

APACHECON EUROPE
Berlin 22-24 October 2019

**UP NEXT:
Who Owns That
Open Source Brand?**



Shane Curcuru
Punderthings Consulting
@ShaneCurcuru



ABSTRACT

Do you know who runs the projects behind the code you run – or contribute to? It's not always obvious, and while you can always try forking the code, successfully attracting contributors to your fork is hard.

You don't have to get involved in branding: but you do need to know who truly controls the direction of the open source technologies that you rely on every day. Far too many individual developers and companies rely on a wide variety of open source tools that come from different projects. How do you accurately evaluate the security, stability, and potential for future support around an open source project? How can you find if your chief competitor truly has a lock on a project's governance and future direction?

The power behind a project's brand is not always obvious. Come discover who governs some key open source project brands, and what might happen to governance when someone goes IPO or gets bought out. Learn how to keep governance of the project truly independent and welcoming – or how to properly own and run your own open source brand.

Surprises guaranteed!



WHO OWNS THAT
OPEN SOURCE BRAND?



Shane Curcuru
Punderthings Consulting
@ShaneCurcuru

SHANE CURCURU



- Founder, Punderthings Consulting
New ways to engage open source
- Past VP, Brand Management
Current Vice Chairman
Apache Software Foundation
- Not a lawyer

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Hello, and welcome - my name is Shane Curcuru. I've been involved in open source at Apache since 1999, doing a variety of community mentoring and branding policy work. On the side, my Punderthings consultancy is here to help understand open source. And while I may play a trademark lawyer on the internet, I am not actually a lawyer (and this is not law advice!)

TOPICS

- Brands, Trademarks, & Open Source
- Why Trademarks Matter
- Three Levels Of Open
- Quiz Time!

We see brands every day, but understanding the use of trademarks lying inside of all those brands you see is something we rarely think about - and even when we do, misunderstandings about trademark law abound. Today, we'll discuss the very basics of how trademarks work, their relationship to brands, and why this matters to open source users, contributors, and project leaders.

Exploring trademark **ownership** - that is, who legally owns these trademarks - in the open source ecosystem also helps explain what I call the three levels of openness: open source, open governance, and open brands. Trademark ownership is a key factor in these levels.

Since open source is interactive, we'll also have quiz time throughout this talk!

CODE - COMMUNITY - BRAND

- **Code** is least interesting - open source is infinitely forkable
- **Community** drives existing projects - constantly changing
- **Brand** is more powerful than we think - and least understood

Three Levels Of Open

If we pull back and think at the big picture around any open source project, there are three aspects to consider:

- The code itself in any specific project is the least interesting aspect - open source is infinitely forkable. The code in any particular project's repositories is a commodity - anyone else can fork it and build their own version.
- The community is what drives a project. These are all the different people who work on a project - often each for their own reason.
- The brand - the name, logo, and images that draw people into the project are actually the most interesting aspect to focus on for the future. Brands - and trademarks in particular - are the least understood aspect of this equation.

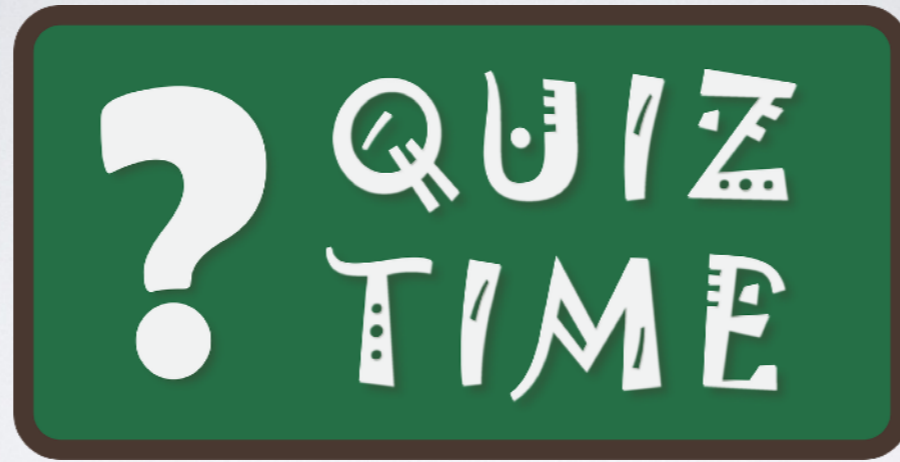
“An open source project’s
most important asset is its
brand.”

