PIERCE LAW
FRANKLIN PIERCE LAW CENTER

Patents and Free Software

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Questions

- Can patents and free software coexist?
- Are patents prejudiced against free software; do they prefer closed source software?
- Can free software developers or distributors benefit from patents?
- How can the risk posed by patents to free software be mitigated?

Patents and Free Software: A Peaceful Coexistence

- Similar goals
- Not mutually exclusive: e.g., IBM, HP, Intel, Sun
- Threat of Patents to Free Software is No More than that Posed to Closed Source Software, Potentially Less
  - Distribution Method Irrelevant to Patent Scope
  - Injunctions Against Free Software Less Likely
  - Exposure to Damages Commensurate to Ability to Defend

Ways to Convey Permission to Practice U.S. Patents

There are several ways for a third party to receive the legal right to practice technology patented in the U.S.

- Express License: Many Open Source Licenses Have This
- Equity (Laches and Estoppel): Cannot be Preordained
- Implied License: “No formal granting of a license is necessary in order to give it effect. ***Any language*** used by the owner of the patent, ***or any conduct*** on his part exhibited ***to another from which that other may properly infer that the owner consents to his use of the patent*** in making or using it, or selling it, upon which the other acts, ***constitutes a license***.” *De Forest Radio,* 273 U.S. 236 (1927).

GPL Silence = Implied License

GPL Contains No *Express* Patent Grant or License

- Does that mean ***NO*** Patent Permissions are Conveyed?

"Generally, when a seller sells a product without restriction, it in effect promises the purchaser that in exchange for the price paid, it will not interfere with the purchaser's full enjoyment of the product purchased. The buyer has ***an implied license under any patents*** of the seller ***that dominate the product or any uses of the product to which the parties might reasonably contemplate the product will be put***." Hewlett-Packard Co. v. Repeat-O-Type Stencil Mfg. Corp., Inc., 123 F.3d 1445 (Fed. Cir. 1997).

Issues for GPL'd Software: "seller" "sells"; "without restriction"; "any uses … to which the parties might reasonably contemplate."

Law of Implied Patent License Comports with Goals of Free Software

"Unless the parties provide otherwise, ***the purchaser of a patented article has an implied license not only to use and sell it, but also to repair it to enable it to function properly***. This ***implied license covers*** both the original purchaser of the article and ***all subsequent purchasers***." Bottom Line Mgmt., Inc. v. Pan Man, Inc., 228 F.3d 1352 (Fed. Cir. 2000).

==> Result is a Positive Network Effect: The entire community that participates in GPL'd software improvement benefits from all implied patent licenses made to any member of the community.

GPL Ensures Software Avoids Patents

§ 7: "If … conditions are imposed on you (whether by court order, agreement or otherwise) that contradict the conditions of this License, they do not excuse you from the conditions of this License. … ***[I]f a patent license would not permit royalty-free redistribution of the Program,*** …***then the only way you could satisfy both it and this License would be to refrain entirely from distribution of the Program***.

It is not the purpose of this section to induce you to infringe any patents or other property right claims or to contest validity of any such claims; ***this section has the sole purpose of protecting the integrity of the free software distribution system*** …."

§§ 2(b) and 6: GPL'd software (and derivative works thereof) can only be distributed by you under the GPL … without any further restrictions.

Value of Patent Portfolios of Free Software Developers / Distributors?

Patents Remain Valid and Enforceable ...

- ... against any software other than the free software distributed by the patent holder; and
- ... against any party that does not, itself, comply with the applicable free software license in distribution of the free software distributed by the patent holder.

WRT Implied License, Can Always Make Express Statement

- IBM's Patent Grant
- Sun's CDDL and Recent Patent Announcement

Is Competitive Advantage Lost by Granting Patent License for Use in Free Software?

Mitigating the Risk Posed by Patents to Free Software

- Support Patent System Reform / Fight Patent System Deform

- Be Prepared
  - Educate Self About Risk and Responsibilities
  - Collect References That Could Be Prior Art
  - Make Redesign Simple / Possible
  - Save Pennies / Investigate Appropriateness of Insurance

- When Patents Attack
  - Coalesce All Interested Parties
  - Resolve in Compliance with Applicable License

Questions and Comments

- Patents and free software can coexist
- Patents are not prejudiced against free software; they do not prefer closed source software.
- Free software developers / distributors can benefit from patents.
- Several steps can be taken to mitigate the risk posed by patents to free software.

THANK YOU!

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