Open Source: Risks and Benefits

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Open Source: Legal Considerations

- The legal pitfalls of an Open Source framework as often MISUNDERSTOOD!
Open Source: Legal Considerations

• Agenda
  – Legal attributes of an Open Source license (high level)
  – Understanding legal pitfalls by comparing proprietary and Open Source frameworks
Legal Attributes of an Open Source License

- Contribution stage
  - Assignment e.g. to non-profit, or license

- Distribution stage
  - Requirement to distribute with source code
  - Product reasonably available for modification and use
Legal Attributes of an Open Source License

- Hot button issues
  - Ability to incorporate OS code in later products?
  - Contribution of IP required, if related to contributed code?
  - Rules related to enforcement of users’ IP rights
  - Legal effect of breach of open source license?
  - What is required to create a “separation” between OS code and other code that you want to control?
Proprietary vs. Commercial

- Not an obvious choice
- Answer is often “hybrid” solutions, with specific legal implications
Proprietary – The Bad

- More complicated licensing conditions (use restrictions etc.)
- Less flexibility to take aspects of deployment in house
- Artificial requirements for outdated approaches to delivery of functionality
- Too much emphasis on product vs. service
Proprietary – The Good

- Patents help new entrants gain a foothold
- Proprietary product provides bargaining power = profit
- Reproduce some advantages of open source using cross-licensing and standard development
- Indemnities, especially IP

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Open Source - The Good

- Framework for collaborative development
- Lower legal costs
- With current economic conditions, OS is very attractive
- Level of acceptance by companies is much better today
Open Source - The Bad

• Significant legal complexity to navigate
• Advantage of larger organizations in providing services
• Relatively small number of companies that are profitable based on OS strategy
Reality: Legal Touchpoints

- Demarcation point between OS and proprietary components
- Ensuring that the code structure of proprietary components is consistent with the demarcation point
- Consider impact of license language on patent rights
- Consider impact of license language on enforceability (Jacobsen)
- Effects of non-asserts, between parties and unilateral (MICROSOFT)
- Need for OS adoption policies
Lessons

• OS framework is not a force field from IP issues!!!
• Need to have a specific market strategy leading to profit, and legal strategy that provides the necessary control, reservation of rights etc.
• Otherwise, you may live to regret going the OS route!!!
• Examine OS leaders closely