

L^{and}aw Technology

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MONDAY, JANUARY 29, 2007

Open Source, Open Legal Issues

The software that offers so many opportunities for business requires careful management.

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SOFTWARE IS FOUND in virtually all products, from automobiles that use it to control fuel mixtures, brakes and stability control, to television sets that incorporate hard disks, Linux operating systems and other software in order to provide functions ranging from HDTV to digital video recording (the Linux operating system is probably the best known and most widely adopted open source program.) And virtually all businesses rely on software for their operations from word processing to accounting to customer relations management.

This pervasiveness of software and its importance to business means that the spread of a new method of developing and distributing

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software, the "open source" movement, is important for those businesses. Open-source software is becoming ubiquitous because of its low cost, ability to modify and ease of change to a different type of software (unlike the "lock in" of proprietary software).

And it has gone way beyond just Linux. According to Dr. Anthony Picardi, senior vice president of global software research for the consulting firm IDC, "The use of open source beyond Linux is pervasive, used by almost three-quarters of organizations and spanning hundreds of thousands of projects." <http://www.idc.com/getdoc.jsp?containerId=202511>

Open source software is best defined by the 10 principles of the Open Source Definition developed by the Open Source Initiative (www.opensource.org). Briefly, open source software is developed in an "open" manner in which the source code (the human readable version of the software) is widely available for review and modification by any developer, subject to the terms of the open source license.

Many open source licenses require that the distribution of the object code (which is

not human readable) include either a copy of the source code or the right to receive the source code. Furthermore, these licenses give the licensee the rights, without charge, to (a) modify the software and (b) redistribute the software (whether or not modified).

Many Fortune 500 companies such as IBM, Google, Wells Fargo, DaimlerChrysler and E-Trade use open-source software. And many major computer vendors such as IBM, Oracle, Sun, Sony and HP have incorporated open-source software in their products.

Some companies have shifted major software products from a commercial to an open-source licensing model: Sun Microsystems Inc. released its Solaris operating system and CA Inc. released its Postgres database software under open source licenses. Microsoft has admitted the attractiveness of this business model through its engagement with open source companies such as SugarCRM, Inc. and Zend, Inc. Even the Department of Defense, in a recent strategic report on its IT needs, advocated the use of open-source software.

However, companies need to be aware that the use of open source software must be carefully managed, because many legal issues

remain uncertain. The failure to manage the use of open source software can lead to violation of the open source licenses; the use of software without a license is a violation of copyright law and creates potential liability for significant damages.

A different problem can arise from the combination of software licensed under an open source license with software licensed under a proprietary license: certain open source licenses would require the "commercial software" to be distributed under the terms of the open source license. The required distribution of source code would dramatically decrease the value of the commercial software.

The Legal Issues

The legal issues that must be addressed include the following:

1. Scope of Licenses. Despite the increase in the use of open source software, the open source licenses have not been interpreted in court and fundamental issues relating to their scope remain uncertain.

The General Public License (GPL), the most commonly used open source license, extends to "derivative works" of the software licensed under the GPL as well as "collective works." Derivative work and collective work are both terms of art in copyright law that have the following meanings:

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work."

A "collective work" is a work, such as a periodical issue, anthology or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

Unfortunately, copyright law poorly fits the manner in which computer software operates and these terms are difficult to interpret in that context.

Several decisions by German courts have found the GPL enforceable, but have provided little additional guidance. The GPL has been

tangentially involved in several U.S. cases, but it has not been interpreted. Other frequently used open source licenses, such as the Mozilla Public License and the Apache Public License, have not been interpreted by the courts.

2. Automatic Termination. Several of the most frequently used licenses, including the GPL and the Apache Public License, are "conditional licenses" that do not have a traditional notice of breach with a cure period. The failure to comply with the terms of the license terminates the license.

Since the software is protected by copyright (which gives its owner the exclusive right to modify, distribute, reproduce, publicly perform and publicly display), the license is the only source of rights to use the software; the termination of the license means that the continued use of the software is copyright infringement.

3. Conflicting Licenses. The Open Source Initiative has approved 58 licenses as "open source" but one vendor of open source management software has found over 600 versions of software licenses, ranging from "home brew" licenses to variations on the OSI approved licenses. This proliferation of licenses that may include inconsistent terms means that it may be difficult to combine several software programs even though they are all licensed under "open source" licenses. Although most open source projects only use eight of these licenses, even they are incompatible. For example, software components licensed under the GPL cannot be distributed with software components licensed under the Mozilla Public License.

4. Demands for Transparency. Many manufacturers and customers are demanding to understand what open source software is in the products they are purchasing, and to ensure that the vendor has complied with the appropriate licenses. In one recent case, the manufacturer of a consumer electronic product demanded that the supplier of a semiconductor component guarantee that the firmware in the semiconductor did not include "open source" software. This issue can also arise in mergers: IBM reduced the purchase price for Think Dynamics by 30 percent due to uncertainties arising from the use of open source.

Given these uncertainties, companies need to manage the potential risks associated with their use of open-source software. It is no longer possible to simply prohibit its use. Rather, companies should avoid these problems by adopting an open-source use policy.

What's in a Good Use Policy?

Such a policy should address the following issues:

- use of open-source components in products for third parties;
- use of open source for internal purposes;
- approved usage models;
- implementation of policy by industry experts or outsourced teams;
- permitted/forbidden open source licenses;
- rules for contribution by employees to open-source projects; and
- use of commercial products (Black Duck/Palmida) to audit use of open source code.

Corporate open source policies range from simple ones for start-ups to elaborate documents of as many as 60 pages for large public companies. The policies are frequently created and implemented by committees that include technical, business development and legal representatives.

The committees are responsible for making the final determinations about the use of open source software. One large company reviewed 1,500 potential uses of open source products in an 18-month period, and the policy committee ultimately approved all but 10 uses.

Conclusion

Although open source provides many new and exciting opportunities for business, it requires careful management. A well thought out and effective corporate open source use policy is essential to this management.