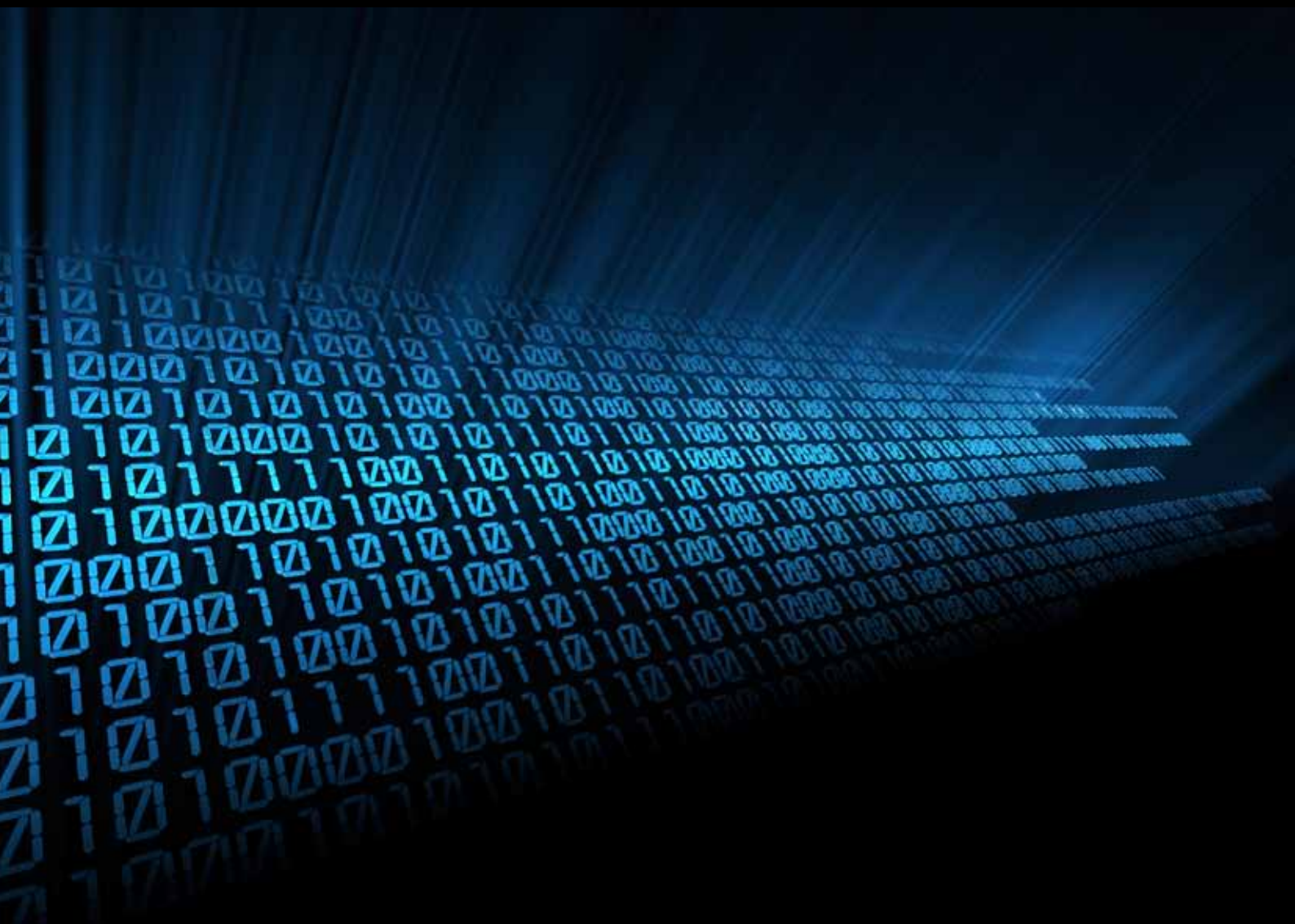


Is Linux a free lunch?

