# "Bazaar" Transnational Drafting: An Analysis of the GNU Public License Version 3 Revision Process

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## TABLE OF CONTENTS

# I. INTRODUCTION

Eric S. Raymond is an early open source software developer.[1] In his 1997 essay, *The Cathedral and the Bazaar*, he reflects on two modes of producing software.[2] The first is the traditional centralized mode with an "a priori approach" where anointed individuals work in "splendid isolation" to produce software.[3] He called this mode the cathedral because the process seemed to require the same degree of care and planning used to build large churches.[4] He contrasted this with a method of production he characterized as "a great babbling bazaar of differing agendas and approaches" which ultimately give rise to the final product.[5] His essay examines how the open source community uses this approach to self-organize and create software.[6]

Raymond's essay then discusses the characteristics which make the bazaar mode of production work in the context of software development. Raymond reflects on how a community of interested parties are collected, how the community communicates about their common problem and goals, the role the leader plays as central administrator, and how the community chooses to, or chooses not to, codify processes. Ultimately, he argues that the cathedral mode of software development will be unable to compete with the bazaar mode.[7] "[T]he cutting edge of open-source software [development] will belong to people who start from individual vision and brilliance, then amplify it through the effective construction of voluntary communities of interest."[8]

Unsurprisingly, when the open-source community embarked on a recent revision of its most widely adopted license, it chose to model the process on the same principles Raymond noted. The community applied open software development principles to the drafting of a transnational[9]

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1. ERIC S. RAYMOND, *The Cathedral and the Bazaar*, *in* THE CATHEDRAL AND THE BAZAAR: MUSING ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY 27, 29 (1999).
2. *Id.* at 27.
3. *Id.* at 29.
4. *Id.*
5. *Id.* at 29–30.
6. *Id.* at 27.
7. *Id.* at 66–67.
8. *Id.* at 66.
9. The legal community typically uses three terms to discuss what would colloquially be called "international" law: 1) foreign; 2) international; and 3) transnational. *See* Yale Law Sch., Lillian Goldman Law Library, Foreign & International Law Resources, http://www.law.yale.edu/library/firesources.asp (last visited Apr. 6, 2008). Foreign law typically refers to law outside one's own regime. *Id.* Therefore, a Canadian studying Chinese law would be interested in foreign law. International law focuses on "the law between and among countries—treaties, agreements, international court decisions . . . ." *Id.* A study of

legal instrument.  Drafting is defined as "[t]he practice, technique, or skill involved in preparing legal documents—such as statutes, rules, regulations, contracts, and wills—that set forth the rights, duties, liabilities, and entitlements of persons and legal entities."[10]  Understanding how and why bodies draft an instrument can be as important as the resulting instrument.[11]  How would this experiment in drafting turn out?  Would this novel process be useful and yield a final legal instrument adoptable by the community?  Would the "open-source" model help make the resulting license adoptable by the global community?  To answer these questions, the community could develop a new method for drafting legal instruments, or follow an existing method.

   There certainly exist ample models, tried and true over time, for drafting global legal instruments, three of which will be relevant here.  First, in 1945, 50 nations chartered the United Nations, which still drafts resolutions as a means to achieve their goal of "harmonizing the actions of nations in the attainment of [][its] common ends."[12]  Treaty negotiations represent a second well studied body of international legal instrument negotiations.  A third model of international instrument drafting is the setting of international standards, for instance the gauge of railroad tracks or the exact distance of a meter, by the International Organization for Standardization (ISO).

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criminal extradition treaties between countries is an example of an international law issue. Transnational "encompasses both public and private international law as well as comparative law."  Stanford Law Sch., Transnational Law: Introduction, http://www.law. stanford.edu/program/courses/details/585/Transnational%20Law:%20%20Introduction/ (last visited Apr. 6, 2008) [hereinafter Stanford, Transnational Law].  Transnational law focuses on the law of organizations both public and private. *Id.*; *compare* Stanford, Transnational Law (expanding the study of transnational law beyond "public international law"), *with* Stanford Law Sch., International Law, http://www.law.stanford.edu/program/courses/ details/376/International%20Law/ (last visited Apr. 6, 2008) [hereinafter Stanford, International Law] (narrowing the study of international law to include only the "law of nations").  Thus, someone interested in licensing software in China and Canada would be studying transnational law because the topic requires balancing national and international intellectual property laws and treaties along with the various ways private parties construct and enforce the licensing agreements.
   10.   BLACK'S LAW DICTIONARY 531 (8th ed. 2004).
   11.   *See generally* Victoria F. Nourse & Jane E. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. Rev. 575 (2002) (examining why the legislative drafting process proceeds as it does).
   12.   U.N. DEP'T OF PUB. INFO., BASIC FACTS ABOUT THE UNITED NATIONS at 3, U.N. Sales No. E.04.I.7 (2004), *available at* http://www.un.org/aboutun/unhistory/ (last visited Apr. 6, 2008); U.N. Charter art. 1, para. 4.

These are three examples of traditional modes of transnational drafting, but they are also examples of cathedral processes. These modes are highly centralized with limited access to certain key parties. Raymond discusses the cathedral process as an activity accomplished in "splendid isolation."[13] Thinking about debate in the great hall of the United Nations General Assembly, it seems appropriate to characterize the resolution process as cathedral. A similar splendid isolation can be seen, for instance, when heads of state meet at Camp David or trade representatives head to exotic locales to negotiate.

This Article will step through the drafting process and compare bazaar and cathedral modes of drafting to determine if a bazaar mode can efficiently produce a legal instrument that crosses legal regimes. As the title suggests, the bazaar process analysis case will be the GNU General Public License version 3 (the GPLv3) Revision Process. A comparison of the advantages and disadvantages of the bazaar mode of drafting to the cathedral mode of drafting will hopefully demonstrate the overall value of a transnational bazaar process like the GPLv3 Revision Process.

The Article analysis approach is to walk through the drafting process at a high level, stopping along the way to highlight and discuss the pros and cons of each mode. Table 1 provides, at a glance, the various salient characteristics relied on in this Comment by summarizing the relative advantages and disadvantages of the four drafting modes discussed in this comment: (1) United Nations resolution drafting, (2) treaty drafting, (3) International Standards Organization, and (4) the GPLv3 Revision Process. This Table is useful for comparing the different modes based on the concerns of the drafting party. It shows strengths and weaknesses of the prototype modes and shows the interplay between them. For instance, in some cases, a characteristic can be both an advantage and a disadvantage.

The analysis will start by looking at how the community comes together. Once the community is defined, they need a place to draft their instrument; this is the forum. Having the parties in place to start work, administrative work is needed to set the agenda, control the agenda, control the time, and keep the parties focused on the goals of the project. Assuming the process produces an instrument, the issue of translation is important, particularly in an international setting. Finally, after the drafting process is over, whether the parties involved never meet again, move on to tackle other, different business, or commit to meet again later are important to institutionalizing and the continuity of the drafting process.

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13.   RAYMOND, *supra* note 1, at 29.

TABLE 1
SUMMARY OF DRAFTING MODE ADVANTAGES
& DISADVANTAGES

| DRAFTING MODE | ADVANTAGES | DISADVANTAGES |
|---|---|---|
| UNITED NATIONS RESOLUTIONS | • Global participation<br>• Formal rules of procedure<br>• Physical presence<br>• Continuity<br>• Central leadership | • Political<br>• Participation limited to governments<br>• Formal rules of procedure<br>• Broad subject matter<br>• Translation<br>• Continuity<br>• Transparency |
| TREATIES | • Focused on interested parties<br>• Focused subject matter<br>• Limited drafting process | • Political<br>• Participation limited to governments<br>• Translation<br>• No formal leadership<br>• Transparency |
| INTERNATIONAL ORGANIZATION FOR STANDARDIZATION | • Focused on interested parties<br>• Focused subject matter<br>• Central leadership<br>• Typically, formal rules of procedure<br>• Continuity | • Participation limited to members only<br>• Commercial in nature<br>• Continuity<br>• Transparency<br>• Central leadership |
| GNU PUBLIC LICENSE V.3 | • Transparency<br>• Focused on interested parties<br>• Focused subject matter<br>• Global participation<br>• Central leadership<br>• Formal rules of procedure | • Commercial in nature<br>• Central leadership<br>• Geographical separation<br>• Translation |

This analysis is useful to illustrate the strengths and weaknesses of each drafting mode using Raymond's observations as a background. By seeing the processes side by side, relative comparisons of how well or poorly the cathedral or bazaar modes address the needs of drafting transnational legal instruments can be made. As the number of global ties between countries increases, transnational instruments become more important as a means to promote growth by protecting parties to agreements. A variety of public and private organizations draft these types of instruments. As these groups struggle to formulate processes and procedures, perhaps new lessons from the "bazaar" open source world can provide useful guidance.

## II. METHODOLOGY

The comparative approach proposed raises several methodological concerns. First, the transnational drafting examples used to analyze the GPLv3 Revision Process are by no means an exhaustive list of situations where communities make a global effort to design a legal instrument. Lawyers around the world have traditionally used copyright law for enforcing software licenses, but more recently, they have been using contract law to enforce software licenses.[14] In light of this paradigm shift, a comparison of the GPLv3 drafting process to international contract negotiation may also prove illuminating. While there remain other cases to consider, I believe the three "traditional" modes selected best reflect the subject matter and general timbre of the GPLv3's mode.

