Issue	Commentary	Who is best placed to bear risk?	Best mechanism to tackle risk	Sample Wording	Supplier's Arguments	Customer's arguments	Comments
Supplier-created code infringes copyright	The risk of detection of infringement is easier for [F/OSS] (as the code is more readily available for comparison purposes, especially if the code is GPL and re-distributed, but the ability of the customer to mitigate its loss is greater, as it automatically has access to the source code, to enable it to re-engineer infringing code itself if the Supplier will not or cannot do so.	Supplier	Indemnity/warranty from Supplier. Supplier has right to rewrite infringing code. Version control system (VCS) shared repository and allowing audit rights	The Supplier warrants that it has title to all Supplier-Created Code and that its delivery [assignment/licence] to the Customer and use in accordance with this Agreement does not infringe the [copyright] of any third party.	No good ones!	Supplier is in control of code creation, and should therefore be liable for third party infringements. Supplier should use a common source code repository, to which Customer may be given access.	
Publicly-available code (i.e. code acquired from third parties under a [F/OSS] licence, and incorporated into the software) infringes third party copyright.	One risk is that the publicly available code selected is inherently infringing (i.e. there is a provenance issue), or alternatively, the component is available under a [F/OSS] licence, but not the one attached to it.	Varies from project to project. If the Customer specifies use of a specific component, then it should be liable for claims in relation to that component. If the Supplier selects the components, there is a stronger argument that the Supplier should bear some of the risk, or at least take care in the selection process.	Warranty or indemnity from the Supplier, to encourage Supplier to take care in source selection. A list of agreed sources of code may give the Customer comfort (even if this is by no means conclusive), and may encourage the Supplier to take fewer risks in terms of provenance. Further, if code is obtained from recognised locations, it is more likely to be heavily reused, and therefore there is arguably safety in numbers (i.e. it's been used lots of times before and there hasn't been a claim yet), and also the likelihood that if it is found to be infringing, the community will generate a non-infringing alternative	The Supplier warrants that each component of Publicly Available Code incorporated in the Software has been acquired solely from the locations listed in Appendix [1] and that the source of each such acquisition shall be accurately documented [as set out in Appendix [2]].	Each Customer has a different appetite for risk. Requiring the Customer to document how it regards the risk of accessing code from different locations, gives the Supplier more information on which to base an accurate price for the job. Alternatively, Supplier may want to give the Customer the option of a cheaper price by doing “quick and dirty” development by scraping code from anywhere, without provenance checking, providing that the Customer takes the risk. In any case, this clause as drafted could prove unduly restrictive for the Supplier. There are vast amounts of quality code available from “grey” sites. Also, is “reasonable skill and care” capable of consistent interpretation given the state of the art? Koders.com contains plenty of roll-your own licences, for example. Also, just because something is on sourceforge.net does not mean that it is necessarily of any better provenance than elsewhere.	Supplier is contracting to supply IPR, and should bear all the risk. How Supplier intends to source IPR should not be Customer's issue. In any event, where the Supplier is actively choosing the code to use, provenance checking should be a selection criterion.	Infringement can occur either because the infringing code is not available under any [F/OSS] licence (e.g. it is derived from proprietary code), or because it is not available under the licence supposedly attached to it (e.g. it is available under the GPL, but appears to be available under the BSD).
	Another risk is that the Customer may specify the use of specific [F/OSS] components, and in using these components faces a similar issue as above, though with a different context for allocating potential liability.	If the Supplier selects the components, there is a stronger argument that the Supplier should bear some of the risk, or at least take care in the selection process. If the Customer performs this selection, the opposite is true.	Customer takes all risks relating to the nominated code.	The Customer acknowledges, notwithstanding any other provision of this Agreement, that the Supplier shall not be responsible for any claim, cost or expense howsoever arising from the Supplier's incorporation, use of, modification of, linking to the Customer's Specified Components [and the Customer shall indemnify the Supplier for any cost, claim or expense arising therefrom].	The Supplier's choice of component is restricted, and therefore it should not be held liable for such use.		

