HACKING THE PATENT SYSTEM

A GUIDE TO **ALTERNATIVE PATENT LICENSING** FOR INNOVATORS

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Table of Contents

Introduction to Alternative Patent Licensing

The patent system is intended to incentivize innovation, but the current system often does the opposite. The traditional model of patent licensing—whereby a company pays a patent owner to license an invention that the company legitimately uses—has been hijacked by non-practicing entities ("patent trolls") and other aggressive patent holders who assert overbroad patents that never should have been granted in the first place. Within this broken patent regime, companies are increasingly hacking the system—that is, finding alternatives to the traditional patent licensing model in order to both promote open innovation and protect the companies themselves. These strategies can be organized into three broad categories: (1) defensive patent aggregators, which pool member companies' resources to defensively purchase patents for the group and to fight patent trolls; (2) patent pledges, whereby companies opt to openly and defensively license their patents to others; and (3) patent troll insurance. This paper provides a guide to these alternative patent licensing options for small companies and startups that care about protecting themselves and not making a broken patent system any worse.

The Patent System Is Broken

The core purpose of the patent system is to incentivize innovation. Patents give inventors monopolies over their inventions for a period of time in order to allow inventors to recoup the costs of R&D and to generate profits that reward inventors' efforts—thereby encouraging future investments. In exchange, patentees dedicate their inventions to the public domain once their patents expire.

Yet, in many high-technology industries today, the patent system is a scourge on innovation. Patent trolls buy overbroad patents, often from bankrupt companies, for the sole purpose of extorting licensing revenues from companies that are actually innovating and creating new products. Overworked patent examiners increasingly grant overbroad, obvious, and non-novel patents—particularly on software. Some companies aggressively assert their patent portfolios to keep legitimate competitors out of the market entirely. Small companies are particularly vulnerable, since the cost of fighting a lawsuit (even a flagrantly frivolous one) could easily put a startup out of business. Faced with the constant threat of crippling litigation, small companies often perceive their best—or only—option to be laying low and hoping to stay off patent holders' radar.

Innovators Are Hacking the System to Use Patents for Good

Fed up with the patent mess left by Congress, the U.S. Patent and Trademark Office, and the courts, companies are collaborating to formulate private solutions. These patent licensing alternatives broadly fit into three categories: defensive patent aggregators, patent pledges, and patent troll insurance.

Defensive patent aggregators use membership fees to purchase patents and give perpetual licenses to members so that future owners of the patents (should the organization subsequently sell the patents) cannot sue members for infringement. Defensive patent aggregators are different from trolls because they buy patents solely for defensive purposes and promise never to assert the patents they own. These organizations often also use membership fees to challenge patents that may be asserted against their members. Defensive patent aggregators include Allied Security Trust, which uses a bidding system to distribute the cost of purchasing each patent among the members who are most interested in each patent; RPX, which buys patents and patent rights on behalf of all of its members; and Unified Patents, which purchases and challenges patents in specific technology areas.

Patent pledges are public commitments that companies make to license their patents in a manner that supports open innovation. By committing to the Defensive Patent License, for example, companies opt into a network in which each company has promised not to sue any other company in the network for patent infringement, except defensively. The Open Invention Network owns hundreds of patents that it licenses for free to any company that promises never to assert its own patents against Linux technology. Through the License on Transfer Agreement, participants agree to license their patents to all other participating companies, but each license only becomes effective if the patent is transferred to a third party. Companies can also make pledges unilaterally. For example, in its Innovator's Patent Agreement, Twitter makes a commitment to its employee inventors that it will not make offensive use of any patent without the inventor's permission. Other examples of unilateral pledges include The Patent Pledge, through which companies promise not to sue small startups for software patent infringement; Google's promise through the Open Patent Non-Assertion Pledge not to assert certain patents against those who implement open source software; and Tesla's opening of its patent portfolio to the public royalty-free.

Two defensive patent aggregators—RPX and Unified Patents—as well as a professional organization for advertisers are now offering insurance to protect companies against the threat of patent troll litigation. Policyholders pay an annual premium, and if a patent troll sues, the insurance reimburses for certain defensive expenses, which may include litigation expenses, pre-litigation expenses, or settlement costs, depending on the policy. Insurance can provide much-needed predictability for companies that are worried about the sudden cash drain associated with a patent troll lawsuit—particularly small companies that could be crippled by such expenses. In many cases, insurance also provides the resources necessary to fight trolls on the merits rather than quickly settling a lawsuit just to avoid legal fees. Trolls often depend on the high cost of litigation to force their targets to settle, even when the trolls' legal claims are dubious. For this reason, insurance that provides funds to defend a claim can help deter against troll lawsuits in the first place.

Each option described in this paper has tradeoffs both for individual companies and innovation as a whole. Patent pledges, for example, make a powerful public statement about a company's values, and can attract talent and publicity. On the other hand, pledging to openly license a patent might lower the patent's market value and, consequently, the company's value for potential buyers and investors. Defensive patent aggregators require annual membership fees that may be prohibitively expensive for some companies, but the licenses and patent intelligence services that come with membership may be well worth the cost for others. This paper explores these options and analyzes some of the drawbacks and benefits of each for small companies and startups, with the understanding that every company must consider its own unique situation in deciding whether to participate in any (or all) of these alternatives to traditional patent licensing.

Opting Out of the Patent System May Not Solve the Problem

Many of the patent licensing alternatives described in this paper—particularly patent pledges—assume that participants have obtained patents of their own. However, many innovators who have understandably lost faith in the patent system have opted out by declining to seek patents on their own inventions.

There are many reasons that companies may opt out of the patent system. Obtaining a single patent can cost $20,000 in legal fees, if not more, and the process can take many years. Some conscientious employees may be reticent to patent their inventions and assign them to their employers out of fear that the patents will later be abused. Once a patent is obtained, asserting it offensively may reflect poorly on the company, alienating current and potential employees as well as the public. If the company were to fail, the patents would likely be sold, and might ultimately fall into the hands of a bad actor.

However, for companies that are concerned with both self-preservation and furthering innovation, there may be some inherent benefits of obtaining patents in the first place:

- First, patents can be used defensively in infringement lawsuits brought by competitors. Defendants in patent infringement lawsuits can countersue the plaintiff for infringing one of the defendant's own patents. This, of course, assumes that the plaintiff has products of its own that could infringe, which is not the case with many trolls or other non-practicing entities like universities—but it makes patents valuable for defending against litigious competitors as well as deterring lawsuits from competitors in the first place.

- Second, patenting an invention clarifies the prior art and can help prevent future patents on overbroad or obvious technologies. All patented inventions must be novel and non-obvious. When determining whether to grant a patent, patent examiners in the U.S. Patent and Trademark Office look for "prior art" that evidences that the technology had been invented before or is obvious in light of previous inventions. Patent examiners have limited time to conduct their research, however, and often miss important prior inventions. One of the most important sources for identifying prior art is other patents. Patenting an invention thus helps clarify who invented what, and can help to prevent bad, obvious, or overbroad patents from being granted in the future.