–Shane Curcuru

Here’s my premise: **The most important asset for any open source project is its brand.** A *project* brand - and therefore its trademarks - are how people **find out about the project** over the long term. It’s also the only part of a project that you **can’t fork**.

Let’s investigate some popular open source project brands, see who runs them, and think about how control over a project’s image and brand can affect a project’s future.

We’ll see what you think about my premise - that brand is most important - at the end of the talk.



Pixabay, CC-0

WHO OWNS THIS BRAND?



- That Cloud-y company
- That Horton-y company
- A business trade association (501C6)
- A non-profit charity (501C3)
- Doug Cutting (project founder)

We'll start with a really easy one - who owns the Hadoop brand and trademark?

Well, judging from the marketing I see, perhaps this one isn't that easy a question, there are several companies associated with the big data elephant.

We're **not** asking who's writing the code for Hadoop, but rather: **who controls the brand, and who owns the trademark?**

WHO OWNS THIS BRAND?



- *That Cloud-y company*
- *That Horton-y company*
- *A business trade association (501C6)*
- **A non-profit charity (501C3)**
- *Doug Cutting (project founder)*

Apache® Hadoop® - Big Data

The Apache Software Foundation

The answer is: A non profit group. The Apache Software Foundation owns the Hadoop brand and the registered trademark for the word HADOOP on behalf of the Apache Hadoop Project Management Committee.

USPTO Reg# 85377777

https://tsdr.uspto.gov/#caseNumber=85377777&caseSearchType=US_APPLICATION&caseType=DEFAULT&searchType=statusSearch

WHO OWNS THIS BRAND?

- Commercial company
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual(s)



Here's another simple one - recognize this tiny hardware maker? Who owns this brand?

Is it:

- A commercial company, out to make money?
- A business trade association (501C6 in the US) - non-profit, but out to build ecosystems for the member companies that pay sponsorships?
- A non-profit public charity (501C3 in the US) - where the purpose is truly for the broader public good, and not for specific corporate interests?
- Or a BDFL - Benevolent Dictator For Life? Some projects are unincorporated, and simply run by the founders or whoever has admin rights to the actual code repository.

WHO OWNS THIS BRAND?

- **Commercial company**
- *Business trade association (501C6)*
- *Non-profit charity (501C3)*
- *BDFL / Individual(s)*

Arduino AG Switzerland



Arduino® - Tiny Computer On A Board

The Arduino trademarks are owned by a commercial company - Arduino AG Switzerland. You may have heard in the past about trademark disputes between two separate companies named Arduino, which cost both companies a lot of money on lawsuits as well as dimmed their reputation. But a couple of years back, they made amends and merged their companies - including the trademarks (in various countries).

But imagine how much better an Arduino would be if they hadn't spent that much effort litigating the trademark?

USPTO Reg# 85144567

WHO OWNS THIS BRAND?



- Commercial company
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual

As the world's most popular blogging platform, Wordpress has a long history and a simple logo. The question today is: who owns the brand?

WHO OWNS THIS BRAND?



WordPress® - Blogging Engine

- *Commercial company*
- *Business trade association (501C6)*
- **Non-profit charity (501C3)**
- *BDFL / Individual*

WordPress Foundation

The *WordPress Foundation*, a non-profit 501C3 company in the US, owns the trademarks for WordPress. Note that legally this is a separate company from Automattic Inc., the company that runs wordpress.com and offers hosting (among other things). However, **leadership of the two organizations is closely tied**, since officers from Automattic are also on the board of the Foundation.

<https://projects.propublica.org/nonprofits/organizations/205498932>

USPTO Reg# 78826734

WHY ARE BRANDS IMPORTANT?

Open Source is an attention economy.

I can hear you ask: those are pretty pictures Shane, but what's really so important about these brands? Well, brands are how newcomers hear about a project, and how users make decisions on what to download, to buy, or contribute back to.

[SPACEBAR]

Fundamentally, **Open source is an attention economy** - we all have limits on our time, and a well-known or attractive brand can more easily capture enough attention from a newcomer to give your project a second look.

But brands are a complicated topic - let's make this simpler and just focus on the underlying trademarks.