A second general concern revolves around using cost benefit analysis to weigh the drafting modes. Scholars of legal inequality are critical of cost benefit analysis' silence on the question of "why?"[15] "[W]hy people have the preferences they have, or why their willingness to pay, to achieve gains and their willingness to accept, to compensate for losses are what they are at any given point in time."[16] Although this may seem like an existential philosophical debate, when we examine why people have preferences in drafting or why they are willing to commit to such drafting exercises, the motivations are: (1) not always obvious and (2) not easily accounted for.

For example, why would a person contribute a comment on a particular draft of the GPLv3? Is it because they believe in the philosophy of free software? Is it because they have a particular interest in protecting an

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14.    *See* Tennille M. Christensen, Note, *The GNU General Public License: Constitutional Subversion?*, 33 HASTINGS CONST. L.Q. 397 (2006).
15.    Louis E. Wolcher, *Senseless Kindness: The Politics of Cost-Benefit Analysis*, 25 LAW & INEQ. 147, 150–51 (2007).
16.    *Id.* at 150.

aspect of a project they are intimately involved with? Or is it simply because they enjoy being part of the community, thereby attaching their name to Internet icons, namely GNU and the Free Software Foundation? Some policy analysts would consider the question of "why" to be a "normative and 'intangible' concern."[17] Irwin acknowledges the difficulty in collecting and harmonizing these types of concerns and proposes two solutions: (1) limiting the possible courses of action and (2) using the normative and intangible concerns as "tie-breakers" between seemingly equivalent choices.[18] This comment will therefore focus on the aggregate communities involved with a limited set of drafting modes to analyze via costs and benefits whether a transnational drafting process can produce an economically efficient legal instrument.

### III. BRIEF HISTORY OF THE FREE SOFTWARE FOUNDATION

> *If you have the right attitude, interesting problems will find you.*[19]

The Free Software Foundation is a "tax exempt charity for free software development" started in 1985 by founder Richard M. Stallman.[20] The Free Software Foundation grew from Stallman's participation in a free software development project called the GNU project.[21] The GNU project arose when Stallman rejected the rise of proprietary software in the early 1980s.[22] In 1984, Stallman created free software that was not necessarily free in a monetary sense, but rather, conveyed the freedom to users to run, modify, or redistribute the software.[23] "Free software is a matter of the users' freedom to run, copy, distribute, study, change and

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17. LEWIS G. IRWIN, THE POLICY ANALYST'S HANDBOOK: RATIONAL PROBLEM SOLVING IN A POLITICAL WORLD 63 (2003).
18. *Id.* at 64.
19. RAYMOND, *supra* note 1, at 35.
20. Richard M. Stallman, *The GNU Operating System and the Free Software Movement, in* OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION 53, 60 (Chris DiBona et al. eds., 1999), *available at* http://www.gnu.org/gnu/thegnuproject.html (last visited Apr. 6, 2008).
21. The project's name comes from a recursive acronym "GNU's Not Unix" chosen to symbolize the project's goals as more than simply creating an operating system, like Unix. *Id.* at 56.
22. *Id.* at 57.
23. *Id.* at 58–59.

improve the software."[24] The first GNU General Public License, and each subsequent revision, embodies this principle of freedom, with the Free Software Foundation as its steward.[25]

The Foundation has authored several free software licenses, but its most popular license is the GNU General Public License (the GPL).[26] The GPL is not only the Free Software Foundation's most popular license, but is also one of the most widely used open source software licenses.[27] The GPL's "flagship" adoptee is the popular open source operating system, Linux.[28] In 1991, the Free Software Foundation released version 2 of the GPL.[29] In 2005, the Foundation announced their plans to launch a process to revise the license.[30]

The GPL is not unique; as of September 2008, the Open Source Initiative, a public benefit corporation that reviews and certifies open source licenses, certified 67 distinct open source software licenses.[31] The idea of a common license that garners its strength through widespread adoption is not unique to the software community either. Authors and artists are also taking the common license idea to protect their work through the Creative Commons.[32] Still, the GPL influences the new licenses as the more recent projects can look the GPL's strengths and weaknesses over time. Whether the GPL's drafting model is sufficient for all cases is yet to be determined, but the GPL's relative maturity, and by extension its history, makes it a rich and interesting case study.

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24. Free Software Found., The Free Software Definition, http://www.gnu.org/philosophy/free-sw.html (last visited Apr. 6, 2008).
25. Stallman, *supra* note 20, at 60–61.
26. FREE SOFTWARE FOUND., GPL3 PROCESS DEFINITION, at iv (2006), http://gplv3.fsf.org/gpl3-process.pdf [hereinafter GPL V3 PROCESS DEFINITION]. In addition to the prior version of the GPL, the Free Software Foundation also owns several versions of a Lesser General Public License which is not as strong a copyleft license as the GPL, and the Affero General Public License which extends GPLv3 to include software over networks. Free Software Found., Licenses, http://www.fsf.org/licensing/licenses/index.html (last visited Apr. 6, 2008).
27. Doug Ferguson, Comment, *Syntax Errors: Why Version 3 of the GNU General Public License Needs Debugging*, 7 N.C. J.L. & TECH. 397, 397 (2006).
28. Richard Stallman, Linux and the GNU Project, http://www.gnu.org/gnu/linux-and-gnu.html (last visited Apr. 6, 2008).
29. GPL V3 PROCESS DEFINITION, *supra* note 26, at iii.
30. Press Release, Free Software Found., FSF Releases Guidelines for Revising the GPL (Nov. 30, 2005), *available at* http://gplv3.fsf.org/press/press20051130.html [hereinafter FSF Revision Press Release].
31. Open Source Initiative, Licenses by Name, http://www.opensource.org/licenses/alphabetical (last visited Apr. 6, 2008).
32. For more information about Creative Commons, see Creative Commons, About Creative Commons, http://www.creativecommons.org/about (last visited Apr. 6, 2008).

The initial GPL versions primarily targeted the law of the United States.[33] Its wording borrowed many statutory phrases from the vocabulary of copyright law as understood in the American system. Since then, the global nature of software and the global adoption of the license have raised concerns about the license's global applicability. The uncertainty arising from a lack of uniform application of the terms across national boundaries, can lead authors and potential infringers alike wonder how, if at all, the license applies in courts of their home country.[34]

Against this backdrop, the Free Software Foundation authorized a revision committee to forge ahead with a new version of the license taking into account the goal of global applicability. In this way, the license should become an instrument that transcends national boundaries and legal regimes. "Version 3 should more fully approximate the otherwise unsought ideal of the global copyright license."[35] In other words, it would be one of the first transnational copyright licenses.

To produce such a transnational license, the Free Software Foundation announced a formal revision process in 2005.[36] The process defined the objectives of the revision effort as well as the steps for submitting, discussing and deciding license provisions.[37] The bazaar style of drafting and its advantages and disadvantages over traditional, cathedral modes is the focus of this comment.

## IV. COMMUNITIES OF INTEREST

> *Given a large enough beta-tester and co-developer base, almost every problem will be characterized quickly and the fix obvious to someone.*[38]
>
> *If you treat your beta-testers as if they're your most valuable resource, they will respond by becoming your most valuable resource.*[39]

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    33.   GPL V3 PROCESS DEFINITION, *supra* note 26, at 1.
    34.   *Cf.* Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 334–39 (2008) (discussing uniformity in the context of treaties).
    35.   GPL V3 PROCESS DEFINITION, *supra* note 26, at 2.
    36.   FSF Revision Press Release, *supra* note 30.
    37.   *See* FREE SOFTWARE FOUND., GPL3 PROCESS DEFINITION (2006), http://gplv3. fsf.org/gpl3-process.pdf.
    38.   RAYMOND, *supra* note 1, at 41.
    39.   *Id.* at 46.

A key theme Raymond reiterates in his essay is the importance of a broad community to provide feedback on the process, whether it in the form of beta-testers or other developers contributing to the project. Cathedral builders see their world as one of "tricky, insidious, deep phenomena."[40] The bazaar sees the world as shallow problems waiting to be solved by one of the many testers or a developer who has a knack for seeing the problem.[41] The key is bringing these parties together.

The Free Software Foundation's main asset is the strength of the community it has built. The Foundation, through free software, seeks to create a self described "learning society" that tries to build knowledge over time.[42] The Free Software Foundation acts as a hub to collect their beta-testers, communities interested in software. In the absence of such a hub to organize the various communities, the transaction costs between individual entities can be prohibitively high.

As an example, different legal regimes treat the technological term "database" differently.[43] The European Union uses a broad definition for database.[44] Proposed legislation in the United States, however, narrowly defines the term.[45] The technical determination of which definition is "right" is not of great importance to the judges who will be determining the fate of a legal instrument containing the term "database." However, the correct definition may be of utmost importance to the authors or owners of the product governed by the instrument.[46]

In the absence of statutory definitions, the onus shifts to the community of interest to develop a lexicon to govern their art. By providing guidance to judges, litigation outcomes can become more predictable.[47] The strength of a particular definition will come from the breadth of the definition's acceptance.[48]

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40. *Id.* at 41.
41. *Id.* at 41–42.
42. Free Software Found., What Is Free Software and Why Is It So Important for Society?, http://www.fsf.org/about/what-is-free-software (last visited Apr. 6, 2008).
43. Dov S. Greenbaum, Comment, *The Database Debate: In Support of an Inequitable Solution*, 13 ALB. L.J. SCI. & TECH. 431, 439–442 (2003).
44. *Id.* at 439.
45. *Id.* at 442.
46. *See id.* at 440 (noting that under the European Union's definition of database, operators of web sites with "random compilations of heterogeneous facts" would qualify for copyright protection).
47. *See* Samuel A. Bayard, Note, *Chihuahuas, Seventh Circuit Judges, and Movie Scripts, Oh My!: Copyright Preemption of Contracts to Protect Ideas*, 86 CORNELL L. REV. 603, 626–31 (2001) (arguing that limiting judicial guidance to legislative history and conceptual nature of the copyright and contract falls short of providing the proper outcome when determining the relationship between contract and copyright rights).
48. *See* David McGowan, *Legal Implications of Open-Source Software*, 2001 U. ILL. L. REV. 241, 259 ("Under the open-source model, programs can easily become (indeed are designed to be) quilts of code from many different authors, each of whom

In developing a precise terminology for use within a particular field of interest, legal and technical practitioners walk a fine line. In developing a transnational legal instrument, they want to ensure the instrument will provide adequate enforcement provisions. However, they also need to be sensitive to the burden it will place on the courts, both in terms of the sheer number of complaints, but also in the cost of deciphering and enforcing.[49]

The Free Software Foundation generates value for software knowledge by creating a common language to discuss, and ultimately protect, software rights. With a language shared by all interested members of the community defined, the Foundation can make further gains by bringing the parties together to discuss their common goals using their common language.

