

Open Source Licensing Risks and Requirements: Contract Compliance, Copyright Infringement, Monitoring

TUESDAY, MAY 22, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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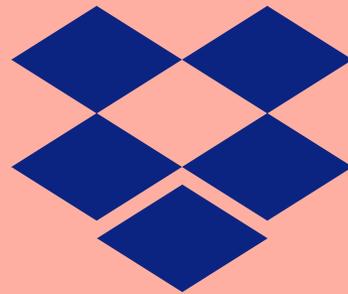
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Open Source Licensing: Conditions and Compliance

Strafford
May 22, 2018
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Open Source: How is it different than traditional software?

❑ *common use of “open source”*

❑ software that is licensed:

❑ to the public

❑ in source code form

❑ under a standard royalty-free license that permits

❑ use, inspection, modification, and re-distribution

Open Source: How is it different than traditional software?

❑ *proprietary (commercial, traditional) software:*

- ❑ distributed under a license agreement
- ❑ permits use of the software
- ❑ does not permit
 - ❑ inspection,
 - ❑ modification, or
 - ❑ re-distribution

Open Source: How is it different than traditional software?

open source licensing	proprietary software licensing
licensed to general public under standard, non-negotiable licenses	licensing terms may be negotiable and vary by provider, customer, product, and use
source code provided and licensed for source or binary use	binary provided and licensed for binary use
licenses generally permit modification (subject to conditions)	licenses typically prohibit reverse engineering and modification
licenses generally permit royalty-free redistribution (subject to conditions)	licenses typically prohibit or impose royalty fees on redistribution
licenses generally include explicit disclaimers of warranty and liability	licenses may include warranties and indemnification
ownership may be distributed among multiple contributors	ownership typically single entity

❓ *“open source software” | 10 license criteria*

❓ *Open Source Initiative (opensource.org)*

❓ *license must be royalty-free, cover source code, permit copying and distribution, and cannot discriminate against persons, groups, uses or technologies*

❓ *“free software” | the “Four Freedoms”*

❓ *Free Software Foundation (fsf.org)*

❓ *license must grant right to run, copy, distribute, and modify*

Open Source Licensing: Categories

☐ *permissive*

☐ *copyleft*

❏ *permissive*

- ❏ “attribution” licenses
- ❏ give me credit
- ❏ if you distribute, provide notice
- ❏ examples: BSD, MIT, Apache

❏ *copyleft*

❏ *permissive*

❏ *copyleft*

❏ reciprocal or hereditary

❏ *if you distribute, use the same terms and provide source code*

❏ *applies to software **combined with** the copyleft software*

❏ “tainting” effect

❓ *permissive*

❓ *weak-copyleft*

- ❓ give me changes
- ❓ if any code in a library is weak-copyleft, all must be
- ❓ can dynamically link to proprietary code
- ❓ examples: LGPL, MPL, EPL

❓ *strong-copyleft*

- ❓ give me everything
- ❓ if any code in a program is strong-copyleft, all must be
- ❓ no linking to proprietary code
- ❓ examples: GPL, AGPL, Creative Commons Share-Alike (CC *-SA-*)

❓ *permissive*

- ❓ give me credit
- ❓ examples: BSD, MIT, Apache

❓ *weak-copyleft*

- ❓ give me changes
- ❓ examples: LGPL, MPL, EPL

❓ *strong-copyleft*

- ❓ give me everything
- ❓ examples: GPL, AGPL, Creative Commons Share-Alike (CC *-SA-*)

❏ *prohibitive*

❏ *forbid specific uses*

❏ *Examples:*

❏ *Creative Commons Non-Commercial license (CC *-NC-*) prohibits commercial use*

❏ *Oracle Binary Code License Agreement prohibits modification or use on dedicated hardware*

❏ *Microsoft Limited Public License (MS-LPL) prohibits use on non-Windows platforms*

❏ *JSON license prohibits using the software for evil*

how do we make sure we are satisfying the license obligations?

how do we manage use of OSS?

should we have an OSS approval process?

are there products we can use?

how do we review and track OSS use?

do we need to audit our software for OSS? if so, how?

how do we train our employees?

how do we provide notice?

