

CHAPTER 5: OPEN SOURCE: THE WAR THAT BOTH SIDES WON - SUPPLEMENTAL MATERIAL

HEATHER MEEKER

From the book [The Next Wave of Technologies: Opportunities in Chaos](#) by Phil Simon

Patents

If the intellectual property lawyers who believed open source too dangerous to use were the alarmists of the 1990s, then the open source advocates themselves are the alarmists of the 2000s. But their fear is different—it is the fear of software patents.

The GPL itself says, “any free program is threatened constantly by software patents.” But in practice, that has been a bit like saying that anyone buying a scratcher is under constant threat of winning the lottery. In fact, there has been minimal enforcement of patent rights against the use of OSS at all, and no significant open source project has ever been stopped because of a patent suit. In fact, open source and software patents have coexisted for over a decade. The friction between them has generated a lot of rhetoric, but neither is at risk of surviving at the other’s expense. Similar to the alarmism over open source infringement that was expressed by IP lawyers in the 1990s, patent alarmism is based on a theoretical risk that does not materialize. But if you think more subtly about how open source and patents interact, it’s easy to understand why it has not materialized and is not likely to do so.

People are afraid of patent lawsuits because they are expensive to defend. But they are also expensive—very expensive—to prosecute. The average patent infringement suit requires a war chest of about \$2 million. Due to changes in the law over the last few years, injunctive relief—court orders to stop selling products due to patent infringement—are more and more difficult to get. Therefore, no one without an economic incentive brings a patent lawsuit. Patents are, quite simply, tools of business. Patent lawsuits are not about pain and suffering. Damages for patent infringement are economic, and patent lawsuits are business competition tools.

There are two kinds of patent plaintiffs—strategists and trolls. The strategist seeks to gain a commercial advantage by preventing its competitors from selling competing products. Imagine you have invented a better mousetrap. You get a patent covering the improved mousetrap and start selling them. Your competitor builds a similar mousetrap and sells them, too. You can use your patent to prevent your competitor from copying your invention (by asking the court for an injunction) or pay you damages equivalent to a reasonable royalty for your invention (which should make the competitor’s invention more expensive than yours). What most people today forget is that the patent system protects big and small inventors alike. Imagine the following:

- There is no patent system.
- You are a small business person.
- Your competitor is a corporate behemoth.

The bigger competitor would always be able to reap economies of scale in production. So, absent a patent system, the big company would always win. It is true that the small company may be hard pressed to pay the legal fees to sue the big company. But at the same time, the big company has more to lose. This is how strategic patent litigation works.

The term “patent troll” was coined to describe a company that enforces patents, but not for strategic gain. The “troll” is not an ugly plastic doll with violet hair—it’s the kind that waits under a bridge and demands its toll for you to pass. Patent trolls are, in a way, the personae non grata of the intellectual property world. The patent troll sells no products, and only seeks money damages. The existence of trolls is enabled by a rule of U.S. law that one is not required to actually practice a patented invention in order to enforce the patent. A patent is merely the ability to exclude, and it can be used to exclude everyone from making products, even to the extent that no products are made. Imagine that the poor mousetrap inventor, beleaguered by competing with the big boys, sells his patents to a troll, takes a payday, and moves to a tropical island. The purchaser of those patents may have no interest in actually making mousetraps, but may have a war chest to sue the big company for patent infringement, and make a business out of that.

Are patents morally right? Should software patents be allowed? These are legal policy discussions about which much has been written. Free software advocates are quick to point out the immorality of a patent system that prevents the community from giving away products they build themselves. However, that is an argument against the patent system, not software patents. Whether that is for the best is an interesting question for politicians and visionaries. For IT managers and CEOs, the more interesting question is whether OSS is more threatened by software patents than any other software. In fact, it is most certainly less true of OSS than proprietary software.

First, patent trolls have no reason to pursue non-commercial open source projects. Trolls want money and most open source projects are usually non-profit efforts. Trolls are fond of suing big organizations for patent infringement, and they don't care whether those patents read on OSS or not. Organizations worry that, because OSS is usually provided "as is," they cannot look to a commercial supplier to defend them from patent suits that might arise. But if you think this makes trolls more likely to sue, then you have never talked to a personal injury lawyer. Having an insurer makes you a bigger lawsuit magnet, not a smaller one. The golden rule of the plaintiffs' bar is never to sue people without money.

Second, strategic plaintiffs might sue for patent infringement accusing OSS, but doing so is a scorched earth public relations policy. SCO, a UNIX vendor that sued IBM relating to Linux in 2003, proved this by engaging in a very public anti-open source lawsuit, and promptly nearly going out of business. Although some organizations have sued others for patent infringement relating to products that use open source (such as the Microsoft vs. TomTom[i] case in 2009), these suits are not necessarily directed entirely at open source. The fact is that even strategic patent suits that accuse open source are mostly the battles of titans. What makes a software product a patent infringement target is that it is a commercial product, not that it is an open source product.

There are other reasons that open source can be more robustly defended against patent lawsuits. The unfettered ability to change it means that no one has to rely on a vendor to mitigate damages. Open source itself creates a huge body of prior art that can be used to invalidate patents or prevent them from being issued. But most important, any claim of patent infringement against an open source product is followed immediately by a community outreach effort to engineer around the accused functionality. This is exactly what happened in the Jacobsen v. Katzer and Microsoft v. TomTom cases.[ii]

The bottom line is that the sky is not falling in on open source—not because of copyright infringement and not because of patent infringement. Those organizations who assessed the intellectual property risk intelligently—or merely ignored it—in the 1990s made the right choice, and those that put a great deal of energy into calling it "viral" and trying to eradicate it have engaged in a colossal waste of time.

Notes

[i] The complaint is available at [Notes<http://www.scribd.com/doc/12875120/Microsoft-v-TomTom-Complaint>](http://www.scribd.com/doc/12875120/Microsoft-v-TomTom-Complaint).

[ii] See the call to find prior art in Jacobsen v. Katzer from Groklaw at <http://www.groklaw.net/articlebasic.php?story=20060514233436196> and reports of engineering around the FAT patent in <http://arstechnica.com/open-source/news/2009/07/vfat-linux-patch-could-circumvent-microsofts-patent-claims.ars>.
