



Hacking the Patent System

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Hacking the Patent System

Juelsgaard Intellectual Property & Innovation
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Full copy at: <https://www.eff.org/deeplinks/2014/05/hacking-patent-system-guide-alternative-patent-licensing-innovators>

UPDATED VERSION COMING VERY SOON

open**invention***network*[®]



Engine





“Because dumbass patents are crushing small businesses. I have had multiple small companies I am an investor in have to fight or pay trolls for patents that were patently ridiculous.”

METHOD AND APPARATUS FOR YOGA CLASS IMAGING AND STREAMING

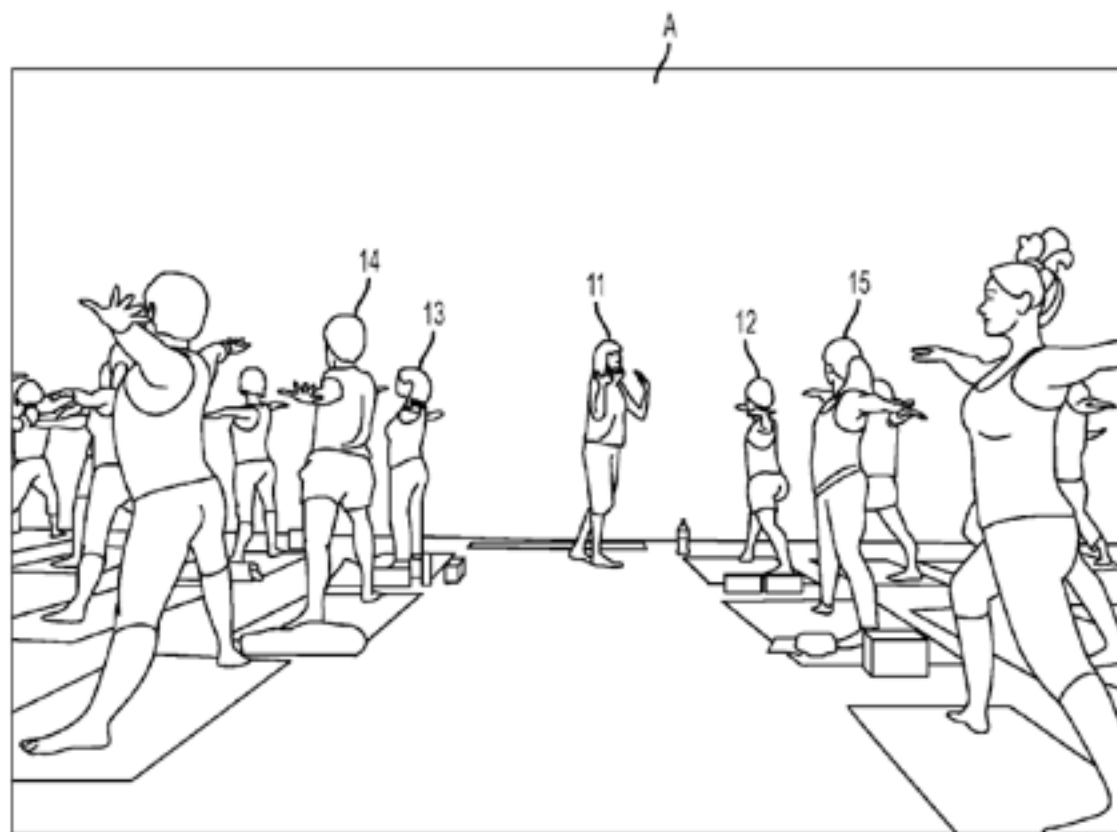
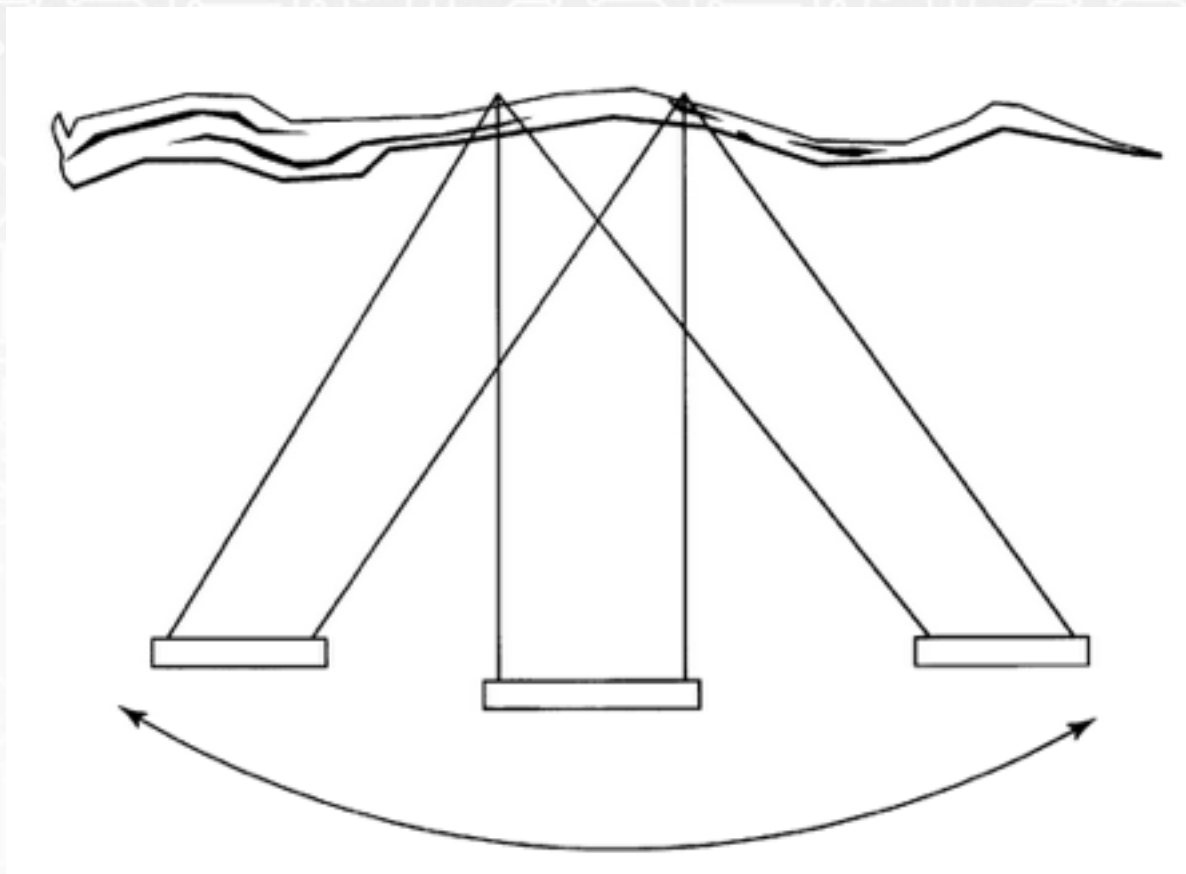