- Third, patenting an invention may help prevent others from claiming it as their own. Keeping an invention a trade secret rather than patenting it runs the risk that another company could independently invent and try to patent the same thing. (Patent law includes a prior use defense, but only if the original inventor was using the invention more than one year before the subsequent inventor filed its patent, and even then there are limitations to how the original inventor can use the technology.) Original inventors can also simply publicly disclose the invention without filing a patent application, which may serve as prior art to prevent others from patenting the disclosed invention.

For companies that choose to obtain patents rather than opting out of the patent system entirely, the alternative patent licensing options described in this paper provide opportunities both to engage with the patent system and to use patents for good.

These Hacks Highlight the Need for Patent Reform

The existence of these alternative patent licensing options does not supplant the need for patent reform; to the contrary, the necessity of these hacks demonstrates innovators' continuing struggle to be free to operate. Rather than focusing their time, effort, and resources on innovating, companies are forced to turn to these options in an attempt to mitigate the damage caused by patent trolls and a broken patent system.

Some of these alternative patent licensing options help to ensure that members' own patents will not fall into the hands of trolls, some harness members' collective buying power to limit the number of patents on the market available to trolls, and some use members' pooled resources to challenge bad patents. However, none of these options can fully protect innovators from trolls. In order to completely address the problems driving innovators to turn to these patent system hacks, Congress must act.

Defensive Patent Aggregators

Defensive patent aggregators use the pooled resources of member companies to purchase patents that may otherwise have been purchased by trolls or aggressive companies and asserted against members. After purchasing each patent, aggregators grant perpetual licenses to their members, so that even if the patent later falls into a troll's hands, the patent can never be asserted against those members. Some aggregators also challenge, invalidate, or amass prior art on patents that may be threats to members. Aggregators typically charge an annual membership fee that is calculated based on each company's size. Many aggregators also offer patent intelligence and other services to members.

Unified Patents

What It Is

Unified Patents is a subscription-based patent risk management organization. Unified identifies specific technology areas that it calls "Zones," and works to monitor and defend each Zone's technology from patent troll assertions. As of July 2015, Unified has five active Zones: cloud storage, content delivery, wireless, automotive, and electronic patents. Companies decide which Zones they would like to join and contribute annual membership fees in exchange for intelligence, statistics, legal support, and deterrence measures in those Zones. Smaller startups can join for free.

Unified was founded in 2012 by former Intuit Head of Intellectual Property Litigation Kevin Jakel, with founding members including Google and NetApp.

How It Works

For an annual subscription fee, companies join a Zone that focuses on protecting a particular technology area from patent trolls. Subscription fees vary based on the company's size and the number of Zones the company seeks to join, but startups can join for free as of the time of writing. The cost of joining for non-startups ranges from $35,000 to $400,000 per Zone.

Unified's goal is to reduce the costs and risks associated with NPE activity in each Zone, ultimately deterring future troll assertions. Unified uses each Zone's subscription fees to challenge troll-owned patents in the U.S. Patent and Trademark Office through ex-parte reexamination, *inter partes* review, and post-grant review proceedings, and to purchase patents before trolls can (but never to purchase patents *from* trolls). When Unified purchases a patent, all Zone members receive an immediate, perpetual license to that patent. Fees are also used to monitor troll activity, investigate prior art, and develop legal resources and acumen in certain technology areas.

Unified's belief is that the participation of startups helps everyone, with the understanding that small companies are often the first to receive troll demand letters and are often the most vulnerable targets. By encouraging startups to participate with low-cost (or free) membership, Unified gains valuable insight into troll demand letter campaigns as soon as they begin. Furthermore, when startups join Unified, they gain protection from certain troll demands, limiting the number of easy troll targets.

In October 2015, Unified Patents launched its Protect: Membership with Insurance program, offering a new membership tier that includes patent troll insurance. This program is described on page 22 in the "Patent Troll Insurance" section.

Pros

- Unified encourages startups and small companies to participate by taking into account company size in calculating membership fees, and (as of the time of writing) offering membership to some startups for free.

- By including small companies and some of the world's largest tech companies in each Zone, startups benefit from larger companies' monetary resources, while larger companies benefit from broader membership in the Zone, early insight into troll activities, and a stronger industry-wide deterrent effect.

- Unified focuses its efforts on specific technology areas, unlike defensive patent aggregators that broadly acquire any high-risk patents. This assures companies that operate in a specific technology space that their membership fees and resources are used to protect only what they care about.

- Unified makes all decisions regarding whether and when to challenge a patent in *inter partes* review. While this means that members do not have say in these decisions, it should allow members to benefit from *inter partes* review of dubious patents without becoming the "real parties-in-interest" in the review. A "real party-in-interest" in an *inter partes* review that reaches a final decision cannot later defend a patent infringement lawsuit using any argument that could have been raised during that *inter partes* review.

- Unified refuses to pay trolls for patents, licensing, settlement, or any other activity, so members can be comforted that their membership fees will never, even indirectly, support troll activities. Furthermore, because Unified never pays trolls, it does not incentivize trolls to enter a Zone it protects.

- Members do not give up any of their own patent rights, nor are they required to license their own patents to other Zone members.

Cons

- The narrow, technology-specific Zone approach means that not all companies will fit within one of Unified's Zones of protected technology.

- Unified refuses to buy patents from trolls, so members do not benefit from potentially dangerous patents being purchased directly out of trolls' hands.

- Compared to RPX, Unified currently has fewer patent assets and less patent-purchasing activity.

Allied Security Trust (AST)

What It Is

Allied Security Trust (AST) acquires patents on behalf of its member companies based on a bidding system that distributes the cost of each patent among only those companies that are interested in purchasing it.

AST has about 30 members. The publicly identified members include Google, IBM, Intel, Oracle, Philips, Cisco, Microsoft, Ford, and Sony.

How It Works

Companies pay an annual fee for AST membership. The annual fee is tiered based on company size, ranging from $25,000 for companies with up to $250 million in revenue, up to $200,000 for companies with more than $4 billion in revenue. Members have access to AST's tool for analyzing available patents and can participate in collective purchases of assets in which they are interested.

AST's tool provides members with basic information about patent portfolios available for purchase, including the number of patent families in an available portfolio, the marketing materials provided by the seller, the technologies that the assets cover, and the products that they could potentially impact. AST holds calls with its member companies to review available assets that could be relevant to that member. After reviewing available patents, an AST member may decide to bid on the patents through AST, or seek to purchase them on their own or through an alternate channel. Without divulging identifying information, AST communicates common interest to other members to foster collaboration. Each member makes its own decision about the value of a patent license and provides a bid of that amount to AST. AST combines funds and uses as little of each member's money as possible while still seeking to provide the seller a market rate. A typical AST purchase involves three or four member companies contributing to the cost of the patent. Members thus share the cost of acquiring useful patents while controlling the amount they bid and maintaining anonymity under most circumstances.

