
Monday, April 2, 2007

Patents and copyright now trade on Web

Traditional companies may do battle with new challenges to accepted notions of IP

By Philippa Maister, Staff Reporter

THE AGE OF collaboration that the Internet has introduced is changing the rules of intellectual property protection, creating new copyright strategies and enabling a virtual online “swap meet” for companies holding patents they no longer need and those searching for new technologies.

From budding composers and musicians to huge companies like IBM and Procter & Gamble, the opportunities the Web creates are being seized to develop new ways of doing business.

“Smart firms are treating intellectual property like a mutual fund—they manage a balanced portfolio of IP assets, some protected and some shared,” Don Tapscott and Anthony D. Williams wrote in their 2006 book “Wikinomics: How Mass Collaboration Changes Everything.”

Experts interviewed for this article think that view is somewhat futuristic—but they agree that change is happening, whether players want it or not.

“You are seeing the battle lines being drawn by the traditional set of creative content providers against a new generation of people who would like to rethink traditional notions of intellectual property,” said William M. Ragland Jr., a partner in Hunton & Williams’ Atlanta office.

Ragland said traditional companies argue strong intellectual property protection is needed as an incentive. “They ask why you would undertake that kind of research and development or pay staff to come up with innovations if the effort is to be given away for free,” he said. “Companies on the other side argue that we are living in a Web-enabled environment where collaboration across borders is possible and different intellectual property laws exist where harmonization has not been possible.”

The force driving the new way of thinking is the model established by the Open Source software movement—a model recently adopted by Microsoft Corp., which was once openly hostile to Open Source, in a deal with Novell Inc. Software developed under Open Source rules can be modified by other developers—as long as they allow their work to be modified. This process has been compared to creating a new drug and releasing to the general public all of the research and information that allows another person to synthesize and sell the drug.

Building on the Open Source model, Stanford University law professor Lawrence Lessig and others have developed a new Creative Commons license that allows copyright holders to easily grant rights to their creative work to others. The license enables creators to protect their work while encouraging certain uses of them—to declare “some rights reserved”—whether that work is a Web site, scholarship, music, film, photography, literature, courseware or some other form of expression.

The nonprofit Massachusetts-based organization’s Web site, www.creativecommons.org, offers six types of licenses. The most open allows others to copy, distribute, display and perform the copyrighted work—and derivative works based on it—provided it is attributed to the original creator. This type of license can be of value to young artists who want recognition more than money. Licenses can also restrict use to non-

commercial purposes. Others allow “sampling” of one person’s musical work by other musicians.

Artists simply display a Creative Commons “some rights reserved” icon on their Web site. It links back to the “commons deed” which contains the license terms.

For example, Flickr, a searchable Web site that enables online photo management and sharing, allows users to attach a Creative Commons license to the photos they create on the site.

Courts have held that Creative Commons licenses are binding and enforceable, said Denise M. Howell, an appellate and intellectual property lawyer, blogger and podcaster in Newport Beach, Calif.

One drawback in the Creative Commons license is that it does not provide a mechanism to license the commercial use of a creative work. Lisensa, a Cambridge, Mass.-based company founded by Harvard Law School professor John G. Palfrey and lawyer and entrepreneur Rudy Rouhana, is addressing that need, Howell said.

The company, on whose advisory board she serves, enables copyright holders to license a work to a commercial user on terms they set and to collect a fee using a PayPal-like service. Initially the service applies only to blogs, but the company plans to add other types of creative work as it evolves. The company retains 10 percent of the fee for its services.

Patent law does not lend itself to a similar openness, according to Georgia State University law professor Michael B. Landau, who teaches intellectual property law.

Landau said copyrights can only be enforced if the infringer has access to the work and then copies it or builds on it. Patents, in contrast, can be infringed even if the infringer did not know the patent existed, he said. Landau noted that patents are defined in negative terms. A patent does not give someone the right to exercise it. It gives the inventor the right to exclude others from practicing it unless they have a license to do so.

Despite these restrictions, some companies have found a way to make their patents accessible to others. For example, in 2005 a group of companies including IBM and several universities entered into an open collaboration agreement called the “Free Public Commons.”

It states that intellectual property created in the collaboration “must be made available for commercial and academic use by every member of the public free of charge for use in open source software, software-related industry standards, software interoperability and other publicly available programs.” Participants don’t have to give up ownership of their patents, and can sell them, provided the public’s rights are protected.

In December, IBM initiated its first project under that agreement in collaboration with Georgia Tech and six other U.S. universities. The Tech project aims to create easy-to-use tools and interfaces for clinical decision support.

“Today, innovation is a dual-value proposition: a balanced foundation of open and proprietary collaborations,” an IBM document states.

Procter & Gamble has taken this concept even further. Spokesperson Jeff LeRoy said the company’s goal is to outsource 50 percent of its innovation. It is already up to 42 percent. “We realized that to sustain the level of growth we needed we couldn’t invent everything ourselves,” LeRoy said.

P&G’s Web site, www.pgconnectdevelop.com, enables inventors to submit proposals to the company. “We are not looking for ideas, but a basis to do business such as a patent,” LeRoy noted. The Web site also offers licenses to patents owned by P&G that it is not using. “We have over 36,000 patents we consider outbound opportunities,” he said.

Both for-profit and nonprofit organizations offer companies ways to derive a royalty stream from unused patents—and a potential business opportunity for start-up companies built around those patents.

Companies decide not to commercialize patents they hold for many reasons, according to Matthew Wagner, executive director of the nonprofit Center for Advanced Technology and Innovation in New Racine, Wis. They may decide the revenue stream will not be adequate, or that the product is not part of their core mission, or that it is not a high priority.

Companies can submit unused patents to the Center. Those that survive a screening process are posted on its Web site. The Center hawks some to entrepreneurs and companies with a potential interest. Others are made available to students at local colleges and technical schools to turn into marketable products—a model other states are interested in adopting as a way of growing companies at home.

Companies also Yet2.com and NineSigma also offer virtual patent exchanges. Yet2.com lists clients like Microsoft and Honeywell among others who either are seeking specific technologies or have patents available for license that they are not using.

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