Open Source Management

Best practices for professional use of open source software

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Overview

- Risks associated with open source software usage

- Towards and open source management policy ?

- Best practices in contracts

Risks commonly associated with open source software :

- Litigation ?
    - Mainly U.S. examples
    - Patent portfolios are central to the discussion, rather than actual open source questions
    - Legal uncertainty as to the reciprocity obligation remains
- Reducing the value of the company's IP assets ?
    - Distinguishing the actual value of code and the mandatory financial information (duty to disclose)
    - Many licences impose no reciprocity at all
    - However, reciprocity obligations may entail a dramatic reduction of the scope of the company's exclusive rights on the code : copyright & patents (through 'implied licence' or 'non-obviousness requirement')

Risks that must not be underestimaded :

- Affecting relations with customers
  - Big accounts and well organized customers may demand an « open source disclosure » in the contracts, and some are reluctant to admit open source components
- Affecting business transactions
  - Distributors or resellers may refuse to deal with software vendors that include open source components in their package, exclude some type of components, or at least apply due diligence on code and reevaluate the deal on that basis
  - This is especially true when it comes to GPL or other « copyleft » licences, because there is still a great uncertainty as to the exact scope of the reciprocity obligations
- ➔ The use of open source components as part of complex projects may result in a decrease of the deal price, or an increase of the warranty obligations on the part of the software vendor.

Developing an open source policy ?

- A question of corporate liability
  - Policies are designed to communicate, but also to show good faith → not relevant as to infringement of IP rights (may be relevant as to the financial disclosure obligations)
  - Unenforced policy is worst than no policy at all

- A question of education, collaboration and enforcement
  - Sensitization is key to the success
  - Not a purely legal issue : business, engineers and legal must cooperate
  - Review, reporting and verification are paramount : make it enforceable !

✂ → Not a magic solution, but it can help since multi source development is now commonplace.

Content of an open source policy ?

- Relations with developers (employees and subcontractors)
    - Inform about the company's approach towards OS
    - Draw black, grey or white lists of licences (or of communities)
    - Provide instructions to : (i) request legal approval, (ii) record relevant documentation (outprint licence and download information) (iii) if need be, develop specific business packages (for compliance purposes)
    - Define standardized process for complying with notice requirements
    - Set the rules for keeping tracks of which code has been used, modified, included in products, etc.

Content of an open source policy ?

- Relations with distributors
    - Impose a standard clause that prohibits distribution under terms that would make the Company's code freely available
- Company's policy re: contributions to the community
- Company's policy re: open source procurement
    - (e.g. which suppliers ? what kind of components ?)
- Etc.

Best practices in contracts

- "Minimum requirements" in any IT contract :
    - the rights granted by the licensor
    - the extent of the representations and warranties
    - the limitations/exclusions of warranties.

- Procurement of open source software :
    - Avoid reciprocity obligations
    - Demand full transparency and disclosure re: open source components and applicable licences

Best practices in contracts

- Procurement of open source software :
  - Like any vendor, an open source vendor may be imposed strong and precise warranty obligations as to the conformity and the hidden defects of the software.

Example : Red Hat Subcription Agreement France (extracts)

- Conformity and hidden defects :
  - "*Red Hat represents and warrants that: (a) the Services will be performed in a professional and workmanlike manner by qualified personnel; (b) it has the authority to enter into this Agreement with Client; and (c) to Red Hat's knowledge, the Software does not intentionally include malicious or hidden mechanisms or code for the purpose of damaging or corrupting the Software*".
  - "*Red Hat does not warrant that the functions contained in the Software will meet Client's requirements or that the operation of the Software will be entirely error free or appear precisely as described in the accompanying documentation*"

- Non-infringement clause :
  - "*If (a) any portion of the Software is found to infringe any third party intellectual property rights, (b) Client has registered its use of the Software with Red Hat, and (c) Client has complied with all of the terms of this Agreement, then for each Installed System for which Client is current in its subscription fees, Red Hat will, at its expense and option: (i) obtain the rights necessary for Client to continue to use the Software consistent with this Agreement; (ii) modify the Software so that it is non-infringing; or (iii) replace the infringing portion of the Software with non-infringing code. The foregoing will not apply to claims arising from: the combination of the Software with products or services not provided by Red Hat; the modification of the Software pursuant to specifications of Client; the modification of the Software other than as directed by Red Hat; or use of the Software in a manner not permitted or contemplated hereunder*"

Thank you

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