussion draft of version 3 of the Free Software Foundation's GNU General Public License (known throughout the software world as "the GPL") was released on January 16, 2006, just a few days ago.

I am undoubtedly the last person capable of expressing an opinion about the view on first impression. After all, Richard Stallman and I have been exchanging ideas for the content of GPLv3 since shortly after I first went to work for him in 1993. We had been preparing for this draft announcement for more than a year, and have spent the last five months working face to face on the final decisions that went into the license draft. The first impression it makes may be the only thing about this proposed license that I don't know anything about.

Much will be said about the technical details of the license over the next year or so, as the Free Software Foundation works through the public comment process to refine successive license drafts. This is not the place for me to comment on comments, or to discuss the tenor of negotiations that haven't started yet. From my present perspective, at the outset of the process, the aspect that strikes me most forcibly is the social, rather than primarily legal, construction going on.

The announcement conference in Cambridge was notable for the diversity of the attending population. Within the rather small confines of a meeting of 300, the full breadth of the GPL Society was displayed. Individual developers from every corner of the world, government officials, corporate counsel, software entrepreneurs, law-firm partners in extremely profitable private practice taking time which would ordinarily be

priced at so very much an hour, senior engineers from household-name multinational businesses, and free software/free culture political activists whose country, like their theater, is the globe—that's who we are now. Those are the people who share a deep enough concern for the content of a software copyright license to have traveled long distances to listen to a presentation from a small charitable foundation, with almost no resources besides its strong social message, whose activities are now inextricably tied to the functioning of the 21st century.

But when I speak of this conference—and those whom they temporarily represented, who will appear in their thousands and tens of thousands before the process is over—as the GPL Society, I don't mean a society that has grown self-conscious. The parts of this social entity still see themselves as altogether separate, contained within the corporate forms, national enthusiasms, technical projects, and political opinions that unquestionably divide them. These components may compete and struggle with, ignore, bewilder and even occasionally malign one another in their other relations, and there is anything but trust among them. Forming an effective society—as distinct from, say, a market—from among those who do not trust one another, however much they need one another, is far from simple.

From the Foundation's perspective, measures to contain the experience of difference are important to the success of the discussion process. The discussion committees were constituted around similarities of organizational culture and socioeconomic function not in order to facilitate either the takeover of the process by corporate interests, as some inevitably charged, or closed-minded rejection of their views by the Foundation, as business executives and their lawyers inevitably told us they feared. Hackers hotly protested the "incompleteness" of our democracy, while others lamented the absence of "reasonable" secrecy. Each of those criticisms, taken separately, appeared to the critic, understandably, well-founded. With each I would have been sympathetic had the critic's case been my own. But one purpose of our process choices has been to create environments for discussion that varied with the organizational values common to subgroups among the participants.

The Foundation's modest insistence that the GNU General Public License is its own, that it must reflect both the needs of its users and the values the Foundation espouses, has naturally been met with substantial initial criticism. Some object that a society unable to determine its own ethical principles by binding consultation of "the people" is not a free society. Others object to the inclusion in a business relation such as copyright permission of measures designed with primary attention to social or political goals. The two arguments offset one another. Those who profess that only "democracy" will do must confront the fact that every other software license they deal with is either unilaterally imposed on disempowered consumers or bilaterally negotiated in secret between parties who would deny that there is a "public interest" in the details of their commercial transaction. If only democracy will do, it stands to reason it would be done somewhere else. But the parties who believe the license

should eschew all social or political strategizing and stick to giving permission for software distribution are no less challenged by the fact that the productive system from which they benefit depends upon the ethical reciprocity of the copyleft, which is itself a political position.

So we have begun, as might have been expected, with crises of trust on all sides. Precisely because the participants have uniformly approached the question of updating the license in good faith, conscious of their own openness to its improvement, they have tended to express their distrust of other participants by demanding that those others keep an open mind. Thus, in the first two weeks, I have heard a profusion of demands for openness of mind, sown broadcast, and sometimes in a tone of voice not fully reflective of the speaker's own mental flexibility.

This is a stage it will be a pleasure to outgrow, and I am reasonably convinced that we will do so quickly. My dear friend and colleague at Columbia Law School, the late Charles L. Black, Jr., once wrote—*a propos* our long struggle towards racial justice in America—that the failure to recognize kinship is the *prima materia* of tragedy. Of comedy, too, I've always thought. It is, at any rate, at once the hardest and the easiest thing for us, with human eyes, to see. The kinship that has knit so many forms of social and economic life together through the GPL is at once both obvious and obscure to those organizations, communities, and companies whose genetic material is, increasingly, copylefted. As the months go by and everyone settles down to working through the issues together, recognition will build, and some forms of trust will establish themselves to last. The GPL Society will then be experiencing self-consciousness, an awareness of the common project that the license is, which will be even more valuable in the long run than any technical improvements in licensing that the final GPLv3 includes.

In the course of that movement to trust, the perception of the Free Software Foundation too will change, I believe. The Foundation's commitment to principle has often been read as refusal to listen, as self-righteousness akin to religious enthusiasm. After more than a dozen years representing the Foundation, I look forward to the opportunity to show that these perceptions are exaggerated. The Foundation is moving forward not under the conviction that either its license draft or its discussion process are perfect, but rather on the certainty that we do not know how to achieve perfection, that the building of a better license is, like building software, the work of a community.