



## Holme Roberts & Owen LLP

*Attorneys at Law*

### HRO CONTACTS

*In Boulder*

**Jason D. Haislmaier**  
jason.haislmaier@hro.com  
303-417-8503

**Craig C. Garby**  
craig.garby@hro.com  
303-417-8548

**Kara L. Rigney**  
kara.rigney@hro.com  
303-866-0549

*In Denver*

**Lynn P. Hendrix**  
lynn.hendrix@hro.com  
303-866-0460

**Jan N. Steiert**  
jan.steiert@hro.com  
303-866-0412

*In Colorado Springs*

**Susan D. Campbell**  
susan.campbell@hro.com  
719-381-8451

**Steven B. Smith**  
steve.smith@hro.com  
719-381-8457

*In London*

**Zarko Iankov**  
zarko.iankov@hro.com  
+44 207 320 6464

*In Munich*

**Jens Roehrborn**  
jens.roehrborn@hro.com  
+49 89 38 39 80-120

**Peter Katko**  
peter.katko@hro.com  
+49 89 38 39 80-130

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*Advertising Material*

# Intellectual Property Law Alert

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## WHY YOU SHOULD CONSIDER AN OPEN SOURCE SOFTWARE COMPLIANCE STRATEGY

By the end of 2004 a majority of all US companies are likely to be using open source software (OSS) in some form. Some of these organizations may make an active and informed decision to begin using OSS, but, a surprisingly large number will likely begin using OSS without much visibility by management. By inadvertently using OSS, these organizations place themselves at risk of unintended violations of OSS licenses and loss of their intellectual property rights. With the growth in OSS usage predicted to continue, you should understand the risks that OSS potentially poses to your organization and consider whether you need to develop a compliance strategy to address those risks.

*If you are not already familiar with OSS, please refer to the HRO web site at <http://www.hro.com/pubs/opensource1.pdf> for additional background information on OSS.*

## KNOWING THE RISKS POSED BY USING OSS

While many of the risks posed by OSS are similar to the risks posed by proprietary software, OSS does pose a number of unique risks. The chief legal risks posed by using OSS relate to:

- Interpretation and compliance with applicable OSS licenses;
- Claims of intellectual property infringement; and
- Absence of warranties and indemnifications in OSS licenses.

Guidance recently released by the Federal Deposit Insurance Corporation (FDIC) (See <http://www.fdic.gov/news/news/financial/2004/FIL11404a.html>) describes these risks, as well as other strategic and operational risks relating to the use of OSS. While the guidance was released by the FDIC, the risks described are applicable to all organizations. We suggest that you become familiar with the risks of using OSS as they apply to your organization and develop a strategy to address these risks.

## TAKING PRACTICAL STEPS TO EVALUATE THE RISKS

OSS does not impact all organizations in the same way or to the same degree. The risks posed by OSS to your organization will vary depending on the way and the extent to which you use OSS. You should evaluate your OSS usage situation before developing a strategy to address these risks. Your evaluation should include the following three steps:

- *Identify All Uses of OSS and Make Every Use of OSS a Known Use*

Unlike proprietary software licenses, OSS licenses often do not require the payment of a fee or the execution of a written document. Typically, all that is required to enter into an OSS license is the act of downloading and using the OSS. This means that OSS often enters an organization outside of traditional procurement processes for proprietary software and often without the knowledge of management. Many organizations find out after the fact that their developers have made use of OSS in the organization's software or IT infrastructures, or that OSS has entered their organization as part of proprietary software licensed or acquired from a third party.



## Holme Roberts & Owen LLP

*Attorneys at Law*

*In Salt Lake City*

**Thomas J. Rossa**  
thom.rossa@hro.com  
801-323-3279

**David O. Seeley**

david.seeley@hro.com  
801-323-3274

**Jeffery M. Lillywhite**

jeff.lillywhite@hro.com  
801-323-3215

*In San Francisco*

**Ola L. Clinton**  
ola.clinton@hro.com  
415-268-1966

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You should perform an internal review to determine if OSS is used (knowingly or unknowingly) by your organization and update your software procurement policies to prevent OSS from entering your organization without proper approval.

- *Maintain A Record of All Applicable OSS Licenses*

At present there are over 50 different OSS licenses (See <http://opensource.org/licenses>). Like proprietary licenses, OSS licenses impose legal obligations on the parties to the license. These obligations can be complex and ambiguous. Your organization's breach of these obligations (even unknowingly) can lead to automatic termination of the rights granted under the OSS license. Because the obligations and penalties under each license are different, overall OSS compliance requires an understanding of the terms of each license to which your company may be subject.

Merely knowing that you use OSS is not sufficient. You should also develop and maintain a record of all licenses applicable to any OSS that enters your organization and the source from which the OSS was obtained.

- *Understand Where and How OSS is Being Used*

The obligations imposed by OSS licenses can vary dramatically based on the circumstances under which you use OSS. Certain uses under a given license may impose few obligations on the licensee. Other uses, however, may have potentially severe consequences, such as obligating the licensee to make publicly available the source code of proprietary software that is distributed with the OSS. Understanding the circumstances under which you use OSS is an important step in understanding the obligations imposed by the applicable OSS license.

As part of your OSS evaluation, you should understand the circumstances in which OSS is being used by your organization. Relevant questions include whether the OSS is being distributed outside of your organization and how (if at all) the OSS interacts with your proprietary software.

### DEVELOPING AN OSS COMPLIANCE STRATEGY

Whether your organization is using OSS or interested in preventing the use of OSS, developing an OSS compliance strategy frequently involves seeking the assistance of legal counsel knowledgeable in the risks of using OSS. The attorneys in the *HRO IP Group* know and understand the risks of using OSS. We have helped clients in the US and abroad develop and implement OSS compliance strategies. Please contact one of the HRO attorneys listed in this *HRO Client Update* for more information regarding how HRO can help your organization develop and implement an OSS compliance strategy that keeps you prepared to deal with this rapidly growing new area of technology.

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