DLA PIPER

EVERYTHING MATTERS

Open Source Think Tank 2011: Managing OSS

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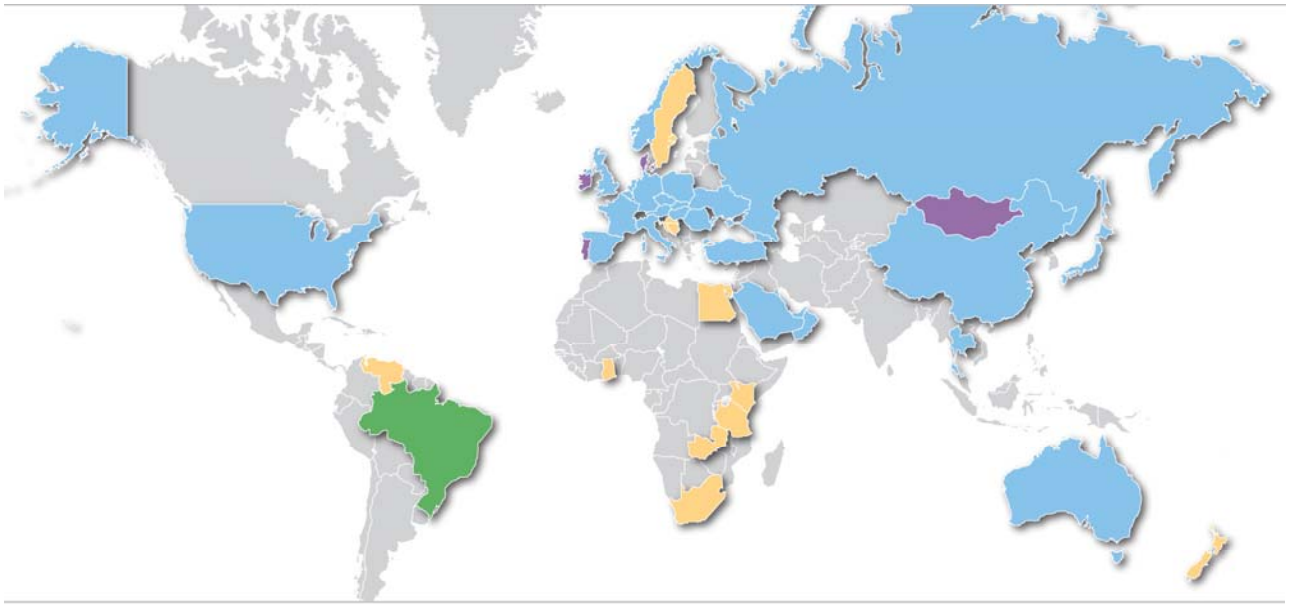
Global Reach with Breadth and Depth



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- Largest law firm in the world with 4,200 lawyers in 30 countries and 76 offices throughout Asia, Europe, the Middle East and the US
- Recognized as the North America International Law Firm of the Year, the North America Transfer Pricing Firm of the Year, and the San Francisco Transfer Pricing Firm of the Year – 2010, *International Tax Review*
- Ranked #1 globally by volume of M&A transactions in 2010 – *mergermarket*
- Ranked #1 by volume of Private Equity and Venture Capital deals in 2010, *Dow Jones Private Equity Analyst*
- *3rd by revenue, according to the Legal Business Global 100 2010*

IP and Technology Practice

- More than 150 IP and Technology lawyers in the US and more than 400 around the world
  - 70+ patent litigation
  - 30+ patent prosecution
  - 20+ trademark, copyright and media
  - 25+ technology and sourcing; licensing
- Ranked in multiple US regions as a top-tier firm in the area of IP, *Chambers USA: America's Leading Lawyers for Business* (2009)
- Among "the top five firms being used and considered for multi-jurisdictional deals covering three or more countries", *Acritas* (2009)
- Many of our IP and Technology lawyers are recognized as top lawyers in *Chambers USA* and *Legal 500*
- Recognized as one of the top law firms that "The 50 Most Innovative Companies in the World" rely on to protect their IP, *IP Law and Business* (2008)

New World of Global Innovation

We too, are standing on a "burning platform," and we must decide how we are going to change our behaviour.

