1

The Business of Licensing

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1.1 THE LICENSING INDUSTRY

Students of intellectual property (IP) law are often steeped in the theory and practice of IP litigation. Record labels sue parodists and illegal downloaders, patent owners sue infringers, luxury brands sue counterfeiters, employers sue employees who leak their valuable secrets. All of these cases and the doctrines that they create could lead to a view of the world of IP as a battlefield. Like armaments, firms acquire IP rights solely to attack others, to bludgeon competitors or extract rent from consumers.

But this view is wrong. It arises from the unfortunate fact that legal education emphasizes reported judicial decisions over all else, and judicial decisions arise from litigation. The reality, however, is that the vast majority of economic activity involving IP arises from transactions – business arrangements among firms and with consumers and, sometimes, the government.

According to one industry group, global revenues for product licensing – the licensing of brands, images and logos for products of various kinds – were nearly $300 billion in 2019.[1] In 2019, recorded music sales, including digital streaming, were approximately $20 billion,[2] sales of enterprise software were $439 billion,[3] and global sales of smartphones exceeded $400 billion. All told, trillions of dollars every year change hands on the basis of IP licenses and transactions – far more than the total sum of all the IP litigation that has ever been brought.

Whichever of these figures most resonates with you, it is undeniable that IP licensing is a major economic activity with far-reaching implications both in the United States and worldwide. Virtually every product, every financial transaction and every communication on Earth depends, in some way, on an IP license.

This chapter lays the groundwork for the detailed study of IP licensing that follows in this book. It describes the business and economic motivations behind IP transactions, and seeks to give the reader an appreciation for the scope and range of IP licensing in the marketplace.

[1] Licensing Int'l, 6th Annual Global Licensing Survey (discussed in Chapter 15).
[2] IFPI, IFPI issues annual Global Music Report, May 4, 2020, www.ifpi.org/ifpi-issues-annual-global-music-report (visited August. 22, 2020).
[3] Brookings Inst., Trends in the information technology sector, March 29, 2019, www.brookings.edu/research/trends-in-the-information-technology-sector (visited August 22, 2020).

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1.2 WHY LICENSE?

The government grants the owner of an IP right the exclusive authority to exploit that right in its jurisdiction. At first blush, this seems like a golden opportunity for the IP owner to go into business. It can make, use, sell, display and perform the IP-protected thing with no competition from others for the entire duration of the relevant right. Build the better mousetrap, show the new masterpiece, storm the market with the new brand.

A moment's thought, however, dispels these aspirations to grandeur. In reality, many owners of IP cannot, or are not willing to, exploit their IP to the fullest degree, if at all.[4] The author of the next Great American Novel would be foolish to self-publish her work using nothing but a laser printer or a personal website. She needs a publisher that can exploit the full range of print and electronic distribution channels that exist today. The university researcher who develops an improved method of satellite navigation can't afford the hundreds of millions of dollars necessary to launch a satellite into orbit – her invention is best utilized by a company or government that is already in the satellite business. The producer of an independent animated film can't be expected to open a factory to produce the myriad lunchboxes, backpacks, T-shirts and action figures demanded by the fans of the film. Those tasks are best left to others already in the manufacturing trade. The list goes on.

The fact is that IP owners are often not in the best position to exploit their own IP. They need help. And the way to get that help is through licensing. Through a license, an IP owner legally grants somebody else – a "licensee" – the right to exploit some or all aspects of a particular IP right. In return, the IP owner – the "licensor" – usually receives some form of compensation, often money, but sometimes services, equity in a company, or a license to IP held by the licensee. All of these arrangements have as their goal a more efficient allocation of rights among the owner and others who may be in a better position to exploit those rights. The result of that allocation is the most efficient use of the IP rights, maximizing the profit that can collectively be achieved by the licensor and its licensees. As such, we can say that the goal of nearly all IP licensing transactions is to optimize allocative efficiency among IP owner and users. When this is accomplished properly, the greatest overall value will result, thus maximizing the social value of a given IP right.

> "the goal of nearly all IP licensing transactions is to optimize allocative efficiency among the IP owner and users."