Once a patent or portfolio is acquired, the AST members that funded the purchase receive a perpetual, irrevocable, non-exclusive license that continues even if the companies leave AST. A member company that did not participate in the initial acquisition may obtain a subsequent license through a Subsequent License Option (SLO). The licensing fee for an SLO is always equal to the highest price paid by one of the initial funders. The proceeds from the SLO are then given to the original bidders, allocated using a formula that pays back members that spent the most first. New members are allowed to take an SLO to any portfolio currently owned by AST.

AST engages in a "catch, license, and release" model for patents rather than aggregating patents. AST purchases a patent, licenses it to members, and then sells the patent (with the licenses still binding all future owners), and distributes the proceeds among the members that funded the acquisition. AST does not take any commission through this process, nor does it charge members for its services in acquiring patents beyond the annual contribution.

AST does not proactively challenge patents in U.S. Patent and Trademark Office proceedings, but it does intervene in active litigation upon member request.

Pros

- AST avoids the "one size fits all" aggregation model by allowing members to bid only on the patents they want rather than paying for licenses in technology areas irrelevant to their businesses.

- If a member leaves AST, the patents they have licensed go with them, which gives companies flexibility to leave.

- AST purchasing decisions can move quickly, and the "delivery date" of a patent is within a few weeks of an accepted offer, which can be an advantage for fast-paced companies.

- Members include some of the world's largest tech companies, which means smaller companies can benefit from their purchasing power.

- In addition to getting a license to the patent, early bidders get money back when other member companies later license the patent, and when AST ultimately sells the patent.

- Members do not give up any of the rights to their own, non-AST patent portfolios, nor are they required to license their own inventions to other members.

Cons

- For privacy-sensitive companies, AST conducts most of its transactions completely anonymously. However, when AST sells patents on the open market, the name of the patent's licensees can be disclosed to potential buyers against the member's will (by a majority vote of other members licensed to that portfolio).

- AST buys and sells patents on the open market, which means that AST may be feeding patent trolls by buying patents from them, and that the patents AST owns may later fall into the hands of trolls. AST members that contributed to the purchase of those patents have perpetual licenses and cannot be attacked with these patents, but members with strong anti-troll convictions may take exception to the idea of indirectly doing business with trolls.

RPX Defensive Patent Acquisition Network

What It Is

RPX is a membership-based patent risk management service that acquires patent rights to license to members for defensive purposes, provides patent intelligence, and offers insurance policies to cover the legal and settlement costs of being sued for patent infringement.

RPX was founded in 2008 by John Amster and Geoffrey Barker, both former vice presidents of controversial patent assertion entity Intellectual Ventures. As of January 2016, nearly 250 companies are members, including Google, Microsoft, Oracle, and Intel.

How It Works

Companies join RPX for an annual membership fee calculated based on the client's annual financial results. As of 2014, annual fees ranged from $85,000 to around $7 million. Each member receives a license to all patent rights that RPX owns. These licenses last for as long as the company remains a member of RPX, with licenses becoming perpetual after a certain number of years of membership. Members do not give up any of their own patent rights, nor are they required to license their own patents to other members.

As of March 2014, RPX had spent $810 million on acquiring patents and patent rights for its 178 members. RPX purchases rights to high-value or high-risk patents on the open market—sometimes only buying licenses for its members, and sometimes acquiring the entire patent, which preempts trolls from buying the patent. RPX also buys patent rights out of active litigation in which its members are defendants. RPX claims to have prevented more than 3,000 lawsuits and claims to have intervened to secure dismissals for clients more than 800 times.

RPX members also gain access to the RPX client portal—an online resource with detailed profiles of NPEs, overviews of the litigation history and chain of title of individual patents, and other market intelligence. In May 2014, RPX announced the launch of a free search engine that allows users to search RPX's proprietary database for every U.S. patent and application, every U.S. district court patent litigation action since 2000, and every patent owner and party in litigation today. The tool also allows users to create custom alerts for patent troll activities.

RPX's insurance offerings are described on page 24 in the "Patent Troll Insurance" section.

Pros

- RPX not only purchases patents preemptively, but also intervenes in active litigation in which clients are defendants.

- RPX's size gives it massive purchasing power to buy patents and license them to members. RPX claims to represent 10% of transaction activity on the open market. As RPX grows in size, so does its usefulness to its customers.

- Members do not give up any of their own patent rights, nor are they required to license their own patents to other members.

- RPX's online client portal is a useful tool, particularly for companies with in-house attorneys. RPX's free search engine offers a limited view into RPX's database.

Cons

- RPX appears to buy patents and patent rights from trolls, which members might find objectionable.

- RPX sometimes sells patents (after licensing them to its members) and is willing to sell to trolls. While its members should be safe from these patents, all other companies—large and small—could be attacked by trolls armed with patents sold by RPX.

- Licenses only last for as long as a company remains a member of RPX—though licenses become perpetual after a certain number of years of membership. Companies that choose not to renew membership before their licenses become perpetual may suffer some diminution of rights.

- RPX's business model is being challenged in court. A patent troll called Cascades Computer Innovation (CCI) sued RPX and some of its members alleging antitrust violations and a conspiracy to "monopsonize" the market (that is, drive down the prices) for certain patents. The judge tossed out CCI's conspiracy allegations, but the antitrust claims survived a motion to dismiss, and a jury trial is tentatively scheduled for January 2017. However, since CCI's patent has been found not infringed in another lawsuit, it is possible that the judge will dismiss the lawsuit against RPX for lack of damages.

- It is troubling for one entity to own so many patents. While RPX has promised never to assert or litigate the patents in its portfolio, its business model could change, and it might assert its patents through shell companies in a manner similar to Intellectual Ventures.

Patent Pledges

Patent pledges are commitments that companies make to license their own patents in a particular way. Many of the pledges described in this paper are multilateral pledges through which companies opt into networks with other companies that have made the same pledge (for example, by promising not to offensively assert patents against any other member of the network that has made the same commitment). Pledges can also be made unilaterally, and any company can create its own pledge to license its patents in a way that benefits open innovation—for example, by promising that the company will never assert its employees' patents offensively without each inventor's permission. Pledges offer a way for companies to continue to patent their inventions while assuring the public—and potential employees—that their patents will be used responsibly.

The Defensive Patent License (DPL)

What It Is

The Defensive Patent License (DPL) is like a non-aggression pact for patents: companies commit to never asserting any of their patents offensively against any other company that has also committed to the DPL.

Berkeley Law Professor Jennifer Urban and New York University Law Professor Jason Schultz launched DPL 1.1 in November 2014.

In the interest of full disclosure, representatives from Engine, the Electronic Frontier Foundation, and the Open Invention Network who participated in preparing this paper also serve on the DPL Advisory Board.

How It Works

Any company can opt into the DPL network by pledging never to assert any of its patents against any other company in the DPL network, except defensively. By joining the DPL network, a company commits to offering any other DPL user a royalty-free license to any of its patents. Companies must dedicate all of their patents to the DPL in order to avoid the problem of members only contributing low-value patents. In return for this commitment, every DPL user is eligible to receive a royalty-free license to any patent in any other DPL user's portfolio.

