“Stand Up for your Product”: Allocating Liability for Open Source Software
Who is has the “moral high ground”? 

Vendor – See Indemnity as Tax

Customer – Sees Indemnity as Protection
But indemnities are not about what is right, but what is commercially reasonable

Economics – What is the most efficient way to avoid or resolve problems?
Non Compliance
How is Open Source different?

**Embedded Software**

Docker images and containers

- **Base image file**
- **Dockerfile**
  
  `FROM xxx
  ADD xyz
  RUN foo
  CMD bar`
- **Image file**
- **Docker “build”**
- **Docker “run”**
- **Running container**
Modified UCC Approach

• § 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.
What is a Product?

Age-Appropriate Explanations
What is a product? (Kindergarten)
What is a product? (Third Grade)

Application  
Language Engine  
Operating System
What is a product? (Seventh Grade)
What is a product? (High School)

- Application
- Library
- Language Engine
- CMS
- Operating System
What is a product? (Real World – Example)
When you Stand Up for your Product

What are you standing up for?

Certainly this

Probably this

Not this

Application

Library

Language Engine

CMS

Operating System
Technical approach...

- If the open source is named in the specifications for the product, it is not covered by the IP indemnity.

- If the specifications for the product require use of the open source, there is no indemnity.

- If the specifications for the product don’t require it, and the vendor selects it as part of an internal build-or-buy decisions, vendor indemnifies.

- When a company makes goods to a buyer’s specifications, the buyer — not the seller — provides the warranty of non-infringement (U.C.C. 2-312(3)).
How do we separate the stack and the product?

**Various Approaches**

- **Interoperability**: The product excludes any code communicating with the application via standard or public APIs (i.e. that can be swapped out with other code).

- **GPL Approach**: The product includes everything in its executable (i.e. that cannot run on its own).

- **Source of Code**: The product excludes anything not written by the vendor.

- **Linux Definition**: The product excludes everything in the Linux stack as defined by the Open Invention Network.
What does the UCC say about IP Indemnities?

• § 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

• (3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.
How do we separate the stack and the product?

Modified UCC Approach

- “Open Source Computing Stack” means any open source software created by third parties that is referenced in the specifications for the computing environment of the Product [in Exhibit ____], which software may include operating systems such as Linux, web server software such as the Apache web server, language engines such as Java, PHP, Python or PERL, and database software such as MySQL.

- Vendor will have no liability under [reference indemnity provision] for infringement of third party rights by the use of the Open Source Computing Stack; provided, however, that the foregoing sentence will not limit Vendor’s liability for compliance by Vendor with the terms and conditions of the open source licenses applicable to the Open Source Computing Stack.
Thank You for Your Time!

Heather Meeker
hmeeker@omm.com
+1-510-463-1116

My blog (for news on open source licensing and other goodies)
heathermeeker.com

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