



# “Open Source” or “Free” Software - It May Not be as “Free” as You Think

Client Advisories

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Most companies faced with a software development project have had to consider whether to rely on “open source” or “free” software as part of their software development. On its face, open source software seems too good to be true. Rather than having to pay a software development firm considerable sums to develop software, many components can be obtained for free on the Internet or elsewhere. The use of open source software can also considerably shorten development timelines, and often results in a more stable software product with less bugs and errors. But is that all there is to consider? Is the decision that easy? Of course not - it is far more complicated. To understand why, it is important to understand how open source software differs from traditional software.

Generally speaking, the developer of a piece of software owns the copyright to the software, meaning he or she has certain exclusive rights to the software including the rights to copy, modify and distribute it. When developers want to allow a third party to exercise one or more of these rights, they typically do so by granting a license. The license terms define what the third party may do with the software without infringing the developer’s rights. Any violation of those license terms, or any use of the software without a license, typically constitutes an actionable infringement of the developer’s copyright. By tightly controlling the rights granted to third parties who license a developer’s software, the developer maximizes the amount it can charge third parties for licenses.

Open source software is licensed under a different model. Rather than seeking to maximize profit from granting licenses to their software, open source software developers seek through their licenses to promote rather than control the copying, distribution, change and improvement to their software by making it readily available, often without charge. Instead of trying to maximize their financial reward, these developers seek to maximize the prevalence and utility of their software. The more such software is used, the more improvements are made, increasing functionality and allowing for errors and defects to be more readily identified and corrected. The goal is generally not financial reward, but rather a better software product and user experience.

There are over 60 different types of open source software licenses recognized by The Open Source Initiative, a non-profit corporation formed to educate people about, and advocate the benefits of, open source software. The terms of many of these licenses vary widely, and significantly impact how the software can be used.

By way of example, one category of open source licenses contains “copyleft” provisions requiring that modifications to the software be licensed under the same terms as the original software. Those terms may require that the software source code be provided to anyone to whom the software is licensed. As a result, a company that uses copyleft-licensed open source software to create a new software product may be required to make the source code for that software product available to any party to whom it licenses its software. That company may also be prohibited from charging a fee for any licenses to its software. If the company’s goal is to maximize profits from the licensing of its software, it may have guaranteed failure by incorporating copyleft-licensed open source software into its product.

This example illustrates the need for careful analysis before deciding whether to utilize open source software when developing a software product. Issues that should always be considered include:

- What third-party code is being used?
- What licenses apply to that code?
- Is a copy of the license available?
- What is the scope of the intended use of that code (i.e., will it be used internally or incorporated into products to be distributed to third parties)?

These issues, and many others, should be discussed with a lawyer familiar with open source software licensing to ensure that the use of open source software is consistent with the goals of the software development project.

If you are interested in open source software licensing, or have other software related issues or questions, please contact Mark J. Sever, Jr., Esquire, Co-Chair of the Intellectual Property Practice Group of Archer, P.C. at (856) 354-3045 or [msever@archerlaw.com](mailto:msever@archerlaw.com).

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