



Trademarks In Open Source

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A decorative background consisting of a network of interconnected nodes and lines, resembling a molecular structure or a data network. The nodes are represented by small circles, some of which are highlighted in blue. The lines are thin and grey, connecting the nodes in a complex, web-like pattern. The overall aesthetic is clean and technical.

Agenda

Shane: The Open Source Ethos Is Sharing
How open source works differently.

Pamela: Trademarks In Open Source Practice
What that means for your clients.

A decorative background consisting of a network of interconnected nodes and lines, resembling a social or organizational graph, in shades of grey and blue. The nodes are circles of varying sizes, and the lines are thin and light grey.

Open Source Is Sharing

- ◎ Open Source Ethos = Culture Of Sharing
- ◎ Open Source Clients Are Different
- ◎ Use Cases For Open Source Brands

The ways that open source are built - technology-wise, people-wise, process-wise - are different than traditional software vendors. Understanding how clients in open source industries are structured, how they work differently, and how they have subtly different goals than traditional corporate clients is important to be able to give the best advice.

The Sharing Ethos

Open source organizations
want and **need to share**
their work - and to a
degree, their brands.






Industry-wide adoption of open source

- ◎ Open source use is the norm
- ◎ **78%** of companies **run part or all** of their operations **on open source software**

This morning, Luis and Eileen talked about the prevalence of open source use and contribution across the industry. But we should correct one bullet point on their slides...



Industry-wide adoption of open source

- ◎ Open source use is the norm
 - ◎ **100%** of companies **run part or all of** their operations **on open source software**
 - ◎ When you use a computer, you are using open source
- 

Virtually every US company uses open source to run their business. If you use a smartphone, laptop, or server just about anywhere in the world, you're using open source software - even if you don't realize it. Open source is truly the norm. Most major proprietary software product you can think of includes some bits of open source inside it today.

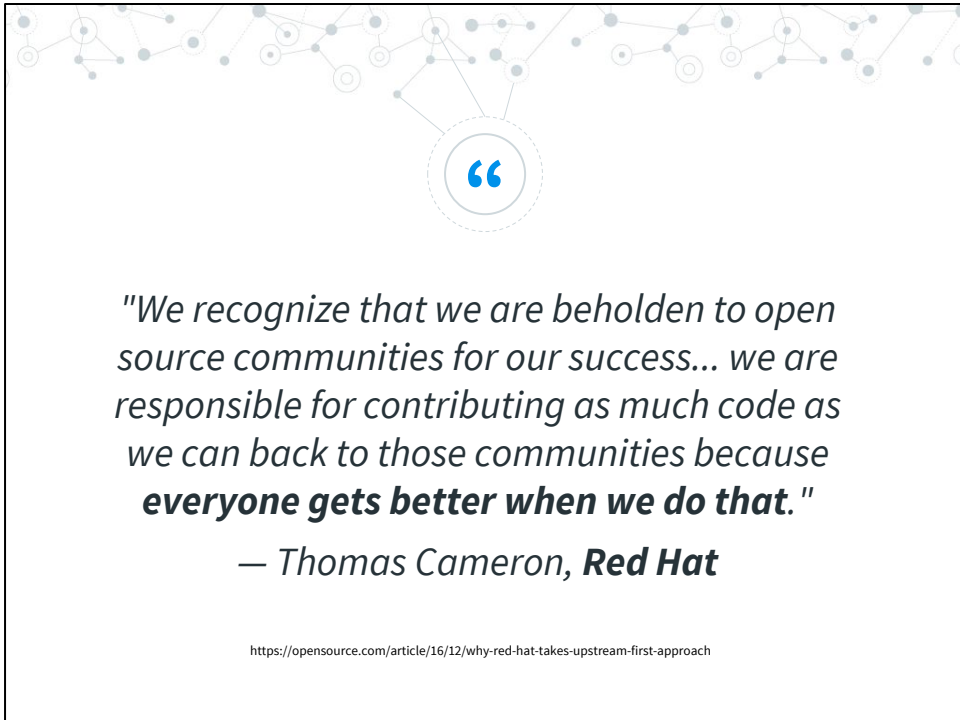


Open Source Organizations Make Sharing Explicit

- ◎ Free Software Foundation and the GPL: designed to **enforce sharing**
- ◎ Apache Software Foundation mission: to provide software for the **public good**
- ◎ Open Source Initiative (OSI) “protects and promotes open source software... and prevents abuse of the ideals and **ethos inherent to the open source movement.**”

