LICENSING REVIEW IN R&D PROJECTS

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OPEN SOURCE LICENSING

Quick Reminder

- "Open Source" or "Free" license does **<u>not</u>** mean *complete freedom* or *free of any contractual obligations*
- Open Source-licensed code is **<u>not</u> 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 <u>*some*</u> 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

LICENSING CHALLANGES

– 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** <u>at all time</u> in <u>all your activities</u>
- 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 <u>activities</u>**

– 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 <u>license models</u>

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 <u>upstream and downstream players</u>

– 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

SUMMARY
ACTIONS AND RECOMMENDATIONS

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