## V. THE FORUM FOR NEGOTIATING

*Provided the development coordinator has a communications medium at least as good as the Internet, and knows how to lead without coercion, many heads are inevitably better than one.*[50]

In the digital world of software, contributors to a given project do not need to be physically co-located with other project members. Raymond suggests that the forum of the Internet helped the open source software process to "harness[] the attention and brainpower of [an] entire communit[y]."[51] In addition to providing an efficient method of communication, a successful forum should also incorporate "cooperative customs" to allow the process to flow.[52]

To draft a transnational instrument, parties from across legal regimes must come together to negotiate the details. In the case of treaties or United Nations resolutions, physical presence is important not just for voting purposes, but also to collect input on draft versions of a given resolution.[53] Bylaws and procedures which define the institutions can

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own rights as to which the others are licensees, and each of whom uses code subject to section 2(b) [of the GPL].").
49. Greenbaum, *supra* note 43, at 439–441.
50. RAYMOND, *supra* note 1, at 66.
51. *Id.* at 62.
52. *Id.* at 63.
53. JOHAN KAUFMANN, UNITED NATIONS DECISION MAKING 119–24 (1980).

contribute to the strength of the instruments produced by the collective.[54] For instance, would a United Nations resolution announced by the Secretary General after an informal straw poll of those gathered, say, at a luncheon be as effective as a resolution which passed by a public, formal, country by country vote on the floor of the General Assembly?

Because of the wide geographic dispersion of the participants in the GPLv3 Revision Process, the Free Software Foundation needed an alternative forum for negotiation to achieve such a broad participation.[55] Recognizing this need, the GPLv3 Revision Process explicitly called upon the discussion committees to "operate largely through network-based communication, voice and data, synchronously and asynchronously."[56]

By using internet or other decentralized communication and organization mechanisms,[57] strength by participation in the drafting process can be achieved while minimizing the cost of collecting the disparate parties and their ideas.[58]

Another benefit to using Internet technologies is the relatively low cost of participation by any given interested party. Most standards

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54.   In ISO's Strategic Plan, they discuss the comprehensiveness and consistency gained when standards are produced through adoption of processes, particularly when they harmonize with other international organizations. INT'L ORG. FOR STANDARDIZATION, ISO STRATEGIC PLAN 2005–2010 (2004), *available at* http://www.iso.org/iso/isostrategies_2004-en.pdf [hereinafter ISO STRATEGY 2005–2010].

55.   Over 100 individuals participated in the GPLv3 Revision Process as members of the formal discussion committees. Free Software Found., Committee "A" Members— GPLv3, http://gplv3.fsf.org/discussion-committees/A/committee-A-bios (last visited Apr. 6, 2008); Free Software Found., Members of Committee "B"—GPLv3, http://gplv3.fsf.org/discussion-committees/B/memberlist (last visited Apr. 6, 2008); Free Software Found., Members of Committee "C"—GPLv3, http://gplv3.fsf.org/discussion-committees/C/memberlist-public (last visited Apr. 6, 2008) [collectively hereinafter GPL Discussion Committees]. Furthermore, the final document was translated into 11 different languages. Free Software Found., Translations, http://www.fsf.org/licensing/licenses/translations.html (last visited Apr. 6, 2008). An unknown number of others, from unknown locations around the world, participated in the process through the public "open" committee or by submitting comments via Internet.

56.   GPL V3 PROCESS DEFINITION, *supra* note 26, at 10.

57.   The Internet by its very nature is decentralized. Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996). From its earliest forms, the web's purpose was to facilitate data exchange amongst various communities of interest. *Id.* at 832. Today the data exchanged on the Internet is not limited text, but the network carries streaming, real-time voice and video around the world. *See generally* Skype, Skype Explained, http://about.skype.com/product.html (last visited Apr. 6, 2008) (providing free Internet voice and video conferencing services).

58.   The Revision Process used an interactive copy of the working draft that allowed someone with a comment to highlight the appropriate section and the comment. Free Software Found., GNU General Public License Last Call Draft of Version 3 (May 31, 2007), http://gplv3.fsf.org/comments/gplv3-draft-4.html [hereinafter GNU GPL Draft]. Comments were then stored in an electronic "ticket" system that allowed assignment of the item to the appropriate discussion committee and tracking of the status of each item as the committee considered it.

setting organizations require membership or a member sponsor to present new ideas to the group.[59]   Other drafting organizations bar individuals from directly introducing resolutions or other international treaties without a sponsoring nation.[60]   The Internet lowers this barrier to participation, enabling anyone with access to the Internet to participate in the process.

Of course, widespread participation via the Internet requires the drafting committee to allow open access to the process.  The choice to allow public comment on the license was a conscious decision the GPLv3 revision committee made explicit as one of the objectives of the process.[61]  On the downside of widespread participation, the committee runs a risk of addressing many non-issues or virtual "filibustering." Because the comment submission form is open to the public, it could be subject to a denial of service attack that either seeks to flood the system with comments or actually seeks to impede the public's ability to reach the site.[62]

The cost of organizing an orderly discussion, even if possible to bring all participants to the same location, would present a seemingly insurmountable hurdle.  Drafting institutions which use a physical presence forum typically have detailed rules of procedure to govern all aspects of initiative from presenting the initial draft through debate to the final vote.[63]   These rules, however, change as the role and scope of the organizations change.  For instance, the 1947 United Nations General Assembly Rules of Procedure was only 29 pages long while the 2006 16th revision contains 44 pages of procedure.[64]

Therefore, one advantage of a transnational drafting process is that it lowers the cost of organizing and synthesizing the actual instrument

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    59.    Int'l Org. for Standardization, Discover ISO: Who Can Join ISO, http://www. iso.org/iso/about/discover-iso_meet-iso/discover-iso_who-can-join-iso.htm (last visited Apr. 6, 2008).
    60.    *See, e.g.,* KAUFMANN, *supra* note 53, at 119–23.
    61.    GPL V3 PROCESS DEFINITION, *supra* note 26, at 3.
    62.    CERT Coordination Ctr., Denial of Service Attacks, http://www.cert.org/ tech_tips/denial_of_service.html (last visited Apr. 6, 2008).
    63.    See RULES OF PROCEDURE OF THE GENERAL ASSEMBLY, U.N. Doc. A/520/ Rev.16, U.N. Sales No. E.85.I.13 (2006), *available at* http://www.un.org/ga/search/view_ doc.asp?symbol=A/520/rev.16&Lang=E [hereinafter U.N. RULES OF PROCEDURE 2006], for the rules of procedure for the U.N.  See also Int'l Org. for Standardization, Standards Development Procedures–ISO/IEC Directives and ISO Supplement, http://www.iso.org/ directives (last visited Apr. 6, 2008), for the procedure used for developing ISO standards.
    64.    *Compare* U.N. RULES OF PROCEDURE 2006, *supra* note 63, *with* RULES OF PROCEDURE OF THE GENERAL ASSEMBLY, U.N. Doc. A/520, U.N. Sales No. 1948.I.1 (1947), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/520&Lang=E.

because the process can bring diverse parties together. If the process does not lower the cost of bringing diverse parties together, it does not produce advantageous results over other traditional modes of draftsmanship. Because the GPLv3 Revision Process leverages Internet technologies to foster communication and consensus on the license and does not place limits on those able to participate, the process produces a benefit beyond that of traditional modes of license negotiation.

To this point in the drafting process, the institutional body has served the role of facilitator, a catalyst for bringing parties together. Once the parties have a means to communicate and a forum in which to do so, the work of drafting can begin. Raymond notes that the open-source software process is "the process of systematically harnessing open development and decentralized peer review to lower costs and improve software quality."[65] The strong leader is one who effectively harnesses the power of the parties collected under their banner. By setting and controlling the agenda, establishing deadlines, and keeping the parties focused on a manageable goal, a strong leader can keep costs low and improve quality.

