

Growing Concerns Over Use of Open Source Code

Matthew H. Jacobs | April 17, 2008

Open source code has become the subject of growing attention in recent years. The advantages of using open source code in the development of a wide variety of software products are clear. As software code development grows more specialized and complex, repurposing pre-existing open source code enables software developers to quicken the pace and reduce the cost of development. Many companies have leveraged the advantages of utilizing open source code in the production of their proprietary software offerings, and that trend appears likely to continue.

Despite the advantages of using open source code, significant problems can arise as a result of the licensing terms governing the use of certain open source code. A popular misconception is that open source code has been contributed to the public domain or is otherwise open, free, or available in an unrestricted fashion for any use. However, a written license typically governs the use of open source code.

Some open source licenses, the General Public License chief among them, require that otherwise proprietary source code be made open and publicly available when that proprietary source code includes open source code. Accordingly, a company's valuable proprietary source code may be "infected" by the inclusion of open source code whereby the entire proprietary source code, regardless of who wrote it, could become subject to unfavorable open source license provisions. This so-called "viral" effect of some open source licenses represents a dramatic departure from proprietary licenses.

Inevitably, on the eve of a major product launch, a financing round, a merger, or some other significant event, the software company and their counsel are left scrambling to determine the ramifications of the inclusion of open source code in their software products. Further, as a result of their own due diligence, potential acquirers, partners, customers, and financiers are likewise keen to determine if the software company's ownership of its otherwise proprietary code has been compromised as a result of the application of an open source license.

Compounding the issue are recent indications that open source code licensors, those who create open source code, may be stepping up their efforts to enforce the license terms governing use of their open source code. In March 2008, one such lawsuit was settled between two principal developers of an open source program and Verizon Communications. At issue was the alleged distribution by Verizon of routers that made use of the open source program in a manner that violated the applicable open source license. The potential for law suits emphasizes the need for creating and

enforcing internal controls on the use of open source code in the development of software. Further, consumers of software products are wise to conduct thorough due diligence to determine the existence of open source code or to insist on appropriate indemnification from their vendors.

Easily accessible open source code, much of which is available at little or no cost to developers, can be used to solve many programming challenges. However, for producers and acquirers of software products that may make use of open source code, caution must be exercised.

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