With the principle of allocative efficiency in mind, consider the following economic rationales that motivate IP licensing from the perspectives of the IP owner (the licensor) and the potential user of that IP (the licensee).[5]

1.2.1 *Market Expansion (Divide and Conquer)*

The owner of an IP right – whether a patent, a copyright, a trademark or something else – may not have the internal capacity to exploit that right to its fullest extent, or at all. By licensing that IP right to someone with different capabilities and resources, segments of the market that are otherwise

[4] Sometimes, of course, an IP owner may wish to use its IP to exclude others from the market and to dominate the market with its own products or services. Cynthia Cannady refers to this as the "fortress" IP strategy. See Cynthia Cannady, Technology Licensing and Development Agreements 46–48 (Oxford Univ. Press, 2013).

[5] For a more detailed analysis of the economic factors motivating IP licensing see, e.g., Jonathan Barnett, *Why Is Everyone Afraid of IP Licensing?* 30 Harv. J.L. & Tech. 123 (2017) and Cannady, *supra* note 4, at 45–72.

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unaddressed may be addressed. For example, a small biotech company discovers a new process for detecting DNA variants. The process will be valuable to the company's own research on diabetes therapies, but could be used in many other applications as well. When different licensees use the process in their own research, its use is expanded far beyond that of the original IP owner. Likewise, the creator of a popular comic book character may not manufacture consumer goods. But if it licenses the copyright in the character to consumer product companies, the character will appear on lunchboxes, backpacks and self-adhesive stickers that otherwise would not exist. Nor does a famous auto maker like Ferrari or Porsche produce T-shirts, key chains or sunglasses, but by licensing its marks to manufacturers of those products, it can satisfy consumer demand that would otherwise go unfulfilled. Some IP owners, such as universities and government laboratories, are unable to go into business at all, making licensing one of the only routes to commercialization of their IP.[6] Each of these examples illustrates the creation of new product and service markets for IP rights that might not exist without the IP owner's ability to license its rights to others.[7]

FIGURE 1.1 Auto makers like Ferrari do not manufacture the merchandise that bears their famous logos. This merchandise exists thanks to licensing.

[6] University and government licensing are discussed in Chapter 14.

[7] And even if the IP owner has the theoretical capability to address all of the different markets that can be addressed by an IP right, it is likely that licensing rights to others in some of those markets will result in the more *rapid* deployment of new products and services (i.e., retaining all rights in the original IP owner could create bottlenecks in the development of new products and services). See Jorge L. Contreras & Jacob S. Sherkow, *CRISPR, Surrogate Licensing, and Scientific Discovery*, 355 Science 698 (2017).

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1.2.2 *Geographic Expansion*

Like market expansion, IP licensing enables IP owners to expand the territorial reach of their IP rights.[8] Many products and services have international appeal, but local markets are often difficult to enter without assistance. Depending on the product and the market, significant regulatory approvals and clearances may be required, advertising and packaging materials must be localized, and adequate distribution channels must be identified and secured. Large multinationals sometimes do all of this by themselves, but most IP owners, even those of considerable size, cannot. Thus, in order to distribute products and services worldwide, local manufacturing, distribution, sales, support and agency partners are often needed. And to the extent that these local partners will be manufacturing, reproducing, modifying or displaying anything covered by IP rights, licenses will be required.

THE RISK OF CANNIBALIZATION[9]

"Licensing for market expansion raises the issue of cannibalization. The licensor company will analyze at what point its licensees' product sales may eat into (cannibalize) its own profits. Apple Computer faced this difficult challenge in the 1990s when it considered licensing its proprietary operating system to PC system manufacturers such as Dell, Vobis, Olivetti, and Acer. If Apple licensed to these companies for cloning, they would reduce the cost of manufacture, eliminate extras like design features, and drag the Apple technology and pricing – and possibly its brand – into commodity status. No one at Apple was able to assess systematically the cannibalization risk, or suggest ways to limit it, other than to exclude Apple's most profitable geographic markets from the licenses. But those markets were precisely the markets that attracted the potential licensees. At the time they were not interested in making Apple clones only for the "rest of world" or "ROW" market (not Asia, Europe, or the United States). The potential licensees also wanted freedom to innovate based on Apple's operating system, a competition that was potentially frightening to Apple. Apple ultimately decided not to pursue licensing its operating system."

