

# **Open Source in Venture Capital Transactions**

**Verso Open Source Business Programme  
Anna Haapanen 19.9.2007**

## Topics

### OSS in Venture Capital Transactions

- VC and Company interests
- Due Diligence
- State of legal affairs from OSS viewpoint
  - Deal feasibility and valuation
  - Agreements
  - Open Source Software (“OSS”) in commercial products
- OSS Risks
  - Case examples
- OSS Risk Mitigation

## Venture Capital Interests

- VC - a type of Private Equity capital
- Excellent business idea
- Exceptionally high potential for growth
- Value at the market
- Financial returns
- Successful exit within the planned timeframe
- Other side of the coin
  - Awareness of risks related to transaction



## Company Interests

- Internal view on conducting business
- Different approach to risks?
  - Possibly more willing to take risks
- Deriving factors for using OSS
  - Possibilities of new business ideas and models
  - High quality “off the shelf” software
  - Ideal for further development
  - Low acquisition costs
  - Time to market
- May result in risks...



## Due Diligence

- Legal review of the company
- Drawing client's attention to material issues of the company having impact on implementation, structure and terms of the contemplated transaction
- Overall risk profile based on
  - analysis of material provided for the data room
  - additional information requested
  - discussions with key personnel

## Due Diligence Report

- Corporate documentation
- IPRs
- Real property and leases
- Agreements and transactions
- Management and employees
- Claims and litigations
- Competition matters
- Insurances
- Other
  - Environmental issues



## Agreements

- Terms and conditions
  - Protection and ownership of IPRs
  - Limitation of liability –clauses
    - Risk of obligations to pay damages (including losts of profits) exceeding the value of the delivery
  - Warranty -clauses
  - Balance between in and out licensing agreements
- Lack of written agreements



## IPR Status

- Understanding on the IPR status
- Technical and Legal Due Diligences
- Assessing value of IPRs
- Need for third party licenses
- Ownership to IPRs created by employees and subcontractors
- Third party software as part of products
  - OSS components?



## OSS Analysis

- Information on OSS as part of products
- List of OSS components
  - Completeness and accuracy of the listed components
- List of OSS licenses and right holders
- Software architecture
  - Information how the OSS components are used in the product development as well as products
- Patents applicable to OSS?

## Obvious OSS risks

- Breach of OSS license terms
    - Notice requirements
    - Distribution of source code
  - Contamination of proprietary code
  - Unbalanced liabilities with regard to OSS in supply agreements
  - Infringement of third party IPRs
  - Dilution of own patents
- > Impact on transaction



Issue	Implication	Action
<p>List of commercial including both owned and third party software required for the Company's operation is incomplete. Necessary third party licenses have not been provided.</p>	<p>The legal status and risks related to commercial software cannot be assessed.</p>	<p>The Company should provide complete lists of commercial software required for its operations and provide relevant licenses. The legal due diligence should be complemented once the information has been made available.</p>

Issue	Implication	Action
<p>List of OSS components required for the Company's operation is incomplete and the Company has not assessed the implications of using OSS as part of its products. No architectural analysis of OSS components has been prepared or provided for review.</p>	<p>Legal risks cannot be assessed. In the worst case, the Company may <b>not</b> have the <b>right to distribute</b> its products and may be liable to the OSS right holders for the damages based on the <b>infringing</b> use. The Company could be under obligation to provide its <b>proprietary products</b> or parts thereof <b>under OSS terms</b> seriously <b>undermining the value of</b> the Company's <b>IPR</b>.</p>	<p>The Company should provide complete lists of OSS components required for its operations and provided as part of its products. The <b>technical due diligence</b> team should conduct the intended architectural review of the Company's products. The <b>legal due diligence</b> should be completed after the technical due diligence with regard to IPR holders and licenses.</p>

Issue	Implication	Action
<p>The Company does not seem to conduct appropriate <b>checks</b> as to the <b>IPR status</b> of its products before such products are launched and/or delivered to its customers.</p>	<p>Company could be at risk in relation to <b>third party IPR claims</b> as to the technology it uses. The likelihood of such claims increases if the Company is part of a bigger entity.</p>	<p>Patent and other IPR review should be made to assess the potential IPR liability related to the Company's products.</p>

## OSS Risk Mitigation

- Product Planning
  - From both the technical and legal viewpoints
- Clear:
  - Software components
  - Architecture
  - IPR status
    - Copyright / patent / trademark holders
  - License terms
- OSS Policy
  - Tool for proper OSS management



## Open Source Policy

- Guidelines how to use OSS
  - in software development
  - as part of commercial products
  - contribute OSS to development projects
  - in order to ensure that OSS license terms are followed and use of OSS does not have unpredictable impacts on commercial products
- To be reviewed
  - Conformance with industry standards
  - Application of the policy in practice

## Clean Report by Implementation of OSS Policy

<p>List of provided commercial software and applicable licenses is complete with regard to Company's operation.</p>	<p>The legal status and risk position may be correctly evaluated.</p>
<p>List of OSS is complete. The implications of using OSS have been assessed from both technical and legal perspectives.</p>	<p>The Company is not under obligation to provide its core proprietary products or parts thereof under OSS license terms.</p>
<p>The Company conducts appropriate checks in accordance with its OSS Policy as to the IPR status of its products in early phase of product development.</p>	<p>Company is not at obvious risk in relation to third party IPR claims as to the technology it uses.</p>

## Due Diligence Findings

- Repairable Faults
  - Breach of e.g. notice requirements of OSS licenses
- Price Impact
  - Other obvious but controllable IPR risks affecting the value of IPRS as company assets
- Deal Killers
  - Contamination of core proprietary code
- Effect of findings always dependent on the surrounding circumstances
  - > Impact on transaction

## Conclusions

- Know your products and services!
- In addition to opportunities, be aware of possible risks!
- Assess the risks and opportunities especially in the prevailing operation environment and also take a look from Venture Capital perspective
- Plan in advance how to mitigate the risks in your business model
- Prepare your company from the beginning for possible transaction(s)

## Thank you!

Anna Haapanen  
Technology

Tel. +358 (0)400 992 925  
anna.haapanen@roschier.com

Keskuskatu 7 A  
FIN-00100 HELSINKI  
FINLAND