The FSF, ASF, and many other open source foundations and independent projects make sharing their work explicit parts of their goals. The people driving many of these organizations and the popular open source programs used for businesses around the world have an expectation of sharing when talking about anything “open source”. Along with other similar open source foundations, these non-traditional corporations provide the underpinnings of the majority of most software products today.

While not all open source companies are so ideologically driven, they are all driven by the business value that an open source development model can bring to many software industries.



*"We recognize that we are beholden to open source communities for our success... we are responsible for contributing as much code as we can back to those communities because **everyone gets better when we do that.**"*

— Thomas Cameron, **Red Hat**

<https://opensource.com/article/16/12/why-red-hat-takes-upstream-first-approach>

More and more companies recognize the importance of working **with** open source projects.

While this quote is from Red Hat - long an open organization - we can find dozens of other similar quotes from both technical and business leaders in various industries. This is not idealism, it's a good business decision for the development benefits of sharing this kind of code.



“Open Source” Or Truly Open Development?

- ◎ “Open source” means it has been provided publicly under an OSI-approved license (Apache, GPL*, MIT, etc.)
- ◎ Being “open source” while ignoring the community will backfire
- ◎ Open development - allowing the community *some* input and collaboration - is the expected behavior - and where the value is

What, specifically, does “open source” mean?

Merely using an OSI approved license means you *could* call your product open source - but it will backfire. Only once you allow open development - where the community can participate and help build the product - is there a benefit to doing so. The open source community is very sensitive to “openwashing” - which is applying an open source license, but ignoring the community. If you never respond to other parties trying to improve the software you’ve open sourced, it will lead to a fork - something you can’t control and won’t gain value from.

So what’s the business value in sharing at least some work with open source?



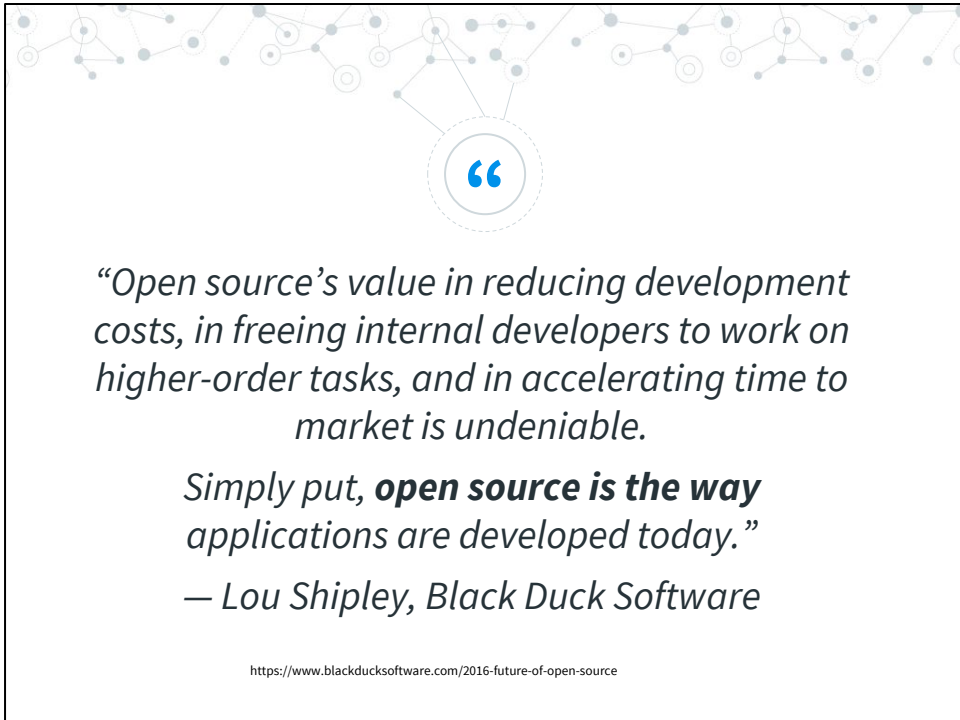
The Business Value In Sharing

- ⦿ Submitting fixes **upstream** reduces development and maintenance costs
- ⦿ Providing open source **API programming models** draws in contributors that help build a strong ecosystem
- ⦿ Employees **want** open source experience
 - **34%** of companies have **>50%** of their developers contributing to open source