These commitments only apply to other DPL users. Companies that have opted into the DPL may still offensively sue (or seek paid licenses from) anyone outside of the DPL network.

DPL commitments travel with the patent, so any future owners of a patent licensed under the DPL must continue to honor the DPL's terms for that patent.

Companies may choose to leave the DPL at any time. However, previous licensees still retain their royalty-free licenses to the patents of the former DPL member. Any royalty-free licenses that the departing company received under the DPL may be converted to paid licenses at fair, reasonable, and non-discriminatory terms at the discretion of the remaining licensors.

Committing to the DPL requires two steps: first, users must declare on a publicly available website their commitment that, for any patents they currently have or obtain in the future, they will provide a DPL license to anyone who makes the same commitment. Second, if accepting the license to another DPL user's patents, licensees should provide the licensors with the URL for the website where their own commitment was published.

The DPL Foundation encourages users to email their Offering Announcement URL to the DPL Foundation at defensivepatent@gmail.com, so others can learn about it and contact fellow users to accept their licenses. In addition to sending the link to the Offering Announcement, users should include their current contact information for licensing purposes and a list of their patents (including country of issue, patent no., and title).

Pros

- The DPL's requirement that licensees commit their entire patent portfolio makes it a serious, company-wide commitment to defensive patenting (unlike some patent pledges that have been limited to only a small subset of a company's patents). Joining the DPL sends a clear message to the public that the company is committed to defensive patenting and open innovation and does not wish to abuse the current patent system. Such a statement can attract both talent and positive publicity.

- Companies that join the DPL do not lose the ability to assert their patent portfolios against, or collect licensing fees from, non-DPL members.

- The DPL's structure is especially beneficial for members with small patent portfolios. However, large companies do still have an incentive to join the DPL network in order to avoid litigation from DPL members.

- Once a DPL license is attached to a patent, trolls will never be able to assert that patent against DPL members who have a license to the patent.

- There is no membership fee to join the DPL. To join, members simply need to pledge their own patent portfolio. (Of course, this is a different type of cost.)

Cons

- The DPL's requirement that licensees commit their entire patent portfolio means that larger companies with big portfolios may be reluctant to join. Some companies, particularly large corporations, may not be in a position to dedicate their entire patent portfolios to the DPL. Members are not allowed to "pick and choose" which patents become part of the DPL network.

- Patents bound by the DPL may be seen by investors or potential buyers as worth less than other patents since they cannot be wielded against any DPL member.

- Although trolls cannot assert DPL-licensed patents against DPL members, the DPL does not prevent trolls from asserting DPL-licensed patents against non-DPL members, nor does it provide protection from trolls armed with non-DPL patents.

- As of December 2015, there were only two DPL users (the Internet Archive and John Gilmore) and 23 patents listed on the DPL's website. Thus, until more companies join the DPL, new users will only receive a royalty-free license to a few patents.

- It is unclear whether courts will uphold the provision of the DPL that precludes future owners of the patent from asserting the patent against DPL members. It is possible that bankruptcy courts may be able to void DPL provisions on a patent that needs to be liquidated in order to satisfy creditors of the previous licensor, though DPL creators Urban and Schultz think this is unlikely.

Open Invention Network (OIN)

What It Is

The Open Invention Network (OIN) is a company that acquires patents and patent applications and makes them available royalty-free to any entity that agrees not to assert its patents against the Linux system, effectively creating a "patent no-fly zone" around essential Linux technologies.

OIN was launched in 2005, and its members include Google, IBM, Philips, Sony, NEC, SUSE, and Red Hat.

In the interest of full disclosure, OIN participated in preparing the original edition of this report along with the Electronic Frontier Foundation and Engine.

How It Works

OIN acquires patents and patent applications in a multitude of technology areas and grants royalty-free, worldwide, nonexclusive, non-transferable licenses to any company that promises not to assert its own patents against the Linux system.

OIN undertakes diverse activities to reduce patent risk for its more than 1,500 licensees. In addition to receiving licenses to OIN's independent defensive patent portfolio, OIN licensees offer free patent licenses to one another on patents that relate to the Linux system. OIN adopted this model in order to protect the Linux platform, thereby enabling companies to feel secure making significant investments in Linux technologies.

Pros

- Joining the network is free.

- Joining OIN provides companies with licenses to all patents owned by other OIN licensees that relate to the Linux system.

- Joining OIN provides companies with a license to OIN-owned patents and applications that relate to non-Linux system areas such as software, wireless, networking, biometrics, security, and other technologies.

- Joining OIN makes a public statement that the company supports Linux and open innovation. This can attract potential employees as well as positive publicity from the open source community.

Cons

- OIN licensees are required to license their patents that relate to the Linux system to each other as part of a broad-based cross-license and a commitment to patent non-aggression within the defined scope of Linux.

- OIN's focus is on providing a safe, open environment for the Linux system. Thus, it does not extend into other technology areas.

Google's License on Transfer Agreement (LOT)

What It Is

Google launched the License on Transfer Agreement (LOT) in July 2014. Under the LOT Agreement, companies license their patents to other LOT members, but the license to each patent only becomes effective upon the patent's transfer to a third party.

The LOT Agreement is administered by an independent non-profit organization, LOT Network, Inc., whose primary mission is to promote and administer the LOT Agreement.

In the interest of full disclosure, a representative from Engine who participated in preparing this paper also serves on the LOT Advisory Board.

How It Works

LOT participants license their patents to all other participants in the LOT network, but each license only becomes effective if the patent owner transfers the patent to a third party. There are two exceptions: when a transfer is made to another LOT user, or when a transfer is part of a legitimate spinout or change of control to a non-troll. Under these circumstances, the licenses do not become effective.

There is an annual fee to participate in the LOT program in order to cover the administrative costs of running and promoting the LOT program. The annual fee ranges from $1,500 to $20,000 per year based on the member's annual revenue.

LOT participants are required to give six months' notice to withdraw from LOT. To address the free-rider problem, the withdrawing participant keeps the LOT licenses it acquired during its membership period only if it had licensed a patent under the LOT Agreement that had become effective during its participation, or it had more than 10 patent assets in its portfolio while a member of LOT.

LOT has 18 members, including Canon, Dropbox, Uber, Ford, Mazda, Red Hat, JP Morgan, Chase, Google, SAP, and SAS. Companies can express interest in joining by contacting Ken.Seddon@lotnet.com.

Pros

- LOT participants retain all patent rights and can assert patents offensively against any company (including other LOT participants) until the patents are transferred.
- Companies that make a certain number of contributions can leave the LOT program and retain their royalty-free licenses, which addresses the free-rider problem while allowing for flexibility to withdraw from the agreement.

Cons

- Patents bound by the LOT could be seen by investors or potential buyers as worth less than other patents because they cannot be wielded against LOT participants after transfer.
- A company that decides to withdraw may lose its licenses to LOT patents if the company has not contributed a patent license under LOT that has become effective.
- LOT is primarily designed to protect participants from privateering—a practice where an operating company sells patents to a troll hoping the troll will then attack its competitors. It does not protect from suits actually brought by other LOT participants or from suits regarding patents acquired outside of LOT. Because each license only becomes effective upon sale of the patent, LOT participants can sue each other directly for patent infringement.

