

Open Source Licenses: a Public Sector Perspective

GOSCON

October, 2005

Overview

- Proprietary Licenses
- Open Source Licenses
- Public Sector Issues



Open is Better?

- Not necessarily
- Open and Proprietary Licenses are different; both have their advantages and disadvantages



Proprietary Licenses

- So familiar, public sector IT and legal employees focus on a few terms or the purchase order
- Licensor or distributor charges license fee based on various metrics
 - Seats, cpus, site, mps (one or more or in combination)
- Licensor provides maintenance and support
 - Annual fee in an amount typically equal to 15 to 25% of license
 - Tied to vendor because no rights to source code
- Licensee obtains Binary Code
 - Or source code with severe restrictions on modifications and distribution



Proprietary Licenses

- Licensor's direct liability strictly limited (no direct, indirect, incidental, consequential, special, exemplary damages)
- Indemnification
 - Third party IP infringement
- Warranty:
 - Title, media free from viruses, (performance--rare, limited)
 - Exclude warranties of merchantability and fitness



Proprietary Licenses

- Restrictions on use of proprietary code with other software typically limited to other software that is infringing (resulting in restriction on indemnification)



Open Source Licenses

- Terms not as familiar to state or municipal IT employee; each OS license must be read with care
- Common misconception: The GPL is *the* OS license.
 - General Public License or GPL, most common license for *all* open source software, but **not** the most common license used for the most commonly used open source software
 - Gartner: In 2004, based on review of 90,000 applications posted on SourceForge, roughly 60% of the open source code in existence is licensed under the GPL, while the remainder under alternative open source licenses, primarily BSD, Apache (a version of the BSD) and the Artistic license. Top 100 most commonly used OS applications, most licensed under Apache
 - Significant differences among OS licenses



Open Source Licenses

- Chart on differences among variety of open source licenses posted at ITD website at <http://www.mass.gov/itd/legal/opensourcequickref.htm>
- Characteristics of **most** open source licenses:
 - Licensee obtains or can obtain source code as well as binary code
 - Licensee can modify source code



Open Source Licenses

- Licensee NOT required to share mods and enhancements, but if does, must use original open source license
- Licensor's direct liability is strictly limited, same as proprietary license
- License lacks:
 - Warranties re: media, performance; UCC warranties are disclaimed, licensed "as is"
 - Third party IP infringement Indemnification
- Licensee not required to obtain maintenance and support from licensor or distributor
 - Access to source code empowers licensee to perform maintenance and support internally or through third party vendor
 - Some distributors provide maintenance and support



Open Source License

- No restrictions on using OS code with proprietary code
- Upgrades, bug fixes, etc., from any source including open source community
- Automatic revocation for failure to conform to license
- Some require indemnification of prior contributors



Open Source Licenses

- Special characteristics of the GPL:
 - Reaches out and imposes itself on modified work as a whole. Critics: a “viral” license; works that incorporate GPL code are “infected” with the GPL because the work as a whole is also subject to the GPL.
 - Restricts licensee’s ability to integrate OSS with proprietary software
 - GPL code can be aggregated on the same computer with proprietary code
 - But GPL code cannot be integrated into proprietary code



Open Source Licenses

- Compare GPL to Apache License:
 - Apache license does not reach out to cover entire work in which Apache code may be incorporated;
 - Apache license does not restrict ability of licensee to incorporate Apache code in proprietary work



License Choice: Public Sector as Software Developer...

- Has little license choice where redistributing OS software that it has received under an OS license, or distributing mods and enhancements to such software
- Can choose or write new license when releasing code that doesn't incorporate previously licensed OS or proprietary components ("new code"); some state law restrictions may apply
 - License of state property for less than FMV
 - Anti-aid amendment licensee

Public Sector Issues



Minimizing Risks Inherent in Public Sector Use of OS code

- Unfamiliarity with licenses, and possibility of automatic revocation: train your staff
- No 3rd party IP infringement indemnification:
 - Reduced impact due to states' immunity from money damages under federal law for 3rd party IP infringement
 - Theoretically still subject to injunctive relief, state law remedies



Minimizing Risks

- No warranties of performance: increased risk with more complex, costly system
- Indemnification of prior contributors: don't distribute this code outside of organization if your state has a "credit clause" forbidding indemnification by the state absent legislative action.
- License choice for "new" code may be limited by state law
- General
 - Risk management. Adopt an OS policy for acquisition and use
 - Identify and track OS used in organization
 - Legal counsel review OS licenses and track compliance
 - Large projects: consider lack of warranty and indemnification
 - Legal review prior to distribution
 - Keep track of mods
 - Balance need for access to need to restrict access for risk management purposes
 - Market based models for risk shifting
 - Document all software projects

Avoid

- Taking sides in the culture war; let the market sort it out
- Either or approaches (all open source or all proprietary)
 - The Massachusetts Way: Best Value requires that both be considered



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Linda Hamel
General Counsel
Information Technology Division
(617)-626-4404
Linda.hamel@state.ma.us