The core of most brands is one (or more) trademark(s). While brands are the project names, logos, colors, and other public marketing, trademarks are the legal instantiation of a brand, and have specific laws and definitions - and owners!

Are there any lawyers in the room? If so, prepare to twitch as we...

TRADEMARKS IN 30 SECONDS

- A trademark is the **legal instantiation** of a brand
- **Specific** and **consistent** name or logo for a product or service
- Trademarks prevent **consumer confusion** as to source of goods

Define trademarks in 30 seconds!

Trademarks are a legal asset governed in the US by the Lanham act The European Union has their own trademark law system as well as separate ones in each country. While some legal details differ, the basic purpose is the same around the world.

- Legal instantiation of the brand - brands are not (generally) regulated by law, but trademarks are.
- A trademark is the **specific symbols** associated with goods or services available in commerce. Providing a software product for free (like open source) to the public still counts.
- The purpose of trademarks is not for us, the producers - it's really for the end user or consumers. Trademarks are designed to ensure that when users purchase or download a product based on the trademark, that they are getting it from the expected producer of that product. Trademarks allow producers a legal way to capitalize on the goodwill and association of qualities their brand(s) build up.
- **AND...**

TRADEMARKS IN 30 SECONDS

- A trademark is the **legal instantiation** of a brand
- **Specific** and **consistent** name or logo for a product or service
- Trademarks prevent **consumer confusion** as to **source of goods**

Trademarks ensure consumers understand **which producer is providing the goods**.

Trademarks are a direct legal tie between the organization producing something, and the goods produced, so that consumers can be assured of getting what they expect. Thus whoever owns the legal trademark can control this relationship.

AND...

TRADEMARKS IN 30 SECONDS

- A trademark is the **legal instantiation** of a brand
- **Specific** and **consistent** name or logo for a product or service
- Trademarks prevent **consumer confusion** as to **source of goods**
- A trademark is **owned by a single organization**

The upshot? A trademark is generally owned by a single organization. Trademarks are not (normally) forkable - they exist to tell consumers (end users) what company or individual is providing a software product. If the original user of the trademark wishes to assert ownership, they can do so legally. This means they can use trademark law to prevent anyone else from using that same trademark - name or logo - to refer to a similar kind of product.

Or to put it in simpler terms...

Trademarks are not forkable.

I can't say this too often: trademarks are not forkable.

Unlike code (infinitely forkable) and community (constant change), trademarks are not forkable. There must be a single owner, and in general, only a single source of goods - i.e. when users come to FooProject to get a software product, they should always be getting it from the same organization - not multiple organizations.

Trademarks are the biggest - often only! - control point any open source project has.

WHO OWNS THE TRADEMARKS?

So who owns the trademarks? A trademark owner can enforce the mark - and effectively the brand around it. Trademark owners unilaterally can control use of the mark - which may be different than a community that is perceived as doing the work in the project.

Do you know who owns these common software trademarks?

WHO OWNS THIS BRAND?




- Commercial company
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual

Let's look at an example where trademark ownership is important - who owns this long-lived brand?

WHO OWNS THIS BRAND?



 **NOT Open Source**

- **Commercial company**
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual

Oracle

Oracle - a commercial company owns the SOLARIS trademarks.

For the few people who still run Solaris, there is no open source offering anymore - it's now purely a fully commercial product just from Oracle.

WHO OWNS THIS BRAND?

- Commercial company
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual(s)



So you're still using Maria DB, and you want to evaluate their long-term chances - so who's behind the MariaDB seal trademark?

WHO OWNS THIS BRAND?

- **Commercial company**
- *Business trade association (501C6)*
- *Non-profit charity (501C3)*
- *BDFL / Individual(s)*

**MariaDB
Corporation Ab**



While there is a MariaDB Foundation that governs much of the development, the trademark is legally owned by the for-profit corporation, **not** the community. While the community may seem to be driving development, it's the for-profit Maria DB Corporation that controls the trademark and it's future.

WHY THIS IS IMPORTANT FOR YOUR COMPANY

So - why is trademark ownership important to your company?