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	It is possible to explicitly address the risk of publicly available code not being available under the licence apparently attached to it, and instead actually falling under a different licence and potentially incompatible licence.	This is similar to the provenance issue, in that the Customer's use/modification/distribution of the Software may infringe third party rights, but in this case, infringement may depend on the Customer's intended out-licence or intended use of the Software. This wording contains an option which limits the Supplier's obligations to checking that the components' attached licences are on an approved list, but not that they are compatible with any intended use.	Warranty relating to the licences attached to publicly-available code components. Optional exclusion of liability for licence incompatibility (Customer takes risk of incompatibility).	[The Supplier warrants that[, so far as it is aware,] each component of Publicly Available Code incorporated in the Software is available under one of the licences specified in Appendix [3] and has documented the provenance of each such component [as set out in Appendix [1]][The Supplier does not warrant that use, modification or distribution by the Customer of the Software will not infringe the rights of any third party, and no provision of this Agreement or implied term shall be construed as such a warranty].	The Supplier does not want to be responsible for ensuring licence compatibility, as the Customer will be much better placed to determine what its intended use is. Therefore, it's more practical for the Customer to specify a list of compatible licences, than having the Supplier do compatibility checks.	The Customer selects code	
	Sweeper up warranty designed to ensure that code-selection for copyrights is within the ambit of the Supplier's services.	Supplier	Warranty that skill and care has been taken in component selection, so far as third party copyrights are concerned	[The Supplier warrants that it has taken reasonable skill and care in selecting publicly available components having regard to the non-infringement of third party copyrights [the Customer's Specified Use and the Customer's Specified Out-Licence], and has documented the provenance and licences applicable to such components [as set out in Appendix [1] and [2] [with reference to Appendix [3] where applicable]].]	This warranty is too vague, at least without qualification as to whether the licences which are attached to the components are compatible with the Customer's Specified Use or (preferably) the Customer's Specified Out-Licence.	The Supplier needs to be put under a practical obligation to make copyright compatibility/awareness part of its selection criteria.	
	Publicly available code is incompatible with the Customer's Specified Use or Specified Out-Licence. By requiring the Customer to specify in this way, expectations are managed, and minds are focused	Supplier		The Supplier warrants that [so far as it is aware, but without having made any specific enquiry] the development of the Software, its delivery to the Customer and the Customer's modification, distribution and use of the Software within the Specified Use [or relicensing to third parties within the Specified Out-Licence] shall not infringe the licences set out in Appendix [3].	This warranty places the onus on the Supplier (at least without the awareness qualification) to ensure compatibility, which can include a legal analysis of different licences, which may be outside the scope of the ability of the Supplier, or the scope of the services intended to be provided.	The Customer has taken time to specify either the licences to be used, or the Specified Use, and it is up to the Supplier to ensure that the Software complies with this requirement.	
Infringement by misuse of third party code by the Customer.		Customer		[The Customer is responsible for ensuring that its own subsequent use, modification and re-distribution of the software [outside the Specified Use] is in accordance with [the licences set out in Appendix [3]].	The Supplier is developing for the Customer. Therefore the Supplier is not to be concerned about out-licensing, outside the scope of the specified use. This is the Customer's issue. Any future or different uses would be subject to a future or different agreement.	The Customer may want to distribute in the future, and may want to out-license to customers etc. Also, passing around the group, or to the acquirer of the business may be “distribution” and therefore should be covered.	

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Infringement of copyright in bought-in proprietary code		Supplier (through contractual relationship with provider of the proprietary code) (unless use of that component is nominated by the Customer – see above)	Indemnity/warranty from Supplier - but can Supplier obtain a back to back indemnity from the provider of that code?	The Supplier [confirms that the licences under which the third party components of the Software are available [are contained within the list set out in Appendix [3] as amended from time to time by agreement between the parties]][will not be breached by the Customer's Specified Use][,permit the Customer to out-license the Software under the Specified Out-License] and that so far as it is aware [but not having made specific enquiry] the development of the Software and its delivery to the Customer do not infringe such licences. [The Customer is responsible for ensuring that its own subsequent use, modification and re-distribution of the software [outside the Specified Use] is in accordance with such licences.][The Supplier agrees to provide reasonable assistance to the Customer in passing the benefit of any warranties associated with such third party [proprietary] components to the Customer subject to the Customer's continued compliance with the licences applicable to such code.	Supplier to use reasonable skill and care in selecting code, but should not be liable for third party infringement. Similar to the supply of third party hardware. May offer to pass on any third party warranties available. May also be subject to the Customer complying with terms passed through by the Supplier.	Supplier is contracting to supply IPR, and should bear all the risk. How Supplier intends to source IPR should not be Customer's issue.	