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As UK plc drags itself out of recession, CIO's and their Boards are looking once more at their IT needs. For many users the "pause" they have placed over the last few years on IT upgrades makes their impending rollouts all the more important. At the same time, the suppliers of software and services have been eagerly awaiting for the upgrade cycle to begin in earnest and have created what appear to be very compelling propositions for their customers. For many of these propositions, the devil is in the detail and that detail is in the contractual terms that accompany the software and services. This article considers the legal approaches that open source distros use to get paid for something that at first looks like a free lunch.

Before delving into some of the contractual niceties it is worthwhile being reminded of some basic business rationales. All software and IT services companies listed on the stock market – from Red Hat to Microsoft and from Salesforce.com to Oracle – have financial obligations to their shareholders, who are keenly interested in money generated from return on capital investment. These companies have a duty to maximise this return to their investors. Even when software companies provide software or services for free, somewhere there must be a potential line in a P&L statement to show how directly or indirectly that free provision may turn into cash.

The business model of a Red Hat or a Novell SUSE would fail if they invested all their time in improving and distributing Linux but no customer took on their paid-for services – they need to recoup their investment by ensuring that the customer takes both the software and the paid services on offer.

What makes the business proposition for a company like Red Hat particularly difficult is that they are providing their version of Linux software for free, while other close derivative versions of Linux are available from alternative suppliers such as CentOS, Scientific Linux, and Oracle. Red Hat makes money on the support and services they provide to customers that are related to the "free software." Indeed, on 22 September, Red Hat reported that in the previous six month period, its customers paid over \$400m for "subscriptions, training and services".

Services often include technical support, bug fixes, and software updates. So Red Hat, understandably, has sat down with its developer teams and lawyers to yoke together a number of building blocks to try to tie in its customers to ensure that there is some commercial or legal obligation to pay Red Hat for services relating to Red Hat's version of Linux. Seasoned CIO's will see that these commercial and legal tricks are similar to those used by proprietary software companies over the years to tie their customers into buying services from them too.

Red Hat's marketing message is this: once a customer has obtained Red Hat Enterprise Linux (RHEL), the customer should also pay Red Hat for support. A Letter from Red Hat to a customer in January, extracted below, shows this messaging. In its June newsletter to its partners, Red Hat went further; it went so far as to suggest that customers must de-install RHEL software from servers with expired subscriptions.

This article does not dwell on whether or not Red Hat does a good job in supporting Linux. What this article does test is whether anything legally prevents a customer from installing RHEL but then using another Linux supplier to support it.

Red Hat appears to use two approaches to discourage customers from receiving RHEL support from a third party supplier. First, on commercial grounds it sets out in its FAQ's (<http://www.redhat.com/rhel/renew/faqs/#6>) (and contract) the five rights that the customer would lose by appointing a different support provider. We analyse these below to discover that only one is actually relevant when moving to another supplier (rather than taking the support in-house, often referred to as "self supported"). Second, Red Hat has as recently as January this year threatened existing users that the likes of Novell were **"not entitled by Red Hat to provide the Red Hat Enterprise Linux Operating System, support, maintenance, version updates, bug fixes, patches or any other Red Hat certified software package or service"**. We analyse this also to conclude that in relation to Linux software (as opposed to any Red Hat proprietary code), this is not sustainable.

FAQ stated impact of switching suppliers

Each bullet below deserves some consideration from a legal and commercial perspective.

“6. If I don’t renew, can I continue to use the software?”

Yes, under the General Public License (GPL), you may continue to use Red Hat software. However, for as long as you have any active subscriptions within your organization, you are also bound by the terms of the Red Hat Enterprise Agreement. This agreement requires that as long as you have an active subscription, you are required to purchase a subscription for each system on which you are running Red Hat Enterprise Linux or JBoss Enterprise Middleware. If you have no active subscriptions, you may still continue to use the software, but you will no longer receive:

- **Software access:** Access to the latest versions of Red Hat software that have been certified by thousands of independent software and hardware vendors.
- **Software maintenance:** Access to updates, upgrades, corrections, and bug fixes for the software.
- **Security:** Rapid response to potential software security issues.
- **Production support:** Access to Red Hat technical support.
- **Open source assurance:** Participation in Red Hat’s intellectual property assurance program.”

