

Risks Associated with Open Source Licenses

For many companies, using “open” source code (that is, source code that has been made publicly available under a license with broad rights to modify and redistribute) has many advantages – it is usually without charge, it can offer a high degree of flexibility and interoperability and, because it harnesses the collective expertise of developers throughout the world, with different backgrounds and perspectives, it is often more stable than commercial software.

However, these benefits may come with significant risks, including unindemnified intellectual property infringement and a “viral” or “tainting” effect on the company’s proprietary code (possibly turning the proprietary code into open source).

Infringement Risk

Because open source is often developed without normal commercial controls, it may be impossible to determine where it originated. As a result, there is a higher risk that the code infringes upon someone’s intellectual property rights. Given the fact that open source code rarely comes with a warranty or indemnity of non-infringement, a company licensing open source code may be assuming substantial risk.

This is illustrated by SCO’s \$3 billion claim against IBM for wrongful disclosure of Unix code that SCO claims it owns, and which, SCO claims, found its way into certain versions of Linux, an open source operating system.

“Viral” or “Tainting” Risk

Certain open source code licenses, most notably the GNU General Public License (or GPL), include a “viral” or “tainting” component. For example, the GPL states: “You must cause any work that you distribute or publish, that in whole or in part con-

“Open” Source code has many advantages, but also significant risks including:

- ✓ infringement risk
- ✓ “viral” or “tainting” risk

Read on to learn what you should do to protect your code...

tains or is derived from the [GPL-licensed source code] or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License.”

This viral effect exists regardless of the amount of GPL-licensed code included. Thus, by including two or three lines of GPL code in an otherwise proprietary software product, a company could “infect” the entire product (i.e., cause it to be governed by the GPL, and thus possibly become open source).

This “tainting” typically does not apply if the software containing the open source code is used for internal purposes only, as opposed to distribution to others. But be aware that limiting the software to internal use doesn’t eliminate the risk of patent infringement (although it would tend to reduce your monetary liability).

What Should You Do?

- ✓ Consult with knowledgeable legal counsel to determine whether the license governing the open source code you wish to incorporate into a product for redistribution contains viral elements or other problematic terms.
- ✓ Don’t distribute software that includes open source code licensed under viral licenses unless you intend to assume the risk of the entire software becoming open source.
- ✓ Segregate open source code licensed under viral licenses from your proprietary software. But be aware that it is sometimes

difficult to be certain that the open source code has been properly segregated.

✓ Determine how long the open source code has been widely available. If it has been distributed for many years with no claims of infringement, the risk that it infringes is less (but not eliminated - the source code at issue in SCO v. IBM had been available for years before SCO made any claim). Additionally, because open source code is constantly being revised, it may be difficult to pin down the amount of time certain code has been available.

✓ Inform developers – whether in-house or independent – about the potential dangers of including open source in the code they develop; require them to obtain permission from an authorized officer of your company before including open source in products intended for redistribution; and provide to all developers a written policy governing the use of open source in your products.

The Morse, Barnes-Brown & Pendleton, PC, **Technology Licensing & Intellectual Property Practice** counsels businesses of all sizes on creating, protecting and transferring IP assets, including advice on trademark, copyright, advertising, Internet and technology law.

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