Twitter's Innovator's Patent Agreement (IPA)

What It Is

The Innovator's Patent Agreement (IPA) is a patent assignment method developed by Twitter to guarantee its employees that if they assign an invention to Twitter, the patent will not be used to sue anyone offensively without the inventor's permission.

Twitter implemented the IPA in early 2013, applying it to all patents issued to its engineers in the past and present. Following Twitter's lead, companies like Jelly, Lift, Stack Exchange, and TellApart are also using the IPA.

How It Works

The IPA is different from other pledges in that it is actually a standard employee agreement that covers inventions assigned by employees to the company. To adopt the IPA, companies need only put a provision in invention assignment contracts stating that the company and employee agree that any invention assigned by the employee to the company will fall under the IPA, and file a copy of the IPA with any patent applications.

Under the IPA, companies may only use a patent for defensive purposes unless the company has the inventor's explicit consent to sue offensively. However, companies reserve the right to assert patents defensively if sued, as well as to pursue offensive litigation with the inventor's consent. Furthermore, the IPA broadly defines "defensive" uses of the patent to include offensively suing any entity that has asserted its own patents offensively in the past 10 years.

The IPA also precludes companies from selling patents to a third party that would then seek patent licensing fees without the inventor's consent. The IPA "travels with the patent," so even if a company were to sell the patent, the IPA's requirements would remain intact, and the new patent owner would have to seek permission from the inventor before asserting the patent.

As added protection for inventors, the IPA allows inventors to license their inventions to anyone who has been sued in violation of the IPA. Thus, even if a subsequent patent owner were to defy its promise and sue offensively, the inventor would have the ability to end the lawsuit by granting a royalty-free license to any defendants.

Pros

- Companies retain the ability to use patents defensively, or offensively with the inventor's permission.

- When companies go bankrupt or sell their patent portfolios, their patents often fall into the hands of patent trolls. The IPA allows the inventor to continue to control how the patent is used so that patent trolls cannot use the invention to threaten the next generation of startups without the inventor's permission.

- Allowing employees to exercise some control over their inventions even after assigning the patents to the company is a perk that can both boost employee morale and attract engineers to the company.

Cons

- Patents bound by the IPA may be seen by investors or potential buyers as worth less than other patents because the ability to monetize the patent is subject to the consent of the inventor.

- The IPA could lead to internal conflict if a company wanted to pursue litigation but an inventor refused to consent.

- Inventors could still exercise control over patents assigned to the company even if they were to leave the company and go to a competitor.

- The IPA's definition of allowable "defensive" uses includes offensively suing any entity that has offensively asserted patents in the past 10 years, which greatly increases the number of companies that a holder of an IPA-licensed patent (including a troll) could target without the inventor's consent.

- As with the DPL, the IPA helps prevent certain patents from being asserted by trolls, but does not otherwise provide protection from trolls armed with non-IPA patents.

- In the event that Twitter were to sell a patent covered by the IPA, it is unclear whether courts would uphold the IPA provision that precludes future owners of the patent from asserting it without the inventor's permission. For example, it might be possible for a bankruptcy court to void IPA provisions on a patent that needed to be liquidated in order to satisfy creditors of the previous owner.

The Patent Pledge

What It Is

The Patent Pledge is a public promise not to initiate software patent lawsuits against companies with fewer than 25 employees.

Y Combinator Co-Founder Paul Graham created the pledge in August 2011.

The 34 companies that have made the Pledge so far are listed publicly on the Patent Pledge website, and include Airbnb, Stripe, Wepay, Bump, and Dropbox.

How It Works

The entire Pledge reads, "No first use of software patents against companies with less than 25 people." It is a public promise not to assert software patents against small startups, but it is arguably not legally binding, and Graham deliberately made it ambiguous.

The Pledge is made only by the company, and does not attach to the company's patents themselves. Thus, if the company's patents are transferred or fall into a troll's hands, the Pledge does not affect what the transferee can do with the patents. The Pledge is not intended to address the patent troll problem, but rather to address the problem of large companies suing competitors to stifle competition. Graham argues that competitor lawsuits are a different problem for startups than patent troll lawsuits, since patent trolls are only looking for a payoff, whereas competitors are looking to shut down the entire operation.

Graham maintains a public list of companies that have made the pledge at www.thepatentpledge.org.

Pros

- By holding themselves to a higher standard than the law requires, companies that make the Patent Pledge attract employees and garner goodwill from members of the public who care about patent reform.

- The Pledge is narrow, only preventing companies from suing small startups for infringing software patents. Pledgers are still free to sue companies with more than 25 employees and can sue small startups for infringing non-software patents.

- Because the Pledge likely binds only the company making the pledge and does not run with the patents themselves, the value of the company's patent portfolio is less likely to be diminished.

Cons

- Companies that make the pledge do not directly receive anything in return.

- The Pledge is likely not legally binding (though it is possible a defendant could bring a promissory estoppel defense based on the pledge).

- The Pledge deliberately trades precision for brevity, so it is open for interpretation. For example, it is not clear whether contractors count as employees for the purpose of the 25-employee limit.

- The Pledge does not run with the patents themselves, so if the company's patents fall into the hands of a troll (for example, if the company went bankrupt), the patents could still be asserted against startups.

- The Pledge is very narrow, only applying to software patents and only to startups, so it does not make as strong of a public statement as some of the other pledges.

Google's Open Patent Non-Assertion Pledge (OPN)

What It Is

Google's Open Patent Non-Assertion Pledge (OPN) is a commitment to not assert pledged patents against open source software.

Google stated that it developed the OPN in response to companies that "seek the benefits of OSS in their own businesses [but] nonetheless launch attacks against open source products and platforms as it suits their fancy."

So far, Google has pledged 245 of its own patents. Other adopters of the OPN include Cloudera and IBM.

How It Works

OPN adopters pledge not to initiate lawsuits for infringing certain patents against companies that make free or open source software, with regards to the use or sale of that open source software. Adopters need not commit their entire portfolios, and can choose which patents to dedicate.

The OPN has a defensive termination clause, providing that the pledge will not apply to anyone who sues the OPN adopter first.

The OPN remains in force for the life of the patent and binds future transferees or purchasers of the patent.

Pros

- The OPN only binds adopters with regards to open source software, so it offers a way to make a public statement about the company's support of open source software without committing to use the company's patents entirely defensively.
- Adopters of the OPN determine which patents they wish to pledge and need not commit their entire portfolios.
- Adopters can terminate their pledge in order to defend against incoming patent attacks.
- The pledge attaches to the patent and binds future owners of the patent, ensuring that the pledge will prevent trolls from asserting the patent against open source software users.

Cons

- Adopters do not directly receive anything in return.

- Since the pledge remains in force for the life of the patent, the patent may be worth less to future buyers, assuming those buyers intend to sue users of open source software. Thus, the pledge could potentially lower the liquidation value of the patent.

