

Monday, July 31, 2006  
Vol. 22, No. 14

# Soft•letter

BUSINESS INSIGHTS FOR SOFTWARE DEVELOPERS & PUBLISHERS



Part II of our Google survey shows that significant numbers of ISVs are experimenting with the Google APIs  
See pages 4-5.

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## Trolls and Robes: The Supreme Court Steps In

*On May 15th, 2006, the Supreme Court of the United States reset the patent playing field. In the case of MercExchange vs. eBay, the court overturned the practice of automatically granting an injunction against a defendant who's been found to infringe on a plaintiff's patent. In its place, the court reaffirmed what is called by many the "four factor" test, a series of conditions the plaintiff must demonstrate exist before a request for an injunction will be granted.*

*The outcome of this case has, we believe, been poorly reported by many in the press. Many writers spun this case as a strike against "patent trolls," companies that buy up patents for the purpose of generating revenue from them via licensing. But this point has been greatly overstated. To help us understand more fully the ramification of the Supreme Court's ruling, we spoke to Michael Jacobs and David Melaugh, both attorneys at Morrison & Foerster LLP. (For you Linux fans out there, Michael and David are representing Novell in its copyright dustup with SCO.)*

**Let's discuss the four factor test the Supreme Court established for adjudging patent disputes. The court stated that before granting an injunction, a plaintiff had to demonstrate that 1) it has suffered an irreparable injury, 2) that other available remedies, such as monetary damages, aren't sufficient to compensate for that injury, 3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted and 4) that the public interest would not be disserved by a permanent injunction. Many writers commenting on this decision thought that this was a new approach to patent law, but this isn't true, is it.**

No, it's not. What the Supreme Court did in this case (and this has great significance for other cases coming up before the court) was reassert its supremacy in patent litigation. Patent cases are first heard in district courts, general venues that consider all forms of litigation. But appeals are handled by the Court of Appeals for the Federal Circuit. This is not a regional appeals court, but a specialist court in Washington, D. C. that deals primarily with patent litigation.

The Supreme Court held that the Federal Circuit, over time, has departed from the standard approach to injunctive relief, ruling that an injunction was an essentially automatic penalty to be applied once a plaintiff had proven infringement *(continued on page three)*

## How to Build an Effective Affiliate Program, Part III of III

by Ted Finch, Chanimal

In my last article, I focused on the software choices you have for managing your affiliate program. Regardless of what system you pick, it should incorporate the following:

- The ability to customize the signup form with additional questions, extensive look and feel settings, and auto-lost password retrieval.
- E-mail notification to the administrator and affiliates after signup (so we can initiate the enablement process) and the ability to auto-register or require pre-authorization (so we can qualify potential candidates).
- Excellent stat reporting so we can manage and classify our affiliates, evaluate their contribution as a partner, and allow affiliates to see who is buying.
- The ability to easily adjust commissions, setup promos, integrate with popular accounting systems, and provide affiliate payout reports.

Now, I'd like to step through a recent campaign I executed for a software company. This program took two weeks to setup and was executed and managed by a college intern (who later turned into a full time employee). The program's goal was to recruit 150 active affiliates within a year (this goal was reached in four months).

- Prospective affiliates were located by registering on targeted affiliate directories, contacting relevant trade associations, visits to competitive web sites, interaction on targeted forums, visits to the websites of companies targeted as likely customers, and the limited purchase of some mail lists broken out by SIC codes (the lists included phone numbers and websites). This process took approximately three weeks to complete.
- A series of three highly personalized E-mail letters were then created and sent to prospective candidates three days apart (avoid the use of canned letters). Response to the mailings was respectively 1%, 3%, and 5%. The letters were highly informational, used industry-specific language, avoided a hard sell, and discussed creating a partnership, not joining an affiliate program. Feedback from the campaign was used to further identify likely customers. Another point is that each letter contained a valid contact phone number; in addition to encouraging the recipients to call to find out more about the program, the number also helped the E-mail make it through the spam filters. (Even with optimization, only 40% of these E-mails were read or received; delivery ratios can differ based on your market's technical expertise and ability to setup custom filters).
- Of those who responded to the E-mails, signup rates were close to 100%.
- After the third E-mail was sent, a follow-up campaign of three phone calls was made to the contact list. Approximately 40% of the contactees were reached directly via telesales, with 40% of them becoming affiliates. Of all affiliates joining the program, 10% were "self serve," with the rest having to be walked through the signup and implementation process.