FOR COMPANIES

Understanding brand ownership helps with:

- Risk management - know where a project is going
- Understand project velocity, maintenance, innovation levels
- Ability to influence direction / prevent disruption to your market

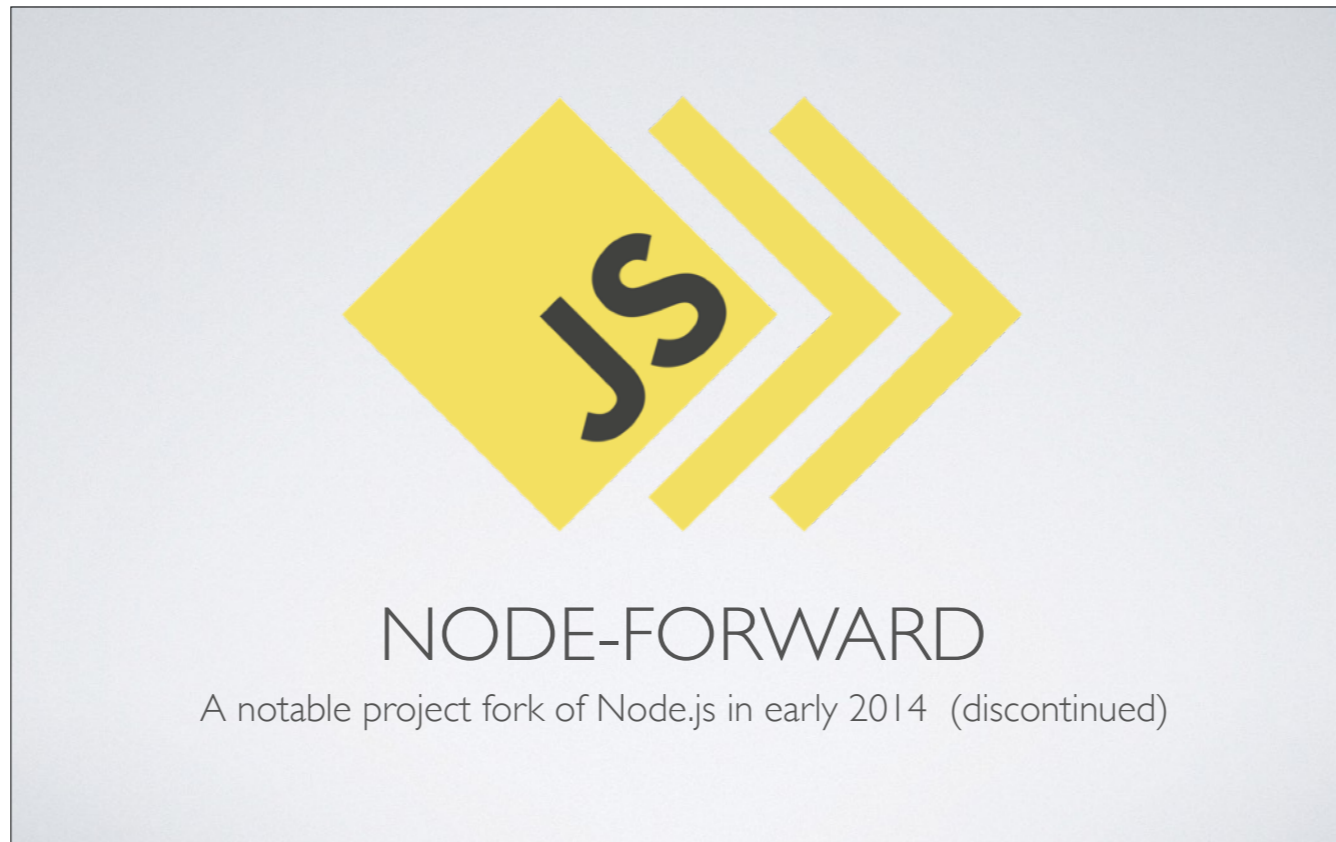
When you're using open source for any significant part of your business, or when you want to invest in an open source technology, you want to manage your risk. Understanding who controls long-term use of the trademark ensures you know who's really in charge. If it's a competitor, you need to know. You also need to understand if it's a truly independent foundation, or actually controlled by a single person or a company who might become a competitor.

Now let's look at how branding changes and trademark ownership can affect the risk level.



WHO RECOGNIZES THIS BRAND?

Anyone?



This was a widely reported fork of Node.js that never really got traction, but clearly got people talking.
Trademark ownership: immaterial - it's a dead project and code.



WHO RECOGNIZES THIS BRAND?

Recognize this logo, with the "IO"?