FIG. 2



METHOD OF SWINGING ON A SWING

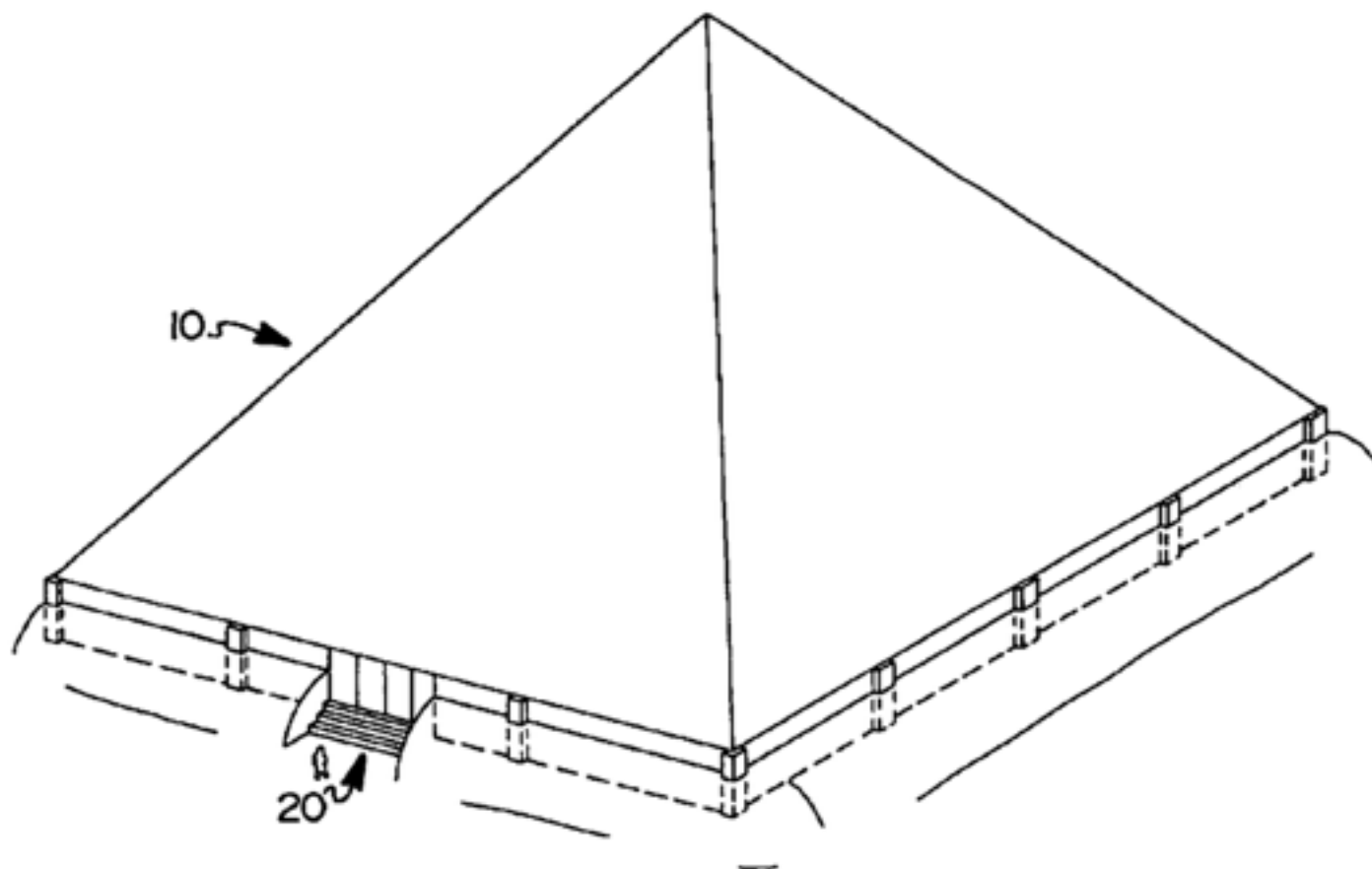


WAT



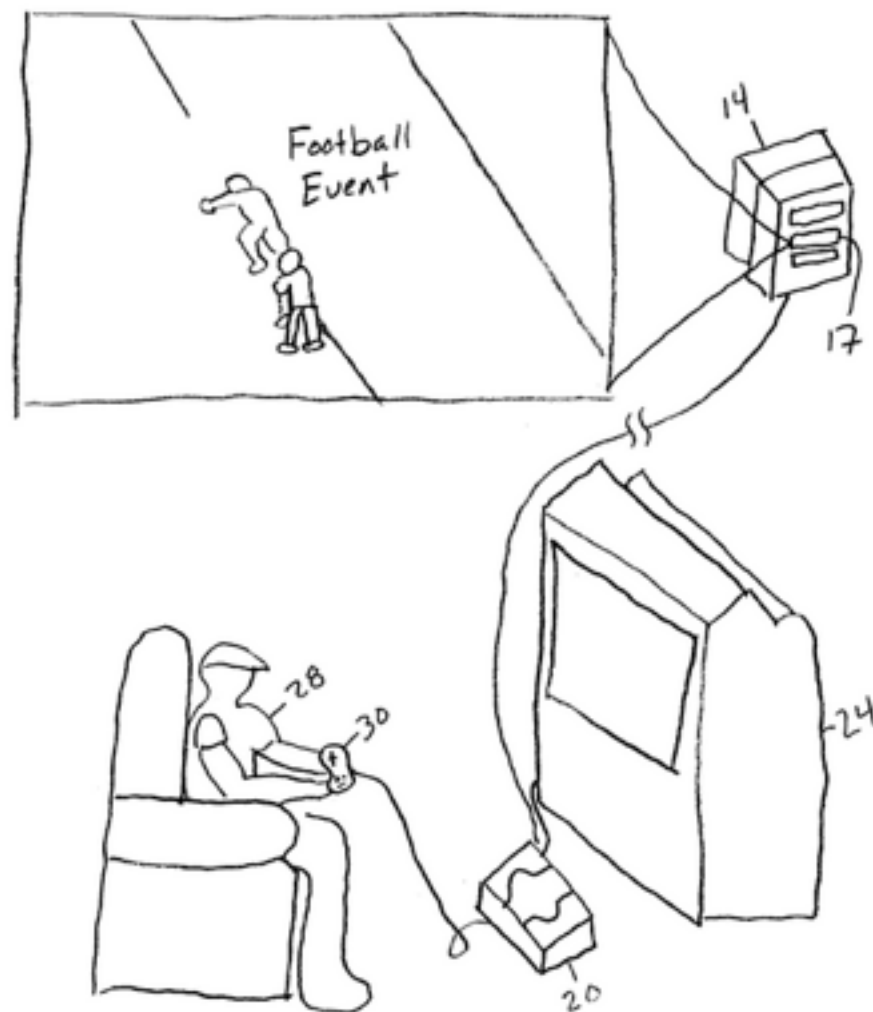


**BURIAL STRUCTURE FOR THE
INTERMENT OF HUMAN REMAINS AND
SIGNIFICANT MEMORABILIA**





Method and system for increased realism in video games





WHY ARE PATENTS SO DESTRUCTIVE TO FREE SOFTWARE?

- No need to show copying - so all the classic strategies of free software licenses are unavailable
- Huge volume of vague software patents makes pre-clearance impractical
- Trolls have no incentive to be good actors
- Patents promote oligopoly and favor huge companies that can amass giant portfolios



WHY HACK THE PATENT SYSTEM?

- Keep patents out of troll hands
- Promote peace between operating companies (especially regarding FOSS projects)
- Engineer recruitment & satisfaction
- Just the right thing to do - minimize the harms caused by a deeply flawed system



NO AMOUNT OF DUCT TAPE CAN FIX ...

- Trolls have no incentive to cooperate and will always be a problem
- Failing companies will always be tempted to monetize / privateer with patents
- Hacks can't fix the USPTO - the flood of bad patents will continue



Defensive Patent Aggregators

RPX, Unified Patents, Allied Security Trust



- Buy patents (sometimes from trolls)
- Challenge patents at the PTAB
- Settle cases for members
- May provide insurance

Check out white paper for details



DEFENSIVE AGREEMENTS & PLEDGES

- Defensive Patent License
- Twitter's Innovators Patent Agreement
- License on Transfer
- Mozilla Open Software Patent License Agreement
- Open Invention Network
- Unilateral Pledges (Tesla)



Defensive Patent License



Troll Proofed. Innovation Protected.