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on the part of a defendant. What the Supreme Court has done is instruct the lower courts that the traditional four factor test, which has always been applied in all non-patent cases, should also apply to patent litigation. This case is a reaffirmation of a traditional approach, not the introduction of a new principle.

The significance of this is that the four factors are now litigable. Before, it was basically unheard of for an injunction not to be granted to the successful plaintiff. Now, though injunctions will still be the norm, defendants may sometimes convince a court to deny injunctive relief. The recent *z4 Technologies vs. Microsoft and Autodesk* case, where the district court in Texas denied the plaintiff an injunction, provides one look into the future of patent litigation in the software industry.

**Let's go through the four factors one by one. "The plaintiff has suffered an irreparable injury." It's hard to see how the plaintiff is suffering irreparable harm if the defendant is willing to pay royalties.**

The law and the court have reconciled this by saying the loss of the exclusivity is presumed, in most cases, to be irreparable harm. Copyright law provides a good example of what I mean by this. You've written a book about the high-tech industry called *In Search of Stupidity: Over 20 Years of High-Tech Marketing Disasters*. I decide to make a play from your book. You sue for copyright infringement and I say to you (and the court) "Hey, I'll be glad to pay you royalties from the proceeds of the play. You're not suffering irreparable harm!" I think you'd agree that's not a compelling argument—I've effectively granted myself a license to your work.

Now, in a case where the plaintiff is involved in broadly licensing its technology, the defendant might be able to rebut any presumption of irreparable harm, particularly if the infringement does not impact the plaintiff's overall business activities. (Say you've already licensed fifty plays from your book, and my play won't hurt your efforts to license more.) But don't be surprised if the monetary damages the defendant will pay are far stiffer than buying a license in the first place. From the court's standpoint, it is imposing a forced taking on the plaintiff. In many circumstances, the judge will allow the plaintiff to obtain more money as a result—a sort of "super royalty." Where an injunction is denied, we would not be surprised to see judgments that award double and triple the amounts you'd normally expect in an industry/market.

