Open Source Licensing

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Level Setting: "Open Source"

- We are referring to software made widely available in source code form
- It comes in many forms and is subject to many different license obligations
- It is distributed using many different business and licensing models

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Level Setting: Software Risks

- Bugs/ Support Infrastructure
  + In-House, Community or Professional Support?
- License Compliance
  + Copyleft
  + Notices
  + Changes to EULA
- Third-party IP claims
  + The SCO problem

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First Principles

- Open source is hard to compete against
- Open source is here to stay
- Code re-use is software nirvana
- Huge efficiencies come with collaboration
- …it just needs to be managed appropriately

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"License Proliferation"

- OSI approves new licenses
- New licenses and business models vs. complexity
- Global concerns
  Localization
  Languages

Eben Moglen:
"The GPL is Four Things"

- A copyright license
- A code of conduct
- A constitution of the Free Software movement
- A vehicle to express the ideas of Richard Matthew Stallman

GPL 3.0

- Version 2.2 was in 1991
- First discussion draft due Dec. 2005
- Changes will be prospective
  + Users can continue to use same license for current code
- Changes for:
  + Worldwide application
  + Clarification

The Art of Programming Has Changed

- Not just static and dynamic linking
- What is the "Work"?
- What is "Derived"?
- Should "Deployment" count?
- Trusted Computing

Interpretation of the GPL

- Whose interpretation?
- A contract is a meeting of the minds
- A "bare license" is not a contract?
- Parol evidence
- Example: Linux device drivers

Distribution

- Related entities
- Web services
- Consultants
- Corporate transactions
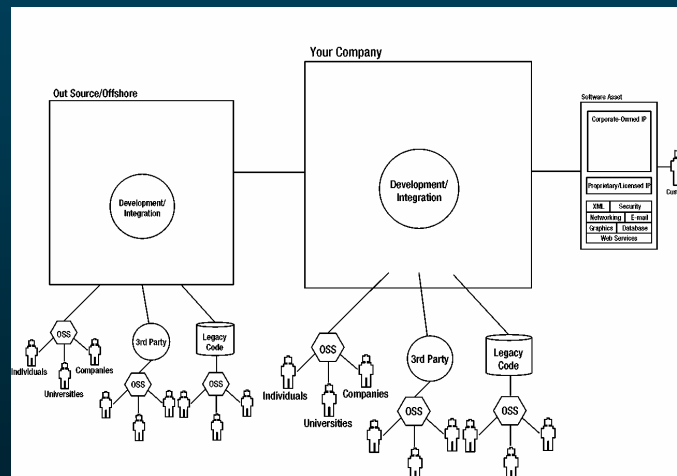- Obligation only extends to recipients of object code?

How to Manage Compliance?

- Ideal Process for Internal Development
  + Enables company to embrace open source
  + Reduces time and cost of development
  + Facilitates cooperation with legal counsel
  + Tracks compliance to product ship

Development Environment

Due Diligence of Acquired Software Assets

- Type of transaction
- Intended use of assets
- Size of Target
- Timing considerations
- Attorney-client privilege
- Liability for continuing infringement
- Valuation
- Leverage

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Variables

- Who/Where/When is code review conducted?
- Who has access to results?
- Who/Where/When does remediation occur?
- How do results get factored into the deal?

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Example 1

- Target's outside counsel reviews code
- Target management and few technical people have access to results
- Remediation by Target's developers occur prior to closing
- Acquirer and in-house and outside counsel review post-closing

Example 2

- Outside counsel for Acquirer conducts review with assistance from consultant during due diligence
- Everyone has access to the results
- Remediation conducted by Target's developers as condition to closing
- Acquirer's attorneys review

The END

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