

# Open Source License Enforcement Actions

What You Can Expect When  
There is a Knock on Your Door

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# Introductions

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## Presenters



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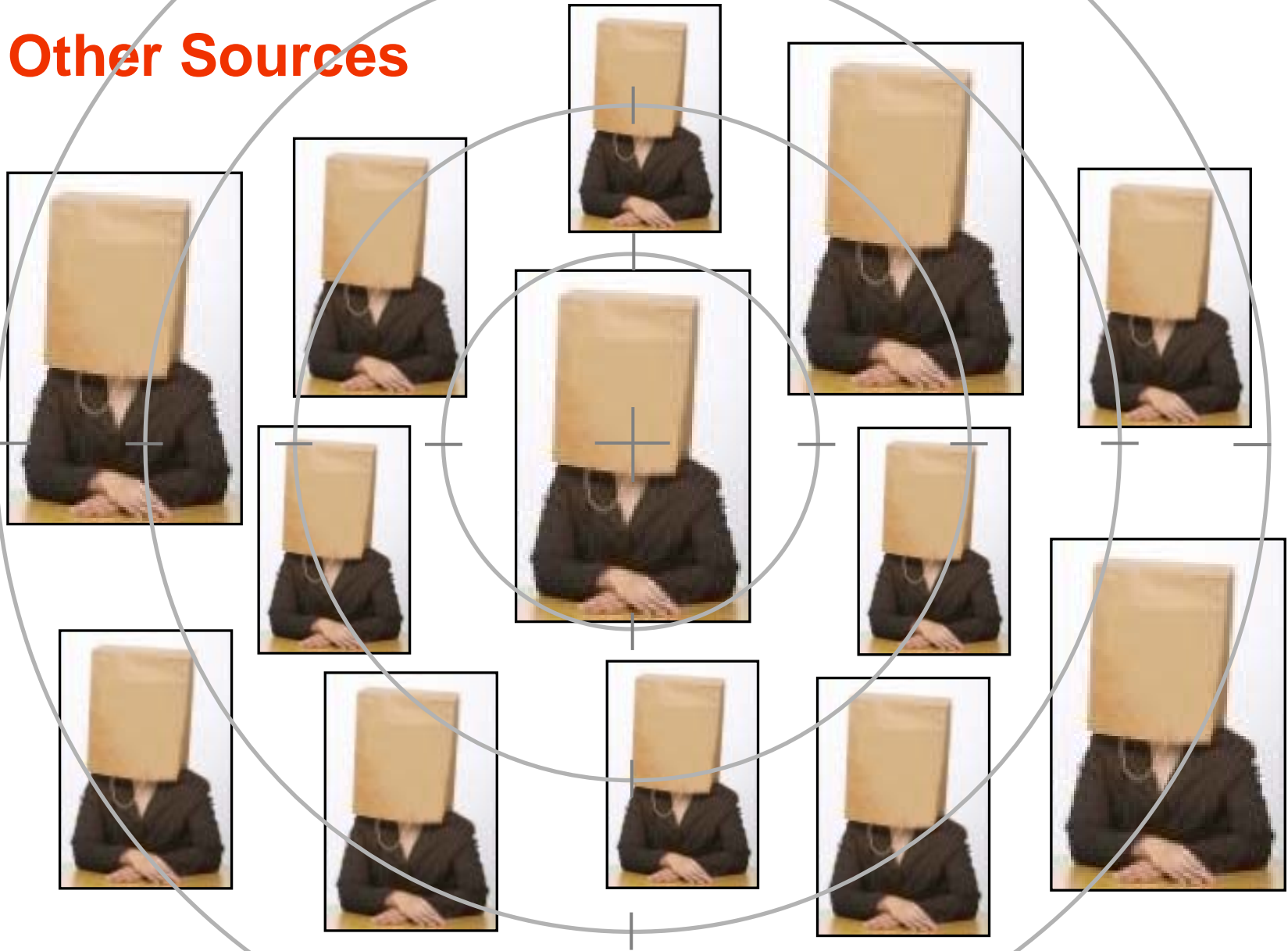


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# Introductions

## Other Sources



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# Overview

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## What We Will Cover

What are Open Source License “Enforcement Actions?”

Who is Doing the Enforcement?

Who are the Targets?

How are the Targets Identified?

What are the Goals of Enforcement?

What are the Costs of Enforcement?

How Should You Respond to an Enforcement Action?

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# What Are Enforcement Actions?

