LICENSING REVIEW IN R&D PROJECTS

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OPEN SOURCE LICENSING

**Quick Reminder**

- “Open Source” or “Free” license does **not** mean *complete freedom* or *free of any contractual obligations*.
- Open Source-licensed code is **not in the public domain**, someone owns the IP (copyright, patents) and grants to downstream users and licensees a license to use the code (typically the source code) via a license that provides *some* freedom - more freedom than a standard “proprietary” license - **but a license which includes contractual restrictions and obligations**.
- All actors in the supply chain must remain compliant.
- Non compliance is not an option.
- Non compliance may lead to termination of contract, breach of contract and allegation of IP infringement.
- Infringing IP is in some countries a criminal offence.
- Allegations of breach of contract and IP infringement come with reputational risks.
LICENSES CHALLENGES

- Anyone selecting open source software needs to be aware that their technical choices have legal implications.

- Selecting open source software is a licensing activity.

- Engineers are routinely making licensing decisions on their own – decisions that, in the past, would have had the assistance of procurement specialists and the legal department.
LICENSING REVIEW

Landscape

- FOSS: Free and Open Source Software
- 300+ different forms of FOSS license models and terms (GPL, Apache, BSD, MIT, MPL …)
- A large range of commercial software include FOSS components
- Think big: FOSS philosophy is not limited to software but applies to all IP-protected items and could become the major form of outbound licensing (documents, specification, users manuals, visual art, media, advertising material, work of art)
- Do not get confused: “open source” is not just limited to giving access to software source code
  - Making the source available is one aspect of the FOSS philosophy
  - FOSS philosophy means providing additional freedom: right to distribute, right to make modifications or create derivative work
  - But additional freedom that usually must flow-down throughout the stream of distributors, contributors and users
- As all devices are becoming more and more “intelligent”, all devices will soon include software code – and very likely FOSS code
- This is just the beginning …
OBJECTIVES: COMPLIANCE, COMPLIANCE AND COMPLIANCE

- Objective: be (or become) and stay **compliant** at all time in all your activities
- Highest risks of non compliance for large corporations:
  1. Products stemming from newly acquired companies (M&A)
  2. Procurement of critical OEMed-in 3rd party items and software applications
  3. Combination of large number of FOSS packages
RISK ASSESSMENT

- **Identify high risk activities**
- Risk rate activity and identify high risk operations and transactions:
  - Internal use ↓
  - Resale of 3rd party commercial application into a mix of large product portfolio ↓
  - OEM-in and OEM-out ↑
  - Resale of high revenue/high volume product ↑
  - Indirect distribution via network of multiple channel partners ↑
  - Incorporation of critical FOSS-licensed elements into flagship product ↑
  - Company with single product ↑
  - Distribution with no access on mid-term to FOSS-licensed elements after distribution ↑
RISK ASSESSMENT (2)

Identify high risk license models
Risk rate license models and identify high risk licenses:
- BSD / MIT ↓
- Apache ↓
- GPL v2 ↑
- GPL v3 ↑
- MPL (Mozilla) ↑
- New FOSS License ↑
- Items with no License ↑
- Items with commercial and FOSS (usually GPL) dual licensing schemes ↑
RISK ASSESSMENT (3)

**Identify high risk upstream and downstream players**

- Risk rate players and identify high risk partners:
  - Software from FOSS project 📈
  - Software from entity with strong FOSS culture 📈
  - Software from entity with strong corporate partnership 📈
  - Software from entity with new or weak FOSS culture 🔻
  - New supplier 🔻
  - Small supplier (start up) 🔻
RISK ASSESSMENT (4)

– **Combine risk rating**

– Create 3D risk grid:
  – Incorporation of FOSS-licensed items into critical high revenue, single product, stemming from new supplier, with FOSS licensed under a mix of GPL v2, GPL v3 and MPL licenses ⬆️ ⬆️ ⬆️
  – Internal use of FOSS-licensed items supplied under BSD license ⬇️ ⬇️ ⬇️
RISK MITIGATION

- List each and every FOSS component of each package in the stack
- Identify FOSS components
- Identify FOSS licenses (GPL, Apache, etc)
- Identify specific FOSS components and/or FOSS licenses (MPL, GPL v3?)
- Request scan of source code by a license parsing tool (e.g. FOSSology)
- Determine how third-party licenses (copyleft analysis) may impact created code or other code (e.g. GPL v2 and Apache)
RISK MITIGATION (2)

- Remove components
- Replace package
- Approach author (manageable if just one)
- Develop replacing component/package
APPLY FOSS GOVERNANCE

- FOSS components signaled in READ ME text or Header Files
- Fulfill FOSS license requirements, e.g.
  - include copyright notice and license text with product, e.g. copied in user guide and accessible to all licensees or incorporate the third party license requirements into the End-User License Agreement (“EULA”)
  - acknowledgments
  - make available the source code
- Dedicated Website or Wiki
RISK MITIGATION WITH PARTNERS

– Legal-contractual protection:
  – Representations (termination): good but does not address reputational risk
  – Warranties (damages): better but potentially insufficient to compensate for reputational risk and business disruption
  – Undertakings/commitments: Best pro-active measures

– Agree FOSS Governance with partners
If you plan to use and distribute open source software:

1. When obtaining open source binaries, also obtain the source code.
2. Inventory the code and the license terms in software that will be distributed.
3. Determine how third-party licenses (copyleft analysis) may impact created code.
4. Fulfill all requirements of the third-party licenses
5. Consider FOSS issues when others create products to be distributed
6. Engage your Legal team
7. Follow any review process
Q&A