DANCING IN THE SHADOW OF INTELLECTUAL PROPERTY: LEGAL RISK MANAGEMENT IN FLOSS

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27-05-2008 3rd FLOSS Conference, Athens
1. Shadowplay – engineers, lawyers, users
2. IPR threats in FLOSS
3. Risk management strategies
   - Patent defenses
   - Indemnifications, warranties, disclaimers
   - Risk insurance
   - General risk avoidance
4. Concluding remarks
Shadow play - engineers

Engineers and lawyers in a software development story

9 out of 1803509 documents...
However, intersection of law and engineering may occur in different forms and stages in a software project.

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Shadow play - users
IPR threats – code origin

Scenario A.

Final product ok

Users / subsequent developers ok

Scenario B.

Final product “tainted”...

Users / subsequent developers exposed
IPR threats and violations

- Patent and copyright violations by copying, modifying and distributing the infringing contribution of source code
  - Copyright – source code used illegally or in violation of the license terms
    - Difficult to detect (allegedly copied source code usually not available. Interpretation of license terms may get ‘misty’)
  - Patents – patents threats become substantive, when the FLOSS project gains in popularity
    - Almost impossible to detect in advance, since most patent claims do not include any source code (no possibility of conducting technical searches)
IPR threats and violations

Interim conclusion?

Scenario A. is hardly a reality: most software contains portions of code that potentially infringes patents (2004 Linux study) and copyrights; it is difficult to write a significant program today without using an idea that is covered by a software patent.

However, this is not something new: the “tainting” of the code is NOT directly related to FLOSS, but to software development in general.

Keep in mind: there is a difference between obtaining patent rights and enforcing them (depends on company policy, e.g. 40% of the patents get invalidated in litigation.
Still, specific problems for FLOSS lie in:

- The easiness to detect infringement as the result of source code availability
- With regard to small FLOSS companies and community projects: the lack of funds for “proofreading” submitted code, or securing appropriate licenses.
Risk management strategies

- Defend against patents / protect end-users:
  - Re-engineer, if possible, sections that allegedly infringe patents
  - Collect and keep prior art information, useful to invalidate patents
    - e.g. “Open Source As Prior Art” Project
  - Establish mechanisms that facilitate better examination and quality of patents
    - e.g. “Peer-to-Patent” Project (Community Patent Review), “Patent Quality Index” Project
- Patent acquisition
- Organize and patent pool – agree to reasonable cross-licensing terms
Risk management strategies

Use of indemnification, warranty, disclaimers:

In favor of Developers

- Limitations to liability for legal errors (including copyright and patent infringements) and technical errors (bugs)

- Disputable effect

In favor of Users

- e.g. HP, Novell, Red Hat, JBoss Linux indemnification programs for their customers

- e.g. Red Hat’s Intellectual Property Warranty for their customers
Risk management strategies

- Check available insurance policies
  - e.g. OSRM + Klin(Lloyd’s):
    - Cover the loss of profits associated with the withdrawal or alteration of a product incorporating non-compliant code or the impaired valuation of an acquisition agreement exchanging open source software
    - pay the costs to mitigate such losses including the expense of repair or replacement of code that is found to infringe upon the GPL or other Open Source license
    - Up to $10 million (indemnification for 3-5% of the chosen amount)
Risk management strategies

- Implement risk avoidance procedures
  - Software IP assessment
    - e.g. Black Duck Software, Palamida (code scan to compile a report documenting instances of FLOSS and 3rd party components in the analyzed code)
  - Formal written copyright assignments/declarations from contributors
  - Don’t underestimate the help you can get
3rd party help

- Software Freedom Law Center
- Software Freedom Conservancy
- Patent Commons Project
- Public Patent Foundation
- Linux Legal Defense Fund
- Patent Lens – Initiative for Open Innovation (IOI)
- Open Invention Network
- Open Source Now Fund
None of the above strategies is foolproof…

Some are expensive (patent acquisition, insurances)

Some offer wide scope of protection but low effectiveness (disclaimers), others offer high protection for a limited scope (patents)

As a result different categories of developers tend to emphasize on a specific type of strategy

Still…

Use of license disclaimers seems to be the standard in the industry

Patent acquisition seems to be a prerogative of big IT companies

Big IT enterprises and FLOSS companies have started to sell warranties and indemnification policies to their users

There is still space for developing insurance solutions, particularly for FLOSS companies, and corporate users

Patent pooling may work for FLOSS community projects,
Thank you for Your Attention!!

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