



Fox Rothschild Podcast

Featuring Attorney Brienne Terril in Pittsburgh

We are talking today with Brienne Terril on Fox Rothschild Podcast. Brienne is an attorney with Fox Rothschild in Pittsburgh. She focuses her practice on intellectual property, including patent prosecution and litigation across a range of technology areas, including computer security systems, encryption technologies, smart cards and biometric systems. She regularly provides counsel to clients on patent issues relating to product and technology development and has significant experience with technology transfer and licensing agreements.

Brienne, welcome to the podcast.

Brienne Terril: Thank you. Glad to be here.

Question: *Brienne, you recently made a presentation on legal issues in open source software to the Project Management Institute in Pittsburgh. It seems to be a hot topic.*

Brienne Terril: Yes, we're advising quite a number of clients in this field because it is so complex and holds so many risks for companies using open source software in their businesses.

Question: *Brienne, just what is meant by the term "open source software?"*

Brienne Terril: Open source software typically provides a user with three main benefits. First, a user may redistribute the software without payment of a fee. Second, a user may access and redistribute the software's source code. And third, the user may freely create and distribute derivative works of the software.

Question: *Are there other advantages of using open source software?*

Brienne Terril: There are many advantages to using open source software, which is why its use is so popular. First and foremost is cost. The majority of open source software is available at no cost or at a minimal cost, which makes it a more attractive option than commercial alternatives. Also, because users of open source software have access to the software's source code, they can easily customize the software to fit their needs and integrate the software into their existing products.

Question: *Brienne, are there public domain misconceptions of what open source software is all about?*

Brienne Terril: Absolutely, and that is where companies sometimes are at risk. Use of open source software may be free of monetary cost, but it is not free of responsibility. As a general rule, users may not use or distribute software without a license from the owner. And this rule applies equally to open source software despite it being publicly available or available for free. Like commercial software, the use of open source software is usually governed by a license agreement that includes terms and conditions of how the software can be used.

Question: *Brienne, how crucial is it for users to understand applicable open source software licenses and their terms?*

Brienne Terril: It is critical to understand the license terms and also how conditions may apply to open

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source software usage. Typically, open source licenses are on a take-it-or-leave-it basis. There is usually no negotiation with the copyright owner and no affirmative action that signifies acceptance of the license terms such as signing a document or selecting an “accept” button. Rather, acceptance is signified by a user performing an action that requires permission from the copyright owner, such as modifying, copying or distributing the software.

Question: *What are the consequences of non-compliance with open source software licenses?*

Brienne Terril: Well, as our listeners might imagine, failure to comply with licenses from software copyright owners can lead to litigation as well as obstacles to pursuing outside investments, mergers, acquisitions or other types of business relationships.

Question: *Brienne, can you tell our listeners about the varying types of open source licenses?*

Brienne Terril: Sure. Well in general, there are two basic types, known as copyleft licenses and permissive licenses. Copyleft licenses allow users to modify the source code and distribute the modifications. But, if a user distributes the modifications, the user must do so under the same terms and conditions as the original software license. These licenses are commonly called viral licenses because their terms spread to derivative works. It is important for open source users to understand the terms of any applicable copyleft license, especially if the open source software is being combined with or integrated into proprietary software. Failure to do so could lead to an obligation to make proprietary source code available under a similar license.

Question: *Brienne, can you tell us more about permissive licenses?*

Brienne Terril: Well, permissive licenses typically do not place restrictions on a user’s ability to modify or distribute the licensed software. However, permissive licenses usually include other obligations, such as including copyright notices or attribution in derivative works. There are many fine points of detail to consider under both copyleft and permissive licenses.

Question: *Are there any notable cases that are setting a precedent in open source software litigation?*

Brienne Terril: Although litigation involving open source software is uncommon, some cases are worth mentioning. Between 2007 and 2009, the Software Freedom Law Center sued approximately 20 different companies, including 14 major consumer electronics companies, for copyright infringement of an open source offering that was licensed under the GPL license. The defendants were accused of selling products that included the executable forms of the software, but failing to include the source code, or a written offer to make the source code available. Interestingly, the lawsuits did not involve any modifications made to the software by the defendants, but rather the defendants’ failure to comply with the license terms. Many of these cases settled out of court for undisclosed amounts.

Question: *How does open source software licensing impact a company’s ability to, say, attract investment or perhaps mergers or acquisitions?*

Brienne Terril: Well, investors and buyers typically want to know the details of a target’s open source usage, especially if the target is in the software business. This includes what open source software is being used, how the software is being used, what licenses apply, proof of compliance with license terms, and whether the target has implemented an open source software policy. If the target cannot provide satisfactory answers, investors or buyers might just walk away.

Question: *What proactive measures do you typically recommend for clients?*

Brienne Terril: Well first, they should implement software usage approval procedures and educate their employees and developers about the risks of using open source software and how to comply with company policies regarding open source software. Companies may also consider establishing a review

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board to analyze and approve software usage requests. It is good practice to maintain a database of open source usage and distribution details and perform regular audits. Companies should always be aware of what software they are using and the terms and conditions that govern such use.

Narrator: *Well, thank you Brienne. Listeners, to receive a copy of Brienne Terril's executive summary, entitled "An Introduction to Legal Issues in Open Source Software," please contact her at 412.391.2404 or at btteril@foxrothschild.com.*

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