Cynthia Cannady, Technology Licensing and Development Agreements 51–52 (Oxford Univ. Press, 2013).

1.2.3 *Capacity Expansion*

In many cases, an IP owner may not possess the internal resources needed to exploit its rights fully, and can only do so with the financial or other assistance of others. A small biotech company does not have hundreds of millions of dollars required to conduct the clinical trials necessary to obtain regulatory approval for a new drug, nor do most screenwriters have the means to produce a television series based on a new script. In other words, an IP right may have value, but it is incomplete or not ready for market without further inputs – money, expertise, resources or additional innovation. In order to put these IP rights to productive use, assistance from others is often required. To do so, the biotech company can license its IP to a large pharmaceutical firm, and the screenwriter can license her script to a film studio or production company. In both cases, a product will be produced where none might exist otherwise, and the licensee and licensor will share the profits of the result.

[8] Many IP rights – particularly patents and trademarks – are strictly national in scope, and some IP rights such as the right of publicity exist in some countries but not in others. The issue of obtaining international IP protection is a complex one and the subject of many other books. We will assume, for our purposes, that such rights are available to IP owners in jurisdictions of interest.

[9] Cannady, *supra* note 4, at 51–52. Despite its unpleasant connotations, the term "cannibalization" is used widely in the industry.

1.2.4 *Modularization*

Even for large firms that theoretically have the capacity to take all the steps necessary to commercialize their IP, it may not be efficient for them to do so. First, there is substantial evidence that firms can increase efficiency and save costs by allocating specific tasks along the production chain to specialized (and lowest cost) suppliers, rather than performing these tasks internally.[10] This approach is sometimes referred to as "modularization" – the division of a multi-step process into discrete modules that can be performed by independent actors. For example, suppose that FryCo has developed an innovative, environmentally friendly coating for nonstick cookware. FryCo could, conceivably, purchase a fleet of delivery trucks to ensure that every consumer and retailer in the country had access to its wares. But unless FryCo's sales volume is huge, it would be far more efficient to allocate delivery to a specialized service such as FedEx or UPS, allowing FryCo to focus on its core competencies. Likewise, if FryCo's principal contribution is its secret nonstick coating, then it could focus its manufacturing efforts on production of that coating, while allocating the production of iron skillets to an established manufacturer of such products and granting it a license to apply FryCo's proprietary coating to their surfaces. As Professor Jonathan Barnett observes, "licensing enables firms to select the sequence of 'make/buy' transactions that deliver innovations (or products and services embodying innovations) at the lowest possible cost."[11]

A related benefit of supply chain modularization is risk mitigation. Put simply, if FryCo manufactured its own iron skillets and its skillet factory burned down, it would suffer a significant business interruption. However, if FryCo sourced skillets to its specifications from, say, three different vendors in different locations, then the loss of any one of them would not be catastrophic. Modularization enables the producer to reduce its reliance on any single source of necessary components, thereby reducing risk in the production process.[12]

Finally, modularization can enable firms to invest in multiple projects concurrently, rather than focusing all of their resources on one project at a time. As a result, a firm can spread its risk among a portfolio of projects, some of which may succeed and some of which may fail.[13]

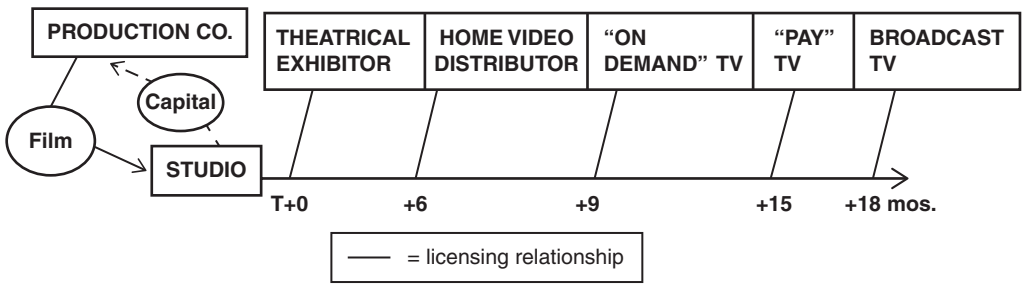

FIGURE 1.2 Jonathan Barnett illustrates how licensing enables motion picture firms to divide distribution rights among multiple entities, each with a specific role in the supply chain.[14]

[10] See Barnett, *supra* note 5, at 133–34 (discussing efficient disaggregation of production functions in the semiconductor chip industry).

