Defensive publications and other patent risk strategies

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About Armijn

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About patents

Patents are a time limited granted monopoly on an idea, in exchange for full disclosure of the idea

Owner of the patent can decide what to do if a patent is granted:

offensive:

license to third parties

force third parties off the market

defensive:

use as retaliation against patent lawsuits from others

Open source developers and patents

My experience: open source developers tend to not care about patents or patent risk reduction (but copyright and licenses are very important).

This leaves them, and their projects, potentially exposed.

Why:

- hating patents with a passion

- not wanting to participate in the patent system ("it should be abolished/reformed", "by participating I am strengthening it")

- actually not knowing what patents are

This is naive: the patent system will not go away anytime soon

Specific threats for open source

Specific threats for open source:

> Non-practicing entities (NPEs/trolls) are extracting value from the market, either by going after open source projects directly (example: GNOME) or companies using open source

> (hypothetical scenario) operating companies filing patents and contributing code under licenses without patent grant

There are cases known of NPEs tracking open source development and filing patents immediately (even though this shouldn't happen, because there is prior art, even if it is minutes old).

Why are patents granted on existing open source code?

Patents on existing open source code are granted. This is wrong, but it happens:

- examiners typically have very little time to do prior art searches (hours, not days or weeks)

- sources that examiners use are limited: patent databases, prior art databases. They do not look at:

  - conference papers

  - conference talks

  - source code/documentation

  - blog posts

We are not doing well at capturing ideas and presenting them to the patent offices in an effective way.

Defensive publications

Defensive publications are disclosures of prior art

  (typically) structured using similar language as patents

  not patents!

  prior art is time stamped and made available to patent examiners

Well known prior art databases:

  IP.com - pay per publication

  Technical Disclosure Commons (TDcommons) - free of charge

Publishing a defensive publication is not a guarantee for success, but should be treated like an insurance.

What else can you do to reduce risk?

Apart from defensive publications you can also:

use a license with an explicit patent grant

join defensive patent pools:

Open Invention Network (open source)

LOT Network (protection against trolls)

COPA (block chain related)

It should be noted that these defenses are about reducing risk, not full protection!

Choose a license with an explicit patent grant

There are some licenses that require an explicit patent grant:

GPL-license family

Apache 2

MulanPSL

MPL 2

etc.

Specifics depend on the exact license terms, but these are, from a patent risk reduction point of view, better than licenses without this language (MIT, BSD, etc.).

Join a defensive patent pool: Open Invention Network

Open Invention Network (OIN):

specifically aimed at protecting a set of widely used open source packages and creating a "patent no fly zone" around core open source

largest IP community in the world

anyone can join, no costs

other activities: pre-issuance submissions to curb bad patents

https://openinventionnetwork.com/

Join a defensive patent pool: LOT Network

LOT Network:

patent cross license aimed at immunization against patent trolls

LOT = License On Transfer: "business as usual", but as soon as patent are sold off to NPEs every participant in LOT gets a patent license

yearly fee depending on revenue, free for small entities

https://lotnet.com/

Join a defensive patent pool: COPA

COPA:

Crypto Open Patent Alliance

patent cross license for blockchain

defensive patent pool for counter attacks

yearly fee depending on revenue, (currently) free for small entities

https://www.opencrypto.org/