Software access

Given that much of the software provided by Red Hat is under the GPL and is readily available, not having “software access” to those elements seems no hardship as a customer’s new support company will doubtless provide those updates. Certification certainly is something of value but given that the certification relates to GPL Linux there is no valid legal restriction that Red Hat could impose on a new supplier to prohibit them from installing the same versions of the GPL code. It does, however, seem odd that certification of “code and kit” could be lost just because a customer chooses another support provider. A supplier’s legal representations made at one point in time to a customer usually remain valid and do not often expire merely because a new supplier is appointed; of course, if the kit or code change (note, not the supplier), Red Hat’s prior certification may not now be accurate and so it is reasonable that Red Hat should not necessarily honour its past reliability statement.

Software maintenance

As above, everyone has access to the same updates, upgrades, corrections and bug fixes as Red Hat is referring to. What no-one but Red Hat can access is any of its proprietary technology components that are usually located on the customer site. So Red Hat is well within the scope of any reasonable licence to prohibit another from utilising Red Hat’s proprietary software. But this begs the question as to why any capable third party supplier would want to use Red Hat’s own tools when they can provide either their own, or utilise suitable open source solutions that achieve the same function.

Security

Whilst important enough to be considered in its own right, security remains part and parcel of software maintenance. And of course given that the software being referred to here is Linux, Red Hat is by no means the only company or entity that provides rapid response solutions. Indeed, it is the very nature of open source software that code fixes to an open source product, like Linux, are available to the community. Where an entity other than Red Hat creates the security solution, Red Hat's customers would expect to benefit from this fix. This community-based healing process should, ideally, make fixes available to all customers, at exactly the same time, whether they be Red Hat's, Scientific Linux's, Oracle's or even a self-supported customer. There should be no exclusivity in code changes.

Production support

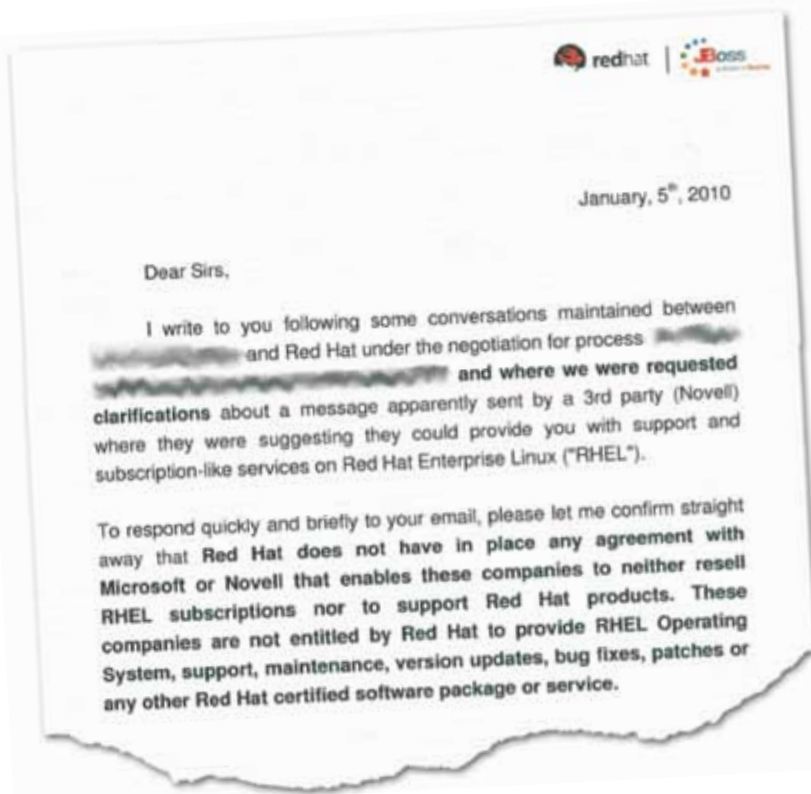
Those customers running mission critical systems need 7 x 24 access to technical support engineers, either located on site, or working remotely in telephone support centres. Support engineers normally own customer incidents through to resolution, often working with colleagues and the community to reproduce and solve critical technical issues. It is clear from the large cost differentials between the different levels of Red Hat support subscriptions offerings (e.g. Basic against Premium) that these are the high revenues streams that Red Hat will be seeking to protect. This explains why it discourages customers from looking at alternatives. That said, either other support providers can offer similar capabilities and services, or they cannot. Ultimately a customer will be able to evaluate whether the alternative supplier is stronger or weaker than Red Hat and then be able to take that into account on pricing. Customers are, however, not contractually bound to stay with any distro merely because they were the first installer.