Infringement of patent in Supplier Created Code		Where Supplier has choice of implementation: Supplier. Where implementation is dictated by Customer's requirements: Customer	Right to change implementation, if implementation is determined by Supplier. Otherwise, risk is on Customer. May be possible to negotiate risk sharing. May be possible to get insurance? Audit rights?	The Supplier warrants that [so far as the Supplier is aware [not having made any enquiry]] the use by the Customer of the Software for its Specified Use [within [jurisdictions]] will not infringe any right which any third party may hold under any valid patent.	It is not economically feasible to undertake a patent clearance prior to implementation. If the implementation is dictated by the Customer's requirements, this should not affect liability.	Supplier is contracting to supply IPR, and should bear all the risk. How Supplier intends to source IPR should not be Customer's issue.	
Infringement of patent in publicly available code		Where Supplier has choice of implementation: Supplier. Where implementation is dictated by Customer's requirements: Customer	Where implementation is dictated by Customer: Customer to bear risk. Otherwise, negotiated on a case by case basis.	<none>	It is not economically feasible to undertake a patent clearance prior to implementation. If the implementation is dictated by the Customer's requirements, this should not affect liability. If supplier has to accept some liability for patent infringement, Again there is the potential to insure against this in the UK at a high price and the additional costs of this would be passed through to the Customer.	Supplier is contracting to supply IPR, and should bear all the risk. How Supplier intends to source IPR should not be Customer's issue.	
Infringement of patent in bought-in proprietary code		Where Supplier has choice of implementation: Supplier. Where implementation is dictated by Customer's requirements: Customer	Where implementation is dictated by Customer: Customer to bear risk. Otherwise, negotiated on a case by case basis. Can Supplier obtain a back to back indemnity from the proprietary Supplier?	<none>	Supplier to use reasonable skill and care in selecting code, but should not be liable for third party infringement. Similar to the supply of third party hardware. May offer to pass on any third party warranties available, or to assist and again this may be subject to a pass through of third party restrictions.	Supplier is contracting to supply IPR, and should bear all the risk. How Supplier intends to source IPR should not be Customer's issue.	
Trade secrets		Supplier		The Supplier warrants that, to the best of the Supplier's knowledge [but not having made any specific enquiry], its delivery [assignment/licence] to the Customer and use in accordance with this Agreement does not breach any obligations of confidentiality to a third party.			
Trademarks		Customer		For the avoidance of doubt nothing in this Agreement [except for clause []] is intended to grant any licence over any trade mark of the Supplier or its licensors. The Customer shall comply with the terms of the licences governing all third-party components comprised in the Software, which may include terms relating to trade marks.	The Customer may wish to use the Supplier's trade mark if the code is distributed (or accessed remotely). The parties may rely on trade mark law to tackle this, or incorporate an explicit licence permitting the use of the trade mark in relation to the Supplier's code only if it is not modified in any way.		

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General Indemnity Wording				The Supplier will indemnify and hold the Customer harmless on demand against any claim or loss arising as a consequence of a breach of any of the [above warranties – warranties set out in this clause].			
Implied terms, pre-contractual representations				Except as expressly set out in this Agreement, the Supplier makes no representations or warranties in respect of or in connection with the Software or its use. All other representations, warranties, conditions or other terms which might have effect between the parties or be implied or incorporated into this Agreement or any collateral contract, whether by virtue of statute, common law or otherwise, are hereby excluded to the maximum extent permitted by law, including, without limitation, implied conditions, warranties or other terms as to satisfactory quality, merchantability, fitness for purpose or the use of reasonable skill and care.			
