

# Open Source Software Legal Risks

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“Open source software is a threat to our very system of capitalism.”



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# What we will cover

- Open source model
- Key advantages
- Legal risks
  - ownership risks – SCO/IBM dispute
  - performance risks
  - infection risks
  - enforcement risks
- Managing the risks



# Open source model

Making the source code for a software program openly available for the public to work with it, at little or no charge



# Open source model

## Key differences from the traditional model

	Open source licence	Traditional software licence
Is the source code available?	Yes	No
Is the software freely transferable?	Yes	No
Can the software be modified?	Yes	No



# Open source model

## Some other notable differences

	Open source licence	Traditional software licence
Must the software be made available to others on open source terms?	Yes	No
Must any works derived from the software be made available to others on open source terms?	Yes (in many cases)	No



# Open source model

Remember:

- Many different types of open source licences
  - Some reflect class principles (e.g. GPL)
  - Some are less restrictive (e.g. BSD)
  - Some are not true open source (e.g. Sun Community Source)



# Key advantages

- Access to source code
  - enables users to understand
  - enables users to fix
  - enables users to develop
  - enables users to manage the life of the software





# Key advantages

- Community of developers
  - encourages co-operation
  - reduces “re-invention of the wheel”
- Cost
  - most open source software is free of charge



# Key advantages

- Decreases vendor tie-in
  - users are not so reliant for support
  - software is less likely to become redundant
- Quality
  - most open source software is robust and functional



# Key advantages

- The growth of the Linux operating system highlights these advantages
- Many other open source products are also developing quickly



# The legal risks

- Growth of open source software has led to more focus on the legal risks
- Commercial users and traditional software vendors are looking to protect their positions



# The legal risks

- The legal risks arise due to:
  - the inherent and unique nature of the open source model
  - non-legalistic open source licences
  - no law or judicial decisions clarifying issues



# The legal risks

4 key areas:

- IP risks
- Performance risks
- Infection risks
- Enforcement risks



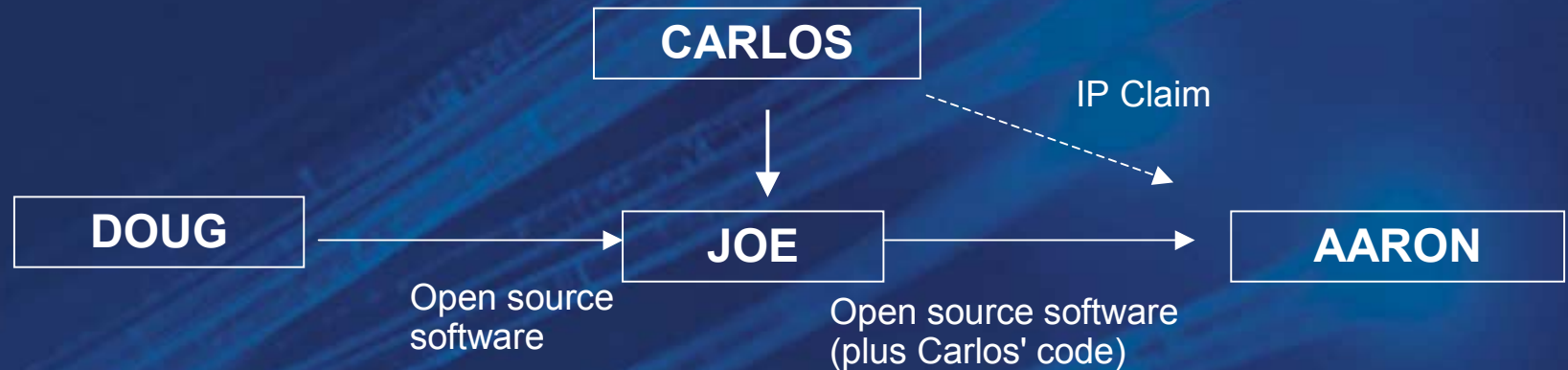
# (1) IP risks

- No assurances that use of the software will not infringe any person's IP rights (e.g. copyright or patents)
- Most commercial software licences contain IP infringement assurances
- Users inherit the risks of any upstream IP infringement



# (1) IP risks

Example:





# (1) IP risks

## SCO DISPUTE - FACTS



# (1) IP risks

## SCO DISPUTE - CLAIMS

- \$3 billion from IBM for “misappropriation of trade secrets”
- Linux is an unauthorised derivative of SCO’s Unix-based operating system
- Warned 15,000 Linux commercial users that they could be in breach of SCO’s copyright



# (1) IP risks

## SCO DISPUTE - REACTION

- IBM has recently filed a counterclaim against SCO
- Alarm and some angry reaction from Linux commercial users
- New Zealand Open Source Society now involved



# (1) IP risks

## SCO DISPUTE – LEGAL ISSUES

- GPL does not provide any IP protection
- Some doubt whether SCO's claim is legitimate
- Any legal claim against users would be complex – detailed evidentiary requirements and complex copyright issues



## (2) Performance risks

- Most open source licences disclaim all liability for any faults or performance issues
- Users have no recourse for any faulty products



## (3) Infection risks

- Some open source licences require any “derived works” to be licensed on open source terms
- Copyleft principle



## (3) Infection risks

GPL (section 2(b))

“You must cause any work that you publish to distribute, that in whole or part, contains or is derived from the program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of the licence”



## (3) Infection risks

- Not entirely clear what constitutes a “derived work” in all cases (opinions differ widely)
- Not relevant for all licences (e.g. LGPL)





## (4) Enforcement risks

- Some flaws in the open source licensing model
- May assist downstream users to evade open source requirements



# (4) Enforcement risks

## A. Contract formation

- Some concerns over how open source licences are “formed”
- Most open source licences just require that a notice be provided in or with the code (e.g. GPL and BSD)
- No clear “acceptance” process is required



# (4) Enforcement risks

## B. Consideration

- Some concern there is no sufficient “consideration” in open source licences
- If no “consideration” exists, there can be no contract



## (4) Enforcement risks

### C. What if no contract exists?

- May be a copyright licence rather than a contractual licence
- These may be revoked at any time



# Managing the risks

## 1. Due Diligence

- Make enquiries about the provider and potential IP and performance issues
- Use a well-known reputable provider (e.g. Red Hat)
- Try to seek warranties and indemnities from the provider?



# Managing the risks

## 2. Managing infection risks

- Review closely any licence terms relating to requirements for “derived works”
- Set up business processes to manage risks



# Managing the risks

## 3. Review the licence terms

- Review the licence terms
- Evaluate and mitigate the risks



# Where to from here?

- A number of legal risks
- Some manageable
- Likely to get more attention
- Likely to be changes to the open source model





- Questions

- [www.x-tech.co.nz](http://www.x-tech.co.nz)



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