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November – December 2007

OPEN SOURCE, OR OPEN DITCH?

[Open source software] licenses typically provide that, if a user incorporates elements of OSS into another program and distributes that derivative work, the person receiving the derivative work must get all the rights to the whole program that the distributor possessed. [Footnote omitted.] The unwitting inclusion of OSS by a licensee in modified licensed technology and its subsequent distribution could jeopardize the proprietary rights of the licensor.¹

Prophetic Warning

This advice from over two years ago was prophetic. On September 19, 2007 Erik Andersen and Rob Landley, developers of BusyBox open source software, sued Monsoon Multimedia, Inc. in the first-ever copyright infringement lawsuit seeking to enforce provisions of the GNU General Public License pursuant to which BusyBox is distributed.

Are CIOs Confused?

After issuing the above open source software warning, several clients questioned the threat's reality. More recent advice has included several more practical, and practiced, views:

What's The Rule For Embedding Open Source Software?

I just talked with two CIOs who have different takes on embedding open source software in their companies' products. One sees it as standard practice, the other approaches it like a snake in a bag.

One gentleman is the CIO of an engine manufacturing company. He says the engineers in his firm regularly embed open source software in the company's products. From what he was saying, it

¹ *Secrets of the Code*, CARPENTER LAW OFFICE CLIENT NEWSLETTER 2-3 (Robert H. Carpenter, Jr., Plano, Tex.), Apr. 2005, http://www.carpenterlaw.net/images/Secrets_of_the_Code_Apr._2005_2007.pdf.

sounded like this was a standard practice in his industry, and that he didn't have much to do with it. Otherwise, his company didn't use much open source software in its IT environment.

The other gentleman is the CIO of a company that provides computing services to financial firms. He says his company is careful to prevent any open source software from creeping into the products and services it sells.

"We try to manage where we use open source software, to manage the IP risk in open source," he says.

Many vendors today have built their software strategies around open source software, like IBM with Linux. And while [IBM seems to have beaten down the liability issues around Linux represented by the SCO Group](#), still there are reasons to be concerned. That's why he says he's careful to keep track of where and how open source software is used within his organization. Also, "anybody can download anything over the Internet," he says.

There's technology that checks software code against known open source projects, like that from [Black Duck Software](#), which CIOs should make it a point to use, he says.

So, what's the rule on embedding open source software in products? Is that a good thing or a bad thing? Or does it vary by industry – some where it's standard practice and some where it should be approached with caution?²

Here are two of the several posted comments from the blog's discussion forum. First,

Open Source software is of course no different from any other software, in that it is licensed IP, and must be treated as such. Interestingly enough you never see articles from CIOs warning of the dangers of using proprietary, closed source software, which are exactly the same as those for open source but with the additional risk of monetary damages for misuse.³

And, then,

We support real-time, open source middleware a lot of which is embedded. For what our clients are trying to do, i.e. build reliable, low cost, tailored systems, then open source is the only way to go.

They are often shaving cents. They do not want useless (superfluous) code, it chews up memory, sucks up power and dissipates heat. Many proprietary packages are value subtractors not value adders. They adapt the open source to suit their needs and as no one downstream is going to use the code to do more development then they are not worried if it is GPL or not.⁴



Happy Holidays!

² Posting of John Soat to CIOs UNCENSORED, http://www.informationweek.com/blog/main/archives/2007/08/whats_the_rule.html (Aug. 27, 2007, 05:33 PM) [hereinafter CIOs UNCENSORED].

³ Posting of Of course this is irrelevant to CIOs UNCENSORED (Aug. 28, 2007, 8:24:53 AM).

⁴ Posting of Malcolm Spence to CIOs UNCENSORED (Aug. 28, 2007, 2:00:05 PM).

Is Anyone Really Hurt?

This exchange of purportedly informed views prompted a rethinking of the 2005 warning. After all, who is damaged by the unlicensed use of code that is “free for the asking”? If one considers “damages” to be harm to the open source movement, what is the real harm? How can damages be measured? Does anyone have legal standing to assert that they are damaged by someone’s taking a thing offered for free? There just did not seem to be any real risk.

But, now Andersen and Landley, backed by the Software Freedom Law Center, Inc., the public interest law firm supporting the Free and Open Source Software (FOSS) community, have filed their suit. Their complaint asks for an injunction against Monsoon’s unlicensed use and for “actual and consequential damages incurred, in an amount to be determined at trial” and for disgorgement of Monsoon’s profits from its copyright infringement.⁵

The cleverness and creativity of Andersen and

Short Circuited – Arbitration Redux

Prior client newsletters have addressed alternative dispute resolution (ADR) mechanisms and expressed skepticism of the efficiency and transparency of binding arbitration. In fact, they have suggested the alternative of mandatory mediation followed by litigation and noted the growing trend among major corporate general counsels to doubt arbitration.

