Hacking the Patent System

A Guide to Alternative Patent Licensing for Innovators

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Introduction to Alternative Patent Licensing

The patent system is intended to incentivize innovation, but the current system often does the opposite. The traditional model of patent licensing—whereby a company pays a patent owner to license an invention that the company legitimately uses—has been hijacked by non-practicing entities ("patent trolls") and other aggressive patent holders who assert overbroad patents that never should have been granted in the first place. Within this broken patent regime, companies are increasingly hacking the system—that is, finding alternatives to the traditional patent licensing model in order to both promote open innovation and protect the companies themselves. These patent system hacks can be organized into two broad categories: (1) defensive patent aggregators, which pool member companies' resources to defensively purchase patents for the group and to fight patent trolls, and (2) patent pledges, whereby companies opt to openly and defensively license their patents to others. This paper provides a guide to these alternative patent licensing options for small companies and startups that care about protecting themselves and not making a broken patent system any worse.

The Patent System Is Broken

The core purpose of the patent system is to incentivize innovation. Patents give inventors monopolies over their inventions for a period of time in order to allow inventors to recoup the costs of R&D and to generate profits that reward inventors' efforts—thereby encouraging future investments. In exchange, patentees dedicate their inventions to the public domain once their patents expire.

Yet, in many high-technology industries today, the patent system is a scourge on innovation. Patent trolls buy overbroad patents, often from bankrupt companies, for the sole purpose of extorting licensing revenues from companies that are actually innovating and creating new products. Overworked patent examiners increasingly grant overbroad, obvious, and non-novel patents—particularly on software. Some companies aggressively assert their patent portfolios to keep legitimate competitors out of the market entirely. Small companies are particularly vulnerable, since the cost of fighting a lawsuit (even a flagrantly frivolous one) could easily put a startup out of business. Faced with the constant threat of crippling litigation, small companies often perceive their best—or only—option to be laying low and hoping to stay off patent holders' radar.

Innovators Are Hacking the System to Use Patents for Good

Fed up with the patent mess left by Congress and the courts, companies are collaborating to formulate private solutions. These patent licensing alternatives broadly fit into two categories: defensive patent aggregators and patent pledges.

Defensive patent aggregators use membership fees to purchase patents and give perpetual licenses to members so that future owners of the patents (should the organization subsequently sell the patents) cannot sue members for infringement. Defensive patent aggregators are different from trolls because they buy patents solely for defensive purposes and promise never to assert

the patents they own. These defensive patent aggregators include Allied Security Trust, which uses a bidding system to distribute the cost of purchasing each patent among the members who are most interested in each patent; RPX, which buys patents and patent rights on behalf of all of its members; and Unified Patents, which focuses its patent purchases on specific technology areas.

Patent pledges are public commitments that companies make to license their patents in a manner that supports open innovation. By committing to the Defensive Patent License, for example, companies opt into a network in which each company has promised not to sue any other company in the network for patent infringement, except defensively. The Open Invention Network owns hundreds of patents that it licenses for free to any company that promises never to assert its own patents against Linux technology. Companies can also make pledges unilaterally. For example, in its Innovator's Patent Agreement, Twitter makes a commitment to its employee inventors that it will not make offensive use of any patent without the inventor's permission. Finally, through Google's License on Transfer Agreement, participants agree to license their patents to all other participating companies, but each license only becomes effective if the patent is transferred to a third party.

Each option described in this paper has tradeoffs both for individual companies and innovation as a whole. Patent pledges, for example, make a powerful public statement about a company's values, and can attract talent and publicity. On the other hand, pledging to openly license a patent might lower the patent's market value and, consequently, the company's value for potential buyers and investors. Defensive patent aggregators require annual membership fees that may be prohibitively expensive for some companies, but the licenses and patent intelligence services that come with membership may be well worth the cost for others. This paper explores these options and analyzes some of the drawbacks and benefits of each for small companies and startups, with the understanding that every company must consider its own unique situation in deciding whether to participate in any (or all) of these alternatives to traditional patent licensing.

Opting Out of the Patent System May Not Solve the Problem

Many of the patent licensing alternatives described in this paper—particularly patent pledges—assume that participants have obtained patents of their own. However, many innovators who have understandably lost faith in the patent system have opted out by declining to seek patents on their own inventions.

There are many reasons that companies may opt out of the patent system. Obtaining a single patent can cost $20,000 in legal fees, if not more, and the process can take years. Some conscientious employees may be reticent to patent their inventions and assign them to the company out of fear that the patents will later be abused. Once a patent is obtained, asserting it offensively may reflect poorly on the company, alienating current and potential employees as well as the public. If the company were to fail, the patents would likely be sold, and might ultimately fall into the hands of a troll.

However, for companies that are concerned with both self-preservation and furthering innovation, there may be some inherent benefits of obtaining patents in the first place:

- First, patents can be used defensively in infringement lawsuits brought by competitors. Defendants in patent infringement lawsuits can countersue the plaintiff for infringing one of the defendant's own patents. This, of course, assumes that the plaintiff has products of its own that could infringe, which is not the case with trolls or other non-practicing entities like universities—but it makes patents valuable for defending against litigious competitors as well as deterring lawsuits from competitors in the first place.

- Second, patenting an invention clarifies the prior art and can help prevent future patents on overbroad or obvious technologies. All patented inventions must be novel and non-obvious. When determining whether to grant a patent, patent examiners in the U.S. Patent and Trademark Office look for "prior art" that evidences that the technology had been invented before or is obvious in light of previous inventions. Patent examiners have limited time to conduct their research, however, and often miss important prior inventions. One of the most important sources for identifying prior art is other patents. Patenting an invention thus helps clarify who invented what, and can help to prevent bad, obvious, or overbroad patents from being granted in the future.

- Third, patenting an invention may help prevent others from claiming it as their own. Keeping an invention a secret rather than patenting it runs the risk that another company could independently invent and try to patent the same thing. (Patent law includes a prior use defense, but only if the original inventor was using the invention more than one year before the subsequent inventor filed its patent, and even then there are limitations to how the original inventor can use the technology.) Original inventors can also simply publicly disclose the invention without filing a patent application, which may serve as prior art to prevent others from patenting the disclosed invention.

For companies that choose to obtain patents rather than opting out of the patent system entirely, the alternative patent licensing options described in this paper provide opportunities both to engage with the patent system and to use patents for good.

Defensive Patent Aggregators

Defensive patent aggregators use the pooled resources of member companies to purchase patents that may otherwise have been purchased by trolls or aggressive companies and asserted against members. After purchasing each patent, aggregators grant perpetual licenses to their members, so that even if the patent later falls into a troll's hands, the patent can never be asserted against those members. Aggregators typically charge an annual membership fee that is calculated based on each company's size. Many aggregators also offer patent intelligence and other services to members.

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