Conduct of Claim				The Customer shall notify the Supplier promptly ("a Claim Notice") should it receive any claim that any portion of the code delivered under this Agreement infringes the rights of any third party, or where it otherwise has reason to believe that it does so. The Supplier's obligation to indemnify the Customer under [clause [ ]] in connection with a claim against the Customer by a third party is subject to: (a) the Customer promptly serving a Claim Notice; (b) the Customer not making any admission as to liability or compromising or agreeing to any settlement of any such claim without the prior written consent of the Supplier[, which consent shall not be unreasonably withheld or delayed]; (c) at the Supplier's written request and at its own expense, the Supplier having the conduct of and the right to settle all negotiations and litigation arising from such claim; and (d) at the Supplier's request and expense, the Customer giving the Supplier all reasonable assistance in connection with such negotiations and litigation. [The Customer shall take all reasonable steps to mitigate its loss arising from any default of the Supplier]			
Access to CVS repository				The Supplier undertakes that it will [during the Term] allow the Customer [read-only] access to the [CVS Repository].			
Replace or Re-write				The Supplier may at any time replace any part of the code ("the Original Portion") delivered under this Agreement where it reasonably believes that such code infringes the rights of any third party or where a claim of such infringement has been made, provided that such replacement code materially complies with the Specification. The Supplier shall cease to be liable to the Customer for any claim relating to the Original Portion to the extent that it arises after delivery of the Replacement Code, except where such claims apply to items already created or manufactured and currently being deployed to market.			
Licence of Collective Work	The Software is likely to consist of a number of components, and the list of components itself will amount to a collective work. Although in many jurisdictions, the collective work will be implied, in some jurisdictions, e.g. Spain, it may need to be explicitly granted. Note also that the GPL may not be an appropriate licence for a collective work – FDL, or creative commons may be more appropriate as they do not introduce source code complications.			The Supplier acknowledges that the combination of the components within the Software constitutes a collective work. The Supplier hereby grants a non-exclusive licence to such collective work to the Licensee [consistent with the rest of this Agreement] [consistent with the Specified Use]			

Issue	**Commentary**	**Who is best placed to bear risk?**	**Best mechanism to tackle risk**	**Sample Wording**	**Supplier's Arguments**	**Customer's arguments**	Comments
Limitations and exclusions of liability				The Supplier's liability under or in connection with this Agreement (whether in contract, tort (including negligence) or otherwise) is limited as follows: (a) the Supplier will have no liability for any loss of profits, loss of business, loss of goodwill, loss of anticipated savings, loss of or corruption to data or for any indirect or consequential loss or damage; and (b) the maximum aggregate amount of any such liability which is not excluded by (a) shall be [ ]. Nothing in this Agreement shall limit the Supplier's liability for death or personal injury or arising as a result of fraud.	On a risk and reward basis the Supplier will wish to limit to the fees for the specific project.		
Status of Supplier	This needs to be considered carefully in the context of each licence. Generally, the Supplier will want to be providing services to the Customer, rather than deliverables. This has issues for distribution, acquired rights directive, liability.			The Supplier is [an independent contractor][acts as Agent for the Customer in developing the Software]			
Failure of software to meet specification: Supplier created	Note that the source is automatically available. No need for escrow. More natural to have documentation available.	Supplier	Warranty from Supplier + ability to re-write non-performing code	To the extent that any Supplier-Created Code fails to meet the Specification, the Supplier shall during the Warranty Period [replace such Supplier Created Code with code that is compliant][insert SLA]	Offer SLA? Maintenance agreement. Warranty period. Source is automatically available	Warranty that Software will perform to spec.	
Failure of software to meet specification: publicly available		Supplier, generally	Warranty (negotiated) from Supplier + ability to re-write non-performing code	To the extent that any Publicly-Available Code fails to meet the Specification, the Supplier shall during the Warranty Period [replace such Publicly Available Code with code that is compliant][insert SLA]	The Supplier should not be responsible for the performance of third party code.	The Customer should not be concerned about how the Supplier opts to select code. Further, for Publicly-Available Code, the Supplier has access to the source, and can therefore treat that code as simply a more-rapidly-developed version of its own code. There is therefore no reason why it cannot give a warranty.	
Failure of software to meet specification: proprietary		Original supplier - can supplier pass on warranties etc?	Back to back warranty from supplier, or mechanism to enable customer to benefit from original suppliers' warranties (agency, third party beneficiary, collateral warranty)	The Supplier shall take reasonable steps to assist the Customer with the enforcement of any warranties applicable to proprietary code, but shall [except to the extent that no reasonable supplier could have specified the use of such code] not otherwise be liable for any failure of any third party code to reach Specification.	Industry standard to use third party code. Depends on type of code (OS/database engine/DLL/Embedded component)	Software should perform to spec.	