**Let's take the second factor. "Other available remedies."**

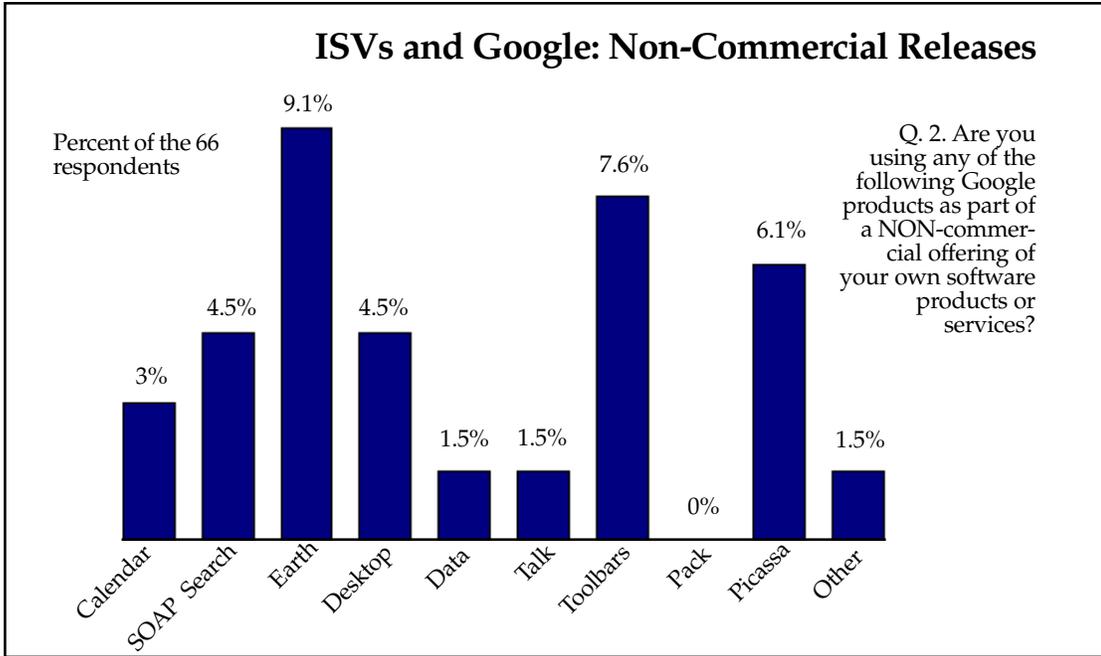
This will have some impact on the "trolls," but not as much as many people think. The classic "troll" model is to extract a little bit of license money from many people. That takes us back to the first factor—money damages are a remedy courts may hold can adequately compensate this sort of plaintiff. I don't think Big Pharma was badly hurt by this decision; their business model requires they turn their patents into products. *(continued on page six)*

**"Judges don't like having to impose 'forced takings' on a plaintiff. If you're found to be infringing, you may beat an injunction, but the cost could be very high."**

—David Melaugh  
Morrison & Foerster,  
LLP

**"The Supreme Court will be ruling on several important patent cases. One of the most significant deals with the standard for obviousness. The Federal Circuit has imposed a higher standard than the Supreme Court. This case, in effect, asks the court to ratify the Federal Circuit's 'modification.' Another important case will look at whether a company has to breach a patent agreement (and thus accrue potential damages) before they can challenge a patent license."**

—Michael Jacobs  
Morrison & Foerster,  
LLP



## Google Survey Part II: Google as a Platform

Highlights from our survey respondents:

- 40% indicated interest in at least one of the Google technologies (Q. 1-4)
- 26% are using Google technology on their company Web sites (Q. 1)
- 20% have released non-commercial software using Google technologies (Q. 2)
- 5% have released commercial software using Google technologies (Q. 3)
- 29% are experimenting with or otherwise considering Google technologies (Q. 4)

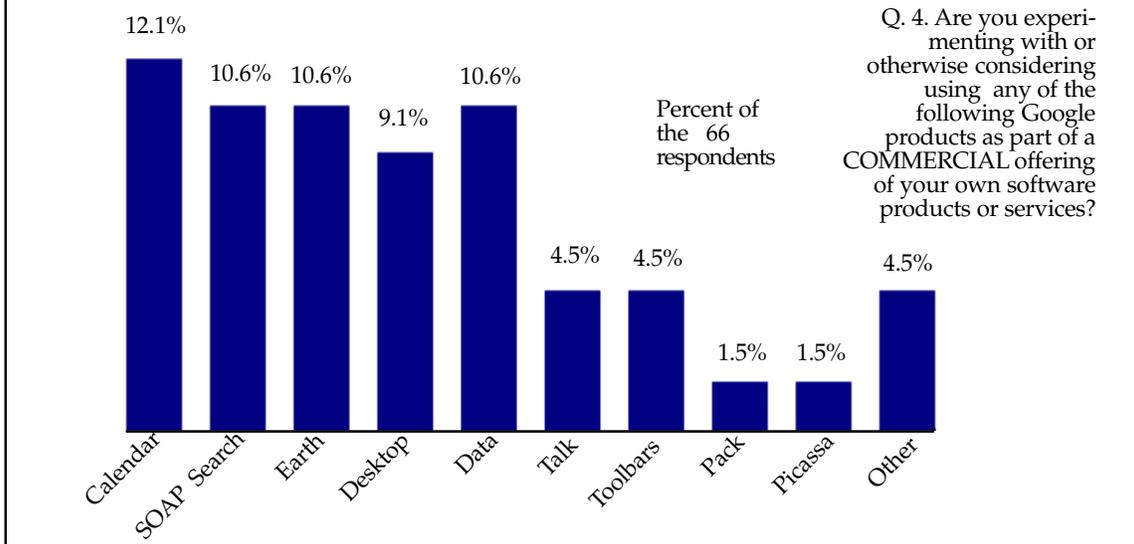
Soft•letter's first Google survey (05-31-06) dealt with ISV use of Google's means of promotion (AdWords, AdSense, etc.). Our second survey deals with ISV interest in and use of Google as a platform.