<https://www.blackducksoftware.com/2016-future-of-open-source>

(SLIDE TO BE HIDDEN IN PLI SESSION - NOT ON TOPIC, NOT ENOUGH TIME)
The business value of adopting open source processes for **appropriate** parts of your software are well known and proven.
As open source becomes the norm for more and more parts of industry, employees are expecting this kind of experience as well.

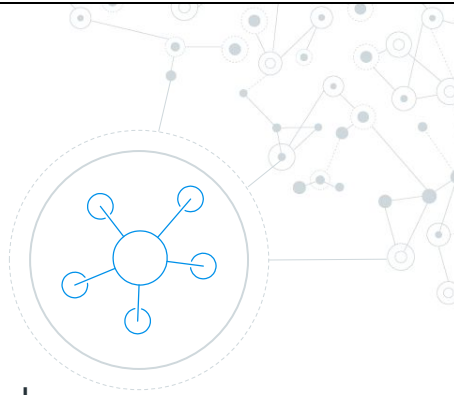


The business value of adopting open source processes for **appropriate** parts of your software are well known and proven. Not only are there good development and maintenance savings, and a lot of opportunity to capture mindshare by partnering appropriately with open source communities, but more and more employees are **expecting** to be able to work in open source for part of their job. The next big change will be how open source experience changes the talent game for companies.

This quote is from the 10th annual Black Duck survey on the Future of Open Source. This is a single quote that distills years of practical business and technical learning, including various studies and the fact that many new business markets are opening because of, and around, major open source technology. One great example: Apache Hadoop is 100% open source, and is the defining core of the big data software stack.

Open Source Clients

Open source organizational structures, actions, people, and culture are different than traditional clients.



The most important thing to take away from today's seminar is this: when you are working with open source clients, understand that they tend to have different goals and motivations than traditional software vendor clients do. Whether you're working with an open source client, or you're sitting across the table from one, understanding their motivations helps you give the best advice to your client.



Open Source Projects Versus Products


- ◎ Open source **projects** are communities of people from various employers, countries, backgrounds
- ◎ Open source **products** are most often epinonimous with the project identity
- ◎ Community lacks legal experience, and won't understand subtle issues around trademarks

To an open source company, their brand is their identity. To the community - and to your client's developers - "Node.JS" **is** the brand. That encompasses the software product(s) being developed, the name of the entity behind the product, and the community as a whole.

While trademarks are legally only the product identifier, for the participants in this technology, the different aspects - company, product, community - are often thought of as the same thing.



Open Source People Are Different


- ◎ The **people leading** open source projects support sharing and contributions
 - ◎ Often have a **personal** connection to the project brand
 - ◎ Careers are measured **across projects**
 - ◎ **Communication** speed, style, organization **can be chaotic** and very technical
- 

The people behind most major open source software are driven differently. They understand the business and community value of sharing parts of the technology, engaging with multiple companies to drive the project, and building the larger open source ecosystem.

In particular, many open source participants are very passionate about their project brand - far more so than in traditional companies. When you combine this passion for their project's identity with their distributed and non-hierarchical model, their reactions to branding issues may be surprising - and may often be expressed very strongly, and might not be to you directly, but rather in public.



Open Source Projects Have Governance


- ◎ Types of governance
 - Benevolent Dictator (individual)
 - Benevolent Company (corporation)
 - Multi-Corporate Board (501C6 foundation)
 - Individual Meritocracy (Apache, 501C3)
 - ◎ Many open source projects have policy for IP submission (CLA or DCO)
 - ◎ Documented community voting on releases
- 

Even apparently unorganized open source groups often have some governance structures; open source at major foundations (Apache, Eclipse, SPI, FSF) will have documented governance covering IP submissions, formal project maintainers, committee voting process to build, test, and produce public releases. While the organization may be distributed and include community members from various employers, their actions **in the context of the project community** follow documented processes and are for the benefit of the community as a whole - not directly their employers.

Governance varies widely, but virtually all popular open source projects have a well-running structure here. Decisions often happen more slowly than in a traditional software vendor context, but they are just as rigorous and expert.



Open Source Organizations Are Different

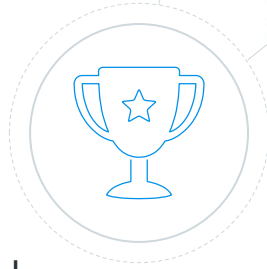
- ⦿ Open source groups are often non-profits
 - ⦿ Participants are distributed geographically, work for different vendors
 - ⦿ Decision making and communication are non-hierarchical
 - ⦿ Goals are mindshare and credit - not profit
 - ⦿ Lack paid staff, greatly under-represented by counsel
- 

The organizations that build and drive many important open source projects are non-profit foundations, either 501C3 or 501C6 in the US, or the equivalent in Europe. Many groups use a consensus model for making decisions, with a very flat and non-hierarchical decision making process.

From the perspective of an open source project, the goal is often mindshare and credit for their work - not profit. Most open source projects aren't **trying** to compete directly with a vendor, they're just trying to build a better tool that they can control. Importantly, most open source projects don't have much legal support, and when they do it's hard to coordinate. So don't be surprised when they react in a business way that might not strictly make legal sense.


Open Source Brands

Open source brands work differently - when building your own, or using others'.





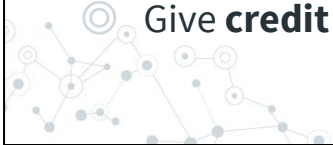
Open Source Projects Encourage Sharing

- ◎ Open source trademark policies often **allow** additional uses of their brands
 - ◎ Vendor marketing including an open source brand **helps** build ecosystem, brings additional contributors to the project
 - ◎ Source of origin still important to the project and the community
- 

Many open source groups allow broader use of their brand by vendors in the hopes that vendor marketing (often better funded and organized than community marketing) will bring more contributors to the open source project itself. So while ensuring the brand still stands for a single source of the open source product itself, most groups welcome vendors talking about their community brand and featuring it at events, in materials, and in the vendor's own products and services. This should be a combination - "SuperProduct uses OpenSource to run faster" - a recognition of the source of some of the software your client is selling (but not all of it).



Using An Open Source Brand

- ◎ Projects may allow outside use of their brands - shows support of their ecosystem, and helps grow their community
 - ◎ But still need to respect policy; not a blanket license or permission
 - ◎ Often freely permit brand use on stickers, apparel, some kinds of services
 - ◎ Give **credit** to the project's community
- 

Just because an open source project doesn't mark their trademarks or have a policy, they will get upset if you misuse their good name. Open source wants vendors to talk about their project, but to keep it clear that it's the community project the vendor is building something on top of.

Note that many projects are much more permissive when it comes to non-software goods. When your marketing team gives out Lucene® stickers at an event, that helps drive awareness of the open source project - as well as perhaps your client's hosting or consulting services.



Creating Your Own Open Source Brand

- ◎ When building open source brands, understand that others will want to integrate the brand into their own work
- ◎ Carefully consider what goes into the open source brand (vs. proprietary brand)
- ◎ Publish a clear policy defining and encouraging community engagement

The biggest question when a client decides to “open source” something is deciding what, exactly, is going in the open source part - and what will stay proprietary.

Ensure clients have a clean separation between the two halves of the product - **and** a separation between the two brands.


Publishing a specific trademark policy for any open source brands is important to help set expectations for the ecosystem. To be taken seriously with an open source product, your client needs to clearly define what and how they are sharing the project direction with the community - or not.

Remember: the open source community can drive a lot of innovation back to your client - but they lack the legal experience to know up front how they can or should use the brand you’re promoting as “open source”. Don’t be surprised by what the community does.



Conflicts With Open Source Brands

- ⦿ Open source groups react differently when you misuse their brand
- ⦿ Enforcement likely to be social and technical, not legal
- ⦿ **Do not underestimate** how important an open source brand is to its community



If your client is accused of misusing an open source brand, stop and discuss with the client's technology leaders first **before** making contact. Overzealous marketing departments regularly go too far when trying to capitalize on someone else's open source brand - and communities and brand owners often react very passionately. There will be cases where a client has the legal right to use the brand some way, but exercising that right will cause business harm to your client from the bad publicity and backlash from the larger ecosystem. Open source groups often don't have sufficient legal counsel to write complaints - so don't ignore complaints from non-counsel project members.

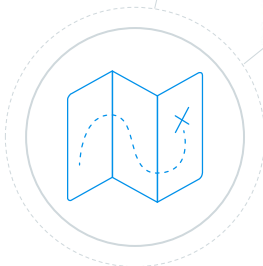


Trademarks In Open Source Practice

- ◎ Basic concepts
- ◎ Trademark rights in open source software
- ◎ Enforcement

Trademark Basics

The **rules** are the **same**



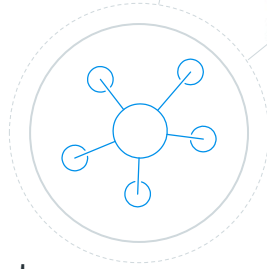


Trademark basics

- ◎ A trademark is a **symbolic representation** of the sum of information about a product or service (in marketing terms, the "brand")
- ◎ It points to a unique single source, but it can signal **many types of relationships**
- ◎ The law only prohibits a situation where there is **confusion** about the relationship being signaled
- ◎ (It is not the same thing as "attribution" contemplated in open source licenses)

Trademarks and Community

Community engagement
drives **different behavior**

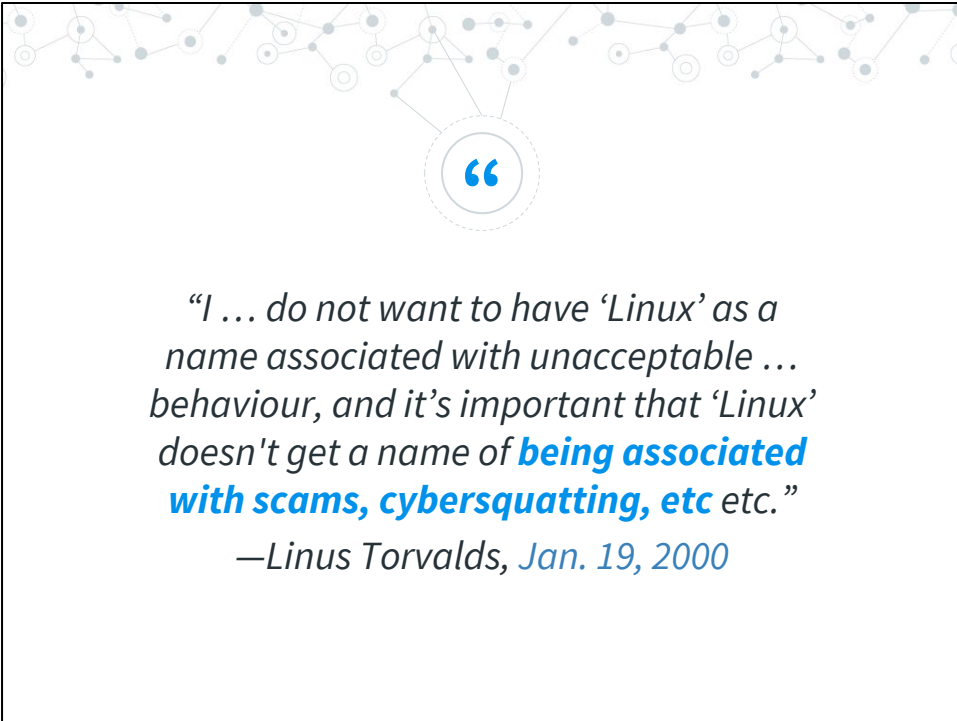




Trademarks and the Community

- ◎ The trademark is the project's most valuable (and perhaps only) asset
- ◎ It carries a heavy load --
 - The name of the project
 - The name of the community
 - The individual contributors' sense of belonging and ownership

No copyright to enforce, patents are the plague.



