

Chapter 2:

Work with the system--

Use OEMs and your legal team

The Free Software Movement wants to change all the rules. Don't forget, it's companies like yours that made the rules!

By working with hardware manufacturers and lawyers, you can help reinforce and update the rules that keep the world operating in a way that works for you-- not a bunch of neck-bearded basement dwellers.

Hardware and firmware keep gaining features. In 2019 we actually need to run firmware updates to keep our CPU chips from being insecure. While monopolies have added unwanted features for their platforms in the past, hardware and firmware make it possible to add unwanted features that the vast majority of free software users won't be able to simply uninstall and replace.

Mark Shuttleworth of Canonical refers to proprietary firmware such as ACPI as a "Trojan horse" and security risk. The only security risk is to the user-- while your company can be the Trojan army.

For more than a decade, Microsoft has enjoyed an extra intimidating step or two-- the user having to disable an important-sounding feature called "Secure Boot" just to install many versions of the free software operating system "Linux." People are afraid to turn off features that sound as if they add security-- won't that make them less secure? Aha, *Gotcha!* A gift from the OEMs to the monopolies.

Hardware OEMs are rarely on the side of these software communists. They exist to make money, and assisting the free software crowd with the full specifications needed to write high-quality drivers for every on-board feature would reveal too much about the designs to competing manufacturers. So without "free hardware" (and we know that won't ever happen) the free software people are stuck reverse-engineering hardware and guessing how to write drivers based on trial-and-error. What the drivers gain in stability and maintenance, they often lose in features and performance.

So for one, you want to always stress that to get the most of your hardware, you need *industry software*-- not cottage or basement software. The free software people have no retort for this, because they know they often can't get the full specs. Meanwhile, the OEMs just keep making new designs-- which often means that free software can't even support the latest hardware.

When you have a monopoly, you don't just have to wait and hope that other

vendors do your bidding. Not only are you in a position to ask for features that favor your company and very few others, but you can actually demand them (or work out deals to get your way.)

Most people expect their computer to come with software already installed. One thing Microsoft was able to do for years, was drop their prices for pre-installed copies of their operating system on new desktops and laptops-- but only if the manufacturer agreed not to offer any machines with their competitors' software-- such as "Linux."

In one fell swoop, Microsoft made use of their monopoly power to stop most people from getting a computer with "Linux" pre-installed.

That's how you stay on top-- work with people you know you can rely on to give you an advantage.

It's worth noting that not all of these manufacturers actually wanted to do business exclusively with Microsoft. Microsoft pushed them to be exclusive, by forcing them to choose between a higher price and a variety of software options. Because OEMs care about the bottom line (and what good business doesn't?) They made the smart decision-- and simply went along with Microsoft's wishes.

Together with Intel, Toshiba, HP, Phoenix and even recent black sheep Huawei, Microsoft participated in the establishment of the ACPI power management system. We just explained that with enough features that aren't fully or properly documented, free software struggles to keep up with hardware specs. By participating in and extending hardware specifications, Microsoft and other vendors have an opportunity to maintain their influence over not only software development, but also the machines that people will try to put free software on later.

Of course, this won't stop the free software authors from trying. Like the Whos in Whoville, if you co-opt all their whatsits, the free software crowd will just keep coding. But new standards that take 10 years to properly implement (or even poorly and inconsistently, but gradually implement) will often take years for the free software community to support. This is not good business between the manufacturers and the free software community-- but they know which side butters their bread, and not to forget it.

So long as you have relationships with OEMs you can exploit, you have the upper hand any time the free software devs want to run their software on popular consumer hardware. That translates to their reduced marketshare, wasted time for free software developers, and ultimately-- a well-guarded software monopoly. The point isn't to keep them out entirely. It's to be sure it takes them so long to get in, that by the time they've supported the hardware it is already obsolete.

Free software may demand a ride in your car these days, but remember that you're in the driver's seat!

OEMs aren't your sole ally in the fight against free software; you also have lawyers. Lawyers should always come to mind when you're figuring out how to get away with murder, whether they're your defensive strategy or your offensive line.

The best-trained lawyers will help you navigate the thin margins between a strategic lawsuit that will come back to bite you, and one that accomplishes your goal: making it too much trouble for a smaller company or developer to continue their efforts to compete with your monopoly.

Unless you are a service-oriented company like Red Hat, leasing the use of your company's intellectual property is the core of your software business-- you need to protect that property to maintain control of your customer base. If some upstart comes along and offers a Solitaire game that works like your own, it doesn't necessarily matter that the game isn't part of your core portfolio-- the best thing to do (as long as it's in your legal budget) is blow the competition out of the water.

In the past, companies like Microsoft and Apple have had mixed results using patents to achieve this goal. While pro-piracy efforts such as PTAB (the Patent Trial and Appeal Board) in the United States have closed off this avenue for the most part, and software patents are gradually becoming a losing option for pursuing directly (via the courts) in Europe, there are two options still worth exploring and exploiting:

First, we have the patent agreements. Legal action from a large corporation isn't about legal justice or fairness-- it's about maintaining ground and instilling fear in smaller companies. If you are a smaller company, you can still have the upper hand in these actions if you place yourself under the "protection" of a very large company.