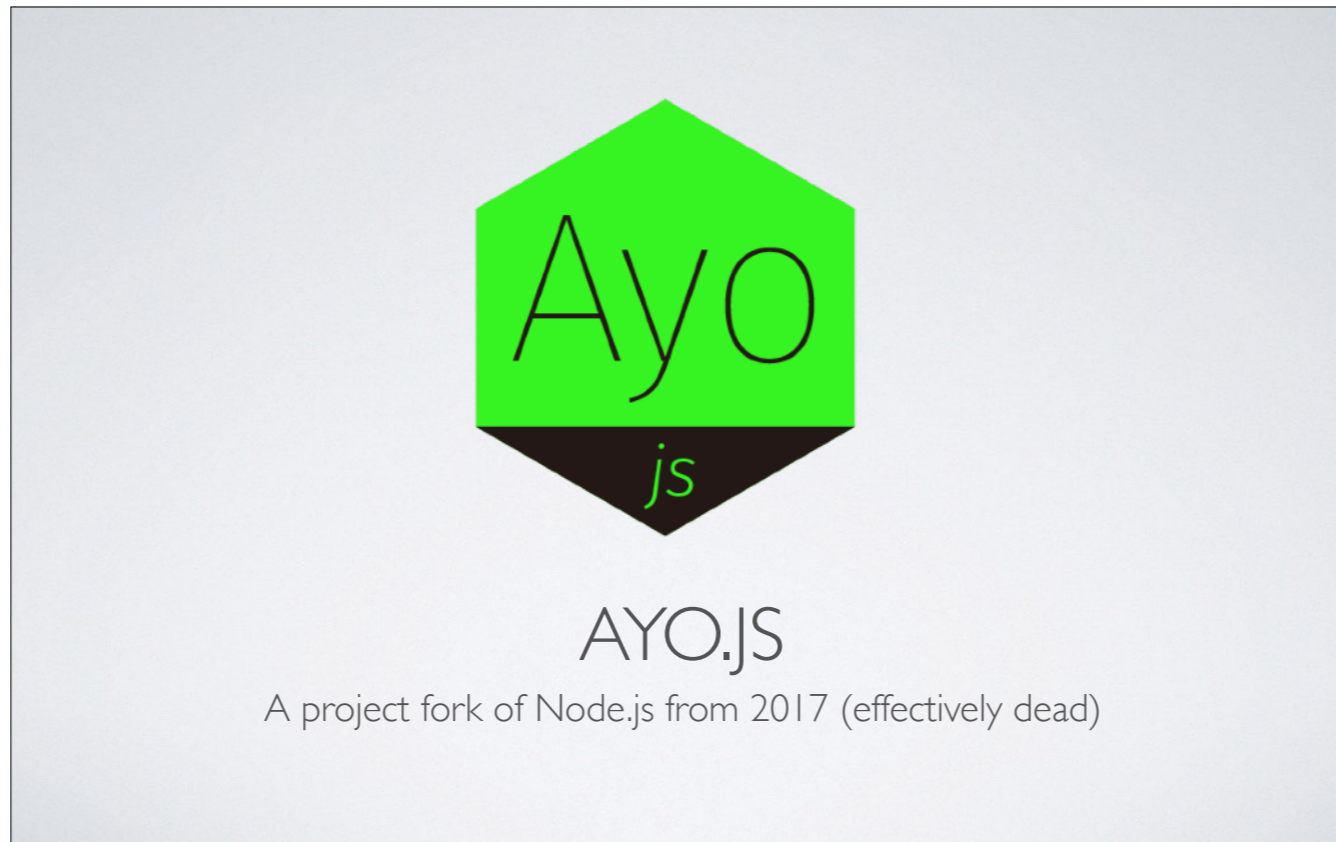


This was a major Node.js fork that did significant development with slightly different community, which eventually merged back to node.js itself.
Trademark ownership: immaterial - it's a dead project, and explicitly ended to rejoin node.js.



WHO RECOGNIZES THIS BRAND?

How about this brand, pronounced "IO" but spelled "Ayo"?



This is a major but inactive fork of Node.js from early 2017. This was primarily a governance and inclusivity issues fork, not a technical one. It made a lot of noise and was widely covered, and had some strong supporters, but now seems to have fizzled; last commit was more than a year ago. Trademark ownership: immaterial, unless they become popular somehow.



