



Fall 2008

## Open Source Stats

About 33% of North American companies and 39% of European companies surveyed say they use open source software\*

67% of companies expressed interest in using open source software to improve cost savings\*

84% of companies allow their IT staff to participate in open source projects\*\*

79% of companies say their experience with open source has been so good that they plan to expand its use\*\*

Of 92 companies surveyed, less than 1% of companies using Linux plan to decrease its use\*\*

53% of respondents in North America say the benefits of using open source software outweigh the inhibitors\*\*\*

\* 2006 Forrester research survey  
\*\* CIO Insight survey of companies with revenue below \$500M  
\*\*\*2008 Actuate annual survey of open source software use

## Patent Reexamination: Letting Open Source Companies Play Offense



**Van Lindberg** – The patent system provides unique challenges for companies that use open source software. While business pressures and shareholder expectations generally favor strong patent protection and substantial use of the patent system to create business value, the open source community can be hostile to the patent system in general and software patents in particular. Patent reexamination includes a number of legal and cost benefits that can make it a valuable tool for open source companies that compete in patent-heavy industries.

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## The Texas Anti-Phishing Act

**Charlie Jones** – Phishing involves the use of deceptive websites and emails to obtain sensitive personal information. The Anti-Phishing Act, effective April 1, 2009, will attempt to curb this growing problem by creating a cause of action against a person for the fraudulent use or possession of identifying information obtained via misleading Web sites, domain names or e-mail messages.

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## Use Conditions in Open Source Licenses



**Lam Nguyen** – In the recent case of *Robert Jacobsen v. Matthew Katzer*, the U.S. Court of Appeals for the Federal Circuit upheld the enforceability of use conditions set forth in an open source license. The court held that an open source copyright license may set conditions on the use of copyrighted material, and that a violation of such conditions constitutes an act of copyright infringement.

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## Federal Circuit Changes Test for Design Patent Infringement

**Alan Herda** – Previously, a design patent holder had to satisfy two tests to successfully establish a claim for design patent infringement, namely the “ordinary observer” test and the “point of novelty” test. In an *en banc* opinion, however, the Federal Circuit recently rejected the point of novelty test, holding that the ordinary observer test should be the sole test for determining whether a design patent has been infringed.

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## “Improper Revival” Not an Invalidity Defense to Patent Infringement

**Garrett Atkinson** – The U.S. Court of Appeals for the Federal Circuit recently decided *Aristocrat Technologies v. International Game Technology*, permitting the U.S. Patent and Trademark Office (PTO) to continue its practice of reviving applications found abandoned because of “unintentional” delay - at least for now. Although the Federal Circuit did not affirm the PTO’s practice, it did find a substantial barrier to challenging it and reversed the trial court on this basis. The Federal Circuit held that an accused infringer cannot raise “improper revival” as a defense at trial.

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## Haynes and Boone IP Personal Profile



**David O'Dell**, a partner in the firm’s Richardson, TX office, counsels clients primarily in the computer, telecom, electrical and semiconductor fields on strategic intellectual property protection and patent enforcement. In addition to regular utility patent prosecution, Mr. O’Dell has prepared and prosecuted over 30 ex parte and inter partes reexaminations. In fact, for the years 2005-2007, Mr. O’Dell and his partners at Haynes and Boone are the No. 1 filer of inter partes reexamination requests according to the USPTO Official Gazette. Mr. O’Dell frequently speaks on reexamination techniques and strategies, including presenting at the USPTO. In addition to electronics, Mr. O’Dell enjoys woodworking and building furniture in his spare time.

### Missed the AIPLA Annual Meeting?

Click below for slides and papers on preliminary M&A diligence presented Oct. 23, 2008  
by Andy Lowes and Jeff Wolfson

#### Lowes:

**White Paper** - [Before The Music Starts – Pre-NDA Due Diligence Steps](#)

**PowerPoint** - [Practicing the Dance: Confidentiality Provisions in the M&A Context](#)

#### Wolfson:

**White Paper** - [Diligence in Preliminary Merger & Acquisition Evaluations](#)

**PowerPoint** - [Dance Fever - Living \(La Vida Loca\) Under Your NDA: Strategies for Preliminary M&A Diligence](#)

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