## VI. AGENDA SETTING

*Smart data structures and dumb code works a lot better than the other way around.*[66]

The agenda is analogous to the data structure underlying a software system; it provides a solid framework for future development. One administrative role a central leader, like the Free Software Foundation, can play is setting the agenda. The power in agenda setting is the power to scope the discussion by allowing debate only on a particular issue and preventing consideration of other issues.[67] "[P]ower may be, and often is, exercised by confining the scope of decision-making to relatively safe issues."[68] Safe issues are "those issues which are comparatively innocuous to [a participant]."[69]

Those with agenda setting power can use their authority to prevent certain actors from being included in the decision process.[70] In the realm

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65.  RAYMOND, *supra* note 1, at 1.
66.  *Id.* at 45.
67.  Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 947–48 (1962).
68.  *Id.* at 948.
69.  *Id.*
70.  *See* Douglas C. Bennett & Kenneth E. Sharpe, *Agenda Setting and Bargaining Power: The Mexican State Versus Transnational Automobile Corporations*, 32 WORLD

of international standards setting organizations, by allowing certain parties to present and argue on standards, like Microsoft or Sun Microsystems, the process can overlook and possibly exclude smaller players in the field.[71] Even if a standards organization allows the smaller players a say in the standard, the organization does not account for other players in the community of interest. For instance, the consumers or end users of products seeking to conform to a proposed standard may be left out of the discussion. A concerned end user can lobby their elected officials and hope their concern will reach the country's appointed representative, but the process does not allow for direct participation by the end user.

In the United Nations, any member country can present a resolution at the General Assembly, but only certain nations can present resolutions in the Security Council.[72] Any of the Council's five permanent members can attempt to use their agenda setting power to direct the attention and energies of the United Nations.[73]

Contrast the agenda setting function within standards setting organizations and the United Nations with how parties create an agenda for treaty negotiations. The treaty process is a delicate negotiation where all parties need to be invested in the final decision in order to ensure the treaty will be carried into execution.[74] One party can apply pressure to the other parties, for instance by threatening to withdraw from negotiations, but rarely can one party take a strong agenda setting leadership position and expect consensus to result.[75]

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POL. 57, 59–60 (1979) (arguing that in negotiations between transnational car manufacturers and local governments, the parties set an agenda that excluded local labor leaders).

71.    ISO only allows members to propose new standards. If an organization (e.g. Microsoft) can convince a member to sponsor their standard, the proposal committee will hear the proposal. Int'l Org. for Standardization, FAQs—General Information on ISO, http://www.iso.org/iso/support/faqs/faqs_general_information_on_iso.htm (last visited Apr. 6, 2008).

72.    *Compare* U.N. RULES OF PROCEDURE 2006, *supra* note 63, at 4, 33 (specifically Rules 13 and 120), *with* PROVISIONAL RULES OF THE SECURITY COUNCIL at 7, U.N. Doc. S/96/Rev.7, U.N. Sales No. E.83.I.4 (1983) (specifically Rule 38).

73.    *See, e.g.*, Phyllis Bennis, *The U.N., the U.S., and Iraq*, NATION, Nov. 11, 2002, *available at* http://www.thenation.com/doc/20021111/bennis.

74.    For a survey of some treaty related issues, see Pablo Zapatero, *Modern International Law and the Advent of Special Legal Systems*, 23 ARIZ. J. INT'L & COMP. L. 55, 57 (2005).

75.    *See generally* Jonathan D. Greenber, *Does Power Trump Law?*, 55 STAN. L. REV. 1789, 1814–15 (2003) (listing a variety of international treaties the United States has unilaterally withdrawn from and the broader, negative implications these actions have on international treaty negotiations).

The GPLv3 steering committee set the agenda at the beginning of the draft revision process.[76] It established four goals the revision should achieve building from the second version of the license: (1) to create a global license, (2) to protect existing freedoms, (3) to do no harm, and (4) to consult with the license user community to ensure the widest needs are met.[77] Although the Free Software Foundation retained ultimate control over the final product, one of its four goals was to promote community participation in the process.[78] In addition to ensuring diverse opinions, participation by the community also involved advocating the final product's adoption.[79]

Therefore, the GPLv3 Revision Process adopts some of the restrictiveness of the "members only" agenda setting used by standards setting organizations and the United Nations. Even in Raymond's analysis, a bazaar needs a central maintainer to ensure the continuance of its project.[80] The GPLv3 Revision Process tempers its central power by providing avenues for broad community participation, and thus the potential for submission of new agenda items. Additionally, the GPLv3 Revision Process implicates the parties intimately involved with the drafting in the promotion of the final product.

## VII. AGENDA CONTROLLING

*The next best thing to having good ideas is recognizing good ideas from your users. Sometimes the latter is better.*[81]

Beyond needing an agenda setting body, initiatives typically need a leader to actually drive the process. As Raymond points out, however, sometimes the most useful outcomes arise not from the leader but from the constituent members.

The United Nations resolution process gives the Secretariat or chairman the power to rule on the boundaries of the discussion and declare the time for a vote.[82] A standards setting organization would be unlikely to establish any useful and meaningful standards without a committee to determine the projects needing attention since it would produce standards

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76. GPL v3 PROCESS DEFINITION, *supra* note 26, at 5–7, 15.
77. *Id.* at 1–3.
78. *Id.* at 3.
79. *Id.* at 10.
80. *See* RAYMOND, *supra* note 1, at 35–36.
81. *Id.* at 48.
82. *See* KAUFMANN, *supra* note 53, at 123–24.

no one would want.[83]   However, the leaders of these bodies are also members of the body.  Leaders must weigh delicate political issues when dismissing unfavorable or unpopular proposals.[84]

The Free Software Foundation serves as the leader for the GPL revision process.[85]   Dating back to the first version of the GPL, it is clear the Free Software Foundation has a political agenda—namely to protect the freedoms of software community to "run, study, copy, modify and redistribute software."[86]   In spite of their political view on copyright protection, they serve as a collection point around which participants can join and decide on the license as well as the form it will take.  Kaj Arnö, a GPLv3 revision discussion committee co-chair, said although "[n]ot all players will like the [Free Software Foundation's] position . . . [Free Software Foundation] is [a] 'benevolent dictator' . . . ."[87]

The Free Software Foundation serves as the sole arbiter of the rules and process used for drafting the license.  After all, the Foundation, at the end of the process, owns the license.  Therefore, the Foundation balances community participation with its objective of reaching a final instrument.  The Foundation selects the initial committee members that will make decisions based on community participation.[88]   The members selected for the discussion committees are prominent members from a wide variety of communities of interest.  Bank of America, Google, University of Texas, Harvard Law School, IBM, Accenture, several law firms, and the Commonwealth of Massachusetts are just a few examples of the diverse committee members selected from the GPL's users to "seed" the GPLv3 Revision Process discussion committees.[89]

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    83.    *See generally* ISO STRATEGY 2005–2010, *supra* note 54 (pointing out the important factors needed to "build[] the appropriate level of consensus to ensure that its deliverables are effectively used and recognized . . .").
    84.    *See* KAUFMANN, *supra* note 53, at 138 (pointing out the "chairman generally does not take initiatives on his own regarding matters of substance since this might involve him in controversy and affect his reputation for impartiality").
    85.    GPL V3 PROCESS DEFINITION, *supra* note 26, at i–iv.
    86.    *Compare id.* at 2, *with* Free Software Found., GNU General Public License Version 1 (Feb. 1989), *available at* http://www.gnu.org/licenses/old-licenses/gpl-1.0.html (noting that "[w]hen we speak of free software, we are referring to freedom, not price").
    87.    China Martens, *GPL 3 Draft Draws Mostly Positive Response*, INFOWORLD, Jan. 23, 2006, http://www.infoworld.com/article/06/01/23/74698_HNglp3response_1.html.
    88.    *See* GPL V3 PROCESS DEFINITION, *supra* note 26, at 9–10.
    89.    GPL Discussion Committees, *supra* note 55.

Notably, but perhaps not surprisingly, no standing committee featured a representative of Microsoft.[90] Skeptics could view this as the Free Software Foundation's attempt to control the debate by only selecting committee members who agree with the Foundation's point of view.

The Free Software Foundation attempts to strike a balance between controlling the agenda and giving freedoms to the process. The "benevolent dictator" analogy seems appropriate. The Free Software Foundation has the benevolent tendencies to promote the ideals of the free software movement and foster community involvement. Its benevolence is only in the eye of the beholder as others in the software or legal communities, like Microsoft for instance, would find the work of the Free Software Foundation distasteful. The Free Software Foundation wields its dictatorial power to form a strong core for the process through the Discussion Committees and by setting the process goals and procedures. From a practical standpoint, this paternal guidance provides a foundation upon which the process participants could build the license, allowing disputes to be resolved quickly and keeping the process on track both ideologically and temporally.

Borrowing from open source management philosophy, the benevolent dictator model is a management style where "final decision-making authority rests with one person, who by virtue of personality and experience, is expected to use it wisely."[91] In the GPLv3 Revision Process, the final authority rests with the Free Software Foundation who is a respected authority in the free open source software community. A successful benevolent dictator tempers their authority with self reflection on their power in the process and self restraint in using that power.[92] While serving as the head of the process, the Free Software Foundation allowed the discussion committees to self organize and authorized committees to invite other members they felt were needed to ensure the broadest debate possible.[93]

The Free Software Foundation walks a fine line between controlling the agenda and allowing the participants freedom to work. The Foundation

90. Microsoft and the free software movement have been at odds for many years. For instance, in leaked documents commonly referred to as the "Halloween Documents," a Microsoft engineer proposed extending standard protocols to hinder open source software running on or connecting with Microsoft's pervasive Windows platform. Microsoft, Microsoft Responds to the Open Source Memo Regarding the Open Source Model and Linux, http://web.archive.org/web/20000816190537/http://www.microsoft.com/NTServer/nts/news/mwarv/linuxresp.asp (last visited Apr. 6, 2008. *See also* Richard M. Stallman, Microsoft's New Monopoly, http://www.fsf.org/licensing/essays/microsoft-new-monopoly.html (last visited Apr. 6, 2008).

91. KARL FOGEL, PRODUCING OPEN SOURCE SOFTWARE 89 (2005), *available at* http://producingoss.com/en/producingoss.pdf.

92. *Id.* at 89–90.

