Licensing Restrictions

Two components:

1. Copyright Act
2. Administrative Policies

Copyright Act simply grants copyright to the crown:

"where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case" (Copyright Act)

No restrictions on free software licensing

The Government of Canada's Communications Policy governs the licensing of Crown copyright:

- Requirements:

"Requests to reproduce a free or priced publication for commercial purposes require a non-exclusive license in which copyright remains with the Crown and a royalty is levied."

- non-exclusive license APPROVED
- copyright remains with the crown APPROVED
- royalty is levied

A royalty is incompatible with free software licensing.

But...

Do these policies, for commercial purposes, even apply?

"the ordinary meaning of the words 'commercial purpose' is the carrying on of business, or a private enterprise for gain"

Poirier v. Advocate General Insurance (1984), 32 Mar. R. (2d) 230

- A free software license is at the request of an authoring department, which clearly has no direct commercial purpose
- A free software license is neutral as to whether the end use is commercial

Rules for commercial licensing may not apply to free software....but Treasury Board policies need to be clarified on this issue!

Licensing Concerns

Two primary concerns cited by government:

1. "Downstream" provisions
2. Patent infringement

Concerns exist about hereditary licenses, such as GPL, that bind derivative works to the same license

The hereditary feature of GPL does not, in fact, restrict government departments:

- For original works, including stand-alone plugins, there is no need to release the code as GPL. When released under a non-hereditary license, the code can still be used by GPL developers.
- For derivative works of GPL, free distribution of the source code opens up the options for a government departmart -- when the source is distributed, licensing fees may be collected for the object code.

Patent infringement claims are more easily tested against open source software, raising concerns of a greater risk of infringement suits

Risk of patent infringement remains small:

- In Canada, most software is not even patentable. In the U.S., the law is currently in a state of change on software patentability.
- The collaborative free software development model allows possible patent infringements to be spotted, and workarounds to be created (The Electronic Frontier Foundation and Software Freedom Law Center are spearheading efforts to this end).
- Licenses such as GPL v3 have strong patent retaliation clauses that act as a deterrent to patent lawsuits.
- Resources of the federal government giving it the ability to defend a patent lawsuit is a strong deterrent.

Conclusions

- No restrictions on licensing Crown copyrighted works as free software exist under the Copyright Act
- Treasury Board policies do not directly address free software. They need clarification.
- Restrictions from hereditary license features are miniscule.
- Risk of patent infringement is remote.

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