

SOCIETY OF IT MANAGEMENT OPEN SOURCE SOFTWARE GROUP RESPONSE TO GOWERS REVIEW

INTRODUCTION

WHO ARE WE?

The Society of Information Technology Management (SOCITM) was founded in 1986 as the professional association for ICT managers working in and for the public sector.

Members are drawn primarily from local authorities but also from the police and fire services, housing authorities and other locally delivered public service.

Managers or consultants from organisations supplying ICT products and services to the public sector, or which support public services in other ways, may also join the Society.

With over 1900 members from 550 different organisations including 98% of all UK local authorities, SOCITM provides a widely respected forum for the promotion, use and development of ICT best practice. It also plays a leading role in the implementation of local e-government in the UK.

The Society is a significant provider of advice and guidance on ICT and e-government to local authorities. SOCITM offers a growing range of services including publications, conferences, events, training, research and consultancy.

The Society has a sub-group - the SOCITM Open Source Software group (SOSS) that concerns itself with the promotion and development of the use of Open Source Software (OSS) within the public sector. Intellectual Property Rights (IPR) are particularly important in the OSS market, as it can only thrive in a framework which permits certain IPR freedoms. This response was prepared by the SOSS group.

ABOUT OPEN SOURCE SOFTWARE

OSS is a community effort, where developers work together in a wide community in order to permit all to gain from their efforts. The basic principal is that all code, file structures and documentation are made freely available to all. OSS developers and organisations, including SOSS, are generally against patenting of software, seeing existing protections: copyright, licenses and trade marking, as sufficient.

The UK Government has strongly recommended that the public sector consider OSS as an alternative to commercial software in all suitable areas.

The first big success of an OSS model was the Internet - by having published file and communication formats and methods, anyone could develop software or hardware to access the system, leading to its rapid growth. It is instructive to note that in the early days of email, there were competing formats - SMTP (the open one) and X.400 (one requiring a fee to obtain the standard). SMTP is now the world-wide email standard. A very similar situation occurred with video recorders - VHS was the published standard, Betamax required a license. In both cases, the technically superior system failed to gain mass-market appeal.

The OSS software model is seen differently by its many adherents, but most would agree to the following statements:

- 1) Software's source code is always published. This allows people to copy, change and review the code. This is in direct opposition to the close source market, where source code is regarded as a confidential and valuable property.
- 2) Licenses for OSS generally allow free use of the software to some or all groups. Some groups do place restrictions on commercial use or inclusion in commercial packages, although this is not regarded as "true" open source by many. Charges are commonly levied for support or inclusion in commercial software. This again is in direct opposition to the closed source market, who usually charge for use of the software itself to all groups (with differential pricing for different markets).
- 3) OSS development is generally done in public, with cooperation between users in many countries with no commercial relationship between them. Closed source is generally developed by a single company, behind closed doors and frequently in a single country.

All of these differences make IPR a particular problem for OSS; in general, IPR assumes a "closed source" method of working, and that the IPR can be tied to a particular legal entity and country.

SOSS Responses to the Questionnaire

(quotations from the original questionnaire are shown in a normal BLUE font.
Replies by SOSS are shown in *an italic black font*.)

GENERAL QUESTIONS

1. How IP is awarded

(a) Are there barriers to obtaining IP rights due to system complexity? What could be done to improve this situation?

*Yes - however SOSS and most OSS organisations are against patenting of software, preferring to rest on copyright and the specialised forms of such developed called "Creative Commons" (<http://creativecommons.org>). Many OSS software developers are private individuals, sole traders, academic groupings or small businesses. Generally, these do not have the necessary expertise in IPR. The current IPR system also **assumes** that prevention of copying and protection of the details of the implementation is the goal of IPR - both exactly opposite the main goals of OSS development.*

(b) How easy is it to find out about obtaining P rights? What could be done to improve awareness for businesses and innovators? Is there sufficient awareness of the need to protect IP internationally?

A worldwide IP right of copyright already exists, although there are differences in implementation across countries. OSS developers oppose the extension of patents to software and Computer Implemented Inventions (CII).

(c) Are there barriers to obtaining UK IP rights on grounds of cost? What drives these costs?

