

# Open Source Software: Coexistence and strategic use of patents

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A patent gives its holder an exclusive right to prohibit others from using, making and selling the invention covered by the patent. A basic advantage of patenting inventions is thus to get a competitive advantage. As the perceived alternative, an Open Source Software (OSS) licence supposedly enables anyone to use and improve on the piece of software concerned, which in the end means higher quality software. Other advantages of OSS include lower costs, no vendor lock-in and more flexible customisation. There is little doubt that for some projects, there are significant benefits to adopting an open source strategy.

## Software patents

The patentability of software-implemented inventions varies from country to country. In Europe, a computer program can be patented if it performs an operation that has a “further technical effect”. In the US, the question of patentability of software is based on whether the method performed by the program is abstract or not. In practice, software can often be patented in both Europe and the US if has a link to a physical process.

## Reasons for patenting OSS

Given that an important advantage of OSS is collaboration to improve the code, what would be the reason for patenting the software if patenting prohibits others from using it?

There may be several answers – one is control. Allowing members of the OSS community to use the patents for free does not mean that anyone can use it. Patent pools in OSS are common and can serve the purpose of putting the OSS in a stronger position with respect to e.g. large corporations that are active in the same field.

A patent does not mean you exclude your community. There are a number of possible license agreements, typically limiting the contributors’ ability to assert patent rights against those who license under the OSS. A patent pool may provide a defensive tool. With a patent in hand, you can create a licencing agreement where you control who uses it, or to what end. You can create a licencing agreement similar to the Gnu Public Licence, or



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take a more strict approach. This grants you, as an example, the possibility of stating that anyone can use the software for non-commercial purposes without asking for permission. Or simply stating that anyone in the community can use and amend it without any restrictions.

The patent pool can be used defensively to ensure that the technology is not patented by others and enforced against the users of the OSS.

Patents in OSS can give the holder the possibility to enforce them on users that breach the terms of the open source license.

A patent that covers OSS can be used for one purpose in the OSS and for another purpose outside the OSS, e.g. in another product where the license is not free.

Large technology corporations (e.g. IBM, Microsoft and Tesla) have opened up their patent portfolios in some areas. This is a strategic move to gain access to open source technology or to promote a certain technology or standard by making it attractive to use and develop. Note that this strategy typically does not mean that the company stops filing new patents or stops maintaining its patent portfolio, thus it has little to do with open innovation.

When considering operating under open source or using a more IP-oriented approach, the answer may in fact be a hybrid approach using a mix of open source and patents where the role of the software is carefully considered strategically. In particular, we recommend that you consider what the actual value of the software is, who will use it, who may contribute to the development, what the risks of operating under OSS are, and what value patent protection could potentially add.

If in doubt, please contact the authors who will be happy to assist you.

#### **Reasons for patenting open source software**

- Defensive use to avoid that the technology is patented by others and as a bargaining tool when faced with a patent of a third party
- Controlling the use of the technology outside the OSS community
- Generating revenue for another purpose covered by the patent outside the OSS
- Use as a competitive advantage against companies or other OSS