DRAFT:

**For discussion at the Santa Clara University conference,
“Solutions to the Software Patent Problem”**

See: <http://law.scu.edu/hightech/2012-solutions-to-the-software-patent-problem.cfm>

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A Proposal for a Defensive Patent License

Software and other abstract patents have a bad reputation—deservedly—among innovators. They are perceived to suffer from overclaiming and overbreadth,¹ and the inventive steps they cover can seem obvious. Those who have looked closely, including legal academics, advocates, and an influential judge² who has had to try patent cases, also criticize these patents on both doctrinal and empirical grounds. Further, the large number of software patents in the system raises the possibility of “weaponized” patents, perhaps weak in claims, but nuclear in their ability to take down a legitimate competitor or a new entrant to the marketplace, being deployed to limit competition.

This fear is not hypothetical. Increasingly complex “thickets” of patents on software, standards, and other ecosystems have become competitive battlegrounds for technologies such as smartphones, online video, and social media. To take just smartphones and social networking as examples, the *Oracle v. Google* case is one battle in an outright legal war, with Yahoo! suing Facebook;³ Apple suing Samsung, and Microsoft and Nokia also involved. After millions of dollars in legal fees and a billion-dollar jury award to Apple against Samsung,⁴ it is clear that some innovators in Silicon Valley are caught in a costly arms race. Further, software innovation happens every day without patent protection, raising the question: why have software patents, at all?

¹ See, e.g., Mark Lemley’s piece in this series: <http://www.wired.com/opinion/2012/10/mark-lemley-functional-claiming/>.

² Judge Richard Posner offered thoughts in his blog, here: <http://www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html>.

³ Yahoo! has sued over 10 patents, most of which cover various aspects of online advertising. See, e.g., Dan Levine and Alexei Oreskovic, <http://www.reuters.com/article/2012/03/12/us-yahoo-facebook-lawsuit-idUSBRE82B18M20120312>.

⁴ See, e.g., Paul Elias, <http://www.csmonitor.com/Business/Latest-News-Wires/2012/0824/Apple-vs.-Samsung-California-jury-awards-Apple-1-billion>. Note that jury decision has been appealed.

So it may come as a surprise that Jason Schultz and I propose⁵ that innovators should—even must—opt back into the patent system if they wish to protect themselves from the growing threats that patents pose. Indeed, we think that this is true even for those—such as free and open source software developers—who practice open innovation. Specifically, we propose that innovators obtain patents that they commit to keeping defensive and link them together in a defensive network. This method would leverage the patent system as it exists today to create a bulwark against some of its worst features.

To do this, we propose the Defensive Patent License (DPL), which innovators would use to license patents they obtain. Innovators that choose the DPL make two main promises: (1) that anyone can take a royalty-free license to their patents in exchange for a promise that the licensee will also offer their own patents under the DPL; and (2) not to use patents against any other DPL user except defensively. As innovators opt in to the network, the DPL would both keep their patents defensive over time and also promote multilateral disarmament by creating a network of patent holders who are publicly and legally committed to defense.

DPL users are free to demand licensing fees or bring infringement suits against anyone outside of the DPL network, but they must remain defensive within it. As such, the DPL builds on the ideas behind free software and free culture licenses, such as the General Public License (GPL) and some Creative Commons licenses, to use intellectual property rights as a tool for creating openness through network effects.

Importantly, the DPL's obligations "travel with the patent:" in the event that a patent is sold, its new owner also must abide by the DPL's terms. By "deweaponizing" patents in this way, the DPL could help limit lawsuit risk. This is especially true for the risks posed by patent trolls, because a patent that can be used only defensively against a large network of innovators is likely to have little value for a troll.

The DPL also helps fix the patent system over the medium- to long-term by encouraging stronger "prior art." Patents themselves provide the Patent Office with the best evidence of prior art, so if innovators who usually opt out of the patent system can find a way to participate without adding to the problems within it, they can help the Office avoid granting overbroad and obvious patents in the future.

Let me be clear. This is a second-best solution, tailored for the world in which we live, rather than a world in which we can fully reform the patent system in the

⁵ Jason Schultz and Jennifer M. Urban, "Protecting Open Innovation: A New Approach to Patent Threats, Transaction Costs, and Tactical Disarmament," *forthcoming* 26 *Harvard Journal of Law and Technology* __ (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2040945.

near- to medium-term. As we explain in our paper, we think that the Supreme Court's recent ambivalence on the scope of patentable subject matter in *Bilski v. Kappos* and *Prometheus v. Mayo* indicates that software and some other abstract patents are here to stay, at least for now. The America Invents Act shows that Congress is also unlikely to fundamentally reform patentable subject matter or patent scope anytime soon. But given recent evidence from the smartphone wars and other competitive battles, we think innovators can no longer realistically ignore the patent system. The possibility of a need to defend against patents wielded by others often requires a company to have its own portfolio to use for defense. The decision whether or not to patent is thus made by virtue of the danger in which companies find themselves as patent suits increase.

This situation leaves innovators—especially those who are committed to openness or to reducing rights “thickets”—in a bind. We think the DPL could help adjust the patent system from within, leaving in place the value of strong patents in industries where they support innovation, and limiting their harm in industries where they operate to raise transaction costs and limit innovation. It can coexist peacefully with other efforts to fix the patent system proposed by other authors in the series until they take effect or broader reform occurs. But unless and until Congress or the courts improve the patent system more broadly, voluntary private solutions like the DPL may provide the best options to stem the rising tide of patent attacks.