- ❑ key: understanding what triggers open source license requirements
- ❑ *distribution*: transferring a copy from one legal person to another
- ❑ SAAS not considered distribution for most
 - ❑ a few exceptions (but not all):
 - ❑ AGPL
 - ❑ Open Software License
 - ❑ Non-Profit Open Source License
 - ❑ Apple Public Source License
 - ❑ RealNetworks Public Source License
 - ❑ Reciprocal Public License

☐ designing an open source program

- ☐ company specific
- ☐ include an education component
- ☐ key: minimize process to encourage compliance

❑ designing an open source program

- ❑ how are you going to define acceptable uses for your product
- ❑ how are you going to communicate policies
- ❑ how are you going to learn about use
- ❑ how are you going to track use
- ❑ how are you going to provide notice

- ❑ defining acceptable uses of open source software
 - ❑ categorize the common licenses
 - ❑ define how they can be used in your product
 - ❑ define type of approval required for each category

❑ communicating policies

- ❑ continuously educate developers
- ❑ provide easily accessible resources that outline policies (for later reference)
- ❑ make use of open source champions
- ❑ make open source team accessible and responsive

❓ learning about use - many options

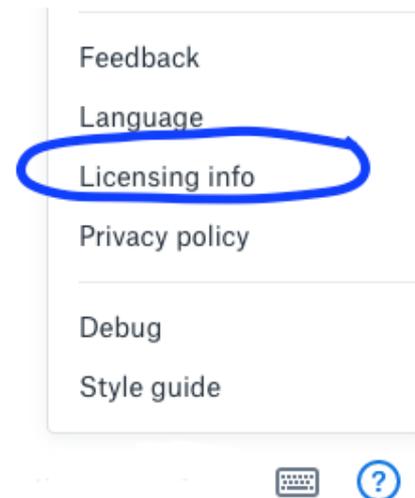
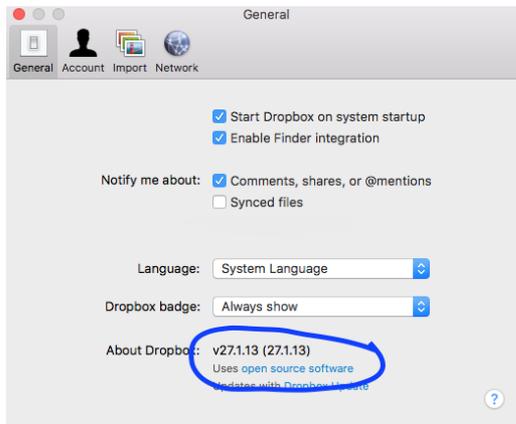
- ❓ rely on self-reporting & open source champions
- ❓ integrated developer tools (e.g., FOSSA)
- ❓ code scanning tools (e.g., Black Duck Software, FlexNet Code Insights)

☐ tracking use - many options

- ☐ rely on self-reporting → submission form and spreadsheet
- ☐ integrated developer tools → auto-generated logs, reports, attribution pages
- ☐ code scanning tools → auto-generated reports

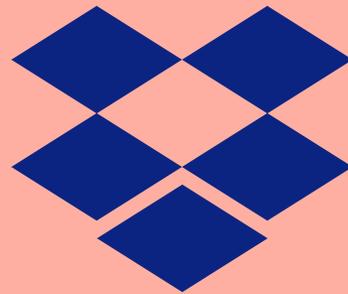
❓ providing notice

- ❓ best practice: use the rules of GPL
- ❓ must be provided with the product
- ❓ easiest way to ensure compliance is to distribute source code
- ❓ alternative provide attribution page or notice file
 - ❓ accessible
 - ❓ easily discoverable



❑ designing an open source program

- ❑ ideal world - tracking since the beginning of product development
- ❑ worst case - shipping product, know there is OS code, but no idea where or what
- ❑ real world - mix



Questions?

