

Who Needs Patents?

By Alexander Poltorak

Today the Open Source movement is preaching life without patents. Kids are living life without copyright. There is growing opposition to all forms of intellectual property.

Sometime this term, the Senate will resume the debate on the most sweeping patent reform bill in recent history, which was passed by the House in September 2007. Those who object to this bill predict the demise of American innovation and our competitive advantage in the global marketplace. Supporters of the bill complain that strong patents impede innovation.

A growing chorus of media pundits asks the more fundamental question, "Who needs patents at all?" At first blush, the pundits may have a point.

THE MUSIC INDUSTRY

Take the music industry. In the pre-Internet days, record companies needed to rely on copyright to protect their investment in the production, marketing, and distribution of records

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or CDs. Now, however, when a budding artist with a camcorder can easily record and upload her music onto MySpace or YouTube, who needs CDs, which seem to be going the way of vinyl LPs? And, therefore, who needs copyright?

Not the artists apparently. As some academics are quick to point out, people are motivated not by money alone, but are driven by the desire to do what they enjoy doing, and to achieve success, peer recognition, or maybe fame. In other words, with or without copyright protection, musicians will continue to compose and perform — because this is what they enjoy doing.

But the story is different for the record companies. Their mission now is to find and bring us new talent, and spare us the agony of listening to lots of atrocious free music on the Internet in the hope of finding a needle in a haystack. Record companies, the new venture capitalists of the music industry, no longer invest so much in records (or CDs) as they do in the artists themselves. Record companies need copyright protection even more than artists. Their new stock-in-trade is the talent of the artists they invest in — an intangible asset that can only

be protected by copyright.

MANUFACTURING AND TECHNOLOGY INVESTORS

The same holds true for investors in manufacturing and technology.

The Open Source community abhors patents as one of the many evils of capitalism. Again, academics are ready to provide a theoretical foundation for this view: "Who needs patent monopoly?" they ask. Inventors will always invent, with or without patents, for fun or for prestige, just as members of the Open Source community write software code, not for money, but to gain peers' respect.

As a former academic, I can testify to that. Like all academics, I published scientific papers, for neither money nor monopoly rights, but because of an intense curiosity, an innate quest for knowledge. What academics want most is not money, but respect from their peers and the advancement of the field, not to mention the prospect of tenure. It is the same with inventors: They, too, will continue to invent regardless of patents.

This is not just speculation. In the former Soviet Union, where I was born and educated, inventors did not

own patents — the state did. Inventors who filed patent applications did not get exclusive rights, only a Certificate of Inventorship. Nevertheless, Soviet engineers still invented prolifically — and boasted proudly of their Certificates.

Does this mean we do not need patents? Of course not! As with copyright protection, we need patents to finance and efficiently manage a system that provides our society with the highest quality of innovation and product development.

Yes, inventors will always invent, with or without patents. But that is not the point. What makes patents so essential to our country is that they are a quid pro quo for invention disclosure, not for invention per se. Without patents, companies would keep their inventions as trade secrets instead of disclosing them to the public through patent applications. And without the exchange and cross-pollination of ideas, inventors would spend their time reinventing the proverbial wheel. That is why the founding fathers empowered Congress to grant inventors exclusive rights to their inventions — "To promote the progress of science and useful arts."

Moreover, as with record companies in the music industry, it is investors, not inventors, who need patents most. Without meaningful

patent protection, a fledgling startup company would be steamrolled by a larger, better-established competitor. And without meaningful patent protection, no investors in their right mind would invest in a startup that's doomed to failure.

LINKED TO CAPITALISM

One thing the Open Source community is right about is that patents are inextricably linked to capitalism. Only in a capitalist economy like our country — where inventors/entrepreneurs can start a new company in a garage, and where venture capitalists can invest in these garage enterprises in the hope of creating new Apples, Microsofts, and Googles — only here are patents important.

Open Source pundits and copyright-infringing teenagers have it wrong. Though IP may not be necessary for those creative and inventive types who, without its protection, would create and invent anyway, IP is critical for venture capitalists and investors who finance and bring the products to market and fruition. Record companies that bring us fabulous new music, and venture capitalists who bring us new products and cures, cannot do this without the exclusivity afforded by intellectual property laws. Unlike the spontaneous act of creativity,

investment in new product or talent has commercial interest and requires financial incentives.

The Patent Reform Act of 2007, which was passed by the House in 2007 but reached an impasse in the Senate in 2008, seems to largely ignore this reality. "Apportionment of damages," "post-grant oppositions," and the shift from the "First-to-Invent" to the "First-to-File" regime are changes proposed by this bill that will make patents less valuable, harder to get, and almost impossible to enforce.

The Patent Reform Act of 2007 may soon be recycled as The Patent Reform Act of 2009 and reintroduced in the new Congress. Should this reform become the law, it is likely that inventors will still invent. My fear, however, is that without strong patent law, investors will no longer want to invest in unprotected ideas. Because it's not inventors, but investors who need patents the most.



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