No - for OSS, copyright is generally satisfactory and this is free. Patents for software and CII (which the question seems to be asking about) are opposed by most OSS groups.

(d) How do these costs compare internationally in your organisation's experience?

N/A

(e) Do you have any comments on the UK Patent Office fees structure for obtaining and renewing IP protection?

SOSS and most OSS developers are generally opposed to patents in software and CII.

(f) Is lack of trust in the system a barrier? To what extent do you rely on other tools to bring innovation to the marketplace, such as being first to market, maintaining trade secrets, or using an open innovation model to generate value through reputation or network effects?

The OSS market uses almost exclusively an open innovation model and does not maintain trade secrets.

(g) Are there specific barriers to obtaining IP rights in your sector?

See previous answers.

(h) Are there specific barriers to obtaining IP rights for small businesses or individuals?

See previous answers.

(i) How well does the national system for awarding IP, administered by the Patent Office perform? How well do the international and European systems work?

N/A

2. How IP is used

Some questions in this area apply to individual organisations. SOSS represents a grouping.

(a) What types of IP does your organisation use and why?

N/A

(b) To what extent do you seek multiple overlapping forms of IP protection?

N/A

(c) To what extent are these decisions influenced by sector-specific considerations?

N/A

(d) How does your company value its IP? Are there problems with raising finance against intangible assets based on IP? What improvements could be made in this area?

N/A

(e) To what extent does the term of IP rights at the margin affect investment decisions?

N/A

(f) How well does the UK IP system promote innovation?

The UK IP system hinders innovation in OSS. Because OSS is published, it is very easy for companies with closed source to claim violation of their IP by inspection of OSS code; the OSS developer has no such ability. OSS developers generally cannot afford patent agents to check if what they are doing violates IPR, or lawyers to defend such cases; this leaves their only option if contested immediately withdraw the product as they cannot afford a legal contest. If patenting of Computer Implemented Inventions is permitted and includes software, additional costs requiring checking of such IPR before development was undertaken could cripple the OSS market and greatly increase costs in the public sector.

(g) To what extent does your organisation make use of other methods used by Government to encourage innovation, such as public funding?

SOCITM organisations are mostly public-funded, and therefore make great use of this.

(h) Are data on the use of patents and other forms of IP useful as a means of measuring innovation?

Not in the OSS field, as patents are not taken. Copyright as IPR does not result in a register of use, so no data is available.

(i) Do you have any evidence as to the static or dynamic costs that IP rights (as statutory monopolies) impose on the economy?

N/A

(j) Have you encountered patents or other IP rights being used defensively, i.e. obtained not to develop products, but only to prevent others from doing so? Under what circumstances do you consider this acceptable?

Yes. The SCO case, where SCO attempted to use IPR it held to charge users of Linux-based systems usage fees despite the fact that the alleged IPR violation had existed for a considerable time is an example. Attempting to restrict market choice in this manner is never acceptable. In some cases, IPR has inhibited the market without being used - for example, Mono; an OSS implementation of a published Microsoft protocol is being held back because Microsoft hold patents on some key features.

3. How IP is licensed and exchanged

Some questions in this area apply to individual organisations. SOSS represents a grouping.

(a) How easy is it to negotiate licences to use others' IP for commercial or non-profit purposes?

It is generally impossible for OSS developers to obtain licenses for closed-source IP due to the requirements of OSS to publish source code. Some hardware vendors, in particular, do not share their internals with OSS developers, regarding their operating mechanisms as trade secrets. This leads to an inability for OSS developers to create suitable drivers for new hardware. A further issue is the growth of DRM technologies at the device level such as the HDMI bus - these again cannot be accessed by OSS developers (see also under DRM). Within the OSS community, IP sharing is easy and natural; the code is published and available.

(b) What mechanisms do you use for finding potential licensing partners?

N/A

(c) How easy is it to use others' IP for research purposes? Have you experienced difficulty around research exemptions?

N/A

(d) Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, trade marks, and designs?

See above.

(e) Are there barriers to licensing IP on grounds of cost? What drives these costs?

See answers in section 1

(f) Are there specific barriers to licensing IP in your sector?

