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No Free Lunch for Open Source Code

Whether you employ software developers or use software created by others, you need to be aware of a recent court decision supporting the position that there is no free lunch when using open source code. Open source and free do not mean unlimited and unrestricted use. Software developers and users of custom software in particular should conduct a compliance review of their software development, use, and licensing practices.

Computer software is a critical part of any business operation, whether for the operation of a voice over IP phone system, the operation and management of a complex database, or other purposes. Many businesses rely on existing software packages to meet their needs, while others engage developers to create custom software to address unique operational and other business purposes. Software developers rely on their own creativity and ability to write new code, but they also rely on software code developed by others. Although some pre-existing software code is available through a private license agreement with its developer, increasingly developers are relying on open source code made available through free public licenses. Open source code is human readable code created by developers that is available on the Internet for use, distribution, and incorporation into other projects at no cost. It is becoming progressively popular, because it allows software developers to use the work of other developers, thereby facilitating collaboration on complex projects. Examples of projects using open source code are the Mozilla® Firefox® Internet browser and Linux® operating system.

Software license agreements generally define the rights of licensees to use the source code, or human readable code, of third party developers. In a private license, the parties negotiate the terms of the license, and then incorporate those terms into an affirmative license agreement. In the case of open source code, however, there is generally no affirmative agreement between the parties. Instead, the party desiring to use the open source code uses it knowing that it is subject to the terms and limitations of an open source license agreement. In today's market, there are several versions of open source license agreements, including the general public license or public license.

Since the advent of open source, there has been some question about whether a prior developer of a project using open source under a public license could enforce the terms of the public license and thereby control the downstream distribution and modification of the project. Open source code is free, and some argue that there is no consideration for the limitations in the public license. However, in a recent case decided by the United States Court of Appeals, Federal Circuit, the court found that upstream developers have the right to control the modification and distribution of copyrighted material by downstream developers and users.

If downstream developers are not careful when using open source by failing to comply strictly with the terms of the public license, or other open source license agreement, or by licensing software incorporating open source without appropriate representations, warranties, and indemnification protection, a user of that software might find itself in the very uncomfortable position of having to remove the offending source code and write around it, or pay for a commercial license to use the code. Further, a downstream user might be forced to disclose source code that is public, but which the user thought would be private. For many businesses, these problems could lead to significant downtime, expense, litigation, and embarrassment. CEOs and CTOs need to manage development and use of software to assure compliance with all applicable license agreements and proprietary rights, whether under a private license or, now, an open source license.

John Rees, an attorney with and member of the board of directors of the law firm of Callister Nebeker & McCullough, helps clients find solutions to their business legal needs. He focuses on corporate and intellectual property issues, particularly relating to licensing and doing business on the internet. He is the chair of the law firm's internet law and intellectual property practice group, and is the founder and past chair of the Utah State Bar Association's Cyberspace Section. He is also a member of the American Bar Association Cyberspace Law Committee. John is a frequent lecturer and enjoys educating and training clients on how to solve their legal problems. He received his undergraduate and law degrees, in addition to an MBA, at the University of Utah.

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