

No Such Thing as a Free Lunch

Is 'Free Software' Really Free?

Open source software (**OSS**) is often referred to as 'free software', and many OSS programs can indeed be downloaded on the internet free of charge. The use of most OSS programs is nevertheless still subject to specific licence terms, and it usually pays to spend the time and effort to review applicable licence terms **before** using the program. Ignoring relevant licence restrictions can prove costly in the long run.

Types of OSS Licences

The licence terms governing the use, modification and distribution of software programs which are available free of charge vary considerably. Most programs can be broadly categorised as either being in the public domain, or being subject to either permissive or restrictive OSS licences.

Public domain

Some software programs are made available to the public without the owners specifying any terms governing the use of the programs or imposing any restrictions. The terms governing the use of such '*public domain*' software are therefore uncertain, although strong arguments would usually exist that it is available under implied licence terms permitting use by anyone for any purpose, including modification, incorporation into other programs and distribution to third parties either in its original or modified form. (Whether this is likely to be the case would need to be determined on a case by case basis.) It is obviously important to ensure that such software is really not subject to any licence restrictions, which generally means obtaining confirmation from the original source rather than relying on middlemen having accurately reproduced all applicable licence terms.

Permissive OSS licences

Many OSS software programs which are available to the public free of charge are subject to the terms of short, user friendly, non-restrictive licence terms. Nevertheless, such '*permissive*' OSS licences usually still include

some limitations on the distribution of both the original program as well as any derivatives based on the original program.

For example, the 'BSD Licence' (which was originally used for the Berkeley Software Distribution operating system) allows unlimited

Importantly, the GPL does not allow distribution of derivative works on terms which include restrictions beyond those already imposed by the GPL, which makes it incompatible not only with proprietary licence terms, but also with some of the more permissive OSS licences.



Avoiding common pitfalls

Use of OSS can be a cost effective way to acquire software functionality at little or no expense, provided the terms governing the use of the OSS allow for it to be used as intended.

The following steps may assist in avoiding some of the common pitfalls when incorporating OSS in an in-house project:

distribution of derivative works for any purpose as long as the distribution is on terms which reproduce the copyright notice and disclaimer of warranties contained in the BSD Licence. It also restricts use of the names of contributors to the original program for endorsement of a derivative work without specific permission.

Restrictive OSS licences

Some OSS licences are very detailed and contain many restrictions on what a user is allowed to do with the relevant program. Such restrictions are usually intended to ensure that the code remains freely accessible to the public and does not become part of proprietary software.

For example, the widely used GNU General Public License (**GPL**) created by the Free Software Foundation specifies that if a work based on GPL licensed code is distributed to anyone, the distribution of such 'derivative works' must also be under the GPL. Further, if such derivative works are distributed to third parties, the source code must be made available as well. Understanding what constitutes a 'derivative work', and what amounts to 'distribution', of GPL licensed code is therefore vital, with the answer not always being clear cut.

- » Review applicable licence terms before using 'free' software – where the terms are too restrictive, alternative (or even the same) software may be available on more favourable terms, or functionally equivalent code may be written in-house, thus avoiding 'contamination' of the project.
- » Make sure the correct version of the OSS licence terms is being referred to when analysing applicable licence terms – for example, several versions of the GPL and BSD licences exist which contain significant differences.
- » Where software is obtained from anyone other than the owner, confirm applicable licence terms with the original source – this can often be done on the owner's website.
- » When using several OSS programs in the same project, make sure the various applicable licence terms are compatible with each other.
- » Ensure all technical staff understand the implications of relevant licence terms – they may be able to structure

Lowering the Threshold

Health World Ltd v Shin-Sun Australia Pty Ltd [2010] HCA 13

The High Court recently considered the requirement for an applicant seeking removal or cancellation of a trade mark from the Register to be “aggrieved” and in particular, whether that requirement should be construed restrictively or liberally.

The High Court ultimately found that Health World was aggrieved because it was in the same trade as Shin-Sun, and traded in the same class of goods in respect of which the challenged mark was registered.

The High Court overruled the Full Court’s decision in *Kraft Foods Inc v Gaines Pet Food Corporation* (1996) 65 FCR 104 to the extent that the Full Court held that the exhaustive test for ascertaining whether a person is aggrieved, is to demonstrate at least a reasonable possibility of the removal applicant being “appreciably disadvantaged in a legal or practical

sense” by the trade mark remaining on the Register.

As a result of amendments to the Trade Marks Act 1995 effective from 23 October 2006, a removal applicant (for the purposes of an application brought under section 92 of the Act) is no longer required to a “person aggrieved”. The above High Court decision is therefore primarily relevant to cancellation actions (brought under section 88 of the Act) where the requirement for the applicant to be an “aggrieved person” still exists.

The High Court decision effectively lowers the threshold for applicants bringing cancellation proceedings against a competitor in that an applicant is arguably “aggrieved” by reason of the parties operating in the same field of business.



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the project in a way that avoids some of the restrictions. For example, when relying on OSS code, it may be possible to merely link to such code so as to avoid certain restrictions rather than incorporating it into the project and thereby resulting in a derivative work.

- » Maintain an accurate and up to date log of all code incorporated into the project, including details of when and by whom the code was included and where it originated from (with references to, and copies of, all applicable licence terms), as well as all modifications made to the original code. This is ideally done for all code on a line-by-line basis.
- » Consider carefully whether to use OSS in ‘proprietary’ software development, particularly where the commercial pathway is distribution of the finished product to other parties.

What to do when it seems too late

Once a business realises that OSS code used for an in-house project is subject to licence terms which do not allow the software to be used as required, there may still be scope to remedy the situation:

- » Check whether the OSS code can be replaced with other third party code (either OSS or proprietary) which is subject to more favourable licence terms.
- » Consider whether the required functionality could be achieved with code written in-house (either by employees or contractors), and the time and effort required to do so.
- » If use of the OSS code is essential, consider approaching the owner who may be prepared to allow use of the code on less restrictive or ‘commercial’ terms, possibly in return for a fee.



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