



Open Source Litigation: How to Defend, Settle, and Avoid It

Open Source Business Conference 2010



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Presented by
Heather J. Meeker
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OBJECTIVES

- Understand how to react to claims before they become lawsuits
- Know the enforcement players and their motivations
- Understand *Jacobsen v. Katzer* and its implications

Enforcement Landscape: The Dawning of a New Age

- **Artifex v. Palm et al (2009, ongoing)**
- **Artifex v. Premier Election Solutions (Diebold) 2008**
- **FSF v. Linksys claims (2003), FSF v. Linksys (2008-9)**
- **Jacobsen v. Katzer (Fed. Cir. Opinion 2008, District Court order 2009, settled 2010)**
- **Busybox cases.**
- **Progress/NuSphere v. MySQL.**
- **gpl-violations.org v. Fortinet and others (2005)**
- **Jin v. IChessU (settled Israeli case)**

Bring on the copyright trolls!

Types of Claimants

- **Small private parties working through SFLC or gpl-violations.org**
 - » Objectives: money, credit, or compliance
 - » Actions reasonably predictable because of organizational involvement – these are not so much pro bono organizations as advocates
- **Small private parties working on their own**
 - » Objectives: money, credit, compliance, work
 - » Usually pre-litigation demands
 - » Actions may be unpredictable, heavy handed responses are counterproductive
- **Open source project stewards such as FSF**
 - » Objectives, compliance, money, publicity
 - » Actions are very predictable
- **Private actors**
 - » Objectives: money, publicity, market advantage
 - » Actions moderately predictable

Structure and Legal Basis of Claims

■ Copyright claims

- » *Jacobsen* supported them
- » Injunctive relief, statutory damages (requires registration)

■ Contract claims also possible

- » *Jacobsen* did not foreclose them

■ Demands for compliance

- » Open source projects often focus on compliance going forward

■ Ancillary claims e.g. trademark, DMCA

- » *Jacobsen* supported DMCA claim

■ Injunctive relief

- » *Jacobsen* did not support, but principles cannot be drawn
- » The injunction in the settlement was voluntary
- » Thresholds for injunction probably rose during pendency of suit

Jacobsen v. Katzer

- **Original claim – DJ action by Jacobsen regarding assertion of patent by Katzer**
- **Additional claim – violation of Artistic License by Katzer**
- **Federal Circuit Opinion**
 - » Claim sounded in copyright
- **District Court Order**
 - » Declined injunctive relief
 - » Stated damages were possible due to costs to develop software
- **Settlement**
 - » Injunction
 - » No confidential treatment
 - » Damages

Settlements by SFLC

■ Compliance

- » Suspend distribution of non-compliant products
- » Publish source code – sometimes goes beyond GPL obligations

■ Press Release

■ Money payment

■ Open Source Compliance Officer

What might happen to you

- **Your company receives an email or call about a potential violation**
 - » Educate all who might receive complaints (engineers, customer service, etc.) on how to respond
 - » Respond immediately
- **Chatter on discussion groups or Slashdot about your practices**
 - » Set up alerts or monitor discussions
 - » Consider tasking a community representative within your company to reply
- **Demand letter, complaint**
 - » Handle as you would any complaint, but mobilize immediately to consider settlement
 - » Consider spin control

How to discourage claims

■ Notices, notices, notices

- » Open source notices are a headache, but will do the most to avoid claims
- » More difficult compliance issues (such as close integration with GPL) are rarely the subject of claims

■ React quickly to all complaints

■ Know your plaintiff

- » If you don't know the open source landscape, talk to someone who does
- » Your litigation team may need to be educated about the politics of the open source world

Weaknesses in Open Source Claims

- Joint author/owner problems
- Choice of Law
- Jurisdiction
- Patent grants (relates to corporate actors)



Thank you for your time.

Heather J. Meeker
Greenberg Traurig, LLP
Silicon Valley Office
1900 University Ave, 5th floor
East Palo Alto, CA 94303
650-289-7825



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CV on Open Source

- Author of *The Open Source Alternative*, John Wiley & Sons, 2008
- Advised Sony Ericsson on Symbian Foundation
- Advised Autodesk on OSGEO Foundation formation and code release
- Advised Mozilla on marketing agreement for Firefox search defaults
- Drafted Firefox EULA for Mozilla Foundation
- Advisor for open source issues to Yahoo, Autodesk, Avaya, Amazon.com, Ebay, Vuze, Serena, TIBCO, LSI Logic, Pace Micro, Insightful, Sony

CV on Open Source

(continued)

- Advised Yahoo! on Zimbra, Right Media, and other acquisitions
- Advised on open source and intellectual property matters in Network Associates' acquisitions of Intruvert Networks, Entercept Security Technologies, Deersoft, and Traxess, 2002-2003
- Prepared trademark and patent policies, contribution policies, and licensing strategies for Active Endpoints, Alfresco Software, Cobia (StillSecure), Jahshaka, Boingo, Centeris, Digium, Second Life

CV on Open Source

(continued)

- Counseled Mozilla Foundation, Open Source Applications Foundation, GNOME Foundation, Python Software Foundation
- Member of Open Bar Advisory Board
- Former Chair of Open Source committee for ABA Science and Technology Section
- Advised Lucas Arts on initiating OpenEXR open source code release
- Advisory Member for ALI project on the Law of Software Contracts



(extra slides for
frequently asked
questions)

Risk Assessment

- **Compliance is not about perfection; it is about risk reduction**
- **Two kinds of risk: Infringement and compliance**
 - » Open source licensing vs. open source development model
- **Major risks include:**
 - » Copyright Infringement damages (probably statutory)
 - » Injunction (orders halting product distribution)
 - » Reduction in value of patent portfolios
 - » Bad PR
 - » Engineer relations problems
 - » Shareholder derivative suits
- **They probably do not include:**
 - » Court orders to disclose source code