

Client Update*Open Source Software: Managing a Hidden Intellectual Property Risk*

Open source software (OSS) is software that is usually licensed without a licensing fee and under terms that provide the underlying programming code to users so that they may access and read it, change it, and build and distribute new versions of the software incorporating the users' changes. Linux is one commonly used OSS operating system. Whether through software development, purchase or use, most companies are using or will soon use some form of OSS. It likely will become even more prevalent as businesses try to lower their software development costs during this recession, so it is vital that businesses understand the compliance risks associated with the use of OSS.

What Are the Risks?

The convenience of open source software comes with significant risks for clients:

- OSS licenses can sometimes require users who modify and distribute software to release the resulting combinations under open source licenses, potentially prompting the release of proprietary software that has been combined with open source code.
- OSS licenses can sometimes require distributors to grant public licenses to any patents the distributor may hold that affect the right of the public to use the distributed OSS software.
- OSS is usually distributed without any warranties of performance or assurance of non-infringement, leaving companies liable for expenses if the software fails (causing injury to the company or your customers) or if it infringes on the intellectual property rights of others.

How Could a Client Be Exposed to Open Source Software Compliance Risk?

- Businesses can be exposed to open source risks through the purchase of assets, mergers and/or other acquisitions.
- Businesses may not be aware that their software developers (whether in-house or outsourced) use OSS, so applicable licenses and their terms and conditions may not have been reviewed by counsel.
- Businesses aware of their own use of OSS may still unknowingly violate the complicated and tedious notice, labeling and distribution requirements of open source licenses if they are not properly reviewed and understood.

What are the Possible Consequences of Non-Compliance with OSS License Conditions?

Users who fail to comply with the conditions of an open source license may forfeit their license to use or distribute the software, breach the applicable license agreement, and be liable for infringement of various intellectual property rights. Unfortunately, compliance with these conditions is difficult because they often are drafted by programmers and thus can be imprecise, confusing and hard to interpret.

OSS users remain unaware of these licensing conditions at their peril: Recent caselaw has held that the violation of conditions of an open source license can subject defendants to copyright damages, including statutory damages and attorneys' fees.

Thompson Coburn Open Source Compliance Counseling Services

- We can advise clients who are familiar with OSS in the prudent acquisition of it as well as with compliance issues.
- We can assist clients that are developing software to assess the risks and rewards of using software that is subject to particular open source licenses and licensing their own software under an open source model.
- We can assist clients who are performing due diligence during mergers and acquisitions to identify applicable open source risks.
- We can assist clients that are involved in an active dispute involving an OSS license.
- We can customize presentations for in-house counsel, management and IT staff.

For more information on open source counseling and due diligence, please contact Jason Schwent (314-552-6291), Chip Fendell (314-552-6528), Ben Volk (314-552-6352), or Tom Polcyn (314-552-6331).

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