Mozilla Open Software Patent License Agreement (MOSPL)

What It Is

The Mozilla Open Software Patent License Agreement (MOSPL) expressly permits the use of Mozilla patents to encourage open innovation, rather than using patents to stop others from innovating.

Mozilla plans to selectively apply for patents and immediately license the patents under a royalty-free license to anyone who wants one. In return, each entity that takes a license to Mozilla's patents must agree to allow open source software projects to freely innovate without fear from patents.

How It Works

Mozilla will immediately offer royalty-free, non-exclusive licenses under the MOSPL to all of Mozilla's patents. Under the MOSPL, anyone can choose to take a license to make, use, or distribute any software covered by one of Mozilla's patents. However, licensees must agree (1) that they will not offensively sue, threaten, or accuse anyone's software of infringing on their patents, and (2) that they will grant royalty-free licenses to any patents they own, upon request, to any other open-source software project that agrees to be bound by the MOSPL. Companies using the MOSPL may still use their patents to defend themselves against prior-filed patent lawsuits without violating the terms of the license.

Everyone automatically benefits from the license for as long as they adhere to the conditions of the license. That is, it is unnecessary to take affirmative steps to obtain a MOSPL license; a company need only refrain from offensively suing, threatening to sue, or accusing of infringement any other company and grant a royalty-free license to any open-source software projects that also participate in MOSPL upon request; as long as the company does both of those things, it is free to make, sell, and distribute any technology covered by the MOSPL-licensed patents.

Companies that use the MOSPL may terminate their use of the license at any time by simply making a public statement of their intention to no longer be party to the license.

Licenses effectively run with the patent, so if a company issues a license under the MOSPL, the license for that patent would still be valid even if the patent were subsequently assigned to a different company. However, the subsequent assignee of a MOSPL-licensed patent would probably not be bound by the original MOSPL with regards to their entire portfolio, just the patent licensed under the MOSPL.

If a company committed to the MOSPL and that company was subsequently purchased by another entity, the purchasing entity would be bound by any licenses that the MOSPL licensee had previously granted.

Pros

- Companies that use the MOSPL can still defensively assert their patents if another company sues them for patent infringement.
- Joining is easy, free, and automatic.
- Terminating participation only requires a public announcement of the termination.

Cons

- The MOSPL only applies to software.
- Companies that take a license under the MOSPL are required to license their entire portfolio under the MOSPL, and cannot choose individual patents to license under the MOSPL.

Individual Pledges

What It Is

Several individual companies have unilaterally made public commitments to open their patent portfolios to the public for free.

In June 2014, Tesla CEO Elon Musk wrote a blog post entitled "All Our Patents Are Belong to You," in which he made the following promise: "Tesla will not initiate patent lawsuits against anyone who, in good faith, wants to use our technology." He explained that the move would benefit Tesla itself as well as the entire electric car industry and the world by allowing for a "common, rapidly-evolving technology platform." While some media outlets were initially skeptical about whether the patents really were free—especially in light of the vague "in good faith" clause—Musk later clarified that competitors can just go ahead and use Tesla's patents, with no licensing discussions required.

Following suit, Toyota announced at the January 2015 Consumer Electronics Show that it would make more than 5,000 of its hydrogen fuel cell patents available royalty free.

How It Works

One option for companies that want to use patents for good is to unilaterally pledge some or all of the company's patent portfolio to the public royalty free.

Pros

- For industries that, like the electric car industry, would benefit from a common platform, opening up a company's patent portfolio may ultimately benefit the company financially.

- While Tesla's pledge may be in the company's self-interest, a promise to open a company's patent portfolio to the public makes a strong statement that goes beyond the company's bottom line. Specifically, the company is stating that it is committed to open innovation and does not want to abuse the broken patent system. Such a message can attract talent to the company.

- A pledge like Tesla's can lead to positive publicity. Tesla's decision to open its patent portfolio was the subject of extensive media coverage (both positive and negative).

- Companies can reserve the right to use their patents defensively by using a promise like Tesla's, which states only that Tesla will not initiate lawsuits.

- Companies can customize their pledges to meet their individual needs, which may not be possible if the company uses a standardized pledge.

- Companies need not commit their entire patent portfolios; like Toyota, they can specify which patents they will open to the public.

Cons

- Companies that make unilateral promises like Tesla's do not directly receive anything in return.

- It is unclear whether Tesla's promise would bind subsequent purchasers of the patent. If not, a subsequent owner could choose to assert the patents against users of the patented technology. (However, users of the patented technology who relied on the initial promise might have a promissory estoppel claim to preclude enforcement.)

- On the other hand, if the promise would bind subsequent purchasers of the patents, the encumbered patents may have lower liquidation value, which could deter investors.

Patent Troll Insurance

While many companies carry insurance, standard liability policies generally do not cover patent troll lawsuits. Patent aggregators RPX and Unified, as well as the Association of National Advertisers, have begun to offer insurance to protect companies from the sudden and unexpected costs of defending against patent troll assertions. Publicizing insurance coverage may also make companies less likely to be targeted by trolls.

Unified Patents ‘Protect: Membership with Insurance’

What It Is

In October 2015, Unified Patents launched its Protect: Membership with Insurance program, offering a new membership tier for companies earning annual revenues under $20 million. In addition to offering the benefits of Unified’s membership (which are discussed above), the new membership tier includes insurance. The policy reimburses defense expenses incurred as a result of litigation initiated by a patent troll.

How It Works

The cost of the new membership tier, which includes insurance, is $995 annually.

The insurance covers pre-litigation and litigation dispute costs arising from patent trolls’ allegations of infringement. For the purposes of the policy, patent trolls are defined as entities that own patents, but do not make, use, sell, or offer to sell anything. This also includes large patent troll entities such as Intellectual Ventures, Acacia, and Empire IP.

The policy also covers invalidity counter-claims and challenges to the patent’s validity in the U.S. Patent and Trademark Office. The insurance does not cover settlement costs, consistent with Unified’s policy of never paying trolls so as not to encourage troll activity.

Unified is working with the Intellectual Property Insurance Services Corporation (IPISC) to offer members this insurance policy. In the event of a civil proceeding, members file a claim form and submit it to IPISC. IPISC then chooses litigation counsel for the insured. While the insured member does not get to choose its own attorneys, the member is ultimately in control of the lawsuit, though IPISC may make recommendations as to how the case should move forward. IPISC states that its litigation counsel average more than 25 years of intellectual property litigation experience and have successfully tried intellectual property cases. IPISC chooses counsel based on successful intellectual property litigation experience, technical expertise, location, and familiarity with the policy and billing guidelines.

The policy limit is $50,000 per claim, but higher limits, alternate terms, and wider coverage scope may be available by applying for separate coverage. There is a copay of 20%, and a Self-Insured Retention (SIR) of $5,000. The SIR is paid out-of-pocket by the insured member; once the SIR is satisfied, the policy begins reimbursement. There is no limitation on the technology covered by the policy.