[11] Barnett, *supra* note 5, at 130.

[12] There are, of course, many examples of components that are only available from a single source, particularly those that are covered by IP of their own.

[13] Professor Barnett offers examples from the motion picture and biopharmaceutical industries to illustrate this point (Figure 1.2). Barnett, *supra* note 5, at 136–37.

[14] Barnett, *supra* note 5, at 140, Fig. 5 [reprinted with permission].

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1.2.5 *Monetization: Direct*

In some cases an entity acquires IP rights primarily to earn revenue from licensing them. This is the case with research universities, which spend large sums on research, but which never intend to bring products or services to the commercial market. Their primary goal in obtaining IP rights – usually patents – is to license them to the private sector so that others can exploit them in exchange for payments. This business model is discussed in greater detail in Chapter 14.

Commercial entities can also find themselves in possession of IP rights that they do not have the capacity or desire to exploit themselves, but which they can profitably license to others. Sometimes, this occurs when business priorities shift, or when product lines that were covered by patents are no longer successful in the marketplace, leaving behind few product sales, but a rich portfolio of patent rights to license. Prominent product manufacturers like Palm, Blackberry, Nokia, Motorola and Ericsson saw the virtual evaporation of their product markets (mostly phones and other handheld communications devices), but were left with sizeable portfolios of patents representing substantial opportunities for licensing income.

Licensing for income generation is also practiced by companies that remain active in product markets, but which find themselves with portfolios of valuable patents that can be licensed. IBM, for example, earned more than $723 million in annual IP licensing revenue in 2018, and chip maker Qualcomm earns between $1 billion and $1.5 billion from its licensing business *per quarter*. This type of licensing revenue need not be related to products sold by the IP owner. For example, from about 2011 to 2015, Microsoft aggressively asserted and licensed patents covering Google's Android operating system against smartphone makers such as Samsung, LG, HTC and Foxconn, earning Microsoft billions of dollars in revenue in a market segment in which it was a marginal player, at best.[15]

ROYALTIES FOR SALE

Many IP licenses involve the payment of ongoing royalties to the licensor. In some cases these royalties can be quite high. But sometimes a licensor needs cash quickly, and cannot afford, or does not want, to wait for years to collect the total value of its IP. Licensors may thus resort to well-known financial instruments used in industries such as equipment leasing and mortgage financing to "sell" future royalty streams for an immediate, up-front sum.

Who buys IP royalty streams? One publicly traded firm, Royalty Pharma (RPRX – NASDAQ), specializes in pharmaceutical royalties. According to one source, Royalty Pharma spent $3.3 billion to acquire a share of the Cystic Fibrosis Foundation's royalties from Vertex Pharmaceuticals' cystic fibrosis treatments, and $1.24 billion for the University of California's royalties from the prostate cancer drug Xtandi, among many others.[16] Likewise, the Canadian Pensions Plan Investment Board agreed to pay LifeArc $1.3 billion for its royalty interest in Merck's Keytruda cancer immunotherapy drug.

In some cases, royalty streams can be auctioned to the public. A share of the famous "perpetual" Listerine royalty (see Section 12.2.3) earning $32,000 per year was sold to an anonymous bidder for $560,000 at an auction in 2020.[17]

[15] Interestingly, in 2018 Microsoft joined the Open Innovation Network and thereby agreed not to assert its patents against users of Linux and Android operating systems. See Chapter 19 for a discussion of the business motivations behind this and similar pledges.

[16] Adam Houldsworth, *Five Key Insights into 2020's Drug Royalty Transactions*, Intell. Asset Mgt., December 16, 2020.

[17] Ryan Davis, Rare Listerine Royalty Auction Tied to 1881 Contract Flub, Law360, July 21, 2020.

