PATENTS – WHY FREE / OPEN SOURCE SOFTWARE MIGHT HAVE LESS TO FEAR THAN NON-FREE SOFTWARE

Daniel B. Ravicher
Executive Director, Public Patent Foundation

Many believe that patents pose a large threat to Free / Open Source Software. Although this may be true, Free Software is no more concerned about, and actually might be less concerned about, software patents than most other software developers.

First recognize that any patent that covers Free Software is going to cover non-free software, because licensing terms are irrelevant to a patent's scope. So, there aren't any patents that only threaten Free Software; they all threaten all software, regardless of license terms.

Now, assume there exists a patent that arguably covers Free Software and the patent holder brings a patent infringement law suit to stop such infringement. It is highly unlikely that the patent holder would receive a preliminary injunction, as they are highly unusual in patent infringement cases to begin with. Further, the equities and public harm would very rarely be in favor of the patent holder, because Free Software is a public good, on which many individuals, businesses, and government rely. Lastly, the wide spread distribution of Free Software would render any such injunction meaningless, unless it attached to every single possessor of a copy of the allegedly infringing code, a highly unlikely scenario for any Free Software project of significance.

This is where free software is very different from non-free software, and why patents are more of a threat to the latter, than the former. A non-free software product will have a harder time defending against a preliminary injunction as, although they might be able to argue equities, they will have much more difficulty arguing a public harm. Further, their product can indeed be easy stopped because they have complete distribution control over it.

Having virtually no chance at preliminary relief, the patent holder will then seek damages, but here they are in a catch-22 when it comes to Free Software. If they go after deep pockets, the defendant will, by the fact that they are a “deep pocket,” be more than capable of defending itself against the patent assertion. Such defendants have a very high success rate in patent cases, as about half of all litigated patents are held invalid and many of those that are held valid are nonetheless held not infringed.

If, instead, the patent holder sues a little guy, there will be no money to recover, because the defendant is a "little guy." Additionally, there are several reasons why a deep pocket may step up to protect any such little guy. First, the Free Software product involved may be very important to the deep pocket. For instance, if a patent holder has a patent on Apache, the most used web sever in existence today, they could sue the Apache Foundation, a small non-profit Free Software development organization. *See* Netcraft Web Server Survey Archives, http://news.netcraft.com/archives/

web_server_survey.html (showing Apache having almost 70% market share in the web server market in February 2004). However, IBM and all of the other major distributors of Apache would have a vested interest in ensuring Apache, the product, wasn't defeated.

Second, a deep pocket competitor may be worried about a favorable claim construction, the pre-trial process of determining what ambiguous or arguable terms in a patent mean, resulting in the case with the little guy because it may believe that it is next on the patent holder's "to-be-sued" list. As such, the deep pocket may very well wish to impact the first claim construction where the little guy is involved to ensure that the claim construction is not a lopsided victory for the patent holder, because future litigations involving the asserted patent may simply adopt or be significantly impacted by that claim construction.

Therefore, a permanent injunction is the only truly threatening remedy available for a patent holder bringing a patent infringement suit against Free Software. However, knowing that patents cannot cover functionality, and can only cover certain structure that accomplishes functionality, it is highly likely that before a patent infringement case is tried and appealed, the Free Software at issue can be designed around the asserted patent. Further, it is also highly likely that the Free Software community, a very participatory and technically sophisticated group, will be quite capable at finding prior art to challenge the patent's validity.

In essence, the common theme is that, because of the network effects inherent with Free Software, no party or project of any significance can be singled out for attack on the basis of patent infringement. It is the opposite of a free rider problem.

However, this does not mean that patents pose no threat to Free Software. The burden placed on parties defending themselves from assertions of patent infringement is indeed substantial, in terms of both costs and distraction. Significant resources will be required to defend Free Software from patents, but the battle can – and will – be won.