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## Anatomy of a License Enforcement Action

- Actions themselves can take various forms
  - Often start with an informal inquiry
  - More formal inquiry and demand for compliance
  - Cease and desist letters
  - Involvement by legal counsel
  - Legal proceedings
- Few established rules of engagement
  - No formal rules of procedure as there would be in a court
  - Many emerging patterns of behavior and conduct
- Focus is not on whether the license is legally enforceable
  - OSS licenses are increasingly assumed to be enforceable
  - Claims often involve clear violations
  - Nobody wants to be the test case for enforceability
  - Few want to challenge the validity of a license or a licensing method upon which they rely
- Focus is often on the *limits* of enforceability



# What Are Enforcement Actions?

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## Anatomy of a License Enforcement Action

- Typically kept private (even though NDAs not signed)
  - Strong resistance to publicity (by the accused)
  - Perceived loss of leverage (by the accuser)
  - Settlement often reached before the need for formal (and public) legal action
- Often not long in duration
  - Weeks or months
  - Can last longer where follow-up is made
  - Can be a collaborative process
  - Strange gaps in communication and follow-up
- Goals vary by enforcer, but typically not as severe as those sought in proprietary software enforcement actions
- Enforcement/defense can end up being costly



# Who is Doing the Enforcement?

## The Usual Suspects and a Few More

- Community enforcement
  - OSS community organizations and projects
  - Customs and decorum
  - Comply or cease use
- Commercial enforcement
  - Commercial OSS vendors
    - vs. users
    - vs. other OSS vendors too
  - More formal (akin to the BSA?)
  - Comply or buy a license
- Fringe enforcement
  - Individuals and activists
  - Much less predictable
  - *ad hominem* attacks, profanity, and general bluster
  - Often resembles extortion
- Internal “enforcement”





# Who Are the Targets?

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## Yes, It Can Happen to You

- “Multiple 100s” of actions
  - FSF and GPLViolations.org
  - Other less well-known players
  - Commercial open source vendors (not just dual-license vendors)
- Typically involve the GPL
  - Focus on disclosure of GPL’d code
  - Can include notice provisions as well
- Growing number of notice and attribution claims under other licenses
- Primarily against proprietary technology software companies (and those making distributions)
- Agnostic as to
  - Size of company
  - Industry
  - Location (but primarily the US and EU)



# How Are Targets Identified?

## The Eyes and Ears of Enforcement

- Tip-offs
  - Self-reporting
    - Employees
    - Developers (developers, developers, developers, developers. . . )
    - Other internal clients
  - Ex-employees
  - End users and distributors
  - Competitors
  - Potential acquirers or investors (following diligence)
  - Other organizations (who do not themselves have standing)
- Followed by independent investigation and confirmation
- Certain, but how certain?

“In nearly every GPL enforcement cases that I've worked on in my career, the fact that infringement had occurred was never in dispute.”

Bradley M. Kuhn

CTO,  Software Freedom  
Law Center

(Fmr. Executive Director, FSF)



# What Are the Goals of Enforcement?

## Goals Vary With The Enforcer

- Compliance
  - Often a moral and not a legal question

“Our number one goal in any GPL violation case is to get proper and full compliance with the license; everything else is secondary.”

David Turner,  FREE SOFTWARE FOUNDATION

“Vendors have to comply [with OSS licenses], just like they would have to with any other proprietary software license.”

Harald Welte,  Let's save the GNU!  
gpl-violations.org

- What does “compliance” include?
  - Release of offending code (both yours and your licensors’)
  - Also often involves re-architecture of the offending code
  - Purchase of commercial license
  - Compliance with notice, attribution, and other clauses
  - Additional “good faith” actions (e.g., notification to distributors)
- If nothing else, then cessation of use



# What Are the Costs of Enforcement?

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## Both Direct and Indirect Costs

- Costs can be high (but need not be)
- Discovery and diligence (internal time spent on the action)
- Settlement costs
- Outside and in-house legal costs
- Damage to brand, reputation, and credibility
- Ongoing enforcement costs
- Ongoing compliance costs
- Management changes?

# What Are the Goals of Enforcement?

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## Goals Vary With The Enforcer

- Injunctions
  - Not (yet) in the US
  - Easier to obtain elsewhere – e.g., Germany
- Compensation
  - Consulting fees
  - Donations
  - Settlement fees
  - Commercial license fees
  - Extortion?

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# How to Respond to an Enforcement Action?

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## Show Respect But Do Not Surrender

- Involve management in the process
  - Leverage your OSS compliance team
  - Decide when to involve legal
  - Manage the enforcement action like you manage other aspects of your OSS usage
- Understand the accuser
  - Who are they?
  - What is their motivation?
- Evaluate the accusation
  - Is it accurate?
  - Is it current?
- Understand your obligations under the applicable license
  - What is required under a “reasonable” interpretation of the license?
  - What does the community expect?
  - What would it mean if the accusation went public?
- Decide early what you are willing to give and where you will dig in your heels

# How to Respond to an Enforcement Action?

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## Show Respect But Do Not Surrender

- Seek to work collaboratively with the accuser/accused
- Open a dialog
  - Highlight your compliance program
  - Show good faith efforts toward compliance
  - If you are not compliant, show how you will get there
    - Searching for low-hanging fruit, but. . .
    - Few compliance rubber-stamps
    - Resolution typically requires more than a token effort
- Assume that any proprietary information you disclose can become public

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# Final Thoughts and Considerations

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## Emerging Best Practices

- Enforcement is not about whether a license is enforceable (but it is often about the limits of enforceability)
- Know and understand your accuser (or your target)
- Seek to develop a relationship and a dialogue
- Gestures and good faith often matter, but compliance is often required
- Treat more formal inquiries as you would a governmental investigation
- Assume that anything you say could be made public
- There is no substitute for solid OSS compliance efforts
- Consider how your existing OSS compliance efforts would measure up in an enforcement action

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**Thank You.**

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