

## **A conversation with Julie Samuels, Peter Eckersley, Daniel Nazer, and Adi Kamdar on October 15, 2013 about software patent reform**

### **Participants**

- Julie Samuels — Senior Staff Attorney, Electronic Frontier Foundation
- Peter Eckersley — Technology Projects Director, Electronic Frontier Foundation
- Daniel Nazer – Staff Attorney, Electronic Frontier Foundation
- Adi Kamdar — Activist, Electronic Frontier Foundation
- Elie Hassenfeld — Co-Founder, GiveWell
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**Note:** These notes were compiled by GiveWell and give an overview of the major points made by Julie Samuels, Peter Eckersley, Daniel Nazer, and Adi Kamdar.

### **Summary**

GiveWell spoke with Julie Samuels, Peter Eckersley, Daniel Nazer, and Adi Kamdar of Electronic Frontier Foundation (EFF) as part of its shallow investigation of patent reform. Conversation topics included: how patent trolls abuse software patents, short-term and long-term reforms, other funders and institutions in this space, and what EFF would do with more money.

### **Background**

The patent office only spends about eighteen hours per application and it approves a high percentage of the applications it receives. Many of the software patents it grants are vague or overly broad. “Patent trolls” exploit bad patents by buying them and using them to sue large and small businesses. These businesses often accept a lack of clarity in the legal demands they receive from the patent trolls and are scared into settling. Patent trolls sue strategically, targeting businesses when they are particularly vulnerable, e.g. right when they are getting new funding or planning an IPO. Trolls aim for cases where it is in the defendant’s interest to settle rather than spend about 1-2 million dollars defending itself in court. A small business might pay around ten thousand dollars in a settlement.

For example, a patent troll has sued Hulu, among others, for showing advertisements before copyrighted content. A petition to have the case reviewed by the Supreme Court has been submitted by WildTangent, another of the defendants in the case.

### **The scale of the problem**

Economists Jim Bessen and Michael Meurer estimate that in 2011 patent trolls caused direct costs of about 29 billion dollars, with overall lost wealth at about 80 billion dollars.

### **EFF's goals**

Ultimately, EFF wants to ensure that software patents get out of the way of innovation. If we are stuck with software patents, however, EFF would like to at least see reforms that make these patents significantly harder to get (with a higher obviousness standard) and narrower (ensuring that claims are strictly limited to the inventor's actual contribution). The patent system is designed to protect big, expensive, easy-to-copy innovations such as molecules used to treat disease. The patent system is largely designed to protect those types of innovation, and it doesn't work when it comes to software, because there does not seem to be a market failure and because there would be plenty of software innovation without patents. Microsoft had only 5 patents in its first 10 years. Now, Microsoft gets 4,000 to 5,000 patents a year.

In the short term, EFF promotes reform that reduces patent trolling.

### *Litigation reform*

Most of the short-term reform efforts are focused on inefficiencies in the litigation system. There are currently 7 bills of this nature pending in Congress. EFF does not think any one of these solutions will solve the problem on its own. Rather, these reforms would work collectively to make patent trolling a less attractive business model.

- **Fee Shifting:** Currently, the losing side usually must pay its own legal fees. This often encourages victims to settle with patent trolls out of court. Fee shifting would help victims to defend lawsuits and would discourage patent trolls from pursuing them.
- **Protecting End Users:** In many patent troll cases, the people being sued are the end-users of a product rather than the manufacturers. For example, patent trolls are suing cafes for using patented systems to provide Wi-Fi to their customers. Establishing end-user immunity would prevent patent trolls from pursuing these smaller, more vulnerable parties. There are academic papers that discuss the frequency of end-user suits.
- **Transparency:** Because settlements usually include non-disclosure agreements, little is known as to how often patent trolls send demand letters and how often these suits get settled out of court. EFF has created a website to track demand letters and to show which trolls are targeting which companies and what the patent trolls are demanding. EFF supports reforms that would require demand letters to be more specific in their claims and require patent holders to reveal the real party of interest in any suit. It is often unclear as to who stands to gain financially, because patent trolls often operate behind "shell companies."

### *Non-litigation reform*

- **Expanding the review of business method patents:** The America Invents Act introduced a review process for patents related to financial systems, also known as covered business method patents. EFF supports a reform that would expand the review process to all technology-related patents. The reform would allow people to petition the patent office to review bad patents rather than fighting bad patents in court. It would also provide a broader range of grounds to challenge a patent,

including failure of written description, failure to describe the invention, and failure of patentable subject matter.

Over the longer term, EFF aims to push for greater specificity in software patents, such as the inclusion of code. EFF also supports changes to “functional claiming,” or the fact that many software patents cover general approaches to solving a problem, rather than specific solutions. President Obama recently issued an executive order to have the patent office investigate functional claiming.