Threats of or actual civil proceeding alleging infringement during the initial 90 days of membership are not covered. Pre-existing accusations of infringement (including warning letters, e-mails, and verbal threats alleging infringement) may be excluded from coverage. However, even if a company has received a threat that is excluded from coverage, the company is not prohibited from obtaining the insurance to cover future threats.

Pros

- Unified's insurance policy is relatively inexpensive; Unified claims its insurance costs 80% less than any comparable product.

- Unified's insurance includes the cost of fighting a demand letter, unlike RPX's insurance, which only kicks in once a patent troll has filed a lawsuit.

- Unified's insurance policy includes the benefits of Unified membership.

- Attorneys are provided for policyholders; however, this may also be a con, because policyholders cannot choose their own attorneys.

- For companies that are at a high risk of patent troll lawsuits (for example, because of high visibility), the fixed price may mean that they pay less than they would if the price were based on an actuarial model.

- Unlike RPX's insurance offering, Unified's insurance policy does not further fund patent troll behavior by covering settlement costs. However, this is also a con, because policyholders that choose to settle have to pay their own settlement costs.

- Unified's insurance policy covers challenges to validity of the patent troll's patent in the U.S. Patent and Trademark Office.

Cons

- The policy limit is $50,000, so policyholders must pay any attorneys' fees that exceed $50,000. This amount is well below what is required to take a patent case through trial in a federal district court. Thus, the policy is designed to allow companies to put up an initial defense. For example, it might be enough to cover the costs associated with a motion to dismiss. In this sense, it should help deter the true bottom-feeder trolls that seek quick settlements for very weak cases. But the policy will provide only limited help against a determined patent owner that is willing to litigate extensively.

- While there is no limitation on the technology covered by Unified's insurance policy, policyholders must be Unified members, and therefore must be in one of Unified's zones: cloud storage, content delivery, wireless, automotive, and electronic patents.

- Unified's insurance policy does not cover settlement costs. This is also a pro, because it means that the policy does not pay to further fund trolls' behavior.

- Policyholders cannot choose their own attorneys to defend against covered patent troll attacks.

- There is a 90-day waiting period, and lawsuits filed by patent trolls during that period will not be covered by the insurance. Companies may want to avoid making it public that they have joined Unified during that 90-day period to avoid incentivizing patent trolls to file lawsuits against them during the waiting period.

RPX Insurance Services

What It Is

RPX Insurance Services offers a variety of insurance policies that cover costs incurred in patent troll litigations in U.S. federal district court, including litigation expenses and resolution payments.

Insurance policies are available for companies of any size, including pre-revenue companies, in the software, media/communications, e-commerce, consumer electronics, and networking sectors. Companies need not be members of RPX to obtain RPX insurance.

RPX has developed a variety of specialized policies to account for individual companies' risk profiles. Annual premiums start at $5,000, retentions (similar to deductibles) are between $25,000 and $500,000, and copays start at 10%. The policy provides limits of between $1 million and $10 million annually.

How It Works

RPX has used its store of litigation cost data as well as confidential and anonymized cost information from each policyholder to build an actuarial model for patent troll risk. Based on its estimation of the frequency and cost of NPE attacks against an individual company, RPX works with companies to deliver the appropriate amount of coverage for each company with varying annual premiums, starting at $5,000. To determine the policy price for small companies, RPX takes into account, among other things, the company's previous experiences with NPEs and the company's visibility. RPX says that it prices and issues insurance policies within 10 days.

When a patent troll files a lawsuit against a covered company, the company initially pays the litigation expenses out of pocket. The company pays RPX a retention fee (similar to a deductible) between $25,000 and $500,000, depending on the policy, and submits monthly reimbursement requests to RPX. RPX then reimburses for litigation costs and resolution payments, minus the insured company's copay, which varies by policy and starts at 10%. RPX reimburses for qualifying litigation expenses and resolution payments up to the individual policy's annual limit, which is between $1 million and $10 million.

RPX insurance includes pre-claim expert advisory services and access to RPX Panel Counsel defense resources. Policyholders have the option to use their own attorneys or to obtain legal representation through the Panel Counsel program. However, opting to use the Panel Counsel program lowers the company's copay percentage. Both panel and non-panel counsel must comply with the RPX Insurance Services Best Practices and Billing, Budgeting, and Reporting Procedures. Attorneys who are part of the Panel Counsel program are pre-vetted by RPX and offer pre-negotiated discounts for litigation services to policyholders. RPX says that its Panel Counsel attorneys have proven patent litigation track records, experience defending companies against patent trolls, and efficient case management practices. RPX will offer a list of Panel Counsel program attorneys to prospective policyholders upon request.

While policyholders have the right to control the course of the litigation, RPX reserves the right to control which litigation costs the insurance policy will reimburse. Paul Scola, RPX's senior vice president for insurance services, told Ars Technica that while each policyholder stays in control of its case, there are "controls in the policy" regarding how the company can react to an offer to settle. Scola went on to say, "This isn't a line of credit. If you want to make a statement to the NPE community, and fight to the death—that's not what we're doing."

RPX insurance only kicks in once a patent troll has filed a lawsuit, not when the patent troll sends a demand letter or threatens to sue. RPX's definition of patent troll for the purposes of the policy intends to capture entities whose primary business is to assert patents through litigation, and contemplates the most common forms and variations of those entities. The definition differentiates patent troll litigation from strategic suits brought by operating companies that have competing products.

RPX offers a variety of insurance options, including emerging risk insurance for early-stage/venture-backed companies that are just starting to face troll risk; standard protection for companies already dealing with patent troll litigation; portfolio protection for clients of venture capital and private equity firms; and indemnification insurance, which allows technology providers to extend their coverage to their customers.

RPX insurance is backed by an A-rated Lloyd's policy.

Pros

- RPX covers settlement costs in addition to litigation expenses.

- RPX's actuarial model quantifies patent risk on a company-by-company basis so that companies can get the appropriate amount of coverage for a customized price.

- Companies need not become members of RPX to obtain RPX insurance.

- Policyholders have the option of choosing their own attorneys, though they will have a higher copay if they use their own attorneys instead of using RPX's panel counsel.

- RPX offers optional indemnification insurance to protect a company's customers from patent troll lawsuits for using the company's products. This is important because U.S. patent law makes it illegal not only to make or sell a patented invention, but also to use a patented invention. End-users of a company's products are thus also at risk of patent troll lawsuits, and may seek indemnification if a patent troll wins a lawsuit against them.

- RPX offers venture capitalists and private equity firms the option of providing insurance for all companies in their portfolios.

Cons

- While policyholders control the course of the litigation, RPX has implemented "controls in the policy" regarding whether RPX insurance will reimburse for litigation expenses if the company has declined a patent troll's offer to settle. RPX's senior vice president for insurance services has gone on the record to say that policyholders are not allowed to "fight to the death" to make a statement to patent trolls. By encouraging settlement, RPX might actually be incentivizing patent troll activity.

- Insurance is only available to companies in certain industry sectors: software, media/communications, e-commerce, consumer electronics, and networking.

- If a company chooses to use its own attorney to defend itself, the company will pay a higher copay, and the attorney must comply with RPX's "best practices" as well as billing, budgeting, and reporting procedures.