See answers in section 1

(g) Does your organisation use methods to facilitate exchange of IP - such as cross licensing or pooling IP rights with other firms or organisations?

N/A

(h) Are there specific barriers to licensing IP rights for small businesses or individuals - for example barriers to entry to patent pools?

N/A

(i) Are there barriers to trade and exchange of IP internationally?

N/A

(j) Does your organisation consider renewing patents using "licence of right" provisions in patent law (which entitle any person to a licence under your patent and reduce your renewal fees by half)?

N/A

(k) What could be done to improve “licence of right” provisions and business awareness of them?

N/A

(l) Do you have any experience of the compulsory licence provisions within current patent law? Are they effective? How could they be improved?

N/A

4. How IP is challenged and enforced

(a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks, and designs?

Yes. OSS groups are against patents in software, but use copyright and trade marks extensively. These can generally only be defended via legal action, which is too costly for many OSS developers to pursue. Groups have been created to fight for such rights and have been successful in some territories, but in some areas the OSS market has simply had to accept the theft of its copyright (e.g. the use of Mplayer in commercial video devices, Linux software in closed-source embedded devices).

(b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?

N/A

(c) To what extent does your organisation make use of other methods than litigation to resolve IP infringement cases, for example the Patent Office opinion service, mediation services, Alternative Dispute Resolution, or the Copyright Tribunal?

N/A

(d) To what extent do you use IP litigation insurance? How effective is it?

N/A

(e) Are there barriers to using such methods to settle IP disputes without recourse to litigation? How might they be removed?

N/A

(f) Are there specific barriers to challenging and enforcement of IP rights for small businesses or individuals?

N/A

(g) To what extent is the risk of litigation a factor in your organisation’s investment in innovation?

N/A

(h) What are the principal barriers to efficient and successful challenge and enforcement internationally?

N/A

SPECIFIC ISSUES

- **Current term of protection on sound recordings and performers’ rights**

SOSS has no interest as an organisation in this area.

Background: The Review will fulfil the Government’s commitment to examine whether the current 50 year term of protection on sound recordings and performers’ rights in sound recordings is appropriate, in the light of its extension to 95 years in a number of other jurisdictions.

(a) What are your views on this issue?

N/A

(b) Is there evidence to show the impact that a change in term would have on investment, creativity, and consumer interests?

N/A

(c) Are you aware of the impact that different lengths of term have had on investment, creativity, and consumer interests in other countries?

N/A

(d) Are there alternative arrangements that could accompany an extension of term (e.g. licence of right for any extended term)?

N/A

(e) If term were to be extended, should it be extended retrospectively (for existing works) or solely for new creations?

N/A

• Copyright exceptions - fair use / fair dealing

Background: There are a number of exceptions to copyright that allow limited use of copyright works without the permission of the copyright holder.

(a) What are your views on the current exceptions in copyright law?

In general, the current exceptions lack clarity.

(b) Could more be done to clarify the various exceptions?

Yes. Clear statements of what is legitimate in plain English would help

(c) Are there other areas where copyright exceptions should apply?

SOSS believes that exceptions should apply to file formats and communication methods - publication of these should be required in order that interoperability can be created. At the worse, the reverse engineering of file formats and communication methods must be allowed, interoperability between OSS and commercial software is rendered impossible. The danger here for the UK is that right to use a copyright file format could be withdrawn or charges made, effectively charging us for accessing our own data. Worse, if the file format is only accessible by software running on a particular item of hardware which is no longer available and the IPR owner does not create a new version, access to archive data could actually be lost. This was the background upon which Massachusetts, US decided that Microsoft file formats could not be used for public documents.

(d) Are the current exceptions adequate or in need of updating to reflect technological change? For example copyright law in the UK does not currently have a private "fair use" exception. Such an exception might allow individuals to copy music CDs onto their PC and MP3 player for their personal use. Should UK law include a statutory exception for "fair use"?

Yes. Purchase of a copyrighted material should allow use and storage on any medium for the purchaser's purposes, including decryption (e.g. removal of DVD keys), re-encoding for other devices/media and archival storage. However, such use should be on the principal that only one copy may be used at a time whilst copyright exists. A transfer right is also needed so that purchasers of copyright material may permanently transfer their right to use to another. Without these rights the loss of access to data in (c) above becomes more probable over time.

