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# Open Source and SaaS

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Many open source software (OSS) licenses grant broad rights to use the OSS code, but also impose certain legal obligations. Unfortunately, many OSS licenses are not well drafted and critical terms often are not defined. For example, under some licenses, a significant difference in legal obligations may result if a work is distributed instead of being used internally or accessed via a network. Yet, the term "distribution" often is not defined in the license. As discussed below, this can be important when using OSS in a software-as-a service (SaaS) or cloud-based business model. In a typical SaaS model, a copy of the software is not given to customers. Rather, the customers access the software via a network connection.

This raises at least two sets of questions with respect to OSS licenses. The first is whether this is a "distribution," which triggers some of the more significant OSS license legal obligations. The second is, regardless of whether this is a distribution, what are the other OSS implications.

## IS SAAS A "DISTRIBUTION"?

One of the exclusive rights of a copyright owner under U.S. copyright law, is the right to distribute copies. Generally speaking, a distribution occurs when a copy of a program is made and that copy is provided to a third party. Providing network access (e.g., via a SaaS or cloud model) to a software program or service typically is not a distribution because the user does not get a copy of the program. Nor does the user get rights to copy, modify or redistribute the software.

As a result, under most OSS licenses, the deployment of a SaaS (or other network access) model with software that uses OSS will not subject that software to the more significant OSS license legal obligations. Thus, even if the SaaS software combines proprietary software with OSS covered by the GPL or most other restrictive licenses, many of the potentially problematic issues (tainting, patent license grants, etc.) that can otherwise arise under OSS licenses are non-issues.

## OTHER OPEN SOURCE IMPLICATIONS

### *AGPL*

Even if a SaaS deployment is not deemed a distribution, a number of legal issues can arise when using OSS with other software in a SaaS model. Certain OSS licenses impose significant legal obligations on the use of OSS, even if it is not distributed. One such license, particularly relevant to SaaS, is the Affero GPL version 3 (AGPL 3.0).

The AGPL 3.0 is a variant of the GPL license. It is nearly identical to the GPL but was designed to impose significant conditions when the covered software is accessed via a network, even if it is not distributed.

For instance, the preamble of the AGPL 3.0 distinguishes itself from the GPL by stating:

The GNU Affero General Public License is a free, copyleft license for software and other kinds of works, specifically designed to ensure cooperation with the community in the case of network server software.

A secondary benefit of defending all users' freedom is that improvements made in alternate versions of the program, if they receive widespread use, become available for other developers to incorporate. Many developers of free software are heartened and encouraged by the resulting cooperation. However, in the case of software used on network servers, this result may fail to come about. The GNU General Public License permits making a modified version and letting the public access it on a server without ever releasing its source code to the public.

The GNU Affero General Public License is designed specifically to ensure that, in such cases, the modified source code becomes available to the community. It requires the operator of a network server to provide the source code of the modified version running there to the users of that server. Therefore, public use of a modified version, on a publicly accessible server, gives the public access to the source code of the modified version.

Thus, the AGPL 3.0 establishes upfront that network access to covered software can trigger certain obligations. These obligations may result in tainting the proprietary software in a way that requires the release of source code of the proprietary software and/or triggering the obligation to grant certain patent licenses.

The tainting provision impacts proprietary software that includes or is derived from the AGPL 3.0 code. It causes the software as a whole (the proprietary and AGPL 3.0 code) to be licensed under the terms of the AGPL 3.0. The ramifications of this are that the source code for the software as a whole must be made available to users who have network access and the users get a right to copy, modify and redistribute that software at no charge.

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Section 13 of the AGPL 3.0 provides the source code access provision. It states: :

> Notwithstanding any other provision of this License, if you modify the Program, your modified version must prominently offer all users interacting with it remotely through a computer network (if your version supports such interaction) an opportunity to receive the Corresponding Source of your version by providing access to the Corresponding Source from a network server at no charge, through some standard or customary means of facilitating copying of software. This Corresponding Source shall include the Corresponding Source for any work covered by version 3 of the GNU General Public License that is incorporated pursuant to the following paragraph.

Sections 4 and 5 gives users the right to copy, modify and redistribute the source code.

