

Intellectual Property, Patent Commons and the Spirit of Sharing

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Outline

- Intellectual Property, Preserving the Public Domain and the Intellectual Commons;
- Patent Commons - Software Patents and Eco-Patents;
- Navigating the Patent Commons – The Pledge; and
- Patents Commons and the Spirit of Sharing - Possible Leverage in Innovation and Creativity?

Intellectual Property – A Continuous Expansion of Private Property Rights?

- Intellectual Property (“IP”) as a distinct body of law has grown in significance over the past two decades particularly in the following areas:
 - Subject matter of protection
 - Scope of protection
 - Duration of protection

Preserving the Public Domain

- Fear for a diminishing “public domain” and consequently advocate for its preservation.
- An ‘intellectual commons’ is analogous to that of a ‘public domain’.
- What is the “public domain”?
- Is there an accepted definition of the “public domain”?

Patents – Incentives or Disincentives for Innovation?

- Justification for patent system - the 'incentive theory'
- Under the commons model (no patent rights) - "tragedy of the commons"
- Change from a commons model towards a privatization model – but, 'patent thicket'.
- Scholars have argued that it is the creation of such 'patent thickets' which leads to an 'unintended and paradoxical' consequence of the 'tragedy of the anticommons'.
- Response?

Patent Commons

- Generally, a commons refers to any set of resources that a community recognizes as being accessible to any member of that community.
- In the case of patent commons, the resources made accessible are patents.
- Thus, the concept of the Patent Commons may be understood as a specialized form of the Creative Commons Licensing System under which the Creative Commons Licenses allow writers, artists and musicians to put their work into the public domain while still retain some rights as to how their work is used and redistributed.

Patent Commons

- In the case of the Patent Commons, patent owners 'pledge' or 'donate' all or a portion of their entire patent portfolio for the public good.
- The objective of the Patent Commons is not to give away patents for free but to provide a tool to protect innovators/developers, so that they may safely rely upon the state of the art, innovate and ultimately contribute to the commons community.
- Contrast Patent Pools.

Types of Patent Commons

- Software Patents
- Eco-Patents

Software Patents

- One type of Patent Commons formed relates to pledges for computer software patents.
- The Patent Commons Project was launched on November 15, 2005 by the Open Source Development Labs (OSDL).
- The core of the project is an online patent commons reference library aggregating and documenting information about patent-related pledges and other legal solutions directed at the open-source software community.
- OSDL has created a central repository of pledged and committed software patents to free developers from worry over violating intellectual property (IP) rights held by patent holders.

Eco-Patents

- Apart from software patents, the most recent Patent Commons formed relates to patents that provide environmental benefits for example they help enable the world community to reduce waste, pollution, global warming and energy demands.
- We are referring to the Eco-Patent Commons established by World Business Council for Sustainable Development.

The Pledge

- A patent pledge is basically a public enforceable commitment under which patent holders agree they will not, subject to certain terms and conditions, assert patent rights against third parties who are engaging in activities that might otherwise give rise to a claim of patent infringement.
- Patent pledges and patent commons are similar to the extent that they are typically created in support of a specific goal.
- Perhaps, the major difference between patent pledges and patent commons is that while pledges can be done unilaterally, commons by nature require the creation of a community, a set of identified intellectual property owners who agree to respect the rules set by the community.

The Pledge

- In general, patent pledges made by the contributors are not licensed to the community as a whole or to any particular individual or company.
- Ownership of the patents remains with the pledger but subject to an enforceable promise or pledge governing how the owner of the patent will or will not enforce the patent in the future.

The Pledge

- Defensive Termination
- Contractual provision not to sue (non-assert)
- If a non-pledger asserts any patent against a pledger, the pledger may terminate its non-assert.
- If one pledger asserts against another pledger, defensive termination only if patent is inside the Commons.

Legal Theories underlying Patent Pledges

- Implied licence
- Equitable estoppel
- Laches

Patents Commons and the Spirit of Sharing

Possible Leverage in Innovation and Creativity?

Eco-Patent Commons

- The Eco-Patent Commons launched in January 2008 has been well received by the business sector and to date almost a hundred eco-friendly patents have been pledged by nine companies representing a variety of industries worldwide: Bosch, DuPont, IBM, Nokia, Pitney Bowes, Ricoh, Sony, Taisei and Xerox.
- Yale University has used one of the pledged patents by IBM to substitute a toxic developer with an environmentally preferable solvent mixture of alcohol and water for their quantum computing device research.
- Xerox has offered technology that helps separate hazardous waste from water and soil more efficiently and economically.
- Dupont has gifted technology that converts non-recyclable plastics into fertilizers.
- Bosch's automotive technology turns waste heat from vehicles into useful energy, Sony's technology helps in recycling optical discs.

Comments and Conclusions

- Patents commons like other creative commons provide access to IP (patents) that can be leveraged by others to invent, innovate and improve.
- Structure is fairly straightforward, the terms are not complicated and will have the effect of minimizing transaction costs.
- Ownership, rights and control are retained under the pledge vis-à-vis the patents.

Comments and Conclusions

- Patent commons provides a simplified system – a balance between accessibility and control.
- Patent commons appear able to guard against “tragedy of the commons” and the “tragedy of the anticommons”.
- Patent commons is certainly a right step towards the spirit of sharing.

Thank you!