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Software licensing is evolving, with the growing popularity of open source software. **Mark Henley** says it is time lawyers got to grips with the open source movement before they are left behind

So many news articles and IT analysts' reports have been written about open source software (OSS) and its rising popularity that the resulting mound of paper could probably wallpaper an area twice the size of Wales. However, with their characteristic, dogged resistance to change, commercial lawyers have continued to view the subject as the preserve of only the geekiest lawyers working in the technology, media and telecoms (TMT) department.

As a result, most commercial IT contracts assume that all software is proprietary, all source code is secret and that a broad third-party intellectual property indemnity is only matched by a Shakespearean sonnet in terms of lyrical perfection.

Unfortunately though, the time has arrived when even the most technophobic of lawyers will be forced to familiarise themselves with the principles of the open source movement, read an actual open source licence and try to grasp some of the basic principles of software development. OSS has finally broken out of the corporate data centres and the geeks' bedrooms. Today it is in our mobile phones, our set-top boxes and, perhaps most frighteningly of all, our law firms.

An increasing number of firms are adopting GNU Linux (the best-known open source operating system) for their servers and for the desktop computers of their fee earners and support staff. Law firms are starting to deploy open source 'wiki' software on their internal networks to foster a collaborative approach to knowledge management. There is even open source law firm management software; indeed, the trend towards greater use of OSS will continue in law firms, as anywhere else.

Lawyers must, therefore, become more familiar with open source licensing, for their own sakes, if not for their clients'. In terms of negative PR and reputational damage, failure by a law firm to comply with the relevant open source licences and the allegations of copyright infringe-

Source of confusion

ment that might result could be as catastrophic as using proprietary software without buying enough licences.

So, what is OSS? In essence, it is software provided under a licence that will protect certain freedoms: the freedom to redistribute the software without paying a royalty; the freedom to modify, which is preserved by providing access to source code; the freedom to use the software in any field of endeavour, with any technology or software and by any person or group.

These fundamental freedoms give rise to certain benefits, the most obvious of these being the absence of licence fees. Once a single copy of the software has been obtained, it can be run on any number of servers or desktop computers without payment of royalties or other fees. This has obvious cost implications, but it also means OSS is particularly well suited to deployment within an IT infrastructure where the exact number and geographic location of computers is not known or constantly fluctuating.

This may sound like an absurd concept — attractive only to the laziest IT departments. Not so, as advances in the field of resource virtualisation (where multiple physical computers are combined so that they appear to be a single high performance computer) have meant that in some cases a user will have no idea which computers will be running their software at any given time. The grid computing model, in particular, envisages computers not owned or man-

aged by the user's organisation being contributed to a high performance virtual computer, without limit as to their number or location.

Another benefit is that for many pieces of OSS, an eager community of programmers is working constantly to improve the code. Bug fixes, additional functionality and improved performance may become available to the users over time without them having to pay for the privilege. In addition, major open source projects are usually forced to employ

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rigorous peer review mechanisms to marshal all of the contributions into a coherent, consistent and stable product. As a result, code eventually adopted for an open source product may be of higher quality than if it was produced by a commercial software developer employing a smaller group of programmers, working to meet release dates set for them by their sales director.

However, in order to take advantage of these freedoms and the associated benefits, open source licences will often impose conditions on the user. There are currently 59 different open source licences listed on the website of the Open Source Initiative, the standards body for OSS. While each meets a central open source definition, there

is variety in the licensing conditions with which the user must comply. For example, in the past the Open Source Initiative has shunned licences that imposed an obligation that the original developer be given an attribution of authorship. It has recently approved the first and more attribution-type licences may be added in the future.

The clarity of the drafting also varies considerably. Disclosure of the source code for OSS will always be permitted under the licence. However, under certain licences it is expressly required whenever the software is distributed. Version two of the GNU General Public Licence (GPL) is the licence adopted for GNU Linux and it establishes a rule described as 'copyleft'. This rule automatically applies the GPL to software that 'contains' or is 'derived from' the original GPL work. The meaning of the word 'contains' has been a source of much confusion and on 29 June, 2007, version three of the GPL was finalised, replacing the reference to 'contains' with clearer language. For the time being though, there will be many open source programs which may be licensed under either version (although not GNU Linux, which will continue to be licensed solely under version two).

A lack of clarity has created a situation in the IT industry where different developers and representatives of the open source movement have formed quite different ideas about what sorts of practices are permissible under the various licences. For example, there has been controversy over whether providers of Software as a Service (SaaS) must comply with Open Source licence conditions, such as source code disclosure, which apply when software is distributed. Some SaaS providers argue that hosting the software on their servers and delivering services which the user access via a web browser do not amount to distribution of that software. Another area of controversy is the placing of application programming interfaces or code 'shims' between GPL and proprietary software in order to defeat the copyleft rule.

The few court cases that have been concerned with software licensed under the GPL have dealt with obvious failures to comply with its conditions. None of them has looked at more complex issues such as the ones above. For the time being, all sides seem content to huddle together under this blanket of ambiguity, rather than risk a court determining a definitive interpretation that went against them.

Everyone agrees that OSS offers exciting opportunities to businesses and that its use will only become more pervasive over time. So where does this leave the commercial IT lawyer, to who a licensing ambiguity represents an affront to civilised society? Whether advising a client or considering for use inside their own firm, the lawyer must be aware that open source licences do not exist in a vacuum. To appreciate and advise on the risks fully, the lawyer must also understand something of how the OSS will be used, in particular how it will interact with other open source and proprietary software and how that use will be perceived by activists of the open source movement. ■

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