Don't send an engineer to do a lawyer's job

7 mistakes to avoid in engaging communities on licensing matters.

FOSDEM, Brussels
February 2017

**Simon Phipps
Meshed Insights Ltd.**

About This Talk

- Inspired by a 2015 thread on legal-discuss@apache.org

- The thread embodies many of the errors an experienced lawyer with little understanding of open source can make in engaging a community, especially via a proxy.

- Not intended as a criticism of the company. We all make mistakes. So they are not named 🙂

- The talk summarises experiences from multiple contexts.

- Other approaches are possible.

- IANAL&WBUTPOCOTE (I am not a lawyer and would be unlikely to play one convincingly on TV either)

Gratuitious Cat Pictures

Background

- In a thread on Apache Legal, a representative of a well-known cloud software company - who have great open source experience - asks for variations on Apache's standard terms for a code contribution.

- The changes relate to software patent rights.

- The writer apparently is a member of the open source team and is likely following directions from in-house counsel.

- It's likely that a new General Counsel from a notoriously toxic corporation and with limited experience of open source has recently been appointed.

- The engineer had an @apache.org e-mail address so was clearly not a newbie.

"...we just need a few small changes to the license"

In his initial e-mail, the engineer presented for Apache's review changes to Apache's standard Software Grant Agreement for some code they want to seed in Apache's Incubator.

A change the formal legal documents that create a community's freedoms is very unlikely. To the closest approximation, never ask for it. If it's necessary for the benefit of the community, propose a discussion when it's not urgent.

Hear Me Roar

"the attached document includes our changes"

The engineer included simply a changed SGA, with no red-line, no narrative and no justification for the changes.

Communities do not like being handed a huge delta that includes many changes, and they dislike changes that come with no rationale. Combining the two is a sure recipe for unhappiness.

"...here's a special agreement we need you to sign"

It wasn't part of this correspondence, but sometimes company representatives actually expect open source projects to "sign an NDA" or similar. Bilateral agreements with individuals are anti-community, both because they discriminate and because they empower the originator over the community.

"...I am not allowed to change any of this"

The engineer just cut & paste messages from other people, and carried messages to the boss in the back room to make decisions.

While it's inevitable there will be management and counsel to consult, it's not OK to be a powerless proxy (in any matter including code). Communities prefer the artisan to the salesperson.

Along for the ride

"Having our attorney speaking directly with yours might be easier"

Getting no traction with the proposed changes from his legal department, and having no authority or indeed skills to negotiate, the engineer asks for 1:1 private negotiations.

He also suggests that the participants in the online conversation lack the skills or qualifications to be entitled to an opinion, just like him.

The decision-making processes of businesses are bilateral. Those of communities are multilateral. Never confuse them even if they look related.

"...here's how we can decide this"

Despite the fact Apache has well-worn consensus policies and practices, the engineer wanted to do things a new, different way that -- in the words of one person -- "avoids the people with the most experience."

It's not just the outcomes that are multilaterally designed. The routes to outcomes are usually well understood and trying to re-invent them mid-process will raise red flags.

"...we are just trying to make a contribution"

The engineer starts to get frustrated and implies that Apache are ungrateful and are needlessly obstructing a good-will contribution.

One list member points out that actually, the changes proposed to the license are significantly to the benefit of the contributor.

Open source projects are on the whole the synchronisation of self interest by many participants. Framing your self-interest as philanthropy is unlikely to help you.

Nothing to see here

"...this is urgent so let's make an exception"

Since he is clearly under pressure from his boss, the engineer suggests waiving the process because the situation is urgent.

Open source projects are multilateral, consensus-driven, uncertainty-resisting communities. Creating the rules that make those things so is a hard-won benefit gained over long periods. One-time exceptions to those rules are anti-community.

Apache Said No

"...the changes are along the lines of providing clarification, but these clarifications are to the primary benefit of your company.

I think that the ASF must deny the request for these changes and for any consideration of us signing the modified SGA."

It was fairly obvious from the beginning this would be the answer.

Very Relaxed About This

"I've conferred with our executives & our GC & managed to get the existing SGA executed."

In less than 12 hours after being told "no", the engineer said "never mind" and accepted the default agreement anyway.

Showing you were just playing a corporate game all along is a great way to discard any remaining credibility you may have, even (especially?) if you frame it as a victory for your 1337 skillz.

What They Did Wrong

They:

1. Sent an non-expert, unempowered proxy

2. Tried to act bilaterally

3. Tried to circumvent consensus

4. Condescended to community

5. Tried to change the license

6. Tried to dump an unexplained set of changes

7. Concealed their true self-interest

Doing it right

- Task a person at your company who is **empowered** and **qualified** and **avoid using proxies**

- Follow the existing process and don't expect changes or exceptions as **community consensus is multilateral**

- When it is needed **change will be slow** as there are many parties whose freedoms are at stake who need to agree

- **Speak in community spaces** as many people now and in the future need to be persuaded

- **Don't try to go lawyer-lawyer** unless invited

You'll know if you did it right because at the end your lawyer will be entitled to be considered a community member!

Gratuitous Cat
Thanks You

Thanks For Listening!

Contact:	simon@meshedinsights.com
Copyright:	© 2017 Meshed Insights Ltd
License:	CC-BY-SA-4.0