Keeping The Peace observed: “Well-drafted arbitration provisions can remedy some . . . deficiencies [like lack of a reasoned opinion and no judicial review of an erroneous award]. But, court-like procedures and an agreed upon judicial review, rather than the finality of binding arbitration, defeats the *raison d’être* for ADR.”¹ This paradox suggests that even custom arbitration clauses do not provide satisfactory relief. And, now, even this partial remedy may no longer be available.

On November 5 the U.S. Supreme Court will hear oral arguments in *Hall Street Assoc. v. Mattel, Inc.*, an appeal from the decision of the 9th Circuit Court of Appeals that deviates from the majority view by limiting the rights of contracting parties to craft their own arbitration process.² Illustrative of the majority view is that of the 7th Circuit:

[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.³

If the Supreme Court upholds the 9th Circuit’s decision that the Federal Arbitration Act (FAA) does not permit parties to prescribe for court appeal of arbitration awards beyond the very limited bases set forth in the FAA, then parties will be forced to sacrifice transparency for elusive efficiency.

Numerous consumer groups, which typically oppose binding arbitration, have joined plaintiffs in support of the freedom to contract. And, so have some commercial groups. (Companies have been so burned by binding arbitration in employment cases that, without the freedom to contract for limited judicial review, many are likely to abandon arbitration altogether.) The American Arbitration Association (AAA), with a vested interest in promoting ADR, sides with the defendants and the 9th Circuit. The AAA bases its position on the ultimate reason for ADR, a quick and final expedient for dispute resolution.⁴

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⁵ Complaint at 7, *Andersen v. Monsoon Multimedia*, No. 07-CV-8205 (S.D.N.Y. Sep. 19, 2007), available at <http://www.softwarefreedom.org/news/2007/sep/20/busybox/complaint.pdf>.

Landley's lawsuit is in its simplicity and focus. It alleges a single count of copyright infringement. The relief it seeks is grounded firmly, and directly, on copyright statutes.⁶

FOSS Makes Its Point

So, it seems that the bloggers, presumably CIOs themselves, do not really get the open source dilemma – free software, at a price. The posting from *Of course this is irrelevant* begins to get the point, noting the underlying license for open source software that, like for proprietary software, governs its use. Then she touches the “third rail” by claiming that there are no monetary damages for such misuse.

Malcolm Spence ties his blind spot for open source software to downstream development. But, Monsoon has embedded BusyBox code in its hardware and software products. Andersen and Landley do not seem to care about downstream development; they object to Monsoon's product distribution. Andersen and Landley are trying to get both of these CIOs back on track.

A Prophet Without Honor

Whether one licenses software or uses outsourced services supported by software, the open source software dilemma has raised its ugly head. Developers should take care to ensure that they are aware of the provenance of their code, and of the consequences if OSS is embedded in it. Consumers (users) of code should take note of how an OSS challenge like that presented by Andersen and Landley could affect their operations.

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Speculation is rampant on what the Supreme Court will do. If it sides with defendants and the AAA, restraints on parties customizing a better arbitration process will tighten. This will surely short circuit the arbitration frenzy and send parties back to courts where expediency gives way to transparency. **Stay Tuned!**

¹ *Keeping The Peace*, CARPENTER LAW OFFICE CLIENT NEWSLETTER 4 (Robert H. Carpenter, Jr., Plano, Tex.), Mar. 2005, http://www.carpenterlaw.net/images/Keeping_the_Peace_Mar.2005_2007.pdf. See also *Taking Notice of Arbitration*, CARPENTER LAW OFFICE CLIENT NEWSLETTER (Robert H. Carpenter, Jr., Plano, Tex.), Nov. – Dec. 2006, http://www.carpenterlaw.net/images/Taking_Note_of_Arbitration_Nov.-Dec.2006_2007.pdf (“[s]enior legal counsel in major corporations are taking notice . . . the arbitration process . . . is not as fast and inexpensive as touted”).

² The arbitration agreement in *Hall St. Assoc. v. Mattel* provided in part that the District Court could override the arbitrator's decision if “the arbitrator's conclusions of law are erroneous.” The Oyez Project, *Hall Street Associates, L.L.C. v. Mattel, Inc.*, (No. 06-989), http://www.oyez.org/cases/2000-2009/2007/2007_06_989/ (last visited Nov. 1, 2007). Other agreements provide even broader review grounds.

³ *Baravati v. Josephthal, Lyon & Ross Inc.*, 28 F.3d 704, 709 (7th Cir. 1994).

⁴ Press Release, American Arbitration Association (Sep. 17, 2007) <http://www.adr.org/sp.asp?id=33066> (last visited Nov. 1, 2007).

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⁶ See generally 17 U.S.C. §§ 101 – 1332 (2000).