

The Future of 'Open': Open Source Software

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Introductory remarks

- Definitions
 - ‘open source’, ‘free software’
 - ‘public domain’, ‘creative commons’
- Using proprietary protections
 - Copyright, patents
 - moral rights (paternity & integrity)
 - Contract & licensing models
- Commercial implications
 - Product development
 - Mergers & acquisitions
- The future of ‘open’



Characterisation

- As licence or contract?
 - Impact on enforceability, interpretation, termination, governing law & remedies
 - *Jacobsen v Katzer & Kamind Associates* (2008)
 - “whether the terms...are conditions of, or merely covenants to, the copyright license”
- As a licence
 - Developers, distributors and end-users
 - ‘Copyleft’, ‘reciprocal’ or ‘viral’ licences
 - as to original material & additional material
 - e.g. GPL v.3

As a licence

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- Triggering acts
 - Reproduce/ or derivative work and distribute (GPL), ‘modifications’ (MPL), ‘contributions’ (CPL)
 - Software as a Service?
- Triggered conditions
 - Access to source code
 - Licence to make/distribute all/part of resultant work
- Prohibitions
 - Fees for distribution *not* permission to use
 - e.g. Red Hat
 - Anti-DRM provisions

Patent issues

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- Software patents
 - Validity & disputes
 - e.g. *SCO v IBM*, *Novell (2003-07)*, *Oracle v Google (2010-)*
- Patent grants
 - Implied or express
 - From grants: RAND, FRAND, RAND-Z
 - To unilateral litigation waivers: ‘Covenants not to sue’
 - e.g. Sun, Microsoft, IBM
 - Anti-discrimination provisions
 - Microsoft-Novell (2006)
 - Retaliation provisions

Pedigree issues

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- Product development
 - Outward/inbound information flows
 - e.g. employment agreement
 - OSS code as a development tool ν incorporation
 - e.g. Static & dynamic linking to libraries
 - gpl-violations.org
 - e.g. Skype VoIP handset, BT's Home Hub
- Mergers & acquisitions
 - Forensic analysis
 - Due diligence, valuation & remediation
 - e.g. IBM & Think Dynamics: \$67-48m



Licence compatibility

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- The problem: over 2000 licences for reusable code
 - Commercially relevant?
- Licence identification
 - Name, version & errors
 - e.g. Ninka
- Licence integration & compliance
 - e.g. SPDX™ & creating standard formats
 - “share license and component information (metadata) forfacilitating license and other policy compliance.”

The Future of 'Open'

- Software supply chains have become complex
 - Re-use & redistribution
- Open source dependency on private law mechanisms
 - Harmonisation of public law rules
 - Substantive & procedural: A proprietary world-view
- Software licences facilitate creativity, diversity & complexity
 - Barrier to development?