

Open Source Software: Recent Muscle-Flexing Adds New Risk

by *Edmund J. Walsh*

Two recent events should give for-profit companies new reasons to reevaluate the ways in which they use “open source” software as well as the extent to which they use such programs. These events are: (1) the release of a new version of the widely used license that covers “Open Source” software, i.e., the General Public License (GPL) version 3, and (2) a round of law suits 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, have been sued for violation of the GPL.

Although the lawsuits are not about changed provisions in the GPL, both are muscle-flexing by the free software community and, taken together, may foreshadow new risks in the irreconcilable conflict between the origins of 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 those risks.

Software “Freedom”

“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 actually 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 smart box, or distributing a program on hardware that blocks execution of modified software, have all proven to be contentious issues. Running commercial web services using open source software without releasing source code has also caused consternation in some quarters. Those actions, and many others that leverage open source software for commercial advantage, are incompatible with the ideals of free software and are driving both litigation and changes in open source licensing.

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.

Limits on Leverage

Changes in the GPL impose other limits on your 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 you may provide to run open source software by prohibiting use of open source software on hardware that blocks execution of

modified software. Further changes in the GPL require you to license all patents you own or control related to open source software, even those not related to code you add to open source software and even if you did not own the patents at the time you distributed the open source software. This provision applies whether that “distribution” is part of a conscious product marketing strategy or just a casual sharing of software with others outside your 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 who 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



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