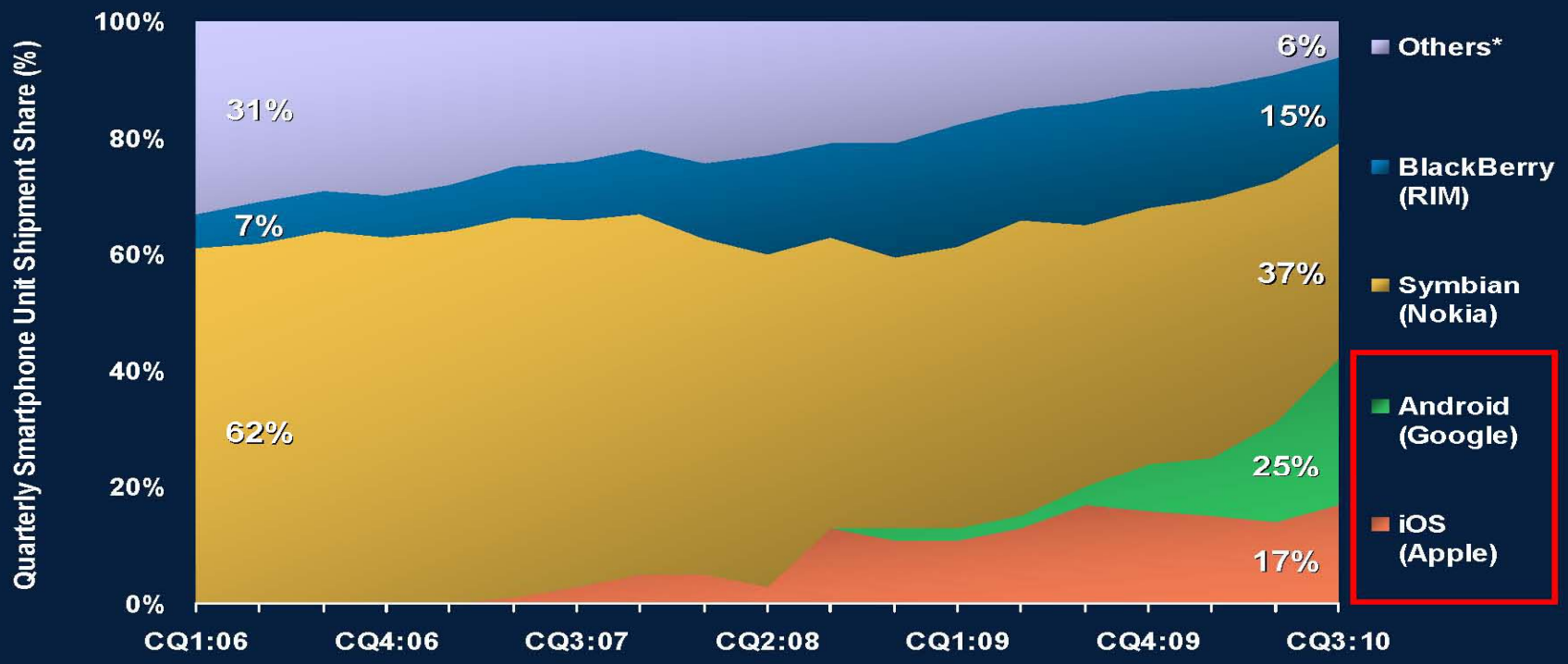
Nokia CEO Stephen Elop

FOSS in the SmartPhone Operating Systems

Source: Morgan Stanley – Mary Meeker (now KP)

Mobile Operating Systems – Attackers (Apple & Google) Driving Market Excitement & Momentum

Global Unit Shipment Share of Smartphones by Operating System, Symbian (Nokia) / BlackBerry (RIM) / iOS (Apple) / Android (Google) / Others, 1Q06 – 3Q10



