

# MILLER THOMSON LLP

Barristers & Solicitors, Patent & Trade-Mark Agents

## Legal Implications of Commercializing in an OPEN SOURCE Environment





# Open Source: Legal Considerations

- Great opportunities for commercializing in an Open Source
- BUT the legal pitfalls of an Open Source framework as often MISUNDERSTOOD!



# Open Source: Legal Considerations

- Agenda

- Legal attributes of an Open Source license (high level)
- Understanding legal pitfalls by comparing proprietary and Open Source frameworks

# Legal attributes of an open source license

- **Contribution stage**

- Assignment e.g. to non-profit, or license

- **Distribution stage**

- Requirement to distribute with source code
- Product reasonably available for modification and use

# Legal attributes of an open source license

- Hot button issues

- Ability to incorporate OS code in later products?
- Contribution of IP required, if related to contributed code?
- Rules related to enforcement of users' IP rights
- Legal effect of breach of open source license?
- What is required to create a “separation” between OS code and other code that you want to control?



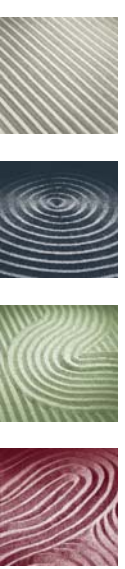
# Proprietary vs. Commercial

- Not an obvious choice
- Answer is often “hybrid” solutions, with specific legal implications



# Proprietary – the Bad

- More complicated licensing conditions (use restrictions etc.)
- Less flexibility to take aspects of deployment in house
- Artificial requirements for outdated approaches to delivery of functionality
- Too much emphasis on product vs. service



# Proprietary – the Good

- Patents help new entrants gain a foothold
- Proprietary product provides bargaining power = profit
- Reproduce some advantages of open source using cross-licensing and standard development
- Indemnities, especially IP



# Open Source - the Good

- Framework for collaborative development
- Lower legal costs
- With current economic conditions, OS is very attractive
- Level of acceptance by companies is much better today



# Open Source - the Bad

- Significant legal complexity to navigate
- Advantage of larger organizations in providing services
- Relatively small number of companies that are profitable based on OS strategy



# Reality: “Hybrid” Approaches

- Pure OS code as a launch pad (Xen)
- Build domain specific versions on top of OS platform (Xen)
- “Professional version” of OS products (MySQL)
- Proprietary companies commercializing add-ons, e.g. GOOGLE Android
- Products that leverage intersection between proprietary and OS domains, e.g. enabling computer to communicate regardless of proprietary or OS operating system (Black Duck)



# Reality: Legal Touchpoints

- Demarcation point between OS and proprietary components
- Ensuring that the code structure of proprietary components is consistent with the demarcation point
- Consider impact of license language on patent rights
- Consider impact of license language on enforceability (*Jacobsen*)
- Effects of non-asserts, between parties and unilateral (MICROSOFT)
- Need for OS adoption policies



# Lessons

- OS framework is not a force field from IP issues!!!
- Need to have a specific market strategy leading to profit, and legal strategy that provides the necessary control, reservation of rights etc.
- Otherwise, you may live to regret going the OS route!!!
- Examine OS leaders closely