(e) How would you see content owners being compensated for such use?

SOSS believes that the purchase price of the original material should be the only compensation.

(f) To what extent has technological change presented difficulties in use of copyrighted material in the field of education?

N/A

(g) Are there issues concerning the archiving of material covered by copyright?

Yes. There are two areas - backup of data and archival. Backup of data (which frequently includes copyrighted material, especially software) should be considered under the same "fair use" rules proposed above. Archival of data frequently requires changes of media (over time, this is inevitable) and this needs to be allowed also. Without open file formats, data loss can occur at these media changes (see (c) above), and archives can be lost.

• Copyright – digital rights management

Background: Increasingly digital media content is distributed with digital rights management (DRM) technologies that can enable rights-holders to track usage and prevent unlicensed copying by technological means. However concerns have been raised about interoperability and that such technologies may impair the content consumer's legal rights. For example they may be unable to take into account exceptions to copyright, the ultimate expiry of copyright term, or the future evolution of technology.

They may therefore undermine legitimate rights to access digital content, now and in the future. (NB: We are aware of all formal submissions that have been made to the All Party Parliamentary Internet Group on this issue.)

(a) Do you have a view on how the use of digital rights management technologies should be regulated?

Yes. Copyright infringement is a social issue not a technical one; many users do not know they are infringing due to the legal complexity. Education in what is and is not permissible is needed. DRM simply restricts the ability of purchasers to enjoy copyright material on a variety of devices, even if "fair use" should apply. It is unlikely that any DRM system devised could not be broken (since all must be designed to be reversible), and therefore the application of DRM simply acts as a barrier to new devices/software entering the market. This is a particular problem for OSS, as most DRM technologies require closed source to maintain their effectiveness, and OSS is therefore "locked out" of any new DRM technologies.

The Sony DRM system debacle provides an excellent example of how DRM creates more problems than it solves. The DRM installed by Sony on a number of its CDs:

- a) Damaged certain versions of Windows to the point where they would not boot.*
- b) Created a security vulnerability which was quickly exploited by virus writers.*
- c) Only worked on one operating system, and not all versions of that.*
- d) Was simply circumvented by holding down the Shift key on Windows every time a CD was inserted, or otherwise disabling the "Autoplay" function.*

- e) *Did not prevent the licensed material being copied.*
- f) *Contained OSS code in violation of its license.*
- g) *Resulted in litigation against Sony by individuals and groups damaged by the above.*
- h) *Resulted in Sony having to withdraw the CDs from the market.*

• Copyright – orphan works

(a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?

This happens frequently in the OSS market, particularly where emulators of old systems are being developed for the purpose of allowing old software to run on new hardware. Where companies no longer exist, it is almost impossible to obtain permission.

(b) Do you have any suggestions on how this problem could be overcome?

No. SOSS suggests that this is an area the review may wish to explore in more detail.

• Copyright - licensing of public performances

SOCITM's members frequently undertake public performances, but this is not an issue within SOSS's brief.

(a) Have you encountered problems with the system of licensing and paying royalties to collecting societies for public performance of music and/or sound recordings?

N/A

(b) Could the system be clarified or simplified, and if so how do you see this working?

N/A

• Patents – utility models

Background: Some countries, notably Germany, have a “utility model” system offering protection for simple inventions, usually subject to less examination and shorter terms than standard patents.

(a) Do you have a view on some sort of second tier patent system?

SOSS is generally opposed to the patenting of Computer Implemented Inventions, and other patent uses fall outside SOSS's brief.

(b) Has your organisation encountered problems in protecting its IP internationally where such systems exist?

N/A

• Pharmaceutical Supplementary Protection Certificates (SPCs)

SOSS has no interest as an organisation in this area.

Background: SPCs are a “sui generis” IP right available in EU Member States for pharmaceutical products (as well as plant protection products). The standard patent term is 20 years. SPCs aim to compensate rights holders for the time required to obtain regulatory approval for their products. Where regulatory approval is issued

more than five years after a patent is granted, SPCs may be granted to extend the term of protection on the active ingredient in the patented product. SPCs last for a term corresponding to the period elapsed between the five-year point and the point at which the product reaches market, up to a maximum term of 5 years.