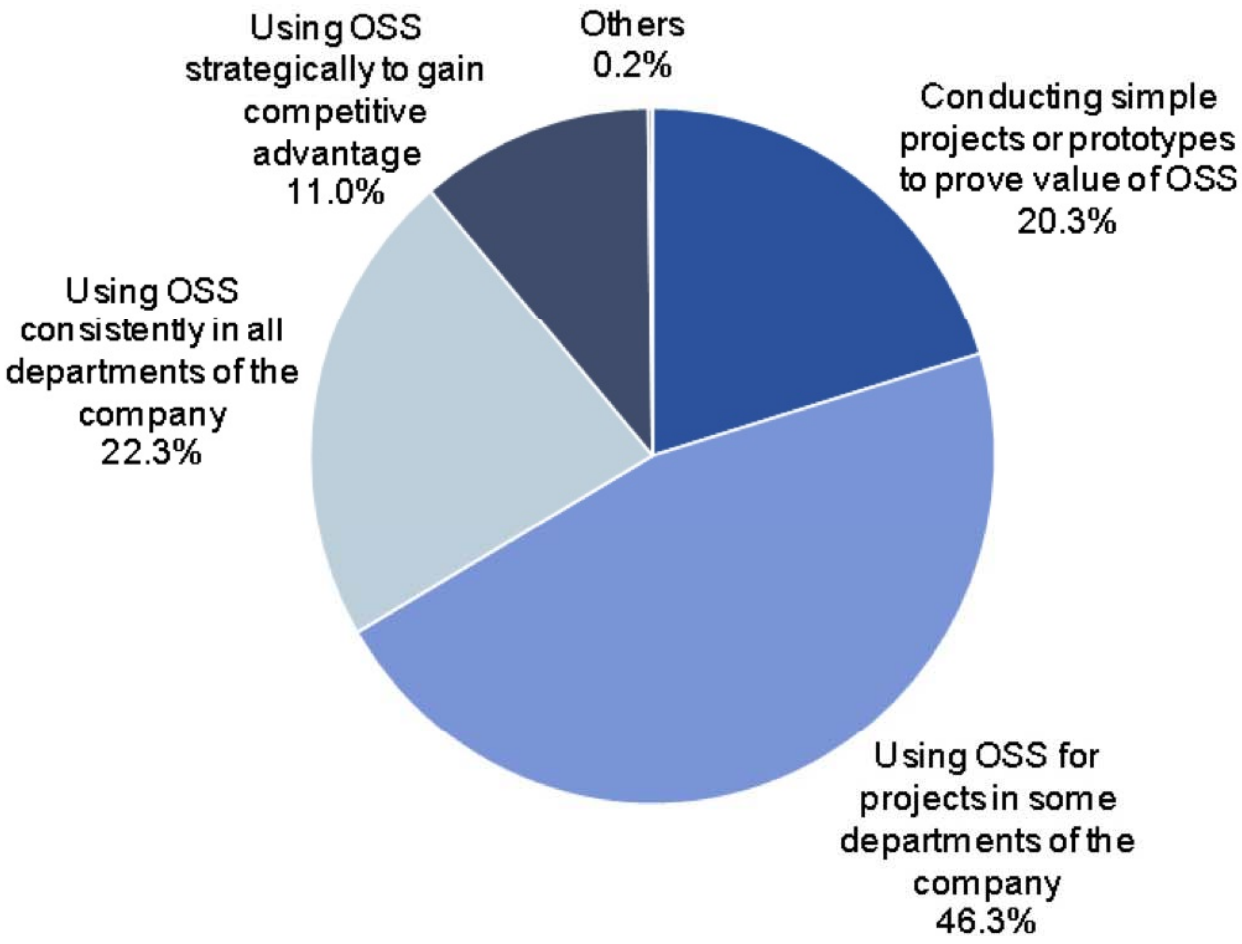
Morgan Stanley

*Note: iOS excludes iPod Touch and iPad shipments as they are not smartphones. *Others include Windows Mobile, Palm OS & WebOS, Linux and other proprietary smartphone OSes. Call outs on the left side represent market shares in CQ1:06; call outs on the right side represent market shares in CQ3:10. Source: Gartner.*

Market Trends: FOSS Success

- Software development has changed forever
  - Internet, community development & open source software (OSS) licensing
  - Componentization and re-use
- Recent survey's confirm OSS has gone mainstream
  - *Based on surveys my colleagues at Gartner and I have conducted over the past several years, mainstream adopters of IT solutions across a widening array of market segments are rapidly gaining confidence in the use of open source software, with many now stressing its valuable features more than its risks*.
  - Laura Wurster, Harvard Business Review, March 2011

OSS Use: Gartner



We won, but ....