93. *See* GPL V3 PROCESS DEFINITION, *supra* note 26, at 9.

serves as a collection point for the license. The cost incurred is the
control the Free Software Foundation may exert; limiting the freedom
for the license to take any form. However, if the Free Software Foundation
did overexert its power, it would tarnish its most valuable asset, namely
its reputation as a benevolent dictator. Without the faith of the open
software community, the adoption rates for the GPL would likely decline
and thereby devalue the license.[94] Faced with this losing position, it is in
the best interest of the Free Software Foundation to strive to maintain
their benevolent dictator status through the drafting process, thus helping
to mitigate the risk of the Foundation becoming overbearing. The Foundation
process seems to manage this risk with attempts to be transparent on at
least two dimensions.

First, the Free Software Foundation does not hide its ideological motives.
The objectives of the GPLv3 drafting process clearly state the four controlling
goals for the process.[95] Therefore, the Free Software Foundation notifies
anyone contributing to the process, in advance, what goals the organization
is seeking to achieve.

Contrast this motivational transparency with the motives of a standards
setting organization. "The objective of documents published by ISO and
IEC [the International Electrotechnical Commission] is to define clear
and unambiguous provisions in order to facilitate international trade and
communication."[96] "Facilitating trade and communication" necessarily
implicates profit motives. Java, a proprietary standard owned by Sun
Microsystems, attempted to gain ISO international standard designation.[97]
During the proceedings, Microsoft, a major competitor to Sun, with market
share to lose if ISO adopted Java as a standard, opposed Sun's application.[98]

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94.   *See* McGowan, *supra* note 48 (discussing how an open source project can fail
or fork due to violations of community norms). Once a project has failed or a new leader
starts a new branch, development on the original product is essentially at a halt which
could motivate consumers to choose the newer project. The community characteristics
embodied in the code as described in Professor McGowan's article are analogous to the
community characteristics embodied in the GPL. Essentially they face similar dilemmas
of standing together or falling together.
     95.   GPL v3 PROCESS DEFINITION, *supra* note 26, at 1–3.
     96.   ISO/IEC DIRECTIVES, PART 2, § 4.1 (Int'l Org. for Standardization & Int'l
Electrotechnical Comm'n 2005), *available at* http://www.iec.ch/tiss/iec/Directives-Part2-
Ed5.pdf.
     97.   Mark A. Lemley & David McGowan, *Could Java Change Everything? The
Competitive Propriety of a Proprietary Standard*, 43 ANTITRUST BULL. 715 (1998).
     98.   *Id.*

While Microsoft formally objected on technological grounds, its financial stake in the outcome was clear.[99]

Contrast further the motivational transparency of the Free Software Foundation with the United Nations' resolution process. Nations present resolutions at the United Nations to press divisive political issues which may not directly relate to the aims of the resolutions' text, but nonetheless draw the issues into question through the process. As a gross example, examine the resolutions leading up to the war in Iraq.[100] Security Council Resolution 1441, passed on November 8, 2002, gave Iraq "a final opportunity to comply with its disarmament obligations."[101] Some believe Resolution 1441 then served as the basis for justification, on the international stage, for the subsequent invasion of Iraq.[102]

The second mode of transparency which the Free Software Foundation employs relates to the publicly available debate on all comments. Anyone with access to the Internet could review all drafts and comments there upon via the GPLv3 web site.[103] The Free Software Foundation also conducts "public meetings" using an Internet chat system to collect feedback on its licenses.[104] After the meeting, the Foundation posts the transcripts from debates on its web site.

Additionally, all comments passed to a discussion committee must arrive at one of four outcomes. The committee will address the issue: (1) by a modification to the draft, (2) by a modification to the descriptive material accompanying the draft, (3) by issuance of advice on using the license, or (4) by doing nothing.[105] Regardless of which method the committee chooses to take in resolving the point, a record will exist that: (1) someone raised the issue; (2) the committee considered the issue; and (3) the committee took some action, even if it was to do nothing. "Lawyers need to understand that inaction always has an effect; 'doing nothing' is 'doing something.'"[106]

Determining the how and why of resolutions, standards or treaties can often be very complicated. In resolution drafting, the evolution of the final wording may not be of record even if parties ultimately negotiate

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99.  *Id.*
100.  Bennis, *supra* note 73.
101.  S.C. Res. 1441, ¶ 19.2, U.N. Doc. S/RES/1441 (Nov. 8, 2002).
102.  Bronwen Maddox, *No Way to Bridge the Diplomatic Gulf*, TIMES (London), Mar. 8, 2003, at 17, *available at* http://www.timesonline.co.uk/tol/news/world/article1071888.ece.
103.  GPL V3 PROCESS DEFINITION, *supra* note 26, at 7, 10.
104.  *See* Free Software Found., First IRC Meeting Wrapup, http://www.fsf.org/blogs/licensing/2007-09-28-irc (last visited Apr. 6, 2008).
105.  GPL V3 PROCESS DEFINITION, *supra* note 26, at 1–3.
106.  Kathleen Waits, *Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 ALB. L. REV. 1027, 1042 (1995).

an acceptable formulation.[107]  The final motive for voting for or against a particular resolution can be hidden or, worse, unduly influenced.[108] Nations sometimes choose to pursue bilateral talks when negotiating treaties because of the relative ease of working with individual nations, one on one, rather than building consensus within a larger group.[109] Here too, however, the deal ultimately struck may have ulterior issues lurking in the background other than the main focus of the treaty.[110]  For example, "[i]n all its bilateral agreements, the United States is using its economic muscle to help big drug companies protect their products from generic competitors."[111]

Therefore, strong leaders that control the agenda can act as road blocks or facilitators to consensus.  The essential characteristic of the leader is the trust they earn from the community.  Part of the bazaar analogy is that the market place is an open space for exchange of ideas.  If the leader wields their power exclusively, the community support will not exhibit the enthusiasm or breadth for the project and change the process into a more cathedral like endeavor.  But by carefully mitigating power and taking on a benevolent tone, a community process remains a bazaar where participants are free to exchange ideas and excited to do so.

## VIII. KEEPING TIME

*Release early. Release often. And listen to your customers.*[112]

Another administrative task the Free Software Foundation performed was establishing a timetable for the revision process.  By setting a timeline, the Free Software Foundation lowered the cost of negotiating the license because the process was set for a certain period of time,

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107.  KAUFMANN, *supra* note 53, at 119–20.
108.  For example, in Bennis, *supra* note 73, a U.S. diplomat said Yemen's vote in the United Nations against a U.S. proposal was the "most expensive No vote you ever cast." The U.S. cut Yemen's aid package the next day. *Id.*
109.  Blum, *supra* note 34, at 338.  "BLTs [bilateral treaties] can produce arrangements that are more coherent in that they tailor their arrangements to the specific needs and circumstances of the particular dyadic relationships they purport to regulate.  BLTs are better structured to meet the problems associated with fragmentation, competing values, and cultural diversity." *Id.*
110.  Joseph E. Stiglitz, Op-Ed., *New Trade Pacts Betray the Poorest Partners*, N.Y. TIMES, July 10, 2004, at A17, *available at* http://www.nytimes.com/2004/07/10/opinion/ 10STIG.html?fta=y.
111.  *Id.*
112.  RAYMOND, *supra* note 1, at 39.

ending with final release no later than March of 2007.[113] The timeline also called for drafts to be released early and often, the first draft being released in January 2006 and the second draft just 6 months later in June.[114]

These release dates acted as mini deadlines forcing progress towards the ultimate final release date but also fostering debate. The debate led to changes in the document, but by having a timetable and releasing incremental versions for discussion, the final product better represented the needs of the community. This improvement is because: (1) it incorporated the ideas of the community and (2) it was released for use rather than being stuck in development.

The Free Software Foundation also ensured the debate did not languish indefinitely by setting deadlines for the revision process.[115] In the United Nations, a resolution draft can circulate informally and indefinitely, until the sponsors finally deposit the draft with the Secretariat.[116] The debate and amendment period may also continue without a deadline.[117] A member nation may also postpone an issue using procedural motions.[118] "Delay can indirectly 'kill' a proposal, especially if the idea cannot be revived later or if the opposition to it meanwhile grows."[119] Delay could be a tactic used to stall an unfavorable proposal until a more accepting climate arrives, but nonetheless the instrument is still not moving forward.

In a similar fashion, the international standards organizations' drafting process may also continue for an indefinite period of time.[120] The ISO standards process does not set out a time frame for resolution on a particular project, only a minimum required number of votes for a particular standard to continue through the process.[121] Once a standard leaves committee stage, the ISO Central Secretariat sends standards not garnering enough votes back to committee for further consideration.[122] In the case where Sun Microsystems sought to formally standardize Java, the standards body could not reach a consensus on the standard, essentially stalling its adoption.[123] Furthermore, because a committee

113. GPL V3 PROCESS DEFINITION, *supra* note 26, at 15.
114. *Id.*
115. *See id.*
116. KAUFMANN, *supra* note 53, at 120–21.
117. *Id.* at 123.
118. *Id.* at 130.
119. *Id.* at 127.
120. Int'l Org. for Standardization, Stages of Development of International Standards, http://www.iso.org/iso/standards_development/processes_and_procedures/stages_description .htm (last visited Apr. 6, 2008).
121. *Id.*
122. *Id.*
123. Lemley & McGowan, *supra* note 97.

that may be considering competing standards decides when and if to take
the vote, delays in deliberation or activity on other issues can slow down
the adoption of a proposed standard, either to ensure the best standard is
adopted, or as a strategic move by market competitors.[124]

Deadlines are an important part of achieving consensus.[125]  Compare
the U.N. resolution process and ISO standards process to treaty situations
where the parties often work under tight deadlines to reach an agreement.
Negotiating under the pressure of a deadline can reduce the cost and
length of negotiations and possibly lead to a more effective instrument.[126]
A deadline can also encourage deadlocked parties to make decisions.[127]
Absent a deadline, parties may consciously delay the negotiation thus
adding a burden not only to the final instrument, but also to transaction
costs of generating the instrument.[128]

On the other hand, forcing consensus by a deadline may not always be
the most effective means for arriving at an agreement.[129]  One of the
criteria for a deadline's effectiveness is the size of the group impacted by
the ultimate decision.  The fewer parties and interests represented in the
outcome, the more effective the deadline would be in achieving a successful
negotiation.[130]  Therefore, a deadline is most effective when the group
acting under the deadline is focused.