- Companies must first pay for litigation expenses out of pocket and submit a request for reimbursement.

- It appears that RPX insurance does not cover the cost of responding to a demand letter or threat to sue; insurance coverage is triggered by a patent troll filing a lawsuit.

- For highly visible companies, RPX may cost more because RPX takes into account each company's visibility in determining the cost of the insurance policy.

Association of National Advertisers (ANA) Patent Infringement Defense Insurance Program

What It Is

The Association of National Advertisers (ANA) has launched a Patent Infringement Defense Insurance Program to protect marketing companies from the expenses associated with patent troll lawsuits. The program is a response to what the ANA says is a growing trend of patent trolls claiming ownership of established advertising techniques, such as using QR codes to direct a mobile device user to web content or putting a store locator on a website. The ANA says it launched the program because standard advertising liability policies do not cover patent infringement, and so far it is unclear whether standalone policies for patent infringement will meet the specific needs and core concerns of advertisers.

How It Works

The ANA Patent Infringement Defense Insurance Program provides the option for ANA members to purchase insurance policies that help cover the cost of defending against patent troll assertions. The insured party may use the coverage to challenge the validity of the patent or otherwise defend against an assertion by a troll, with reduced out-of-pocket expenses.

When a policyholder receives a threat from a patent troll—whether oral, written, or through an actual lawsuit—the ANA provides funds to defend against the assertion, covering litigation expenses and challenges to the patent's validity in the U.S. Patent and Trademark Office.

ANA offers two insurance options. Both options cover patent troll assertions where the allegedly infringing product involves creating and implementing marketing campaigns, including production and distribution of marketing content and related collection and sales activities. The first option applies to products and services purchased by the insured from outside organizations or individuals (assuming the insured uses the products and services as intended without substantial modification). This option does not cover allegedly infringing marketing campaigns that were developed in-house, and is therefore less expensive. The second option includes the coverage of the first option, as well as marketing campaigns that the insured creates in-house.

ANA's insurance covers up to $500,000 per claim per year, and up to $1,000,000 for an aggregate of all claims per year, though plans with higher limits are also available. Premiums for the first option (products and services that the insured purchases from outside companies) cost between $10,000 and $20,000 per year. The cost of the premium for the second option depends on the extent and type of marketing and advertising programs developed in-house.

The coverage is offered through Scottsdale Insurance Co. and underwritten by Intellectual Property Insurance Services Corporation. Retail insurance broker Twin City Group is responsible for soliciting and advising ANA members.

For more information, contact ANA's group executive vice president, Bill Duggan, at bduggan@ana.net or (212) 455-8010.

Pros

- ANA has multiple offerings to differentiate between companies that use outside products and services and those that create marketing campaigns in-house.
- Coverage includes the cost of challenging the patent troll's patent at the U.S. Patent and Trademark Office.
- Policyholders appear to be able to choose their own attorneys.
- Coverage begins when a patent troll makes a demand, not just when a patent troll files a lawsuit.

Cons

- The insurance is only offered to companies in the advertising space.
- Companies must be members of ANA to obtain insurance.
- The insurance does not cover the cost of settlement.
- Coverage and pricing is not necessarily customized to the needs of each individual company.

Disclaimer

This guide is for informational purposes only and does not constitute legal advice. The purpose of the guide is to provide a general description of the alternative patent licensing options available, but each factual situation is unique and requires individual consideration. Therefore, please do not act on this legal information alone; if you have any specific legal problems, issues, or questions, seek a complete review of your situation with a lawyer licensed to practice in your jurisdiction.

Comparison Tables

Defensive Patent Aggregators

	AST	RPX	Unified
Minimum annual fee for startups	$25,000	$85,000	Free
Fee adjusted based on company size		✓	✓
Focuses on specific technology zones			✓
Members receive licenses to entire portfolio		✓	✓
Members make purchasing decisions	✓		
Members give up their own patent rights			
Challenges patents in the USPTO		✓	✓
Intervenes in active litigation	✓	✓	✓
Offers patent intelligence services	✓	✓	✓
Offers patent insurance policy		✓	✓
Does not do business with trolls			✓

Patent Pledges

	DPL	OIN	LOT	IPA	TPP	OPN	MOSPL
No annual fee	✓	✓		✓	✓	✓	✓
Users pick which patents to dedicate		n/a		✓		✓	
Users opt into a cross-licensing network	✓	✓	✓				✓
License provisions travel with the patent	✓	✓		n/a	✓	✓	✓
Specific to a particular technology area		✓				✓	
Withdrawing users may retain licenses	✓	n/a	✓	n/a	n/a	n/a	
May assert patents against nonusers	✓		✓	n/a	n/a	n/a	

Patent Troll Insurance

	Unified	RPX	ANA
Minimum annual premium	$995	$5,000	$10,000
Minimum copay	$20%	10%	?
Minimum deductible/retention	$5,000	$25,000	?
Coverage maximum per claim at min. premium	$50,000	?	$500,000
Coverage maximum annually at min. premium	?	$1 million	$1 million
Covers pre-litigation costs	✓		✓
Covers litigation costs	✓	✓	✓
Covers settlement costs		✓	✓
Indemnification option		✓	
Policyholders choose their own attorneys		✓	✓
Requires membership	✓		✓
Only available in certain industries	✓	✓	✓

Overview of Options

Defensive Patent Aggregators

Unified Patents protects specific technology "Zones" by challenging patents in the PTO; buying patents and licensing them to members; and offering intelligence, legal support, and insurance.

Allied Security Trust acquires patents for its member companies through a bidding system that distributes the cost of each patent among only the companies interested in that patent.

RPX acquires patents and licenses them to members, challenges patents in the PTO, provides patent intelligence to members, and offers patent troll insurance policies.

Patent Pledges

Under the Defensive Patent License, companies commit to never asserting any of their patents offensively against any other company that has also committed to the DPL.

The Open Invention Network acquires patents and patent applications and makes them available royalty-free to any entity that agrees not to assert its patents against the Linux system.

Under Google's License on Transfer Agreement, companies license their patents to other LOT members, but the licenses only become effective upon the patent's transfer to a third party.

The Innovator's Patent Agreement is Twitter's guarantee to its employees that if they assign a patent to Twitter, Twitter will not assert the patent offensively without the inventor's permission.

The Patent Pledge is a promise not to initiate software patent lawsuits against startups.

Google's Open Patent Non-Assertion Pledge is a commitment not to assert pledged patents against open source software.

Mozilla Open Software Patent License Agreement users get licenses to Mozilla's patents for agreeing not to initiate software patent lawsuits and to grant free licenses to other MOSPL users.

Tesla and Toyota have unilaterally opened some or all of their patent portfolios to the public.

Patent Troll Insurance

Unified's Protect: Membership with Insurance program reimburses defense expenses incurred as a result of litigation initiated by a patent troll.

RPX Insurance Services offers a variety of insurance policies that cover costs incurred in patent troll litigation, including resolution payments.

The Association of National Advertisers offers patent troll insurance policies to members.