

Silicon Flatirons

Patents and Free and Open Source Software

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On April 29, 2010, Silicon Flatirons presented a conference entitled Patents and Free and Open Source Software. While both patents and open source have received credit for a great deal of technology innovation, this conference explored what happens when the two meet in a single system. Research Fellow, Wendy Seltzer, organized three distinguished panels, each followed by a short break for discussion.

The first panel, Open Source and Patent Business Model, was moderated by Paul Ohm, Associate Professor of Law at CU. This panel focused on how open source and patents are utilized and taken into account by entrepreneurs, venture capitalist, and established companies. Pamela Samuelson, Professor of Law and Professor of Information Management at Berkeley, spurred the conversation with a presentation on empirical research collected from software companies in 2008. The research answered the question: how do high tech companies value and incorporate intellectual property and open source within their business models?

Jason Haislmaier, Partner at Holme Roberts and Owen LLP, explained that when advising start-ups on these issues, it is about choosing the right tool for gaining and retaining their particular value and how their future investors will perceive the use of those tools. Managing Director of Foundry Group, Jason Mendelson, stated that he is not interested in patent portfolios and pointed out that, based on Samuelson's research, entrepreneurs are not interested in or incentivized by patents either. Stormy Peters then went into the details of the Gnome Foundation, of which she is Executive Director, and discussed the anti-patent culture in the open source community. She explained that in order to entice the open source community, companies may need to rethink the proprietary attributes of their software. Samuelson described previous research that confirmed hostility toward patents from open source developers and a resulting mixed strategy toward software IP for many companies.

Harry Surden, CU Associate Professor of Law, moderated the second panel focusing on open source and patent litigation. Lucky Vidmar, an associate with Greenberg Traurig LLP, began by stating that lawsuits accusing an open source product are rare and generally brought against companies that are targeted for competitive reasons (as opposed to open source developers). Julie DeCecco, Legal Director of the Litigation Department at Oracle America, Inc., then explained that because of the high cost of patent litigation, exposure to a lawsuit is directly related to the revenue brought in by a company. Jennifer Urban, Director of the Samuelson Law, Technology, & Public Policy Clinic at Berkeley, discussed the conflict between IBM and Turbo Hercules as an example of circumstances that attract litigation and the interesting terms and repercussions of the settlement between Microsoft and TomTom.

David St. John-Larkin offered insight into the pros and cons to the public nature of open source creative process, concluding that open source products may be easier targets for litigation in the future. Jason Schultz, Director of Samuelson Law, Technology & Public Policy Clinic emphasized the benefits of openness in litigation pointing out that the indexed history of open source software can help with defense assessment, while DeCecco emphasized the open source community's ability to organize quickly to perform collective prior art searching and complicate damages analysis.

Schultz and Urban then presented work on a defensive patent licensing system designed to create a larger network of and commitment to defense and deter offensive lawsuits. By using defensive patenting to create cross-licensing portfolios, companies can decrease information costs, threats to injunctive relief, and litigation costs and create greater certainty. While received with optimism, the distributed license structure was not seen as a solution to troll litigation. The panel also suggested strategies for companies that use open source to mitigate their risk to patent infringement, including issues related to indemnity clauses and disclaimable warranties.

The third panel discussed patents, standards, and the open source ecosystem and was moderated by Wendy Seltzer. Steve Mutkoski, Director of Interoperability & Standards at Microsoft, began by giving a short presentation framing issues surrounding patents and standards. Because technical standards may include patented technology, questions arise about the interplay between the proprietary licenses and open source licenses of standards. John Card discussed the standard making process explaining ANSI's role in guiding accreditation bodies and the tension between the open source community and the standards community.

Nina Wang, a partner at Faegre & Benson LLP, elaborated on the 802.11 standard for wireless communication explaining the transition that standards go through as their purposes change and how that complicates patent litigation. The Vice President of Video Technology Policy and Deputy General Counsel for CableLabs, Jud Cary, talked about innovations in standard development including the establishment of an LLC with elaborate bi-laws on IPR. Cary also mentioned that standards organizations may utilize open source for reference implementation in order to benefit from network effects and community maintenance.

Comparing the perspectives of patent holders and open source developers, Card explained that choosing a license requires that open source developers consider the constraints of patent liability and suggested a need for a fair use-like defense in patent law. Wang pointed out the limitations of patent pools saying there is a lack of incentives when competitors do not partake and likelihood of litigation is not diminished.

Card commented on increased integration of software into standards and the qualitative differences between the types of standards developed using the younger software disciplines and the more established engineering disciplines. Cary pointed to the Open Web Foundation, which is an open source model for drafting specifications, as an alternative standards drafting approach.

Mutkoski emphasized that the reference implementation should never be considered the standard because of the multiple ways of implementing a particular portion of the standard that leads to innovation.

Finally, panelists discussed changes needed in patented standards policy. Wang expressed a need for clearer disclosure principles. Mutkoski warned that commercial disputes among participants in the standard setting system should not drive policy. The need to incorporate a fair use concept when the government mandates standards was suggested by Cary. Card explained that the exclusion of monetary discussions in standards organizations has forced engineers to skirt around the topic and talk about practical implications in terms of complexity.