Google's effort to become a platform addressed itself first to geeks, who gladly took advantage of Google APIs to create "mashups" of their technology and Google's, particularly of Google Maps. For examples of their diversity and creativity, see [www.lifehack.org/articles/lifehack/essential-resources-for-google-maps.html](http://www.lifehack.org/articles/lifehack/essential-resources-for-google-maps.html).

This relative openness of Google has encouraged a rapid spread of the Google APIs among developers in a viral fashion that resembles the Open Source phenomenon (although the software underlying the APIs is closed); it also smacks of Anderson's Long Tail-effect (<http://longtail.typepad.com/>) of a large object being steered by a great number of small impulses.

Soft•letter wondered how far the mashup trend had spread into ISVs, and our survey has given us some answers. We believe we are seeing a beginning of ISV interest in the Google APIs. Google has set the example by first offering promotional help for vendors, then offering the APIs for promotional purposes, and is only now finding its way to licensing terms for the various technologies. Google Maps began the mashups craze; Google Earth is the first Google API with commercial licensing.

## ISVs and Google: Potential Commercial Releases



This commercial availability has spurred 29% of our respondent ISVs into “experimenting with or otherwise considering” a commercial release of their software using Google Earth, and 4.6% have actually taken the plunge into commercial release of such software. If these figures seem low, remember that they represent interest focused on a fraction of the Google technologies available.

Our first question to the ISVs explored their use of Google’s free promotional technologies: 1. Are you currently enhancing your company’s Web pages with any of the following? 11% of the ISVs said they were using the Maps and Sitemaps tools; the Google Web Toolkit was least popular, and the AJAX Search was in between with 8%.

Question 3—Are you using any of the following Google products as part of a COMMERCIAL offering of your own software products or services?—was intended to be the key question and explore the commercial reality of current software releases incorporating Google technology. But because Google Earth is the only technology with commercial licensing, it is the only product to show up among the ten technologies we asked about.

Questions 2 and 4 (see the charts) show the potential of the market. There is significant non-commercial development. It is non-commercial because currently only Google Earth offers a commercial license. Presumably both Google and the implementing ISVs are studying the technology and the market to see which products (both Google’s and the ISVs’) will make it to the commercial market. A large proportion of ISVs are trying out or considering the technologies.

At this stage it is impossible to see what will be done with all these APIs. Just as the long list of Map mashups given above shows great diversity, the long list of Google APIs and their many uses does not begin to show us the complexity of what will eventually be done with them.

And the one question no one can answer at this time is whether commercial mashups will turn out to be a fad, a market failure, or the heralds of Enterprise Web 2.0.

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Also look to see whether the licensing firms change their business approach. Some licensors will set up programs that formally offer their patented technology for commercial development to firms within a particular market. When companies refuse to engage because there's a dominant player in that space (for example, eBay in online auctions), the plaintiff will have strengthened their position on the issue of irreparable harm because the loss of exclusivity also means the loss of their potential business.