- ***Even as our survey painted a rosy picture of the future of enterprise use of open source software, it also surfaced a concern. Most organizations, it revealed, have not established a policy framework to guide decision-making on the use of open source software. A proper framework would outline types of licenses acceptable to the organization, guidelines pertaining to intellectual property, regulations governing contributions to external projects, and an approved vendor/project list. Just a third of respondents claimed their organizations have anything like this kind of policy structure; the rest rely on ad hoc or informal processes.***

- Laura Wurster, Harvard Business Review, March 2011

Managing FOSS: Why Do You Care?

- Your customers care: they are asking for BOM
- Your potential acquirer cares: some companies have separate open source diligence process
- More participation in open source communities: what are your employees contributing?
- Litigation: compliance is now an important issue
  - BusyBox suits
  - Potential expense (Oracle v. SAP: $1.3B in damages)
- Litigation: remedies are more clearly established after Jacobsen, copyright remedies such as injunctive relief and statutory damages are available

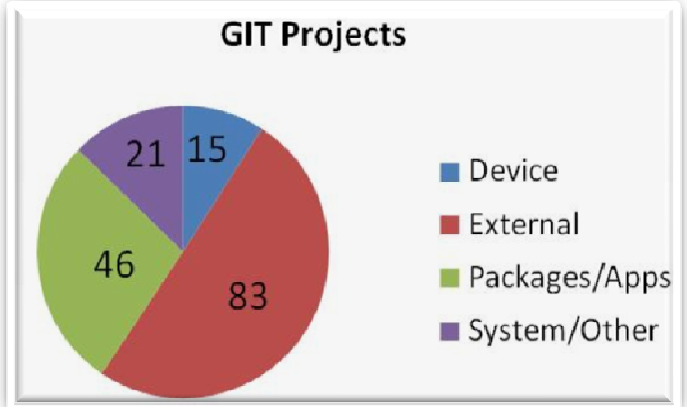
Success breeds Challenges

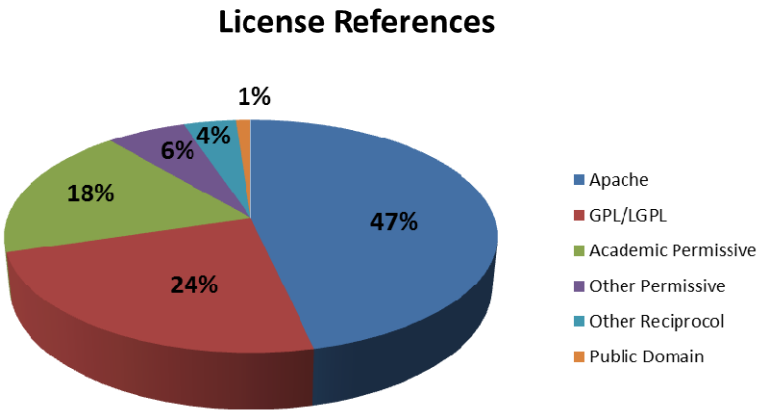
- Android
  - Oracle: patent/copyright
  - 38 lawsuits involving Android
  - Naughton claims about violation of GPLv2 through use of Bionic
- Patent purchases relating to FOSS
  - Novell (CTPN) $450M
  - Nortel (Google Bid) $900M
- Other issues
  - FOSS pixie dust: Symbian II
  - GPL and AppStores
  - FOSS & Cloud

What's Inside Android?