## IX. FOCUSING THE PROCESS

*Treating your users as co-developers is your least-hassle route
to rapid code improvement and effective debugging.*[131]

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124.    Mary Catherine O'Connor, *Japan Offers ISO a Gen 2 Alternative*, RFID J.,
Feb. 10, 2005, http://www.rfidjournal.com/article/articleview/1396/1/1/ (suggesting one
company submitted a proposal to ISO to stall the movement of another company's
standard).
125.    Gerald W. Cormick, *Crafting the Language of Consensus*, 7 NEGOTIATION J.
363, 367 (1991) (discussing the power of a deadline in reaching a consensus).
126.    *See* Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J.
1, 75 (1982).
127.    HARVARD BUSINESS ESSENTIALS: NEGOTIATION 55 (2003).
128.    Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated
Rulemaking*, 3 YALE J. ON REG. 133, 140 (1985).
129.    Dexter Filkins & James Glanz, *Leaders in Iraq Extend Deadline on
Constitution*, N.Y. TIMES, Aug. 16, 2005, at A1 (suggesting that friction between factions
may increase if the Iraqis forced a quick consensus).
130.    Cary Coglianese, *Assessing Consensus: The Promise and Performance of
Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1329 (1997).
131.    RAYMOND, *supra* note 1, at 37.

The leader of the process is a natural choice as the source of focusing the process. By their nature, software projects have a focus, whether it be to develop a new operating system or a better text editor, but honing this focus onto the problems and features that are most important not only to the developers by also to the community is essential for the open source development model to succeed.[132] Luckily for the software community, the customers are often the developers. In law however, this focus is not always a natural co-existing phenomenon.

The GPLv3 Revision Process limited its focus to developing a legal instrument to govern the distribution of software. The GPL does not place limits on the parties allowed to participate in the revision process by allowing public comments and participation in debate.[133] But those who choose to participate will typically have an interest in free software thus limiting the interested parties. The GPLv3 Revision Process did not have a mandate to include other issues which could distract the commission such as the types of software to be protected, or the language software must be written in to be protected.[134] The process could have included these types of provisions if enough members felt it furthered the goals of the GPL, but by keeping the focus on a narrow set of goals, the process help foster successful negotiation.

Treaty negotiations may not have the same focus as the GPLv3 Revision Process. Treaty negotiations are subject to external political factors that can expand the field issues of the negotiation. For instance, topics discussed in Israeli Palestinian negotiations were all over the map, literally.[135] Furthermore, because the external political situation is not static, arriving at a consensus can be a juggling process.[136] Because some treaty negotiations do not have a focus, the negotiations may stall or fail.

The United Nations resolution process also contends with political issues.[137] The trouble with building the consensus is exacerbated by the fact that resolutions need sponsors to reach the debate floor. This requires the drafters to coordinate with several nations at once in an attempt to create a version of the resolution that stays true to their original intentions

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132.    *Id.* at 36–37.
133.    GPL V3 PROCESS DEFINITION, *supra* note 26, at 10; GNU GPL Draft, *supra* note 58.
134.    However, some may argue about the boundaries of what protections should be included. Some comment that the inclusion of digital rights management (DRM) provisions oversteps the license's scope. Posting of Linus Torvalds to http://lkml.org/lkml/2006/2/1/377 (Feb. 1, 2006, 14:31 PST). On the GPLv3 DRM provisions, "I personally think that the anti-DRM clause is much more sensible in the context of the Creative Commons licenses, than in software licenses." *Id.*
135.    Steven Erlanger, *In Annapolis, Much Hope for Leaders' Cooperation, but Little for Results,* N.Y. TIMES, Nov. 25, 2007, at A26.
136.    Filkins & Glanz, *supra* note 129.
137.    *See* KAUFMANN, *supra* note 53, at 119–20.

but includes enough provisions to garner the support of cosponsors. These "behind the scenes" prenegotiations do not appear necessary in the GPLv3 process. Individuals can submit comments to the revision committee and these are openly debated without any initial compromises or back dealing needed to start the discussion on a given proposal.

The United Nations also has a broad mandate which allows member nations to present resolutions on a variety of topics.[138] While this allows the United Nations to use its power to affect change in a wide number of ways, the breadth comes at a cost of difficult consensus building. Because of the diverse nations involved in the process, mandatory resolutions are often defeated or avoided altogether.[139] The GPLv3 Revision Process may also face the same diversity issues. The GPLv3 helped reduce diversity by focusing area of interest, namely software licensing. The GPLv3 process then used the diverse opinions to build a stronger web of support as well as a license with broader applicability. When an issue galvanizes a group, such as world hunger or free software, the goal may serve as a polestar to encourage participants to set aside minor differences in favor of the achieving the larger goal.

Even if debate on a resolution closes, the General Assembly may not even vote on the issue but rather the chairman can declare a consensus.[140] The United Nations declares a consensus if "[t]he action to be taken is more or less agreed, but the drafting of a specific text would cause insurmountable difficulties."[141] However, the consensus position is typically a "vague or general" statement of all positions.[142] Thus, a draft resolution with "bite" may effectively have its teeth removed.

Focusing the topic not only narrows the realm of decision points, but also encourages highly specialized participants. A delegate may discuss a United Nations resolution on climate change generally, but a final instrument should collect expert opinions be collected and synthesize them into a final instrument. Lawyers, not statesmen, typically draft

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    138.   For example, in 2006 the United Nations General Assembly passed almost 300 resolutions.  *See* U.N. DEP'T OF PUB. INFO., DAG HAMMARSKJÖLD LIBRARY, RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY AT ITS 61ST SESSION, http://www.un.org/Depts/dhl/resguide/r61.htm (last visited Apr. 6, 2008).
    139.   KAUFMANN, *supra* note 53, at 119.
    140.   *Id.* at 127–28.
    141.   *Id.* at 129.
    142.   *Id.*

treaties.[143] "[T]he government's international lawyers exerted a 'major influence' on the views and policies of the U.S. government and . . . their work was indispensable to the conduct of foreign affairs."[144] Most lawyers fancy they are experts, but do not necessarily operate in the communities their decisions will influence.

In contrast, the experts "from industry, the academy, and the garage" are involved with the GPLv3 Revision Process.[145] The Free Software Foundation selected core members of the discussion groups from a variety of fields sharing an interest in free software.[146] The process necessarily embraces the need for community involvement by inviting the public to participate and empowering the discussion committees to invite other necessary parties to the table.[147] This method of organization helps reduce the cost of collecting the experts because the Free Software Foundation selects an initial group to represent the core of the process. If the core is disreputable, the final product will be suspect since the community would distrust any decisions flowing from the process. With the Free Software Foundation's and GPL's reputations at stake, however, there is incentive to select the best committee members.

The Free Software Foundation not only sets the stage for finding the top professionals from their respective fields, but it also provides a context for harmonizing the debate since they are likely to all be from similar fields rather than diplomats that might have diverse backgrounds. For example, terminology hurdles that may exist between a climatologist and a diplomat are likely to be lower between a corporate intellectual property attorney and a software engineer. The focused principles of the GPLv3 Revision Process seem narrow enough to provide a manageable idea-space where participants will have common ground to debate and ultimately reach a decision. Lowering the cost of negotiation by efficiently collecting the appropriate experts and by helping the most diverse members of the group debate gives the bazaar mode of development an advantage over the traditional cathedral modes.

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143. OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL 2006/2007, at 298 (2006) (reporting that Office of Legal Adviser lawyers serving the Secretary of State "draft, negotiate, and interpret treaties [and] international agreements . . . [and] represent the United States in meetings of international organizations and in international negotiations . . . [and] before international tribunals").
144. Hilary Charlesworth, *Saddam Hussein: My Part in his Downfall*, 23 WIS. INT'L L.J. 127, 130 (2005) (citing Richard Bilder, *The Office of the Legal Adviser: The State of Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633 (1962)).
145. Richard M. Stallman & Eben Moglen, GPL Version 3: Background to Adoption, http://www.fsf.org/licensing/essays/gpl3-background.html (last visited Apr. 6, 2008).
146. GPL V3 PROCESS DEFINITION, *supra* note 26, at 9–10.
147. *Id.*

## X. INSTITUTIONAL CONTINUITY

*When you lose interest in a program, your last duty is to hand it off to a competent successor.*[148]

Institutions help provide a structure to drafting processes. The members gather and decide on general rules for assembling and proceed, typically, with a common goal or mission statement to guide their actions. Institutions which draft instruments may form for one purpose and then disband after completing their work.

Other institutions live past a single instrument and take up new work once the assembly dispenses old work. Whether parties involved in the drafting instrument A today will also be negotiating instrument B tomorrow can affect their behavior in both situations. This quid pro quo situation where one party will concede a point to another on an issue in return for concessions on an unrelated subsequent issue is at the heart of many international negotiations.[149] Table 2 provides an overview of the degree to which the drafting modes are: (1) institutionalized and (2) continuous.