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But perhaps the most creative IP royalty sale was the 1997 securitization and public offering of 7.9 percent coupon bonds backed by the income from twenty-five pre-1990 recordings by singer David Bowie. The so-called "Bowie Bonds," all of which were purchased by The Prudential Insurance Co., earned Bowie $55 million in a single transaction, and by 2016 had reportedly served as the model for more than 100 similar transactions in the music industry.[18]

More recently, with the onset of the COVID-19 pandemic and the indefinite suspension of live musical performances, an increasing number of artists, including legendary performers like Neil Young and Bob Dylan, have sold off the rights in their song catalogs to make ends meet.[19]

1.2.6 *Monetization: Indirect*

Sometimes, the owner of an IP right may lack the ability and the resources to commercialize that IP right. For example, an individual inventor may make a breakthrough discovery in a field dominated by large players with which he or she cannot effectively compete, a start-up company may fail to raise sufficient funding to stay afloat, a company with a rich IP portfolio may be liquidated in bankruptcy, a company may be acquired by another firm that offers a competing product and a large firm may decide to discontinue a business line to which it holds IP rights. In all of these cases, the IP owner holds an asset that it spent valuable resources to create, but which it can no longer utilize productively. As a result, the IP owner's best (or only) option may be to license or sell the underutilized IP right to an entity that can make productive use of it. But finding such an entity may be difficult, and the small inventor, the failed start-up, the bankruptcy trustee and the disinterested acquirer may lack the ability to do so.

Enter the middlemen, known variously as patent licensing firms, nonpracticing entities (NPEs), patent assertion entities (PAEs) and patent "trolls."[20] These entities acquire IP rights from any of the sources described above and then seek to license them to others purely for economic gain, without creating or selling products or developing IP of their own. Despite the heated rhetoric that pervades this discussion, there is nothing inherently illegal or immoral about seeking to monetize IP assets, just as there is nothing wrong with financial institutions transacting in portfolios of consumer loans, mortgages or credit card debt.

THE DEBATE OVER PATENT TROLLS

"Patent troll" is a pejorative moniker commonly assigned to [non-practicing entities] (NPEs) because they allegedly wait for an industry to develop, then appear to exact a toll on companies who commercialize the technology. According to the detractors' narrative, trolls are recent fly-by-night shops that assert business-method and internet patents. Trolls assert low-quality patents in low-quality litigation. They obtain patents from failed companies in fire sales. Worse, because trolls do not make anything, their patents do not provide anything

[18] See Emma Channing, *Bowie: Rock God or Tax Genius*?, February 7, 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2729014.

[19] Thomas Seal, Neil Young Sells 50% Stake in 1,180-Song Catalog to Hipgnosis, Bloomberg Law, January 6, 2021.

[20] While these entities have attracted the most attention in relation to patents, assertion entities exist in the copyright world as well. See Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 Iowa L. Rev. 1105 (2014) and Shyamkrishna Balganesh & Jonah B. Gelbach, *Debunking the Myth of the Copyright Troll Apocalypse*, 101 Iowa L. Rev. Online 43 (2016).

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of value to society. In short, according to their critics, patent trolls represent a significant break from past practices and foreshadow the downfall of innovative society.

NPEs are not, however, without their defenders. According to their proponents, NPEs create patent markets, and those markets enhance investment in start-up companies by providing additional liquidity options. NPEs help businesses crushed by larger competitors – competitors who infringe valid patents with impunity. NPEs allow individual inventors to monetize their inventions. These functions, the proponents argue, justify the existence of NPEs.

Michael Risch, *Patent Troll Myths*, 42 Seton Hall L. Rev. 457, 459 (2012)

We need not delve into the debate over NPEs, PAEs and patent trolls, which has been ongoing for years. It involves questions well beyond the scope of this book, including the appropriateness of certain litigation tactics and the underlying quality of many patents that are asserted in litigation. While some PAEs shoot first and negotiate later, others would seemingly prefer to license their IP assets without resorting to expensive and risky litigation. The common motivating factor for licensing among these entities is the generation of financial returns.