Android 2.3 ("Gingerbread")

- 165 Projects
  - 83 are "External"
  - Does not include Kernel Mirror
- Total Size
  - Over 84,000 Files
  - Over 2GB total size
  - Does not include Kernel Mirror





A Look Inside Two Android Components: Bionic & Webkit

License types in: Bionic

Apache License v2.0
BSD Licenses
CMU License
Cryptix License
Free clause
FreeBSD
Historical free
INRIA OSL
Intel OSL
Internet Software Consortium
MIT
Public Domain
Python InfoSeek
X.Net License

License types in: Webkit

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MIT v2 with Ad Clause License
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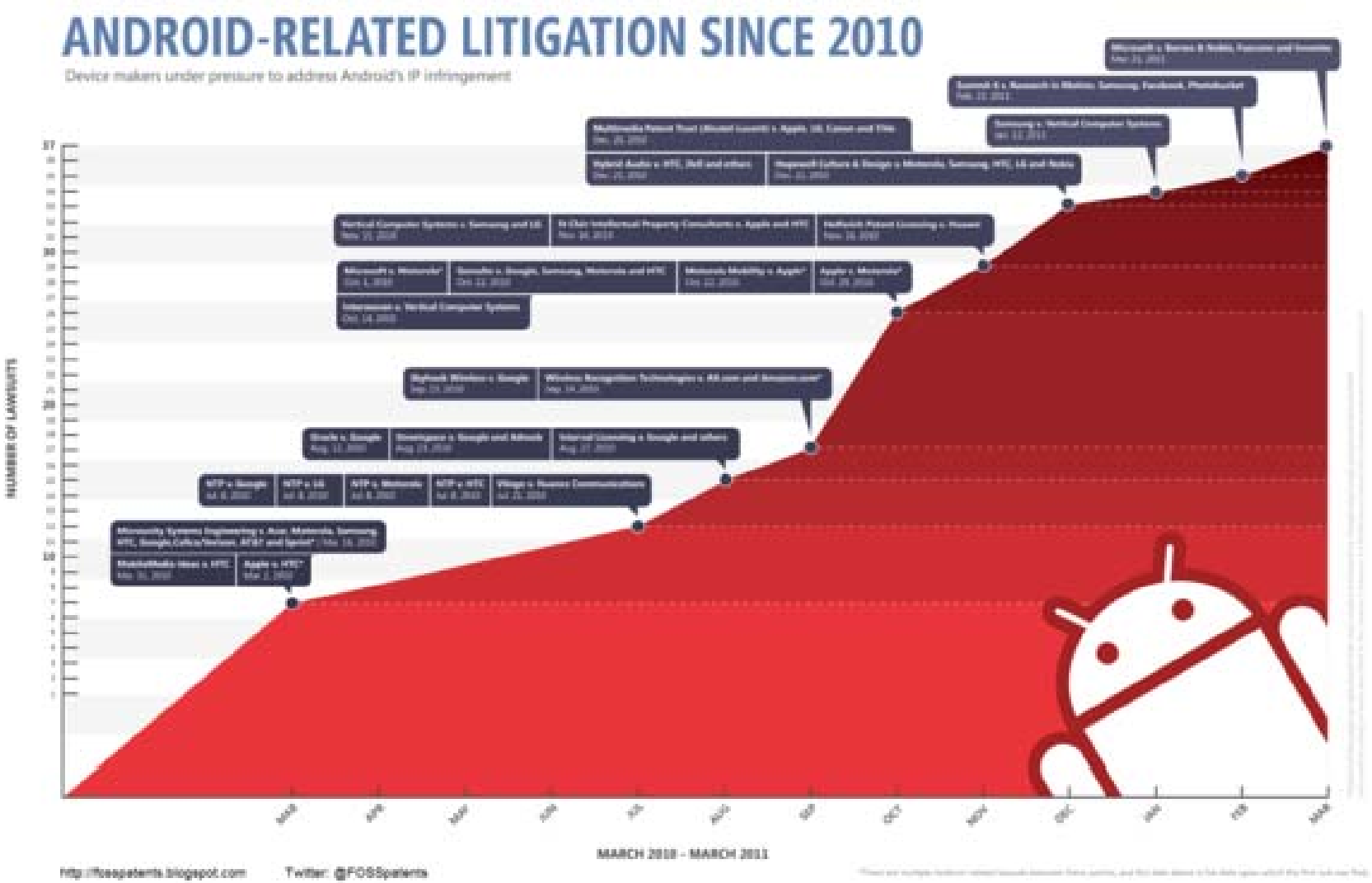
PCRE License
Public Domain
SWIG License
The wxWindows Library License
zlib/libpng License

