

The background features a light blue and white color scheme with a pattern of binary code (0s and 1s) scattered across it. A prominent blue chain with circular links is draped across the center, extending from the left towards the right. The chain is set against a backdrop of overlapping, semi-transparent blue and white circular shapes that create a sense of depth and movement.

OPEN SOURCE BUSINESS CONFERENCE

Building Your Big Data Future with Open Source

COMPUTERWORLD

OSBC

SAN FRANCISCO



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GOODWIN

PROCTER

Patent Strategy for Open Source Companies

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About Goodwin Procter

- Global law firm
 - Most of our attorneys in Boston, California, and NYC.
- Large technology companies practice
 - 160+ attorneys focused on technology clients.
 - Many attorneys from Testa Hurwitz, Gunderson, Wilson.
 - Open source clients include Acquia, Black Duck Software, Citrix (Xen), Engine Yard, Hadapt, Lucid Imagination, Pentaho, RStudio, Sencha, Twilio & Vyatta.



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Agenda

- Patent Basics
- Patent Process
- Patents & F/OSS
- How Patent Litigation Works
- Can't Beat 'Em? Join 'Em
- Questions?



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Patent Basics

- Something is patentable if its not a law of nature, physical phenomena, or abstract idea.
- Right to exclude; not a right to practice.
- Territorial right.
 - U.S. patent reaches U.S. activities, etc.
- Strongest kind of IP protection there is.
 - Protects against second movers.
- Reaches making, using, selling, importing, offering for sale, etc.



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Patent Process

- Inventor contacts patent attorney.
- Patent attorney drafts and files patent application with PTO.
- A year after that, a PCT application is filed for foreign patents.
- Two years later, PTO offers opinion on patent application.
- After another two years of dialog, PTO likely issues patent.
- A few years after that, foreign patents may issue.



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Patents & F/OSS

- Patents let you stop another from making, using, selling, etc.
- F/OSS licenses let another make, use, sell, etc.
- Patents + F/OSS = ???
 - Explicit patent license covering software you distribute – e.g., Apache2
 - Implicit patent license covering software you distribute – e.g., GPLv2
- Standard analysis is that patents at best have no value, at worst a threat to the freedom to use, study, innovate, etc.



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Patents & F/OSS (cont'd)

- Standard analysis leads to intellectual commons free of patents.
- Problem – “We are not alone.”
 - June 2006 – Firestar v. Red Hat re: Hibernate.
 - Oct 2007 – IP Innovation re: Linux.
 - Jan 2008 – Trend Micro v. Barracuda re: ClamAV.
 - March 2009 – Software Tree v. Red Hat re: JBoss.
 - March 2010 – Apple v. HTC re: HTC Android phones.
 - August 2010 – Oracle v. Google re: Dalvik



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How Patent Litigation Works

- $M = \max\{I, r*s\} + i - c1 - c2$
 - M = Money recovered by patent owner
 - I = lost profits; r = royalty rate; s = infringer's sales
 - i = value of buying out an injunction
 - c1 = cost of patent litigation; c2 = cost of counterclaims
- Rules of thumb
 - Recovery scales with revenue.
 - Risk of suit scales with revenue.
 - c1 can be zero, or a nominal figure.



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How Patent Litigation Works (cont'd)

- The only variable the defendant can control is c2.
- What counterclaims can you pursue against a patent owner arguing that you've independently implemented their idea?
 - Reexamination, ex parte – good odds, not expensive
 - Reexamination, inter partes – even better odds, somewhat expensive
 - Decl. judgment of noninfringement, invalidity – unpredictable, expensive
 - Patent infringement – unpredictable, expensive but recovery available
- No recovery for any of these actions except for counterclaims of patent infringement.
 - Put the equation to work in your favor.



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Can't Beat 'Em? Join 'Em

- Identified exposure to patent litigation.
 - Your competitors have a lot of patents.
 - Your competitors are party to patent litigation.
 - You're using products that are contested.
 - You generate a lot of revenue.
- "Make-or-Buy" Decision
 - Buy patents from third parties.
 - Pursue your own patents.



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Can't Beat 'Em? Join 'Em (cont'd)

- "Buy" Patents
 - Reasons
 - Your business doesn't generate patentable innovations.
 - You don't have time.
 - Sources
 - Intellectual Ventures
 - RPX/Rational Patent
 - Ocean Tomo
 - "Special situations" – e.g., Google/Nortel



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Can't Beat 'Em? Join 'Em (cont'd)

- "Make" Patents
 - Reasons
 - Your business is premised on innovation.
 - You have time and money to build a strategically-valuable asset.
 - Process
 - Find patent counsel with right technology background.
 - Teach your inventors how to identify patentable inventions.
 - Put process in place to collect and evaluate disclosures from inventors.
 - Work with patent counsel on appropriate filings with Patent Office.



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Questions?



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