**The third factor. "Balance of hardship."**

This argument is going to be difficult for defendants to make. In the copyright context, we've seen cases granting injunctive relief that would severely damage the defendant's business. A defendant is going to have to make a very compelling business argument, and must also demonstrate (tied in to the first two factors) that the denial of an injunction will do the plaintiff little harm. In the z4 case, which involved Microsoft's product activation technology, the company made the argument that if it had to turn off its activation servers as part of an injunction, all sorts of awful things would happen, such as people buying pirated copies of Windows with viruses in them and such. The court bought the MS argument, when coupled with an argument that z4 would not be harmed as it could still market and license its activation technology to other software companies.

**Hmmm. In light of Microsoft's WGA notification program and the proposed Windows "kill switch," I find this somewhat ironic. OK, the fourth factor? "Public interest?"**

In the copyright context, courts have consistently held that the exclusivity inherent in copyrights creates a presumption that injunctive relief is in the "public interest." There is no reason to think they won't do the same for patents. Unless your software provides a cure for cancer or is used to inoculate people against a deadly virus, it's going to be hard for a software company to rely on this factor as protection against injunctions. This is an area where pharmaceutical plaintiffs have more to worry about.

**Let's look into the future a bit. In how many cases can we expect the court to, in effect, set licensing terms for plaintiffs in patent cases?**

Most patent cases are settled before going to court. I don't have exact numbers, but Wayne Paugh, the former Chief of Staff for the United States Patent and Trademark Office, recently estimated that "only about 100 cases go to trial each year." Plaintiffs win in about 55 to 60 of these cases.. I'd estimate that in only about five to 10 cases per year will the courts end up acting as defacto licensors, denying injunctive relief based on the application of the four factors.

**How do you think the results of the case will impact future patent litigation? Both from the plaintiff's and defendant's viewpoint?**

For defendants, you're going to have a small but definite shot at avoiding an injunction. Balance that possibility with an increased chance of paying "super royalties" if you're found to be infringing. Be prepared to advise your senior executives and the board that the law is evolving and it is unclear how often injunctive relief will be denied plaintiffs. Defendants will still have to plan on injunctive relief in any case and damages will accrue. There aren't many changes from the plaintiff's side; the potential upside remains good on both the monetary and injunction fronts.

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## Liabilities, Liabilities, Liabilities...Is That All You Can Think About? Part I of II

By Mark S. Reed, Corum Group

Many sellers think negotiations are nearly finished when agreement is reached on a deal's value. But some of the hardest battles are waged on how the buyer and seller will share risks after the M&A transaction closes. Negotiation of the seller's representations, warranties, and indemnification is one of the most difficult aspects of a transaction; this is where many deals fall apart, especially when sellers are unprepared.

The seller's "representations and warranties" are statements the buyer wants the seller to make about the nature and condition of their company. "Indemnification" provisions put teeth into the reps and warranties by exposing the seller to financial risk if the company doesn't measure up. Since the buyer drafts the initial language for the M&A agreement, it's not surprising that the allocation of risk favors the buyer and potentially exposes the seller to liabilities that may far outweigh the benefits of the transaction.

Reps and warranties cover all aspects of the seller's business, such as financial condition, legal matters, tax matters, intellectual property ownership and infringement, products and technology, employee relationships, facilities and equipment, customer and vendor relationships, and other important factors. The buyer will want the seller's "guarantee" about these aspects of company operations to be as broad as possible, sometimes extending into areas where the seller might have no knowledge and to areas outside his control. Extensive reps and warranties can create such a broad set of liabilities for the seller that the entire transaction consideration is at risk.

The seller's first challenge is to ensure the scope of the reps and warranties is reasonable. The seller should ensure the reps and warranties are relevant to their business and qualified appropriately based on materiality and the seller's knowledge.