Earlier in the chapter it was mentioned that OEMs don't always want to do business exclusively with a software company-- but they can be pushed into deals they don't always want to be part of. The intellectual property landscape adds an entire playing field for such deals, because no matter what the arena looks like today, nobody knows for certain what tomorrow holds.

Fear of the future is your best ally in this landscape, because you have (or your enterprise partners have) the best lawyers, and they could sue the competition for just about anything.

So don't worry too much if the patent landscape is evolving-- if one door closes, another will soon open. Since nobody can be sure what the future holds, there is success to be had in patent agreements. Here is how that works:

First, a large group of people create a work that violates your software patents. It doesn't always matter if your patents would be thrown out as bogus in court, the purpose of them is to get people to settle so they don't have to fight.

Originally, the way to do that was to threaten to sue over an enormous patent portfolio. But in the first chapter, we said to act like a friend first. By all means sue when appropriate-- but when possible, be a friend!

Patent agreements are an olive branch we extend to companies, who simply agree that what they are using is our intellectual property. We don't threaten to sue when that's unlikely to bear fruit-- instead we say "Hi, we **don't want** to sue you-- we just want credit for your use of *our property*. If you will simply **admit** that what you're using is ours, we agree not to fight it."

What's great about this is that there's no fight-- these companies (who often didn't even write the software-- it was often written by others, such as the Linux kernel) simply roll over and hand us the verdict we couldn't get in a courtroom.

They admit that what they wrote is really our property!

And while we can't achieve this in court or with a C&D, we can achieve this as friends. We can't stop them from using our IP-- because the patent offices that would let us do that are too weak. So what they can't accomplish, we have to do ourselves, with strategy and diplomacy.

They get to continue development, but something important has changed in the landscape-- instead of fighting to prove that something is ours, we have it in writing-- so when we **stop bothering with their licenses and terms** and co-opt the software in whatever way we choose, how are they going to stop us? *We have an agreement!* Even the largest Linux-based companies said this is ours! Who's going to argue then-- the little student coders that work for them?

Second, every big software company is getting into hardware. While software patents are dwindling, hardware gives us a new opportunity to exploit the patent landscape as a means of seeking royalties.

In the meantime, we can enjoy the royalties coming in from every USB stick and Android device.

And patents aren't the only IP we can throw at them, either. A move towards our own Open Source licenses could let us use license terms to go after companies we want to force into other agreements.

No matter what though, the purpose of your legal team isn't to ensure that other companies are doing *the right thing*-- the purpose of your legal team is to ensure that other companies are doing *what you want them to do*. They who have the best lawyers, win!

And if somehow the lawyers have nothing else to do-- you can always lobby to make new laws, for your legal team to exploit. The future is nothing to fear-- but your legal team certainly is.

Relevant quotes from the Halloween documents:

“The effect of patents and copyright in combatting Linux remains to be investigated.”

“This memorandum also suggests that Linux could be attacked through patent lawsuits.”

From <https://antitrust.slated.org/halloween/halloween2.html>

“It plants the idea that any MIS manager so foolish as to use Linux will find his operating system yanked out from under him by a future patent lawsuit -- perhaps one initiated by (whisper it) Microsoft itself.”

From <https://antitrust.slated.org/halloween/halloween3.html>

“The risk that Microsoft will go on a patent-lawsuit rampage, designed more to scare potential open-source users than to actually shut down developers, is substantial.”

“Seventy-four percent (74%) of Americans and 82% of Swedes stated that the risk of being sued over Linux patent violations made them feel less favorable towards Linux.”

From <https://antitrust.slated.org/halloween/halloween7.html>

“SCO holds no Unix patents; the state and disposition of the Unix copyrights is unclear and presently disputed between SCO and Novell”

“Novell retained the Unix patents, and gave the Unix trademark to somebody else.”

“These sorts of factors complicate the release of every piece of Open Source software I've consulted on at HP so far, no matter what division it comes from.”

“if OpenMail is released as Open Source, we will have to first sanitise it: remove software that is connected with non-disclosure agreements that we entered, patents that we licensed, proprietary code that we bought but can't relicense, and so on... We don't know how big this sanitisation project is yet, if it's bad, it could cost Millions.”

“Even relatively small proprietary projects, like the [open-source release of Borland's Inprise database](#) require the codebase to be extensively scrutinized to remove licensed third party intellectual property.”

“We don't know if there are any patent infringements [in this code] with somebody we don't know. We don't want to take the risk of being sued for a patent infringement.”

“Patent infringement is much more difficult to detect than other kinds of intellectual property infringement, because it's possible to infringe a patent you've never heard of: you can never be sure there isn't some patent somewhere that you're infringing among the millions of patents granted annually.”

“large software corporations patent everything they can and then cross-license their entire patent portfolio with other companies.”

“SCO has no patents, they don't own the trademark, copyright won't serve them and the only contract they have with the Linux community is the General Public License, which SCO is the one violating. So they fall back on trade secrets, which aren't secret anymore”

From <https://antitrust.slated.org/halloween/halloween9.html>

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