The Defensive Patent License

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Solutions to the Software Patent Problem
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PROBLEM

Innovation in the shadow of software patents*

Especially for Open Innovation Communities
   FOSS
   Open Hardware
   Mixed- or Sole-Strategy Companies

Also a problem for non-OIC tech companies

*Overbreadth and other quality problems with software patents
POSSIBLE SOLUTION: DEFENSIVE PATENTING

“If you can’t beat ‘em…”

(Or, “If we’re getting patents anyway…”)

Seek patents to *deter* offensive lawsuits, not for licensing or exclusion purposes

In theory, only asserted in response to litigation

In patent-heavy industries with well-resourced competitors, often leads to cross-licensing détente

Requires some level of overlapping technology

Dealing with software patents, specifically: “your broad, vague patents can be matched by mine”
THREE POTENTIAL USES FOR DEFENSIVE PATENTING

Patent threats between competitors
Patent threats from bullies
Patent threats from trolls
WHY DON’T SMALL FIRMS AND FOSS PROJECTS PATENT DEFENSIVELY?

Current model requires concentrated costs and benefits

• Legal, information/search, transaction costs to build portfolio and fight back against threats
• Start-ups and FOSS projects generally lack these resources; but see OIN (Oracle, IBM, NEC, Novell, Philips, Red Hat, and Sony)

Cultural and political opposition to software patents

• Used by bad actors: anti-competitive, bullying, trolling
• Inappropriate SM: patenting math, laws of nature
• Recent lawsuits not building confidence in the patent system…

Mistrust of “defensive” commitments and longevity
THE DPL

Distributed network of defensive patents
Distributed license structure similar to GPL/CC
Licensor offers [entire] patent portfolio under DPL

- Automatic NE, RF, perpetual, worldwide licenses to all comers who also commit to offering their portfolios under the DPL
- Irrevocable unless (1) licensee sues DPL user non-defensively or (2) stops offering own patents under DPL

DPL users may continue to license or litigate against parties outside the network (those not using the DPL)

DPL users may stop offering DPL with appropriate notice

- We are currently considering six months as appropriate
- Previously issued licenses to other DPL users remain in effect after a party leaves
  - But see Hayes/Schulman “sticky”/”non-sticky” idea
- Leaving users’ DPLs may be revoked at each licensor’s discretion

DPL obligations “travel with the patent”
HOW THE DPL COULD HELP

Distributes both costs and benefits via network effects

- Costs of patenting are distributed to those who can afford them or already need to patent; possible pro bono help
- All users benefit from each commitment to defense
- Eliminates info, injunction, litigation costs w/in network
- Costs of cross-licensing are low as with GPL and CC

Uses high legal, information, and transaction costs of patent strategy to encourage growth of network

- High info costs & risks vs. commitment to defense and associated certainty may incent new firms to join network, increasing its value

Provides legally binding commitment to defense: multi-lateral disarmament

- Licensees can stop worrying about particular patents coming back to haunt them, even if ownership changes

Promotes “Safer Patenting”

Supports OIC cultural and political norms

- IP used to promote freedom to innovate, access to knowledge, and protection from legal constraint
- Like instrumentalist approaches of GPL and CC in using copyright

Technology Neutral

Can be done NOW, entirely through private choice

- No changes in examination, PSM, claiming needed
- But can work along with these solutions

Co-exists peacefully with other solutions
WHAT ABOUT TROLLS?

Defensive patenting generally ineffective because trolls do not make, use, sell, or offer for sale

But a true, permanently defensive patent has little value to trolls: safer patenting!
WHAT ABOUT PATENT QUALITY?

Patents are the best prior art
DPL users should support other ideas for increasing patent quality and clarity (Menell, Lemley, Chin, others)

WHAT ABOUT PATENTABLE SUBJECT MATTER AND CLAIMING?

Encouraging networked defensive patenting is indeed a second-best solution
Can absolutely work in connection with other ideas for tweaking examination, etc
CONCERNS

Need overall patent system reform

  Patentable subject matter
  Patent overbreadth and vagueness

Technical and Practical Concerns:

  • Network has to hit a size threshold for some benefits to kick in
  • Weak incentives to patent and/or join
  • Adds to patent thicket
  • No requirement of mutual defense
  • Too much to ask for whole portfolio [could be by standard or technology]
  • Too hard to leave
  • Too easy to leave
  • Antitrust concerns, especially in EU
  • Gaming the system/free riding/bankruptcy
THANKS!

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Paper:

Op-ed:

David Hayes and Eric Schulman response: