

Legal issues for free and open source software in government

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As more governments begin to adopt and release free and open source software, it is important to be able to readily recognise and identify the associated legal risks and potential liabilities. This panel will examine and discuss the most common of these associated risks and liabilities. These issues include, but are not limited to:

- indemnities against claims of intellectual property infringement from third parties
- requirements of consumer protection and antitrust legislation
- obligations to redistribute source, and when they arise
- enforceability of free software licences
- layering and combining of licences
- dual-licensing
- licence incompatibility
- software patent liability
- contemporary developments in software licensing

There are significant advantages to a broad government adoption of free software. These range from potential cost savings, adoption of open standards and protocols, and wider use of stronger, more flexible and more secure software, to the social benefit derived from promoting a contributory commons of free software. However, governments ought to be aware of the obligations that may be imposed by the use and redistribution of FOSS, and when exactly these obligations will arise. Governments must also be mindful of the effect that implied warranties may have upon the sale or supply of free software, and the limitations inherent in indemnity clauses in many free software licences.

Where a government is using public funds to develop a software application, great care must be taken when choosing a licensing strategy. If there is a large

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commercial market for the unmodified application, a traditional closed source licensing approach can be considered to generate income. If the only commercial market for the software consists of software developers who would heavily modify or integrate the software, then a dual licensing approach could be taken to provide an income stream from those developers while still allowing the benefits of publicly-funded software to flow back to the community. Finally, where there is no commercial market for the software, or if the commercial market is more concerned with custom development and support services, there is a strong argument that the government should release the software under a free licence.

The evaluation of whether a government should use free or open source software for any given application is a complex matter. However, with the continual increase in quality and quantity of available solutions, coupled with increased understanding of the advantages and obligations involved, we can expect to see more widespread use of FOSS by governments across the world. In this context, the challenge for lawyers and government officials will be to fully understand the intricacies of this emerging area of law. This panel is but one step in gaining an appreciation of the legal landscape involved.