*“I ... do not want to have ‘Linux’ as a name associated with unacceptable ... behaviour, and it’s important that ‘Linux’ doesn't get a name of **being associated with scams, cybersquatting, etc** etc.”*


—Linus Torvalds, Jan. 19, 2000



Trademarks and the Community

- ⦿ No open source license in use grants a trademark license


BUT

- ⦿ The ethos of sharing carries through to how the project manages its trademarks
 - ⦿ All while the open source project has the same challenges as a commercial company
- 

The license to modify the code does not imply any right to use the trademark
It's exactly the same law as trademarks used by proprietary companies, the difference is the community's desire to encourage a sense of belonging and share
Meanwhile, they also have infringement and cybersquatting



Trademark Ownership

- ◎ Who owns the open source trademark, i.e., who can register it?
 - Individual
 - A recognized type of legal entity but not formally formed, e.g., partnership
 - Non-profit foundation
 - Corporation or benevolent custodian
 - Fiscal sponsorship
- 

Foundation, e.g., GNOME, OpenStack (charitable or trade)

Corporate owner, e.g., Fedora, Ubuntu

Fiscal sponsor, e.g., SPI, Software Freedom Conservancy

Founder, e.g. Linus Torvalds

Unincorporated association



Trademark Ownership

- ◎ Quality control
 - There is a canonical (i.e., “single”) source, just like any product developed in more traditional ways
 - The quality of the product is highly controlled

Shane explained the various ways that the open source project software is developed, even though it is a decentralized development model there is clearly quality control going on, generally quite easily shown



iceweasel

5.0

Iceweasel is designed by [Mozilla](#), a [global community](#) working together to make the Internet better. We believe that the Internet should be open to all users, and accessible to everyone without any restrictions.

Sound interesting? [Get involved!](#)

[Licensing Information](#)

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...getting FireFox on Debian Linux



What is Iceweasel?

Iceweasel is a fork [from  [Firefox](#)] with the following purpose :

1. backporting of security fixes to declared [Debian stable](#) version.
2. no inclusion of trademarked Mozilla artwork (because of #1 above)

Beyond that, they will be basically identical. (quoting Roberto C. Sanchez post in  [debian-devel](#) mailing list)

https://wiki.debian.org/Iceweasel#How_to_install_iceweasel_28Firefox.29

Trademark Enforcement

When to enforce is
malleable, and requires a
delicate touch





Trademark Guidelines

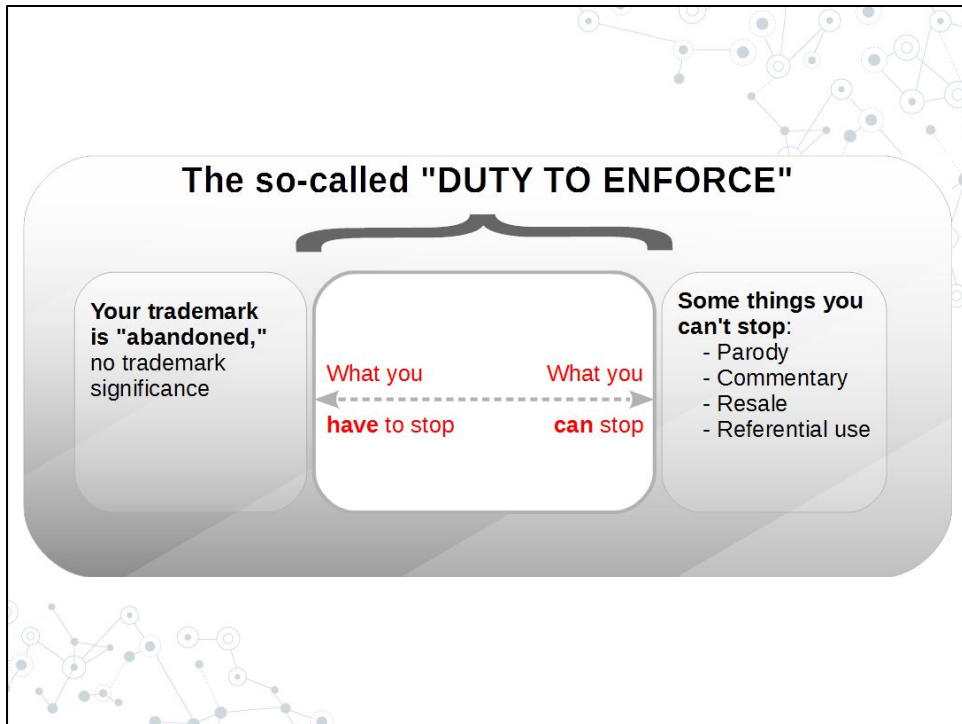
- ◎ Open source project guidelines will often grant licenses, especially for promotional goods
- ◎ It will also describe lawful use for clarity
 - Referential use
 - resale