Defensive Patent License

- Company-wide, portfolio-wide, non-aggression pact with respect to all DPL users
- Version 1.1 does *not* include anti-cloning provision
- Withdrawal requires 180 days notice and licensees have option to convert to RAND terms



Defensive Patent License

- **7.2 “Defensive Patent Claim”** means an Infringement Claim against a DPL User made in response to a pending prior Infringement Claim by said DPL User against the asserter of the Defensive Patent Claim.



Defensive Patent License

Pros:

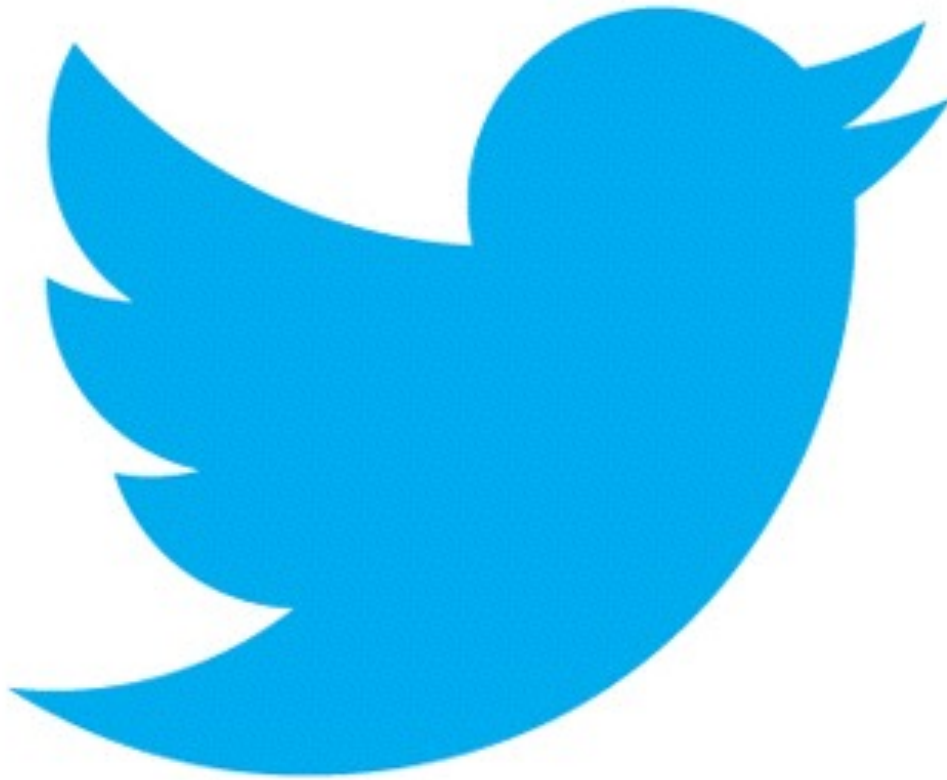
- Serious, company-wide commitment to defensive patenting (at least as to all DPL users)
- Trolls can't later use portfolio to attack DPL users
- No membership fee

Cons:

- Not many have joined (only 2 users, 23 patents so far)
- Must commit entire portfolio
- DPL provides no protection from attacks from outside the network



Innovator's Patent Agreement





Innovator's Patent Agreement

- Assignment agreement between inventor and company
- Grants inventor a license sufficient to enforce promise not to assert patents except for a “defensive purpose”
- Defensive purpose defined fairly broadly
- Promises are intended to run with the patent and bind future owners



Innovator's Patent Agreement

“Defensive Purpose” if the claims are asserted:

- against an entity that has sued or threatened to sue assignee
- against an entity that has filed a patent infringement lawsuit “against another in the past ten years” (unless that suit was defensive)
- or “otherwise to deter a patent litigation threat against Assignee or Assignee’s users, affiliates, customers, suppliers, or distributors”



Innovator's Patent Agreement

Pros:

- Shows broad commitment to defensive patenting
- Empowers inventors who may otherwise be reluctant to support patenting
- Adopted beyond Twitter (Jelly, Lift, and StackExchange have adopted the IPA)

Cons:

- Distributes control over patent portfolio into many hands
- Could reduce value of portfolio (certainly makes the patents less valuable to trolls)



License on Transfer



LOTNETWORK
WHAT GOOD CORPORATE CITIZENS DO

<http://www.lotnet.com/>



License on Transfer

- Anti-privateering project - 80% of troll patents originate with operating companies
- A license that only becomes effective if the patent owner transfers the patent to a third party.
 - Unless the transfer is made to another LOT user or as part of a legitimate spinout or change of control to a non-troll.
- Members include Google, SAP, Newegg, Dropbox, Cannon, Ford, Mazda (over 100,000 patents and applications)



License on Transfer

Pros:

- Wide adoption - over 100,000 patents and applications are covered by LOT
- Much more limited commitment than DPL
- Makes large portfolios unavailable as weapons for trolls against LOT users

Cons:

- Limited to anti-privateering. *Not* a broad commitment to defensive patenting.
- LOT users can sue each other for patent infringement
- Annual fees (though not very large)



Mozilla Open Software Patent License Agreement



<https://www.mozilla.org/en-US/about/patents/license/>



MOSPL v1

- A conditional license - in exchange you agree not to assert your patents against open source projects
- You may already be a licensee ...



MOSPL v1

- “You will be bound to this Agreement if you (a) make, use, sell, import or otherwise exploit any Software, or practice any method embodied in Software, in such a fashion that, absent the licenses granted to you herein, would infringe any Licensor Patent; (b) take any action knowingly relying on the licenses granted to you herein, or (c) show in any other reasonable way your intention to be bound to this Agreement.”



MOSPL v1

- You “agree to grant, upon request and upon reasonable, non-discriminatory and royalty free terms and conditions, to Licensor and any Participant a royalty-free, fully-paid-up, worldwide, non-exclusive, non-transferable license under your Patents to make, have made, use, sell, offer for sale, import, and otherwise exploit any Open Source Software and practice any method embodied in Open Source Software.”



MOSPL v1

Pros:

- Low cost way to leverage patent portfolio to promote open source
- Creative way to leverage massive user base

Cons:

- Can't bind those who don't want to be bound
- May not be useful idea for companies without widely deployed products (because they would have few licensees)
- ... new idea, untested



open**invention***network*²

<http://www.openinventionnetwork.com/>



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
- Owns ~500 patents
- Has over 1,500 licensees
- Helped create Linux Defenders defensive publication website



Open Invention Network

Pros:

- Promotes freedom to operate for all Linux developers
- Hundreds of OIN patents no longer available to trolls who might attack Linux
- Joining network is free

Cons:

- Limited to Linux system as defined by OIN
- Controlled by a few large members (Google, IBM, NEC, Philips, Red Hat, Sony, SUSE)



Unilateral Pledges

All Our Patent Are Belong To You

Elon Musk, CEO • June 12, 2014

Yesterday, there was a wall of Tesla patents in the lobby of our Palo Alto headquarters. That is no longer the case. They have been removed, in the spirit of the open source movement, for the advancement of electric vehicle technology.



<http://www.pijip.org/non-sdo-patent-commitments/>



Unilateral Pledges

- Over 100 pledges have been made - each with unique terms and scope
- Don't have the characteristics of a contract (no offer, acceptance, etc.)
- Promissory estoppel? But can you prove reliance on a specific promise?
- Do these promises run with the patents?
- Lots of questions and very few answers (maybe this is a good thing)



Troll Insurance?

- Unified Patents offers a policy that would pay \$50,000 toward legal fees only (no settlement payments) - aimed squarely at bottom-feeding trolls
- RPX offers much larger (and more expensive) policies
- Association of National Advertisers offers insurance to ANA members



questions?

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