> 4. Conveying Verbatim Copies.
>
> > You may convey verbatim copies of the Program's source code as you receive it, in any medium, provided that you conspicuously and appropriately publish on each copy an appropriate copyright notice; keep intact all notices stating that this License and any non-permissive terms added in accord with section 7 apply to the code; keep intact all notices of the absence of any warranty; and give all recipients a copy of this License along with the Program.
> >
> > You may charge any price or no price for each copy that you convey, and you may offer support or warranty protection for a fee.
>
> 5. Conveying Modified Source Versions.
>
> > You may convey a work based on the Program, or the modifications to produce it from the Program, in the form of source code under the terms of section 4, provided that you also meet all of these conditions:
> >
> > a) The work must carry prominent notices stating that you modified it, and giving a relevant date.
> >
> > b) The work must carry prominent notices stating that it is released under this License and any conditions added under section 7. This requirement modifies the requirement in section 4 to "keep intact all notices".
> >
> > c) You must license the entire work, as a whole, under this License to anyone who comes into possession of a copy. This License will therefore apply, along with any applicable section 7 additional terms, to the whole of the work, and all its parts, regardless of how they are packaged. This License gives no permission to license the work in any other way, but it does not invalidate such permission if you have separately received it.
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> > d) If the work has interactive user interfaces, each must display Appropriate Legal Notices; however, if the Program has interactive interfaces that do not display Appropriate Legal Notices, your work need not make them do so.
> >
> > A compilation of a covered work with other separate and independent works, which are not by their nature extensions of the covered work, and which are not combined with it such as to form a larger program, in or on a volume of a storage or distribution medium, is called an "aggregate" if the compilation and its resulting copyright are not used to limit the access or legal rights of the compilation's users beyond what the individual works permit. Inclusion of a covered work in an aggregate does not cause this License to apply to the other parts of the aggregate.

The patent grant provisions of the AGPL 3.0 impact existing or future-acquired patents covering proprietary software that includes or is based on AGPL 3.0 code. It causes those who own or control patents covering such proprietary software to grant a license under those patents to make, use, sell, offer for sale, import and otherwise run, modify and propagate the proprietary software (or other software or functionality covered by those patents).

Section 11 includes patent grant provision, which states:

> Each contributor grants you a non-exclusive, worldwide, royalty-free patent license under the contributor's essential patent claims, to make, use, sell, offer for sale, import and otherwise run, modify and propagate the contents of its contributor version.

Section 11 defines a "contributor" as "a copyright holder who authorizes use under this License of the Program or a work on which the Program is based. The work thus licensed is called the contributor's 'contributor version'."

This section also defines a contributor's "essential patent claims" as "all patent claims owned or controlled by the contributor, whether already acquired ***or hereafter acquired***, that would be infringed by some manner, permitted by this License, of making, using, or selling its contributor version, but do not include claims that would be infringed only as a consequence of further modification of the contributor version. For purposes of this definition, 'control' includes the right to grant patent sublicenses in a manner consistent with the requirements of this License.

## OTHER LICENSES

It is fairly well known in the open source community that the AGPL contains this network access provision. What seems to be less well known is that the AGPL is not the only license

that can impact SaaS software. Some of the other licenses that can raise such issues include the Open Software License 3.0 (OSL-3.0), the Honest Public License (HPL), the European Union Public License (EUPL), the Apple Public Source License, the Academic Free License, and several of the Creative Commons Licenses, just to name a few.

Some OSS licenses can be interpreted to include AGPL-like network access provisions even if not expressly stated as such. For example, the Artistic License 2.0 defines the term "distribute" to mean: "providing a copy of the Package **or making it accessible to anyone else**, or in the case of a company or organization, to others outside of your company or organization." An argument can be made that making covered software "accessible to anyone else" includes providing access to the covered software via network access without actually providing a copy of the covered software. Under this interpretation, providing access to covered software via a network (e.g., in a SaaS implementation) could be deemed to be "distributing" the covered software under the terms of the Artistic License. If so, obligations relating to distribution would be triggered by providing use of the covered software via a network.

## OTHER ISSUES

Other fact-specific issues can arise when you provide network access. For example, in some cases, some client-side code may be necessary to access server-based code. In such cases, the client-side code may be deemed to be distributed. It is important to understand all of the software that is being used in any SaaS deployment and analyze the various components and their interactions to understand the potential OSS legal ramifications.

## CONCLUSION

When using OSS in network accessed deployments (e.g., SaaS or cloud), it is imperative to understand all of the facts and review each of the licenses that govern the OSS components to ensure no unknown or undesirable legal consequences.

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**James Gatto** is a partner at Sheppard Mullin and is the leader of its Open Source Team. Jim has over 30 years of IP experience, with a strong focus on software, digital media and interactive entertainment. He routinely advises clients and delivers presentations on legal issues associated with open source software, including developing and implementing corporate policies on use of open source software, handling open source legal issues and diligence in transactions, open source patent issues, open source licensing business models and open source issues in the distribution chain.

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