## **Likelihood of short-term reform**

### *A moment of political opportunity*

After the passage of the America Invents Act in 2011, large-scale movement in patent reform was not expected for another 20 years. In the last year, the likelihood that Congress will pass patent-related legislation has increased dramatically, partly because patent trolls have been getting more extreme. Whereas patent trolls used to pursue large technology companies, in the past 18 months they have been pursuing smaller businesses such as start-ups and app developers, and they have been pushing companies out of business.

EFF has helped build the media narrative surrounding patent trolls. Now there is considerable mainstream coverage of patent trolling by media outlets such as *This American Life*. The White House issued a report on patent trolls two to three months ago that echoed many of the messages EFF has been pushing for a long time. EFF capitalizes on news coverage of patent trolls in its efforts to shift the debate around patent reform.

### *The political landscape*

Patent reform is one of the few causes with bipartisan support. The President, the House Judiciary Chairman, and the Senate Judiciary Committee all support of patent reform. There is a good chance that Congress will take up the seven patent reform bills before the next mid-term elections (in 13 months). There is a good chance that Congress will pass these bills.

## **The patent office**

Targeting the patent office is not the most efficient way to enact change, given its staffing limits and a mandate over which it has little control. Furthermore, persistent applicants can always file new claims, even if their previous claims have been rejected. This system allows patent trolls to repeatedly file for a patent until it is granted. EFF monitors some of the work done by the patent office and has a fairly constructive internal relationship with them.

## **Likelihood of fundamental reform**

There are no serious reform efforts currently aimed at eliminating software patents. A year

ago, it was not realistic to consider fundamental reform. However, the debate around patent reform has shifted considerably in the last year, and there is the sense among organizations like EFF that more is realistic now than before. Some reforms require revisions to patent law in general, rather than to software patents specifically. The pharmaceutical lobby, which is quite powerful, is expected to be resistant to such change.

### **What EFF would do with more money**

There are currently 2.5 FTE staff members at EFF working on patent issues. They also work on other IP issues but focus on patent reform.

With more money, EFF would:

- Do more litigation. EFF would like to get a case on functional claiming before the Supreme Court. It would also like to look for other cases for which it could be the litigant. This would require many more resources than it currently has.
- Do more direct work with legislators, e.g. help draft legislation.
- Conduct or fund empirical research to discover how many demand letters are being sent to small companies, how often companies are settling with patent trolls out of court, what these settlements look like, etc. Questions like these are difficult to research.
- Partner with academics and members of the tech community. There is a lot of legwork involved in getting prominent computer scientists to speak out in an organized way.
- Do more work internationally. This is resource intensive.
- Develop its strategy for moving fundamental reform. For now, EFF is almost exclusively focused on the short term, particularly on the seven bills currently pending in Congress.

### **Funding in this space**

The short-term legislative push for reform is well funded. Although total funding for non-profits working on this issue is likely less than one million dollars a year, companies are spending millions of dollars per year to support or oppose the legislative reforms discussed above. Other funders include web hosting companies, retailers, travel websites, hotels, trade associations, Cisco Systems, and Rackspace. Companies and individuals are funding this space more so than foundations. Most of these funders have only just gotten involved in the past 12 months. It is hard to know who is spending and how much they are spending, because many companies are not public about their involvement in this space.

### **Other institutions in this space**

- Computer & Communications Industry Association — has a project called Patent Progress.
- Public Knowledge — recently got funding to expand and hired someone to work on patent reform full-time .

- Public Patent Foundation — has been working on patent reform for a long time.
- Free Software Foundation — was influential in getting groups like EFF to work on the issue and has been working in this space longer than anyone else.
- Free Software Foundation Europe (FSFE)
- Foundation for a Free Information Infrastructure (FFII) — was very influential in Europe in the 2000s.

## **Other reform movements in intellectual property**

Fifteen years ago, organizations such as EFF started noticing problems with the patent system in both pharmaceuticals and technology. Since then, a new civil society-oriented perspective has emerged on the issue, moving the debate from “how do we protect intellectual property” to questions like, “how do we ensure access to medicine in the developing world?”

There is the broad critique that patents are not good solutions to the fundamental problems that they were created to solve and that they are not maximizing the social benefits of invention. The problems in each industry are different; therefore, the solutions should be industry-specific.

Many patent reform movements are taking place in pharmaceuticals and technology. These are the spaces where alternatives have been articulated clearly. Though there may be problems in other fields, EFF is not aware of them and expects that the issues may be less problematic, if they do exist.

### *Pharmaceutical and biotechnology patents*

In the US, the patent system is often perceived to work well for pharmaceuticals. The main critiques in the pharmaceutical space are that patents reduce access to medicine in developing countries and that there is significant industry capture of regulators. There are many organizations working in the “access to medicine” space.

### **Software patent reform in Europe**

EU has been more successful than the US at limiting the damage done by patent trolls and at preventing treaties from interfering with domestic reform. The EU was close to abolishing software patents entirely but ultimately did not.

*All GiveWell conversations are available at <http://www.givewell.org/conversations>*