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Advertising Material

# Intellectual Property Law Update

A Publication of the Intellectual Property Group of Holme Roberts & Owen LLP

## THE LEGAL IMPLICATIONS OF USING OPEN SOURCE SOFTWARE

Open source software has been hailed by the Wall Street Journal as “[o]ne of the most important forces in all of technology.” The low-cost and easy availability of open source software has led to rapid growth in the use of open source software in the development of software applications. Yet, despite its growing importance and popularity, relatively few companies are aware if they are using open source software, and fewer still appreciate the legal implications of doing so. If your company develops or uses software, you should be aware of the potential implications of open source software on your business.

### What is “Open Source” Software?

Open source software can be distinguished from other traditional forms of software by the structure of the license agreements under which open source software is made available. Traditional licenses for proprietary software generally seek to restrict software by placing significant restrictions on the use of the software. In contrast, open source software licenses seek to create a more “open” legal environment in which:

- The software is available to users in both object code (machine readable) and source code (human readable) forms;
- The software may be used, enhanced, modified and redistributed;
- Redistribution of the software (and enhancements and modifications) is made subject to the terms of the open source license; and
- There is no fee (or only a minimal fee) charged for these rights.

Open source licenses are similar to traditional mass-market licenses insofar as they are not negotiated between the parties. Instead, they are agreed to in a standard form through the action of using the software. While somewhat different from a traditional license in that agreement does not require a signature or “click-through,” open source licenses are generally regarded as enforceable and should be complied with as you would comply with any other contract.

### How is Open Source Software Addressed Under Applicable Law?

The open source licensing model is generally permissible under U.S. copyright laws, but may encounter difficulties under the laws of other countries. Under U.S. law, the owner of a copyrighted work (in this case the software) may license that work, either in whole or in part, with or without receiving a royalty or fee in exchange for the license. However, the copyright laws of other countries, for example Germany, require that the owner of a copyrighted work receives adequate compensation in exchange for a license to that work. In order to facilitate the open source licensing model, Germany has introduced a so-called “Linux-clause” into German copyright law which makes it possible to grant a simple license to the general public for no fee (or only a minimal fee). While this development should greatly increase the viability of open source software in Germany, it is prudent to investigate the extent to which the laws in the countries in which you are doing business allow for open source licensing.



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## Why Should You be Concerned?

At the present time there are over 45 different recognized open source licenses. Common open source licenses include the General Public License (GPL), Lesser General Public License (LGPL), MIT, BSD and APACHE licenses. While each license shares the common traits described above, the "open" environment fostered by these licenses should not be mistaken as being "free" from obligations. To the contrary, open source licenses generally seek to preserve an "open" legal environment by imposing obligations on the licensees of open source software. These obligations are complex, and at times unclear or even ambiguous. The potential implications of using, modifying and distributing open source software varies greatly with each license. For example:

- Licenses such as the GPL or LGPL can obligate the licensee to make publicly available the source code of proprietary software that is distributed with open source software;
- Other licenses such as the BSD and MIT licenses only obligate the licensee to make publicly available the open source code obtained under these licenses; and
- Nearly all open source licenses create at least some obligation for the licensee to provide certain copyright ownership notices and attributions on any copies of open source software distributed to third parties.

Because the obligations vary based on the license and on the action being taken under that license, no single analysis is sufficient for all situations. Instead, careful analysis based on the form of license and the type of use is necessary to ensure compliance with the license.

## What Steps Can You Take?

Open source software can represent a great benefit to companies developing or licensing software. Users of open source software must understand, however, that open source licenses create binding obligations on the licensees of open source software. While these obligations are not always clear, taking steps to identify and manage the use of open source software can help reduce their impact on your business. Prudent steps that you can take include:

- Raising general awareness among IT personnel that while open source software is "open," it is not "free" and is subject to license terms.
- When licensing software:
  - Watch for exclusions of "open source" or "third party" software from the terms of licenses for proprietary software; and
  - Insist that your licensor disclose whether open source software is part of the software that is being licensed and what open source licenses apply; and
  - Seek an intellectual property infringement indemnification that includes open source software.



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- When developing software:
  - Inventory all uses of open source software and applicable open source licenses; and
  - Implement a consistent procedure for analyzing and complying with all applicable open source license obligations.
- When contracting with third a party software developer:
  - Require that the developer inform you before the developer uses open source software;
  - Obligate the developer to provide non-open source options if you disapprove of use of the open source software; and
  - Seek warranties and indemnifications that cover any open source software that is used.
- As with traditional software licenses, consult an attorney familiar with open source when analyzing unfamiliar open source licenses.

HRO attorneys are familiar with the terms of many of the existing open source licenses. We have worked with clients to develop and implement open source training, management and compliance programs involving these licenses. We continue to monitor developments in the open source software area and to integrate this knowledge into our practice. Please contact one of the HRO attorneys listed on this Client Update for more information on this topic or for information on open source licensing.

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