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Strafford Webinar: Open Source Licensing

May 22, 2018

Prepared by Heather Meeker

ENFORCEMENT AND LEGAL RISKS

Enforcement Landscape in 2018

- Most enforcement is still by community groups such as SFC (Software Freedom Conservancy) or gpl-violations.org
- Informal enforcement still more common than lawsuits
- Formal enforcement is stepping up
- Copyright profiteers are popping up

Kinds of Enforcers

- Individual Authors
- Community Enforcers
- Strategic Enforcers
- Copyright Profiteer



Let's save the GNU!

gpl-violations.org



Software Freedom
Law Center

COMMUNITY ENFORCEMENT GUIDELINES

<https://sfconservancy.Org/copyleft-compliance/principles.Html>

PRIVATE COMPANIES ARE FOLLOWING COMMUNITY ENFORCEMENT PRINCIPLES



Red Hat lead the “Common Cure Rights Commitment,” an initiative to give violators notice and an opportunity to cure, as required in GPL3, to GPL2 and LGPL2.1 violations.

<https://www.redhat.com/en/about/press-releases/momentum-builds-new-wave-technology-industry-leaders-join-efforts-increase-predictability-open-source-licensing>

LINUX KERNEL DEVELOPERS COMMIT TO COMMUNITY ENFORCEMENT PRINCIPLES

Linux Kernel Community Enforcement Statement.

<http://kroah.com/log/blog/2017/10/16/linux-kernel-community-enforcement-statement/>

Linux™



Latest Enforcement Actions

- **Hellwig v. VMware** – Community action, dismissed
- **Unnamed injunction in Germany** – Individual
- **McHardy** – Copyright Profiteer
- **GPL Case in China** – Digital Heaven Internet Technology CO., LTD. (数字天堂网络技术) v. Pomelo Technology CO., LTD. (柚子科技有限公司)

Unnamed Injunction in Germany

- German court issued order to cease and desist use of software in violation of GPL
- Defendant was an unnamed German university
- Defendant made the software available for download by its staff and students
- Plaintiff complained about the activity, and asked for a “cease and desist declaration with a penalty clause” which defendant refused to sign, claiming it was unnecessary because the software had been taken down.



Unnamed Injunction in Germany

The Order

- Removal of the software in dispute from the Defendant's website was not sufficient to eliminate the risk of repeat infringement
- Order provided for a fine of between 5 and 250,000 Euros or imprisonment of up to six months for continuing violations
 - specifically provided for imprisonment if the fine could not be paid
- Order also required Defendant to pay legal costs.

- Translation here:
http://www.jbb.de/Docs/LG_Halle_GPL3.pdf

Unnamed Injunction in Germany

Why We Care

- The facts would not have supported an injunction in the U.S.
 - No current infringing activity
- A judgment against a university trumpeted as a victory for open source software
- Possibility of criminal sanctions – debtor's prison!

- Also, making materials available to students was distribution

McHardy v. Everyone

- ***The information here is not public, more of an “open secret” in the tech business. It should not be attributed.***
- McHardy is a Linux kernel developer – working on the Netfilter project and other kernel development
- He has reportedly sued many companies in private actions (Germany allows confidential filings)
- He seems more interested in damages than compliance
- Tactic of proposing settlements with heavy penalties for repeated infringement (similar to the unnamed order discussed above)

McHardy v. Everyone

Why We Care

- The SFC has distanced itself from “trolling” by releasing The Principles of Community-Oriented GPL Enforcement.
 - <https://sfconservancy.org/copyleft-compliance/principles.html>
- McHardy was kicked out of the Netfilter project.
 - <http://marc.info/?l=netfilter-devel&m=146887464512702&w=2>
- Open source suits in Germany (like Hellwig v. VMWare) are vulnerable to procedural challenges, so zealous advocacy can defeat such claims.
- McHardy has recently been less successful in claims due to court’s skepticism about his ability to prove his status as an author.
- Don’t sign settlements with penalties for repeated violations.

