

A Jukebox for Patents: Should Patent Licensing be Controlled by Compulsory Licensing?

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The patent system today no longer follows the classic understanding of how it is designed to work. In theory, to avoid infringement, a product developer searches the database of issued patents looking for those that might read onto the product being developed. If such patents are found, the developer can approach the patent holder for a license, can attempt to design around the claims, or can abandon the project. With many hundreds of thousands of patents being issued annually—a rate of issuance almost an order of magnitude larger than a hundred years ago—it is now a practical impossibility to search for collisions. Last year, for example, approximately 760 new utility patents were issued every day. In any major technological area, there are not enough hours in the day to read, understand, and apply the outstanding patents that might cover a new product.

As a consequence of the overwhelming number of new patents (as well as the declining probable validity of them), innovation companies have changed the way they use patents. Recently, for example, a patent practitioner from a major computer firm described his company's current strategy of using patents as deploying the haystack rather than the needle. Discovering that a particular patent reads onto a competitor's product is no longer the method of analysis; instead, he wants to be able to throw hundreds if not thousands of patents at any opponent asserting that they are being violated. The financial reality of patent defense makes defending against a single patent costly; doing so against a haystack of them is prohibitively expensive. As the practitioner described it, as long as his haystack is bigger than the other company's haystack, he is going to win. In effect, therefore, the marketplace for licensing patents no longer works, making it unreasonable to expect the classical patent model to operate.

This paper presents an alternative based on copyright law concepts. As music distribution technology expanded throughout the twentieth century, it became prohibitively expensive for a music copyright holder to trace who was performing the work. In other words, as is now being seen in patents, the viability of one-on-one licensing disappeared. To address this, copyright law creates several licensing mechanisms for different uses of music that establish the royalties that will be owed through an administrative process. An individual who is using recorded music need not seek out the copyright owner for permission to use a work of music; instead, by paying the set royalty, non-infringement is ensured.

Most patents today would be better managed by a system of mandatory royalties. This system would have to be sensitive to the field of invention as well as the inventive scope of the patent claims. This paper will present such a system and defines the outlines of how it would work. The system will include most patents, but will allow some exceptions where, for example, the patent owner desires to maintain the patent rights exclusively for the owner's product or to engage in limited direct licensing.