WHO RECOGNIZES THIS BRAND?

Here's an easy one.



OK, THAT ONE IS PRETTY OBVIOUS

This is the popular Node.js project

That's pretty obvious. But!

WHO OWNS THIS BRAND?



- Commercial company
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual

Who owns this trademark? The one that no-one could fork, even though several groups tried to fork the code earlier?

WHO OWNS THIS BRAND?



Node.js®

- **Commercial company**
- *Business trade association (501C6)*
- *Non-profit charity (501C3)*
- *BDFL / Individual*

Joyent, Inc. (Samsung)

Joyent - a single commercial company (now wholly owned by Samsung) owns this registered trademark. While governance and project direction is generally controlled in the community of the Node.JS Foundation as a LF collaborative project, legally the trademark is owned by a single company.

WHO OWNS THIS BRAND?



[https://tsdr.uspto.gov/
#caseNumber=86067374&caseType=SERIAL_NO&searchType=statusSearch](https://tsdr.uspto.gov/#caseNumber=86067374&caseType=SERIAL_NO&searchType=statusSearch)

Now do you see a little more risk?

While one presumes that the technical governance of the project at the Linux Foundation is in charge, there's always the chance that Joyent could decide to exert control over the trademark and stop certain changes in the project if they wanted to.

Who was surprised to learn this today?

(Side note: the original Node.js registration in the US was cancelled due to non-renewal; however Joyent has since registered both the wordmark 87851829 and the logo 86067374 showing that they're serious about protecting the mark).

Imagine if all the efforts around forks had gone into innovation.

Unlike code (infinitely forkable) and community (constant change), trademarks are not forkable. There must be a single owner, and in general, only a single source of goods - i.e. when users come to FooProject to get a software product, they should always be getting it from the same organization - not multiple organizations. Forks split the attention - both of the community doing the work, but also within the users and larger ecosystem, who are left wondering which fork's brand they should pay attention to.

Trademarks are the biggest - often only! - control point any open source project has.

WHY THIS IS IMPORTANT
FOR YOU - A CONTRIBUTOR

So what about us as individuals? What do we need to look for?

FOR CONTRIBUTORS

Understanding brand ownership helps you:

- Know how to participate in project governance
- Secure reputation in the gift economy around FOSS

As a contributor, you want to know if your voice will be heard.

Will your contributions will be recognized and will be visible to the world? When github is part of your resume, this is a critical part of any job: getting recognized for personal accomplishments, and especially doing so in an open and public community that draws attention. Foundation-led projects that explicitly give a say to individual contributors are very different than corporate open source.

If you know project governance is controlled by a single company, you need to understand if your contributions - as a non-employee - will still be valued.

WHO OWNS THIS BRAND?



- Commercial company
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual

Here's an example of when trademark ownership becomes important.

Who recognizes this brand - a dapper butler? And who do you think owns this brand?

WHO OWNS THIS BRAND?



Hudson® - Continuous Integration

- **Commercial company**
- *Business trade association (501C6)*
- *Non-profit charity (501C3)*
- *BDFL / Individual*

Oracle

This is of course the Hudson butler, a open source CI tool. Currently, the project is run in two places, both at Eclipse and at java.net. However the HUDSON registered trademark #85193459 is legally owned by Oracle, meaning they can control who is allowed to produce software using that mark.

Why is this important? Well, perhaps people are more familiar with this logo:

WHO OWNS THIS BRAND?

- Commercial company
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual



Jenkins

Here's another butler - for the Jenkins continuous integration server!

Years ago when some developers were unhappy with how Oracle was moving the Hudson project roadmap along, they decided to fork the code. Oracle declined to license them the trademark - forcing the new project fork to choose a completely new name.

WHO OWNS THIS BRAND?

- *Commercial company*
- *Business trade association (501C6)*
- **Non-profit charity (501C3)**
- *BDFL / Individual*



Jenkins

Software In The Public Interest, Inc. Jenkins® - Continuous Integration

Jenkins is an SPI (Software In The Public Interest) project. SPI is a 501C3 public charity that acts as a fiscal and trademark steward for the people who actually run the day-to-day Jenkins project. So in this case, the registered JENKINS trademark #85447465 is owned by SPI on behalf of the actual individuals or governance group running the project - not for the benefit of any specific company.