Enforcement often starts with guidelines

The project itself will follow the guidelines

Trademark guidelines for proprietary companies are just what you can't do


Trademark guidelines for open source projects may actively grant permission



When do you really need to enforce?



Trademark Enforcement

- ◎ The community is often **highly engaged** in enforcement
 - ◎ While there is a named owner, the community members are **equal stakeholders**
 - ◎ Because of the sharing culture, enforcement has to be approached **delicately**
- 

Resources

Learning about the open
source perspective.



Home: Model Trademark Guidelines

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 - 2.1 Model Trademark Guidelines
 - 2.2 Working drafts
 - 2.3 Project trademark policies
 - 2.4 Sites Using the Model Trademark Guidelines
 - 2.5 Case law
- 3 How the Project Works
 - 3.1 Site Organization
 - 3.2 How to Participate

Welcome! [edit]

Welcome to the Model Trademark Guidelines, written by and for free and open source software communities. This site trademark guidelines for FLOSS software projects. It describes various provisions that might be included in trademark considerations for the provisions. It is not intended to advocate for any particular set of permissions or restrictions, but choices that would be found lawful and enforceable under trademark law, that are consistent with FLOSS culture, and ensure that the software distributed under the trademark delivers a consistent user experience and meets the brand with the project, please read [How the Project Works](#) below.

<http://modeltrademarkguidelines.org/>

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FOSSmarks

A practical guide to understanding trademarks in the context of Free and Open Source Software projects.

Consider the following scenario:

You've created a free and open source software project and are hoping to attract contributors and followers. You want to come up with a name or logo that sets your project apart from other projects. Ideally, you want users to know they are using your project when they see your name or logo, and not some other software or another version of your software.

This website is designed to serve as your guide, from the basics of what a trademark is to tips on choosing a name, registering a name, and what to do if you find someone else using your name. This resource is designed to be useful to those just starting out, but may also be helpful for more mature projects.

You decide where to start:

AWESOME. LET'S START FROM THE BEGINNING.

I ALREADY HAVE FOLLOWERS AND CONTRIBUTORS.

I'M READY TO TURN THIS INTO A BUSINESS.

SOMEONE IS USING THE NAME IN A WAY THAT'S HARMFUL.

<http://fossmarks.org/>



The Apache Way

Contribute

ASF Sponsors

A listing of various helpful information about Apache® trademarks, including links to some generally helpful information about trademarks in open source. The ASF considers the names of all Apache projects and software products to be trademarks of the ASF.

APACHE TRADEMARK INFORMATION SITE MAP

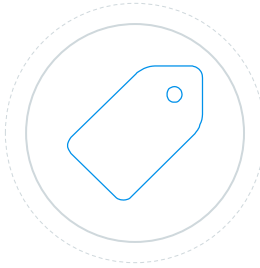
This is a site map with links to all Apache Software Foundation (ASF) trademark documents, categorized by audience - i.e. are you an Apache PMC member or committer working *within* an Apache project, or are you a user, new contributor, software vendor, or third party?

For Users And Outside Parties

For Apache PMCs And Committers

<https://www.apache.org/foundation/marks/resources>

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Thanks!

Any questions?

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