

Delicate issues associated with Open Source Software

Legal considerations to bear in mind when procuring it

By Dr. Ursula Widmer*

When procuring and using Open Source Software (OSS), there are certain specific risks that have to be borne in mind from a legal perspective. With OSS, the licensing is carried out directly by the various developers who have made a contribution to the OS product in question. These OSS licenses frequently seek to exclude, to the greatest extent possible, any liability on the part of the licensors or warranty for errors in the software.

Open Source software (OSS), which is to say software whose source code is openly accessible and may be freely modified, was one of the most notable innovatory trends in software development. The OSS movement is finding increasing support from established hardware and software providers such as IBM, Hewlett-Packard and Novell, and the use of OSS in private companies, organizations and governmental authorities is growing.

Preferences vary in the public sector

There is much debate at the present time as to the status that should be accorded to OSS when software is procured by public bodies. In Switzerland, the Federal Strategy Unit for IT (ISB) approved an OSS strategy for the Federal Administration in February 2004. According to this strategy, OSS should not be given preferred status over Closed Source Software (CSS); however, OSS should be included regularly in the evaluation process. In other countries there are examples of public bodies admitting that they favor OSS rather than CSS, for instance in some ministries in France or several administrative units in Germany.

When OSS is procured, a certain number of special characteristics must be taken into account from a legal perspective. If this is not done, those responsible for the procurement will lay themselves open to the charge of neglecting their duty of care in evaluating the software. One of the fundamental differences between OSS and CSS is the fact that the software is not licensed by one sole contracting party. The license is issued directly by the various developers who have made a contribution to the OSS product. Liability on the part of the licensors and their warranty for defects in the software are frequently excluded as



far as legally possible in such OSS licenses, as is also any guarantee that the software does not infringe any third party copyrights or patent rights. Even if such warranties were to be included in an OSS license, this would only be of limited help to the party acquiring the software. Liability and warranty claims are difficult to enforce against the individual developers. This is because it can be difficult to answer the most basic question of which of the many developers a particular claim, e.g. for remedying a software defect, should be asserted against. This is compounded by further practical problems in prosecuting the individual developers, since they may be scattered around the world and usually do not have adequate means to cover claims for damages.

Detailed investigation advisable

Prior to procuring OSS products, therefore, quality and security aspects must be carefully scrutinized and answers obtained to the following questions, in particular: how and by whom was the development project organized? What acceptance criteria are imposed upon the OSS project developers? Which standards are being followed in the development process and how are the individual development contributions and the test procedure being documented? How widespread is the use of the software to be procured, and what kind of references exist?

If satisfactory answers can be found to these questions and if the OSS in question can therefore be judged to be of good quality, it may be possible to justify its procurement - despite the absence of liability and warranty on the part of the software developers and licensors - depending on the purpose for which it is to be used. As to the question of maintenance (error correction) and further development of the software, OSS licensors assume no obligations in this respect. This is a point of variation compared with the providers of proprietary software. Checks must therefore be carried out at the procurement stage to ensure that the OSS project in question is able to provide continuity and enjoys sufficient backing from the developers to be assured of longer term continuation. If this can be affirmed, then the fact that there is no contractual maintenance obligation for OSS on the part of the licensors becomes relatively less significant. It can be assumed that any software defects identified will be remedied within a reasonable time and the software continuously improved and further developed, as is the case with the Linux operating system, for instance.

It should also be established how the implementation of and support for the subsequent operation of the software can be assured. Typically, there are no corresponding services offered by the OSS licensors. It must therefore be established whether or not the requisite specialist and human resources already exist in the respective organization, or have yet to be created, or must be bought in from outside service providers. Without the assurance of professional implementation and support in the operational phase the procurement of OSS would have to be deemed to be grossly negligent.

Commercial availability of OSS

Companies such as Red Hat or SuSE have utilized OSS products as the basis for a commercial business model and offer their customers, in the form of mutually compatible so-called 'distributions', the numerous programs belonging to Linux supplemented by installation and configuration programs and documentation. Customers are also offered services that provide implementation and maintenance of the software, as well as training. This is not a contradiction to the OSS concept insofar as any form of payment is precluded only in respect of the licensing of OSS. A charge may, however, be made for the creation and distribution of program copies, for the acceptance of warranty obligations and for services connected with the software. The legal position of OSS software customers has become comparable to that of customers buying CSS products since the arrival on the market of commercial OSS providers, in that the commercial OSS providers are prepared, for a fee, to assume warranty, liability and maintenance obligations in place of the developers.

Heeding the impact of Copyleft

A characteristic feature of OSS is the right of those acquiring it to modify and further develop the software as much as they want. If an OSS product is further developed or parts thereof incorporated into other software, the respective conditions of the license under which the product concerned was acquired must be heeded. Special care must be taken to ascertain whether or not the terms of the license specify that all further developments of the OSS or new software created using the OSS may in turn be distributed only as OSS. This is what is referred to as "Copyleft". It is of particular relevance in GNU Public License, which is by far the most widely used OSS license. If OSS is procured for the purposes of further development or incorporation into other software, and if the result is not to be distributed as OSS in its turn, then care must be taken to ensure that the license for the OSS



obtained to serve as the basis for the acquiring party's developments is not itself subject to Copyleft. This is particularly important for public sector development projects. Here it is frequently the intention to distribute the software developed to a restricted circle only, for instance only to other governmental authorities.

To sum up, it can be said that when procuring and installing OSS rather than CSS, certain specific risks must be considered from a legal perspective. It is only after investigating these that it can be decided if the acquisition of Open Source Software may be justifiable.

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