Open source assurance

This is one aspect of Red Hat's withdrawals that does have a potential legal impact on the customer. CIO's will know that Linux, like all computer code, can infringe a third party's software patents and other intellectual property protections. Most readers will recall that in 2004, the Open Source Risk Management Group reported that there is a patent infringement risk that Linux users and developers should be aware of. Merely because the software is free, that does not mean it has not copied another's code or does not infringe another's protected invention. As a user, therefore, it is a little troubling to know that installing Linux may be free-of-charge but not free of liability. In contrast, most proprietary software companies provide an indemnity to their users such that the supplier stands in the user's shoes if litigation ensues. Red Hat's open source assurance, to an extent, provides that in relation to the Linux code they supply. In other words, the user should not be overly concerned that they will be out-of-pocket should an intellectual property action be brought against them. Customers would therefore be well advised to ensure that any substitute supplier provides them with the same or greater comfort.

Approach to moving customers

Below is an extract of a letter written by Red Hat to a customer seemingly involved in negotiations with Red Hat to change support provider. This extract was published by CNET in a blog article by Matt Asay, chief operating officer at Canonical. (http://news.cnet.com/8301-13505_3-10436809-16.html?part=rss&subj=news&tag=2547-1_3-0-20)



The clear message being delivered to the customer, emboldened by Red Hat, is that no other supplier can support Red Hat Enterprise Linux. In June, Red Hat pushed this concept even further in a newsletter to its "partners" saying: ***"If [customers] choose not to renew, they must de-install Red Hat Enterprise Linux software from servers with expired subscriptions."***

These messages are neither technically true nor legally sustainable. Technically, every byte in Red Hat Enterprise Linux is known by and usable by the community which includes Red Hat, the customer and any supplier. Some suppliers may be more expert than Red Hat in supporting certain aspects of the kernel, others may be significantly worse than Red Hat. But everyone can support that code base.

As to the law, simply tossing a Red Hat logo onto some open source software does not make it proprietary to Red Hat. That is the bargain all suppliers make when they decide to distribute Linux software: they do not own it. It follows that as they do not own it, they also have no rights to stop others supporting it, maintaining it, or providing bug fixes, or patches to it. Yes, they have rights to any proprietary elements but these are likely to be removed by an incoming supplier in any event. What makes Red Hat's adoption of the tactics described in this article so interesting is that the vast proportion of the millions of lines of code that Red Hat distributes is not exclusive to them. The very nature of the Linux kernel and open source ecosystem means that anyone can legally support Red Hat's version of Linux.

Of course, if Red Hat did own the copyright in the Linux kernel it would be perfectly entitled to bundle any services or other software with its product. The law does not stop non-dominant suppliers from bundling one product with another.

Some customers, naturally, will be concerned by letters such as Red Hat's above and will assume they have no choice except to renew subscriptions and agreements and stay with Red Hat. Those customers need not be so concerned since they are in a superbly strong position. Once they have met their payment obligations to Red Hat, they take the free lunch, and never need to pay Red Hat again.

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