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- Employment
- Business Operations
- Business Succession
- Dispute Resolution
- Start Ups
- Special Projects

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## Should Your Company Use Open Source Software?

By Dirk Bartram

Open source software is breaking out into the commercial world, and more closely-held companies are considering its use. No doubt they want to save time and cost in software development. We advise companies to be careful, though. Open source is a great solution for some companies, but for others, the upfront savings are not worth the legal risks.

### The Nature and Benefits of Open Source Software

Open source software ("OSS") is software made freely available to business or individual users in source code and object code form. The user may copy, modify, and redistribute the software free of charge for nearly any purpose. For instance, the user can incorporate OSS in its own proprietary software to solve a problem or fix a bug. The idea driving OSS is that when programmers can read, redistribute, and modify the source code for software free of charge, the software evolves rapidly. The open source community believes that this rapid development produces better software than the traditional closed model, in which only a very few programmers can see the source code. Proponents claim that open source software is more reliable and secure.

Though OSS is free, it is typically *not* in the public domain. OSS is usually protected by copyright and subject to license terms that permit its free use. Most open source software is licensed pursuant to the GNU General Public License (GPL), the GNU Lesser General Public License (LGPL), the Mozilla Public License (MPL), the MIT License, the Apache Software License and the Berkeley Software Distribution (BSD) License.

### Some Potential Problems

OSS certainly has advantages, but OSS licenses also create legal risks. For instance, OSS is usually offered "as is." The user gets no warranties that the OSS will perform as expected or that

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the software does not infringe someone's copyrights or patent rights. Also, the user typically gets no support contract from the OSS developer.

That puts your business in a risky position if you develop software to sell. Contracts to develop or sell software usually give the buyer warranties against defects and infringement. The contract might also obligate the developer to maintain and support the software and indemnify the buyer against any infringement claims. If the developer sells its proprietary software with an open source component which the buyer later finds to be defective or infringing, the developer can turn to no one to absorb or share the costs of fixing the situation.

That's not the only problem. Some OSS licenses say that if you incorporate the OSS into your software, you must also make your software publicly available. That means that if a software developer incorporates an open source component into its own proprietary software, the developer must make the source code for its entire proprietary software freely available. This clearly contradicts most developers' business strategies. If the developer uses the software and refuses to comply with the source code requirement imposed by the license, the developer is subject to claims of copyright infringement and breach of contract.

OSS can also become a problem when the company attempts to raise financing or sell its business. Lenders, venture capitalists and buyers are becoming aware of the potential pitfalls of OSS. They often insist that a company that uses OSS give warranties regarding ownership and use of the OSS, and indemnify them against any loss or expense arising out of the software.

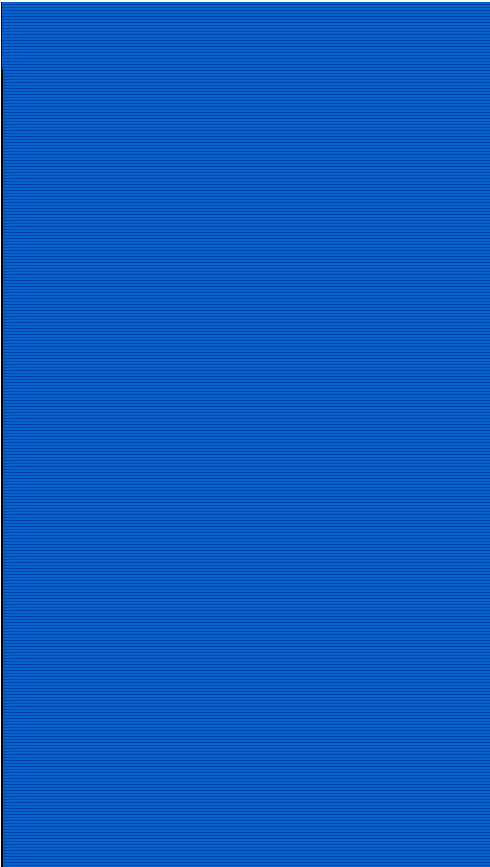
The problems described above don't apply to all OSS users. For instance, a company that uses OSS for only internal functions (e.g. as a component in its payroll software) doesn't have to worry about getting sued by a buyer for a defective or infringing open source component in its software. Moreover, an internal user may not care if it must make its source code freely available, since it doesn't depend on sales of the software for profits.

Also, not all open source licenses create the problems explained above. For instance, the BSD license doesn't require a software developer to make its proprietary source code freely available when its software incorporates OSS. However, much OSS is still distributed under the GPL license, which does impose such a requirement.

The way to deal with the issue of OSS is straightforward. Read the OSS license with care *before* you use the OSS and make sure it's consistent with your business plan.

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