TABLE 2

RELATIVE INSTITUTIONAL CONTINUITY OF
DRAFTING PROCESSES

|  | DEGREE OF INSTITUTIONALISM | DEGREE OF CONTINUITY |
|---|---|---|
| U.N. RESOLUTIONS | Highly | Highly |
| INTERNATIONAL STANDARDIZATION ORGANIZATION | Highly | Highly |
| TREATIES | Slightly | Moderately |
| GPLv3 | Slightly | Slightly |

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148. RAYMOND, *supra* note 1, at 36.
149. For example, in 2006, the United States had trouble negotiating treaties with India on various points. Somini Sengupta, *An Assertive India Girds for Negotiations With Bush*, N.Y. TIMES, Feb. 28, 2006, at A8 (highlighting some of the difficulties in arriving at a in negotiations between the United States and India on a variety of topics); *see generally* Joshua Robbins, *The Emergence of Positive Obligations in Bilateral Investment Treaties*, 13 U. MIAMI INT'L & COMP. L. REV. 403, 438–39 (2006) (discussing the role quid pro quo plays in international law).

The United Nations and international standards setting organizations are examples of continuous institutions. The United Nations will move to the next item of business once the President declares the current item complete.[150] Similarly, a standards setting organization moves on to new versions of the standard or takes up a different standard once a review cycle is complete.[151] In both instances, the participating parties remain relatively constant and the organizations live beyond the instrument.[152]

In the case of treaties and the GPLv3, the processes are terminal and typically set forth a date on which the instrument should be complete.[153] If nations agree on the terms of a treaty, the meeting ends and the nations announce the treaty. There may be subsequent national ratification as well as subsequent treaties which modify the original document, but there is little institutional scaffolding that can influence one round of treaties to the next.

The treaty process, however, is subject to a certain degree of quid pro quo negotiation. Nations will continue to have relationships and their ongoing relationships can influence behavior across negotiations. Practically, treaty negotiation between nations must consider the past to ensure each side honors existing commitments or is willing to replace previous agreements with new decisions.

The cost to a continuous relationship is that "repeat players" have "low stakes in the outcome of any one case, and . . . the resources to pursue its long-run interests."[154] Furthermore, in the long run, the institution lives longer than its constituent members. "One shot" players, on the other hand, will be relatively indifferent to the subsequent ripples caused in any one instance because they will not return for future considerations.[155] In the realm of drafting, making a decision as a one shot player comes with a degree of freedom from the future, but at the cost of limiting the development of a long term relationship with the drafting process.

The community's attitudes toward the drafting process can help one shot players to refocus on the future. If the community feels strongly about the process, a one shot player gains some of the advantages

150.  *See generally* U.N. RULES OF PROCEDURE 2006, *supra* note 63 (appointing the President of the General Assembly as the person responsible for coordinating General Assembly meetings and upholding the rules of procedure).
151.  Int'l Org. for Standardization, How are ISO Standards Developed?, http://www.iso.org/iso/standards_development/processes_and_procedures/how_are_stan dards_developed.htm (last visited Apr. 6, 2008).
152.  Over time, member organizations may appoint new delegates, but the primary party involved in ISO and the United Nations is a national-level interest rather than individuals. *Id.*; U.N. RULES OF PROCEDURE 2006, *supra* note 63.
153.  GPL V3 PROCESS DEFINITION, *supra* note 26, at 5–6.
154.  Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98 (1974).
155.  *See id.*

enjoyed by repeat players. In particular, the institution formed by the
community exists longer than its constituent members. The GPL process,
through the Free Software Foundation, serves as a community linked by
Richard Stallman's "free software" principles.[156] One of the most relevant
advantages enjoyed by repeat players is establishing and maintaining
credibility.[157] In the case of the GPL, credibility is a large part of what
drives people to trust and adopt the license and ultimately makes the
license valuable.

The GPLv3 Revision Process appears to be an institutional but non-
continuous process. The Free Software Foundation centrally coordinates
the revision process.[158] While each revision process would incur the cost of
establishing a new set of drafting rules, each subsequent revision can
draw on the institutional experience of previous drafts to inform the next
version's procedures. Similar to the United Nations, the Free Software
Foundation drafting process can evolve over time. However, the Free
Software Foundation's process can evolve more easily because each time a
revision is scheduled, the Free Software Foundation can promulgate
the rules of procedure. The United Nations, on the other hand, must follow
an existing process to affect change.[159]

The notable distinction between the GPL revision process and the United
Nations is that the revision process does not require the same members
from version to version. The only required repeat player for the GPL
process is the Free Software Foundation as owner of the license.[160]
The GPL revision process does not require identical discussion committee
members or public comments. This can be either a cost or a benefit for
the GPL process.

By not requiring continuity it is possible for one revision committee to
develop a version that is drastically different from previous versions
because the parties and rules used to draft it are so different. This drastic
difference can be a positive aspect of the process because it encourages
the process to change over time to take advantage of modern methods of
organization and communication. Similarly, differences within the
instrument over time may also benefit by taking advantage of more

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156.    Stallman, *supra* note 20, at 59–60.
157.    Galanter, *supra* note 154, at 98–99.
158.    *See generally* GPL V3 PROCESS DEFINITION, *supra* note 26, at iii–iv.
159.    *See* U.N. RULES OF PROCEDURE 2006, *supra* note 63, at 43–44.
160.    The Free Software Foundation, as publisher of the GPL, is its copyright holder.
Free Software Found., GNU General Public License Version 3 (June 2007), *available at*
http://www.fsf.org/licensing/licenses/gpl.html.

recent social and legal thought. If the goal of the instrument is to be a standalone item, then the variation may be acceptable. If the goal of the instrument is to build and form a continuous chain, however, this may present consistency issues from a legal standpoint and confusion from an adoption standpoint since each new version may introduce undesirable provisions.[161] While the GPLv3 Process Definition points to the history of the license, the document also indicates the desire to break with the old versions in light of new technology, new issues, and users' opinions.[162]

The GPLv3 Revision Process specifically calls for the use of modern Internet technologies for coordination and dissemination of revision.[163] Despite the availability of these technologies, the United Nations does not formally recognize these connective technologies in its rules. The United Nations is an institution with tradition, and perhaps the institutional stasis prevents adoption of new ways of transacting business.

By continually experimenting with legal arguments and forcing various legal ideas to compete into or out of a version, the instrument can obtain similar benefits gained from a Federalist system.[164] "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[165]

The participants in the GLPv3 process are codependent only in their desire to provide the same protection for their software. In the end, a party can decide not to adopt the revision if a required provision is missing from the license or the license does not meet the author's expectations.[166] The revision process is similar to a constitutional convention. A central power calls it into being and empowers the parties to draft a new instrument. The convention may not be strictly limited in its focus and

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    161.    Within the GPL community there is much debate on whether to adopt Version 3 or stand at Version 2. The Open Road, http://www.cnet.com/openroad (July 9, 2007 8:33 PM PDT). However, as of August 31, 2007, an open source research group involved with the revision process estimated that roughly fifty percent of the open source projects licensed under the GPL upgraded to Version 3. The Open Road, http://www. cnet.com/openroad (Aug. 13, 2007, 11:57 AM PDT).
    162.    GPL V3 PROCESS DEFINITION, *supra* note 26, at iii–iv.
    163.    *Id.* at 10.
    164.    By having state and federal courts share jurisdiction over issues, new theories can be tested in the state courts and either adopted or rejected later at the federal level. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
    165.    *Id.*
    166.    For instance, Linus Torvalds, developer of the Linux operating system, considered not adopting version 3 of the GPL because he objected to a provision that would require Linux contributors to share encryption keys. Posting of Linus Torvalds to http://lkml.org/lkml/2006/1/25/273 (Jan. 25, 2006, 17:39:16 EST).

may consider topics broader than their initial mandate.[167] When the convention is over, the committee passes the product onto the larger community for approval or adoption.

Because the GPLv3 revision process provides a high level institutional infrastructure coupled with a dynamic participant pool, the legal instrument resulting from the process can reap many benefits. In particular, it benefits from the structure and prior experience of a continuous institution for the process of drafting, while freeing itself to act as a noncontinuous, noninstitutional organization for the actual work of adding ideas to the instrument. Herein lies the value of the GPLv3's process.

## XI. TRANSLATION

*When writing gateway software of any kind, take pains to disturb the data stream as little as possible—and never throw away information unless the recipient forces you to.[168]*

Once the process produces its final instrument, the final task is to make sure the drafting body effectively communicates the decisions to the world. This problem is not unique to the final drafted instrument, but could also arise earlier in the process as the drafting body decides the terms of the agenda through the debating process. However, those using the process or instrument will ensure they achieve the intended outcomes by focusing on the data stream and ensuring that the fidelity of its contents.

Any global instrument, whether it is a license, treaty, standard or resolution, needs to undergo some translation to ensure the instrument carries the drafters' intention around the world. Once drafted, a written instrument may require literal translation, social translation, and legal translation to fulfill its purpose. Literal translation is taking the written word and converting it to the written word of another language. Legal translation may be necessary to map an instrument's provisions to the local legal regime.[169] In some instances, however, translating an instrument may be impossible or prohibitively difficult.[170]

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167. *See* Walter E. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention,* 88 YALE L.J. 1623, 1624 (1979) (arguing a convened convention may focus on one issue but is not required to do so).

168. RAYMOND, *supra* note 1, at 54.

169. *See* discussion *supra* pp. 13–14 and discussion *infra* pp. 50–51.