Here, the brand is open - owned by a 501C3 non-profit public charity.

WHO OWNS THIS BRAND?



- Commercial company
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual

WHO OWNS THIS BRAND?



- *Commercial company*
- *Business trade association (501C6)*
- *Non-profit charity (501C3)*
- **BDFL / Individual**

Dries Buytaert

The DRUPAL registered trademark is legally owned by Dries as an individual. Obviously, he has a close relationship with the Drupal Association, a US 501C3 nonprofit - but Dries maintains personal ownership of the trademark.

While the Drupal foundation will always have strong governance, Dries as an individual will always have his own, personal say over the project, immaterial of other changes.

https://tsdr.uspto.gov/#caseNumber=86464584&caseType=SERIAL_NO&searchType=statusSearch

Here, the risk factor is likely tied to Dries' health and wellbeing - a very different perspective than for a company or non-profit organization.

THREE LEVELS OF OPEN

THREE LEVELS OF OPEN

- Open **source** - public code that uses an OSI-approved license
- Open **governance** - documented leader elections / decision making
- Open **brand** - trademark owned by 501 C3 non-profit charity

We all understand what makes an open source project - publicly available code under an OSI approved **license**.

And plenty of projects practice open governance - where there is a **documented** and well-publicized governance model and roadmap that allows productive contributing newcomers to get a seat at the table and have an influence on the project.

AND...

THREE LEVELS OF OPEN

- Open **source** - public code that uses an OSI-approved license
- Open **governance** - documented leader elections / decision making
- Open **brand** - trademark owned by **501C3 non-profit charity**

There are **Open Brands**. The first factor is ensuring that ownership of the trademarks used by the project are obvious and publicly known - not hidden.

To be truly open, the trademarks are owned by a 501C3 non-profit public charity (or the equivalent in Europe or elsewhere) - so that control of the trademark stays with the organization and individuals actually doing the work itself, and not outside corporations or sole individuals. Most country's non-profit laws ensure the organizations are somehow serving the greater good; this organizational ownership is a fundamentally different model than the rest.

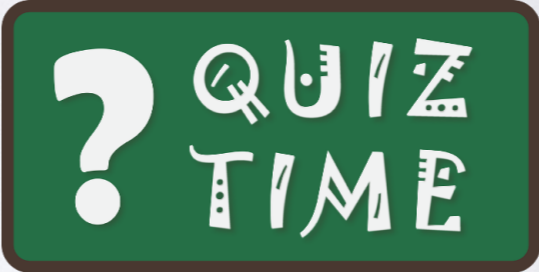
“An open source project’s
most important asset is its
brand.”

–Shane Curcuru

So what do you think about my premise now?

Yes - having useful code and an engaged community are important. But thinking at the higher level, a project is defined (to the world - of both users and contributors) solely by its brand.

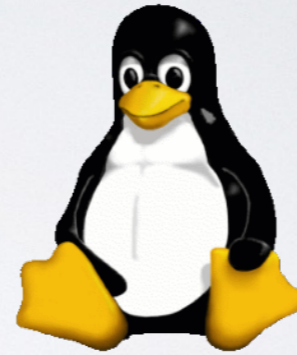
*Question
Time?*



Pixabay, CC-0

WHO OWNS THIS BRAND?

- Commercial company
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual(s)



Here's a beloved penguin we all know. But who owns the trademark for this graphical logo?

WHO OWNS THIS BRAND?

- *Commercial company*
- *Business trade association (501C6)*
- *Non-profit charity (501C3)*
- **BDFL / Individual(s) ?**



Larry Ewing (design copyright, **but not** trademark)

The original trademark registration by Tux LLC has expired because it **wasn't maintained**. Since Tux has been used in so many different formats, by different vendors for different kinds of products, there is no clear ownership any more.

Copyright and design ownership is from the original author, Larry Ewing

<http://isc.tamu.edu/~lewing/linux/>

WHO OWNS THIS BRAND?

LINUX

- Commercial company
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual

How about the wordmark LINUX itself? Know who owns that?

WHO OWNS THIS BRAND?

LINUX

- *Commercial company*
- **Business trade association (501C6)**
- *Non-profit charity (501C3)*
- **BDFL / Individual**

Linus Torvalds, licensed by/through the Linux Foundation

While Linus legally owns the registration for LINUX software products individually, it is licensed to the Linux Foundation for all management purposes, so effectively this is with a trade organization. USPTO Reg# 74560867

WHO OWNS THIS BRAND?

