Chapter 7
Legal Issues with FOS–ERP:
A UK Law Perspective

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ABSTRACT

Whilst there are numerous benefits for a business from procuring a ERP on the basis of FOS licensing terms, there are a number of legal risks which need to be considered. These legal risks include: (a) assuming all FOS licences are the same; (b) uncertainty as to the enforceability of FOS licences; (c) lack of clarity in relation to the legal characterisation of FOS licences; (d) risk of poor performance; (e) risk of IPR infringement claim; (f) issues arsing from reciprocity; (g) legal challenges to FOS licences; and (h) the issues arising from the missing contractual provisions. The chapter outlines these legal risks and provides recommendations as to how to mange such risks.

INTRODUCTION

At its simplest level, free/open source (FOS) is a way of licensing software and this chapter accordingly begins with a reminder of why we need software licences and what they typically include in a conventional model.

It is from that basis that the different approach taken in FOS licensing is introduced. This chapter outlines the key features of FOS licences (in particular the most common FOS licence, the GNU General Public Licence) and considers the key legal issues and risks to be considered when licensing an ERP using FOS. These legal risks include:

- assuming all FOS licences are the same;
- uncertainty as to the enforceability of FOS licences;
- lack of clarity in relation to the legal characterisation of FOS licences;
- risk of poor performance;

- risk of IPR infringement claim;
- issues arsing from reciprocity;
- legal challenges to FOS licences; and
- the issues arising from the missing contractual provisions.

This chapter is based on the laws of England and Wales as at 15 October 2010.

BACKGROUND

To understand some of the legal risks a business could encounter with using a ERP licensed on the basis of a FOS licence, it is useful to explain how ordinary (i.e. proprietary) software is licensed.

As a general comment there is only a limited amount of literature and research on the legal issues with FOS-ERP. It should be acknowledged that much of the literature on open source software is from the perspective of developers who regard the social ideal of shared software and the developers' community above all other ideals (such as securing a revenue model), without acknowledging some of the legal difficulties with open source licensing (such as those canvassed in this chapter) (James, 2003).

Software Copyright and the Need for Licensing

Property is simply a bundle of rights to own, use and prevent others from using something, for example, a plot of land, a car or a house. Intellectual property is a bundle of rights that protects applications of ideas and information that have commercial value (Cornish and Llewelyn, 2010). Intellectual property rights (IPRs) give creators certain exclusive rights over the knowledge and information they create to prevent others using it without permission (Gower, 2006).

IPRs cover a wide variety of subject matter, but in respect of software the principal right is copyright (although database rights and patents can also apply). In this chapter, the focus is on copyright. However, software patents should not be ignored and are increasingly likely to apply to software products. They represent a separate area of risk, however, they are beyond the scope of this chapter.

Under English law, software is automatically protected by copyright, as soon as the code is expressed in a material form such as writing (Korn, Oppenheim and Sol Picciotto, 2007). Unless varied by contract, the first owner of the copyright in software is its author, except that in the case of software created during the course of employment, it is the employer rather than the employee (Section 11 of the Copyright, Designs and Patents Act 1988).

Copyright places a number of restrictions upon use, which include:

- permanent and temporary copying, either of the program as whole or a substantial part, either of the source or object code, including writing code in any language which is substantially based on it;
- communicating to the public (for example, making it available on a website to other than authorised users) of all or a substantial part;
- making an adaptation, arrangement or other altered version, including a translation into another computer language; this includes repurposing of any elements, for example, combination or incorporation with other software or other copyright works;
- distribution or rental;
- de-compilation of a program, unless it is for the purpose of creating an interoperable program;
- possessing or disseminating an infringing copy. (Korn, Oppenheim and Sol Picciotto, 2007).

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