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Open Source Software Shows Its Muscle

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IP Law & Business
June 03, 2008

Two recent events should give for-profit companies new reasons to re-evaluate the ways in which they use open source software as well as the extent to which they use it. These events are: (1) the release of a new version of the widely used license that covers such software, i.e., the General Public License version 3, and (2) a round of lawsuits filed by the Software Freedom Law Center against for-profit companies using the software for commercial gain. Four companies to date, the largest of which is Verizon Communications Inc., have been sued for violation of the GPL.

Although the lawsuits are not about changed provisions in the GPL, both events are muscle-flexing by the free software community and, taken together, may foreshadow new risks in the irreconcilable conflict between open source software and its widespread use by for-profit companies. With the filing of court documents, a philosophical debate about the proper place for software in society has become a business dispute with the risk of substantial consequences. For-profit companies using open source software should take notice and understand the risks.

Open source software had its origins in the free software movement. By now, most open source users understand that free refers to freedom, not to price. The new lesson is that the freedom belongs to the software, not to users. You are not free to do whatever you want with the open source software and may find yourself in a legal fight if what you do restricts the freedom of the software.

Many of the things that for-profit companies strive for end up limiting some software's freedom. Any activity that leverages software for business advantage is likely to restrict the software's freedom, and the growing use of open source software by for-profit companies has been a growing irritant for free software advocates.

For example, implementing proprietary features on top of open source utilities to provide a low-cost computer-controlled product ("smart box"), and distributing a program on hardware that blocks execution of modified software, have proven to be contentious issues. Running commercial Web services using open source software without releasing source code has also caused consternation in some quarters.

Under prior versions of the GPL, it was generally accepted that open source and proprietary software could peacefully coexist so long as the proprietary software interacted with open source only through defined interfaces. Under the new version of the GPL, the proprietary characteristics of software that step into the ring with open source software are

knocked out, unless the proprietary components are "separate and independent works, which are not by their nature extensions of the [open source] work, and which are not combined with it such as to form a larger program." Losing proprietary rights can be significant because those rights are frequently essential for any company seeking to profit from differentiated high-tech products.

Changes in the GPL impose other limits on the ability to leverage a proprietary position when open source is involved. Under the new version of the GPL, those limits even extend to hardware that companies may provide to run open source software by prohibiting use of open source software on hardware that blocks execution of modified software. Companies are also required by the new GPL to license to others all patents they own or control related to open source software, even those not related to code they add to open source software, and even if they did not own the patents at the time they distributed the open source software. This provision applies whether that distribution is part of a conscious marketing strategy or a casual sharing with others outside the organization. Other changes add penalties for asserting patents against open source contributors.

Against this backdrop of change, litigation against companies alleged to be restricting the freedom of software was met with glee among free software advocates. In reality, the litigation may be but a glancing blow for a few companies that did not read the fine print on their free software licenses and did not provide source code when they used open source software. The litigations are unlikely to answer the most unique and complex questions relating to the GPL, such as what the limits are on the use of open source software with proprietary software and how the court system will apply theories of damages and remedies. In fact, three of the four lawsuits have already settled without any legal precedent being set. Legal proceedings in the fourth have been put on hold because settlement is likely.

The litigation, however, is significant because it pounds home the need to understand the incompatibilities between open source software and many business models. Though settlements in litigation are private, it is likely that the targets of this round of litigation had to make payments and waive their proprietary rights by applying open source terms to their software. Whatever advantage these companies had from not providing the source code initially is likely more than wiped away.

With incompatibilities increasing through changes in licensing practice, for-profit companies now have fair warning that they may face litigation on accusations of restricting software freedom. In future litigation brought by open source advocates, the comfortable understanding in the broader technical community about what it means to keep proprietary software and open source software separate may not apply.

The next legal fight could be an attempt to force release of proprietary server code due to some part of the output of the server constituting a "work" generated by open source components on the server. As litigation raises awareness of the risks, look for effects to spill over into other areas. Startups using open source software should expect more scrutiny in due diligence before investors will commit to funding. Companies with patents can expect the compulsory licensing scheme of the GPL to be raised as a defense when others infringe their patents.

With the new GPL in place, free software advocates seem willing and able to take action. You should make sure that the use of open source software is ready for the challenge.

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