- Commercial company
- Business trade association (501 C6)
- Non-profit charity (501 C3)
- BDFL / Individual(s)



Here's an old one - something that was moving emails before some of us were adults.

WHO OWNS THIS BRAND?

- **Commercial company**

- *Business trade association (501C6)*

- *Non-profit charity (501C3)*

- *BDFL / Individual(s)*



Although it started out as a mark of Eric Allman an original software developer, it then was owned by SendMail, Inc. as a small company, which was bought out by ProofPoint, a much larger company, who owns the USPTO # 75979292 registration today.

WHO OWNS THIS BRAND?



- Commercial company
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual

This one seems kinda obvious, doesn't it?

WHO OWNS THIS BRAND?



- Commercial company
- Business trade association (501C6)
- **Non-profit charity (501C3)**
- BDFL / Individual

Oracle donated the trademark to Apache as part of Incubation!

As part of the Apache Incubation process, any registered trademarks must be legally transferred to the ASF before graduating as an Apache project; thus this long-used trademark is now legally owned by a non-profit; Oracle no longer has any rights here. USPTO Reg# 75419186

WHO OWNS THIS BRAND?



- **Commercial company**
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual

ownCloud is a commercial company in Germany running the ownCloud software project, that lets you run your own cloud software. Some of the lead developers - including a leader of the company itself! - decided to fork the software, leading to...

USPTO Reg# 85474057

WHO OWNS THIS BRAND?

- **Commercial company**

- Business trade association (501 C6)
- Non-profit charity (501 C3)
- BDFL / Individual(s)



nextCloud - a fork of ownCloud software by some of the lead developers. nextCloud is also open source, but is run by a commercial company. While some of the code is shared open source, it is not possible to fork the brand, so they started with a new name and logo.

USPTO Reg#85306921

WHO OWNS THIS BRAND?



- Commercial company
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual

WHO OWNS THIS BRAND?



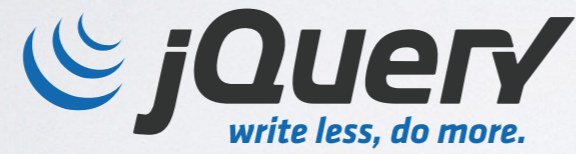
- *Commercial company*
- *Business trade association (501C6)*
- **Non-profit charity (501C3)**
- *BDFL / Individual*

Software In The Public Interest, Inc.

DEBIAN registered word mark is owned by SPI, Inc., a 501C3 non-profit that holds the assets on behalf of the Debian maintainers. The Debian group itself manages their own affairs, but since they aren't legally incorporated, SPI holds the legal assets for them. USPTO Serial 75386376

This shows a common structure for some FOSS projects, where the technical governance is led by the people doing the work, and the legal ownership is brought to a non-profit foundation like SPI, Software Freedom Conservancy, or the Apache Software Foundation - all 501C3 public charities in the US.

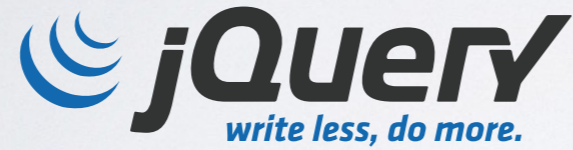
WHO OWNS THIS BRAND?



- Commercial company
- Business trade association (501C6)
- Non-profit charity (501C3)
- BDFL / Individual

Here's an interesting story along the way...

WHO OWNS THIS BRAND?



- *Commercial company*
- **Business trade association (501C6)**
- *Non-profit charity (501C3)*
- *BDFL / Individual*

Software Freedom Conservancy → Linux Foundation

While jQuery was hosted for a while at the Software Freedom Conservancy, a 501C3 public charity, governance and the trademark have moved to a collaborative project of the Linux Foundation (the JQuery Foundation), essentially being under a 501C6 business association. USPTO Serial 85438842



QUESTIONS?

Thanks for attending!

<http://shaneslides.com/TBD/I0/Who-Owns-That-FOSS-Brand/>

SEE ALSO:
<http://ShaneSlides.com>
<http://Punderthings.com>

THANK YOU!

Shane Curcuru
Punderthings Consulting
@ShaneCurcuru



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