Digital Heaven v. Pomelo

- Digital Heaven Internet Technology CO., LTD. (数字天堂网络技术) made publicly available its product HBuilder.
- One of the modules in HBuilder (“Aptana” released by Appcelerator, Inc., a third party) was licensed under GPL 3.0, and three modules developed by the plaintiff, “CIM plugin”, “ACR plugin”, and “HTML code drawing in real time plugin”, also included in HBuilder, had no other specific licensing terms.
- Plaintiff alleged that defendant Pomelo Technology CO., LTD.(柚子科技有限公司) used some of its source code in a project called APICloud without permission.
- Defendant alleged that plaintiff’s software was licensed under GPL3 and therefore they had not infringed.
- Judges ruled that the relationship between the modules developed by the plaintiff to the GPL licensed Aptana is aggregation only, and thus the plaintiff’s modules need not be licensed under GPL 3.0.
- The judges ruled for the plaintiff and ordered damages. The judgement is appealable.

Digital Heaven v. Pomelo – Why We Care

- First GPL case in China
- GPL license is enforceable in China
- However, judges called the integration of the plaintiff's software with third party software mere “aggregation” rather than a “derivative” work” under GPL-3.0, which may run counter to the received wisdom of community enforcers like SFC.
- Note: The decision is in Chinese, and the above is based on a description from secondary sources

Security: Why We Care

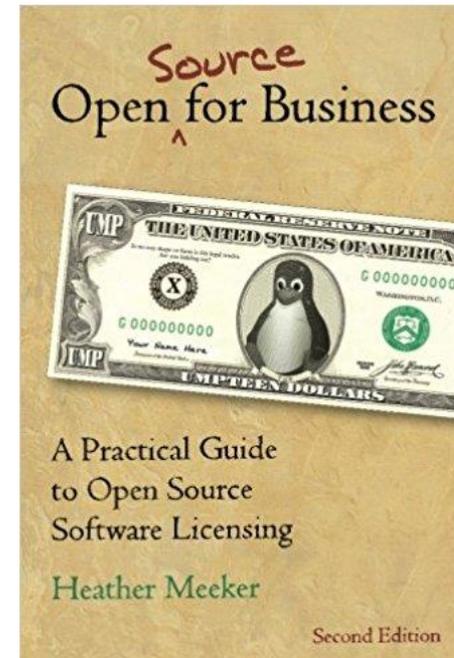
- License compliance and security compliance are always bound together
- Security problems can result from understaffed/underfunded projects
- Security issues can result in huge liability (from private class actions or government actions) such as:
 - Target:
https://www.nytimes.com/2017/05/23/business/target-security-breach-settlement.html?_r=0
 - Equifax:
<https://heathermeeker.com/2017/09/15/equifax-security-hack-and-apache-struts/>

Non-legal risks

- Employee morale and recruitment
 - Remediation and diversion of resources
 - Public relations
 - Loss of licenses
 - Outside counsel fees
-
- These internal costs are the hidden costs of non-compliance

Book

- Available in Kindle and paperback at Amazon.com
- Or just ask for an electronic copy



Heather Meeker



Heather Meeker is a partner in O'Melveny's Silicon Valley office and a member of the Technology Transactions Group.

Her practice focuses on advising technology clients on intellectual property matters, including licensing and collaboration arrangements, software copyright and patent issues, technology procurement, open source licensing strategies, and intellectual property-related aspects of mergers and acquisitions and other corporate transactions.

Heather is nationally and internationally recognized for her leadership in the field of intellectual property law, with *Chambers USA*, the *Legal 500*, *The Best Lawyers in America*®, and *Super Lawyers* naming her among the industry's top lawyers in multiple consecutive years. *Managing IP* named her one of the top 250 female IP lawyers in the world in 2018. The *Daily Journal* named Heather to its list of "Top 100 Women Lawyers in California" in 2013, and has named her twice to its list of "25 Top IP Portfolio Managers (Licensing) In California." *Managing IP Magazine's World IP Handbook and Survey's* named her to its "IP Stars - Top 250 Women in IP" list in 2013. In 2012, *Best Lawyers* identified her as its "San Francisco Information Technology Law Lawyer of the Year." Heather was most recently listed in *The Best Lawyers in America 2016* in the areas of Copyright Law, Information Technology Law, Litigation – Intellectual Property and Litigation - Patent.

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