170. *See* Michael P. Van Alstine, *Treaty Law and Legal Transition Costs,* 77 CHI.-KENT L. REV. 1303, 1321 (2002) (noting that translation does not need to necessarily be

In the United Nations drafting process, the rules require translation of a resolution into the six working languages.[171] When limited to the six working languages, translation issues often require changes to a proposed resolution.[172] Sometimes a literal translation of the original text to another working language is unavailable.[173] United Nations resolutions are negotiated between and amongst various nations around the world. Translation may also be hindered because the text of a resolution may "offend the customs" of other delegates.[174] The United Nations has a formal notion of "consensus" which a chairman can declare if translation proves "insurmountable."[175]

Each sovereign nation has some recognized system of jurisprudence. Within these individual systems, the law may take on unique meaning that may be inconsistent with neighboring nations. "[L]egal terms of art from another legal system may not be easily or completely translated into the judge's language. This is a particular problem when the official text of the treaty is written in only one language."[176] Most treaties and resolutions require each signatory nation to take national steps to enact the provisions. During this national phase, the legislatures may arrive at different interpretations, for various reasons, as to what those who negotiated the treaty actually agreed upon.[177]

The Free Software Foundation addressed these problems head on in the third revision process, making the global nature of the license the primary objective of the exercise.[178] Version 2, while focusing on the Berne Convention[179] as a standard assumption for the license, used the language of copyright law of the United States.[180] For example, several provisions in

into different languages; even in the same language, courts encounter difficulty in translating the terms of a treaty).

171.   U.N. RULES OF PROCEDURE 2006, *supra* note 63, at 16.
172.   KAUFMANN, *supra* note 53, at 123.
173.   *See id.*
174.   *Id.*
175.   Under this process, the chairman would broadly draft a statement reflecting what he or she believes to be the general view on the issue. *Id.* at 127–29.
176.   Michael S. Straubel, *Textualism, Contextualism, and the Scientific Method in Treaty Interpretation: How Do We Find the Shared Intent of the Parties?*, 40 WAYNE L.REV. 1191, 1211 (1994).
177.   *See* Keith D. Sherry, Comment, *Old Treaties Never Die, They Just Lose Their Teeth: Authentication Needs of a Global Community Demand Retirement of the Hague Public Documents Convention*, 31 J. MARSHALL L. REV. 1045 (1998) (identifying the need for authentication of what the provisions in a treaty mean).
178.   GPL V3 PROCESS DEFINITION, *supra* note 26, at 1–2.
179.   Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221, *available at* http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf.
180.   GPL V3 PROCESS DEFINITION, *supra* note 26, at 1.

version 2 refer to "distribution" of software.[181] "However, we later found out that copyright laws in other countries use the same word, but give it different meanings. Because of this, a judge in such a country might analyze GPLv2 differently than a judge in the United States."[182] Revision 3 opted for the more global term "convey" and explicitly defined the term in the license to ensure the instrument did not require judges to interpret the license's provisions.[183]

The GPLv3 Revision Process addresses the social translation issues in two ways. First, by establishing a diverse discussion committee base, the Free Software Foundation attempted to account for an array of known points of view.[184] Acknowledging it may have overlooked an important player, the Foundation enabled each committee to invite additional members as needed. Thus, a committee could add a member to help understand an unrepresented foreign regime's social or legal understanding of the license.

The second way the GPLv3 Revision Process helps social translation is by narrowly focusing the topics the process will address. The United Nations has a wide range of concerns while the GPL is limited to software distribution.[185] By topically limiting the negotiations and collecting parties from diverse yet overlapping areas, the Free Software Foundation creates a community for revising the GPL. This creates a social structure united by the free software principles which helps the process of social translation.

One way the GPLv3 Revision Process eases legal translation issues grows from the social community created by the GPL. Revision participants from legal fields (e.g. lawyers, law firms, corporations interested in software) join the GPL community. In joining the community, the legal professionals acknowledge the goals of the process. When legal professionals debate provisions for the license, their understanding of the GPL's goals in relation to their understanding of their local legal regime will help

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181. "This License applies to any program or other work which contains a notice placed by the copyright holder saying it may be distributed under the terms of this General Public License." Free Software Found., GNU General Public License Version 2 (June 1991), *available at* http://www.gnu.org/licenses/old-licenses/gpl-2.0.html.

182. BRETT SMITH, A QUICK GUIDE TO GPLV3, at 5 (2007), http://www.gnu.org/licenses/quick-guide-gplv3.pdf.

183. *Id.*; Free Software Found., GNU General Public License Version 3, *supra* note 160.

184. *See* GPL V3 PROCESS DEFINITION, *supra* note 26, at 9–10.

185. *Compare* U.N. Charter pmbl. (broadly stating the aims of the United Nations, e.g. "promote social progress"), *with* GPL V3 PROCESS DEFINITION, *supra* note 26, at 1–3 (narrowly defining the four aims of the Revision Process).

ensure proper mapping between the two systems. The legal professional who participates in the process acts as a translator between the GPL world and their local legal regime.

Another way the process helps ensure proper legal translation is by issuing advice on how to use the license.[186] The Free Software Foundation archives the advice on their public website for future consideration by license adopters, lawyers, or courts.[187] The Free Software Foundation becomes a clearinghouse for the license's interpretation and enforcement. The Free Software Foundation provides usage guidance to potential adopters.[188] The Foundation also hosts a Frequently Asked Questions webpage to address common concerns about the license and its usage.[189] Finally, the Foundation provides a procedure for notifying them of potential violations of the license.[190]

Translation is effectively ensuring the "data stream" does not "throw away any information" about the legal instrument. Because the GPLv3 Revision Process provides mechanisms to support literal, social, and legal translation of the license, the process exhibits advantages over the traditional drafting modes used for creating a global legal instrument.

## XII. CONCLUSION

In a transnational drafting process, explicit and implicit factors affect the amount of work that needs to go into a process for it to achieve its goals. Explicit factors making more work for a drafting body include: (1) the number of issues the body addresses, (2) how the body addresses the issues, (3) the number of participants, and (4) the degree of diversity amongst participants. Implicitly these factors increase the work required to draft an instrument by introducing politics and increasing organizing and translation costs.

A narrowly focused, both temporally and topically, transnational drafting process started by a central authority with a reserved administrative authority that solicits open participation from the communities of interest in the instrument strikes an efficient balance of costs and benefits producing an instrument. Return now to Eric S. Raymond's cathedral and bazaar analogy. The foundation for bazaar-style development

186. GPL V3 PROCESS DEFINITION, *supra* note 26, at 12.
187. Free Software Found., How to Use the GNU Licenses for Your Own Software, http://www.fsf.org/licensing/licenses/gpl-howto.html (last visited Apr. 6, 2008).
188. *Id.*
189. Free Software Found., Frequently Asked Questions About the GNU Licenses, http://www.fsf.org/licensing/licenses/gpl-faq.html (last visited Apr. 6, 2008).
190. Free Software Found., Reporting Violations of GNU Licenses, http://www.fsf.org/licensing/licenses/gpl-violation.html (last visited Apr. 6, 2008).

is a "plausible promise."[191] The GPL's plausible promise is free software. Using this plausible promise, the bazaar manager can attract other participants.[192] The GPL's promise of "free software" appeals to individual software developers interested in protecting their work as well as businesses interested in using software that suits their strategic long term goals. The GPLv3 Revision Process reflects these interested parties.

However, attracting other participants is only half the problem, getting these participants to contribute requires the bazaar manager to be personable and a good communicator.[193] The Free Software Foundation plays its role as "benevolent dictator," providing paternal leadership for the revision process. Should the Free Software Foundation burden the process, its reputation and the reputation of the license would diminish. This diminishment would ultimately lead to a reduction in the value of the license.

Similarly, because the GPLv3 Revision Process happens in a largely virtual environment, clear communication amongst members is essential to success. Practically, the Free Software Foundation fosters communication by using various technologies to promote collaboration and preserve transparency in the decision making process. Ideologically, the Free Software Foundation communicates the revision's goals in the form of a process document to help focus participants.

Another virtue of the bazaar-style of development is iteration through several versions of the product. The GPLv3 Revision Process called for at least three discussion drafts before the final release.[194]

"The cost of litigation [over copyright ownership] is out of reach for many academics. . . ."[195] One may extend this argument for the average hobbyist working on a pet coding project. Mr. Greenbaum suggests that "[w]hat is needed is simple, minimalist legislation that will yield predictable results."[196] Legislation, however, is not the only solution to solving the issue of how to enable a wide audience to protect their work. An instrument, such as GPLv3, could also provide a "minimalist" approach that can "yield predictable results."[197]

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191. RAYMOND, *supra* note 1, at 58.
192. *Id.*
193. *Id.* at 60.
194. GPL V3 PROCESS DEFINITION, *supra* note 26, at 15.
195. Greenbaum, *supra* note 43, at 499.
196. *Id.*
197. *See id.*

Beyond yielding predictable results, though, in a system where resources are scare, worth is the resulting instrument's value measured against the resources used to create it. Instrument's gain their value based on the institutions that back them. The GPL does more than protect software rights; it is the means to enable the philosophy of the free software community. In the treaty drafting community, minority factions can simply ignore treaties.[198] Standards may pass the international committee, but adoption by the public at large is voluntary.[199] In ISO's view, the market is the key factor.[200] In the free software world—the bazaar world— the community, in the end, is what matters.

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198. *Cf.* Blum, *supra* note 34, at 350.
199. Int'l Org. for Standardization, *supra* note 151.
200. *Id.*