Android Litigation



Community Initiatives to Assist in Management

- Project Harmony: template contributor agreements
  - License format
  - Assignment format
- OWF Contributor Agreement
- SPDX
  - Developing a common vocabulary to describe licenses

Remedies for Breach of License

- License terms effect which remedies apply
  - Copyright Infringement
    - Injunction available
    - Statutory damages (up to $150,000 per copyright)
  - Breach of Contract
    - Monetary damages
    - Injunctions rare
- Jacobsen v Katzer
- Non economic obligations such as notices/attributions can be enforced
  - Wording is critical: “provided that” or “conditional”
  - Applies to both open source and proprietary licenses.”

Reasons for an Open Source Policy

- Role of a policy
  - Manage risk
  - Ensure strategic flexibility
- Unusual OSS risks
  - Automatic termination of GPL
  - Uncertain scope of GPL
  - Broad scope of patent termination in MPL
  - Forking of code
- Customers are demanding to know what is in your product
- Compliance important for financings/M&A
- Enforcement increasing by commercial and non commercial licensors
  - Commercial: Artifex; Oracle
  - Non commercial: Welte; Software [_____]

What to do?

- Open Source is Ubiquitous
  - Needs to be managed
  - Process is critical
- Cross functional
  - Product Planning/Management
  - Legal, Security & Export Compliance
  - Engineering
- Integrated Processes
  - Component Management
  - License Management
  - Release Management
    - Release Planning
    - Release Delivery

Best Practices of FOSS Management

- Systemic
  - Baked in to the culture & workflow
  - Event Driven
    - Component approval request
    - Planning a release
    - Accepting a code drop from a vendor/outsourcer
    - Performing a build
    - Creating a release
- Embrace Supply Chain Techniques
  - ERP systems brought together different users and processes
  - Workflow automates task creation
    - Notifications
    - Process Monitoring
  - Central repositories of data
  - Business Process Integration is the key

Sample FOSS Policy Contents

Policy component	What it should specify
Goals of OSS adoption	Justification for using OSS (e.g., cost avoidance, speed, performance, quality)
Acquisition processes: • Method of procurement • Distribution policies • Support policies • RACI matrix	• How will you acquire OSS components? • Where are they downloaded from? • How is dependent code made available? • What's the strategy for providing support? • Who is responsible, accountable, consulted, informed?
Rubric for business case	• How will you determine the total cost of ownership? • What performance service-level agreements are needed?
Guidelines for appropriate use including: • License classification • Usage restrictions • Reporting requirements • Derivative use • Remediation policies	• What are the specific guidelines for developers? • What OSS licenses can be used and where? • When should OSS not be used? • How do projects report their use? • How are modifications handled? • What is done when unreported use is detected?

Source: February 2, 2009, "Best Practices: Improve Development Effectiveness Through Strategic Adoption Of Open Source" Forrester report

Common Mistakes in OSS Policies

- Legalese: make it understandable
- General policy intended for certain products/business model/groups
- Failure to cover all sources of software
  - Consultants and contractors
  - M & A
  - Third party licensors
- Policy too strict or impractical, so VOA: Violated on Arrival
- Does not allow for edge cases
- Does not provide for modification to meet changes
  - Business model
  - Product lines
  - Development approaches
- Lack of continuous education and management attention

Open Source in M&A

- Separate diligence process
  - Cisco
  - Verisign
- Due diligence issues:
  - What is the OSS use policy?
  - How is it implemented?
- Government scrutiny
  - MySQL in Oracle/Sun merger
  - Patents in Novell sale
- Special OSS legal issues
  - Inability to assign most OSS licenses
  - What is distribution?
- Experience
  - Increase in escrow amount and duration
  - Reduction in price

Summary

- We won, but now comes the hard part
- Treat the management of open source software as an integrated, cross-functional *business* process
- Establish policies, define the process and process owners
- Phase the deployment to yield near-term results
- Technology platforms can automate the process, enhance cross-functional collaboration and ensure validation