A second way to reduce the seller's liability is to create disclosure schedules that identify areas where the seller's business might not conform to the language of the reps and warranties. It is essential for a seller to very carefully review these and fully disclose any situations that may not comply. Once an issue is disclosed on a schedule and accepted by the buyer, the seller's liability is eliminated or reduced for that issue.

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Company/Description	Acquired by	Price/Terms	Revenues	Multiple
<b>Mercom Systems</b> • Performance evaluation solutions	Verint	\$35,000,000 Terms: Cash	\$16,000,000	2.19
<b>Mercury Interactive (MRQ.DE)</b> • Application performance monitoring	HP (HPQ)	\$4,500,000,000 Terms: Cash	\$775,20,000	5.80
<b>WatchGuard Technologies</b> • Unified threat management solutions	Francisco Partners	\$151,000,000 Terms: Cash	\$77,100,000	1.96

**CORUM**

## Web Clipping Services

- **BurrellesLuce** ([www.burrellesluce.com](http://www.burrellesluce.com)): Well-known PR service that offers the Cyber Talk web clipping system.
- **CyberAlert** ([www.cyberalert.com](http://www.cyberalert.com)): System can monitor blogs, forums, TV, and websites.
- **Google Alert** ([www.googlealert.com](http://www.googlealert.com)): Free Google service that can be configured to act as a fairly effective web clipping service.
- **SmartBrief** ([www.smartbrief.com](http://www.smartbrief.com)): Service provides free clippings from hundreds of vertical publications.
- **Webclipping.com** ([www.webclipping.com](http://www.webclipping.com)): Service that claims to have more comprehensive coverage than Burrelle's. Currently offering a free two-week trial.
- **Website-Watcher** ([www.aignes.com](http://www.aignes.com)): Inexpensive desktop product that constantly monitors websites, forums, etc for user-defined terms and search criteria.

**COLUMNIST LARRY SELTZER ON "DOMAIN TASTING."** "It all started with a message from a reader. She was planning to put a Web site up and needed to register a domain name. She chose to use her first and last names for the domain (just as I own larryseltzer.com) and checked it on at least one service for availability. She went back in a day or two to register it and, lo and behold, it had just been registered to an outfit named Chesterton Holdings." (Quoted on <http://www.eweek.com/article2/0,1895,1991365,00.asp?kc=EWSTEEMNL072006EOAD,07/19/2006>)

**COLUMNIST STEVEN J. VAUGHAN-NICHOLS ON MICROSOFT'S MSDN PROGRAM:** "MSDN isn't cheap, but for Microsoft developers it's worth every penny. Open-source sites like SourceForge are very handy, but they're more useful as project incubators than as educational sites. No, open source and Linux don't have anything to match MSDN." (Quoted on <http://www.linux-watch.com/news/NS5991301042.html>, 07/25/2006)

**DESKTOP PIPELINE DAVID DEJEAN ON THE WINDOWS INSTALL:** "The typical Windows installation has become a production worthy of Cecil B. DeMille, with the blessings and curses of the license agreement, the shriek of your hard drive as temp files are copied, directories initialize, cab files spring into being, registry entries are set, and DLLs are sprinkled across your hard disk like seed across a field." (Quote on [http://www.desktoppipeline.com/blog/archives/2006/07/the\\_drama\\_queen.html](http://www.desktoppipeline.com/blog/archives/2006/07/the_drama_queen.html), 07/21/2006)

**ENTREPRENEUR MARK CUBAN ON WEB 2.0:** "Not as exciting as going from DOS to Windows. Not by a long shot. Heck, it's not as exciting as going from WordStar and all its keyboard combinations to WordStar 2000 was. Now that was progress!" (Quoted in *InformationWeek*, 07/25/2006)

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Subscription rates: \$395 worldwide.  
Subscription office:  
United Communications Group, 11300 Rockville Pike, #1100, Rockville, Md. 20852-3030;  
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