(a) Does your organisation use SPCs?

N/A

(b) How fair and effective are they in delivering an incentive for investment?

N/A

(c) How could they be improved?

N/A

(d) Should the term of SPCs be more flexible - perhaps relating straightforwardly to the period between patent award and regulatory approval?

• **Trade Marks – international issues**

SOSS has no interest as an organisation in this area.

(a) To what extent does your organisation register its trade marks at the European rather than national level?

N/A

(b) Could the UK trade mark system be improved to work better alongside the European system?

N/A

• **Designs – registered designs and unregistered design rights**

SOSS has no interest as an organisation in this area.

(a) To what extent does your organisation rely on registered designs? And on unregistered design rights?

N/A

(b) To what extent does your organisation register its design at the European rather than national level?

N/A

(c) To what extent does your organisation rely on the European unregistered design right rather than the national UK unregistered design right?

N/A

(d) Could the UK registered design be improved to work better alongside the European system?

N/A

(e) Could the UK unregistered design right be simplified to work better alongside the European unregistered design right?

N/A

(f) Do you see a useful role for the UK unregistered design right alongside the European design right?

N/A

• **Legal sanctions on IP infringement**

SOSS has no interest as an organisation in this area.

(a) Are you aware of any inconsistencies or inadequacies in the way the law applies legal sanctions to infringement of different forms of IP or to different circumstances?

N/A

(b) For example, should criminal sanctions on online infringement be the same as those relating to physical infringement?

N/A

• **Coherence between competition policy and IP policy**

SOSS has no interest as an organisation in this area. However, please see the notes at the end of this document for issues that have links here.

(a) Has your organisation experienced any activity linked to IP rights that you regarded as unfair competition?

N/A

(b) How did you deal with this problem?

N/A

(c) Was competition law effective at controlling this behaviour?

N/A

(d) Should competition law have a greater role to play in regulating IP?

N/A

(e) How would you see the system working?

N/A

• **Parallel Imports / International Exhaustion**

SOSS has no interest as an organisation in this area. However, we note that parallel imports in general reduce costs and therefore suggest that no restrictions should be placed on such activity.

Background: European law does not allow firms to use trade mark or copyright law to prevent their goods sold in one EEA Member State from being imported and resold in another Member State – i.e. they are not able to segment the EU market. However European law does allow the use of trade mark and copyright law to restrict the imports to EU Member States of goods sold outside the EEA. It also specifically inhibits EU Member States from legislating to remove such import restrictions at the national level – so called “international exhaustion” of trade marks or copyright.

There has been a good deal of debate, both here in the UK and at EU level, about the costs and benefits of removing restrictions on parallel imports. There is a further issue of firms taking advantage of variations in prices on pharmaceutical products across the EU and repackaging drugs bought cheaply elsewhere within the EEA to resell within the UK.

(a) Has your company been affected by parallel trade?

N/A

(b) What would be the impact on your organisation of a change in the current rules?

N/A

(c) What evidence is there of the costs and benefits, both for consumers and firms of the current rules?

N/A

OTHER COMMENTS

OSS developers in general are working in a market where interoperability with closed source developments is key. A package such as OpenOffice would not be able to compete if it could not read Microsoft Office documents; being able to read and/or reverse engineer such file formats is vital to innovation and maintaining a competitive marketplace.

SOSS would like to see a restriction on all IPR such that file formats and communication methods *cannot* be patented or copyrighted. The preference would be that these should generally be published, but failing this that restrictions on reverse engineering and removal of DRM are lifted. This would ensure that interoperable OSS could be developed to perform similar functions to commercial software, that no monopoly on a file format or communication method could be created and that material can be moved between media as needed for archival and "fair use".

OSS, even where charges are made, is usually much cheaper than commercial offerings with which it competes and its health is therefore vital to lowering costs and maintaining competition. This can be seen in the growth of Open Source over recent years - far faster than the closed source market by some estimates. This competition also drives the industry to innovate, leading to better products for all.