1.2.7 *Rights Aggregation*

In some cases an entity's IP protects only a portion of an overall product, or constitutes an improvement on somebody else's IP. In these cases an entity's IP cannot practically be exploited without the cooperation of others. Sometimes, no one entity can act in a field without obtaining permissions from others – such fields are said to be characterized by "blocking" positions. For example, in *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163 (1931), four large oil companies each held patents necessary to perform the process of "cracking" crude oil to make gasoline. Each company's patents were blocking – none could perform the process without the cooperation of the others.[21] Likewise, in *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d

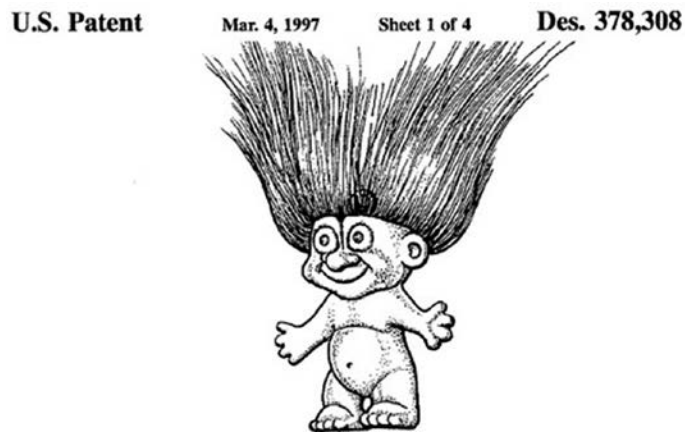

FIGURE 1.3 The debate over "patent trolls" has been raging for over a decade.

[21] This important case is discussed and excerpted in Section 26.2.

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368 (2d Cir. 1999),[22] an independent toy designer created a spinning plush toy based on Warner Bros. "Tazmanian Devil" character. He could not market his toy without the permission of Warner Bros., nor could Warner Bros. market the toy without his permission.

One important function of IP licensing is enabling entities to overcome these blocking positions, so that they may operate productively in the field. That is, without licensing an entity would have to acquire ownership of all blocking rights or create an entirely new product or service that does not infringe the IP of others. Both of these alternatives are often impossible, making licensing the best and only option for the productive use of one's own IP. Licensing of this nature can occur through individual licensing negotiations, cross-licenses (in which each party grants parallel licenses to the other), or pursuant to IP pools in which the rights of multiple IP owners are licensed on an aggregated basis (discussed in Chapter 26). While these transactions are often quite different in nature, they share the common feature of eliminating barriers to the efficient utilization of IP within a market sector.

1.2.8 *Platform Leadership*

In some instances the developer of a technology or creative platform may wish to license rights to others to encourage the broad use of its platform. This approach was adopted early by the makers of video game consoles (Sony, Nintendo, Microsoft), which sought to encourage game developers to write games optimized for their platforms. Today, the Apple App Store and Google Play exemplify a similar approach.[23] Similar motivations are at work in the area of open source software (Section 19.2), technical interoperability standards (Chapter 20) and many patent "pledges" (Section 19.4).

In each case, the owner of a platform technology makes it available, often without charge, to encourage the independent development of products and services compatible with the platform. With a platform's growth and adoption, the IP owner can sell ancillary products and services, effectively using the broadly licensed rights as "loss leaders" to promote other revenue-generating activities. For example, IBM's open source licensing of its Linux-based operating system led to substantial revenue from the sale of Linux servers and professional services, and Google's release of its Android operating system on an open source basis led to its widespread adoption and substantial ad revenue for Google.[24] Likewise, the developers of important interoperability standards such as Bluetooth and USB license patents covering these standards on a royalty-free basis, as the broad adoption of these standards enables them to sell more products and services (e.g., laptops, routers, chips, network services) that rely on those standards.

Notes and Questions

1. *Cannibalization*. What is cannibalization of a market? Why did cannibalization concerns deter Apple from licensing its operating system to other manufacturers, as Microsoft had done?
2. *Unplugging bottlenecks*. As noted in note 7, Professors Contreras and Sherkow claim that "even if the IP owner has the theoretical capability to address all of the different markets that can be addressed by an IP right, it is likely that licensing rights to others in some of those markets will result in the more *rapid* deployment of new products and services (i.e.,

[22] Discussed in Section 4.2.

[23] For additional examples from the computer and biotechnology industries, see Cannady, *supra* note 4, at 52–54.

[24] See Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedom 46 (Yale Univ. Press, 2006); Jorge L. Contreras, *Patent Pledges*, 47 Ariz. St. L.J. 543, 586 (2015).

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FIGURE 1.4 Large information technology companies like IBM and Google embraced the open source Linux operating system to support the sale of associated hardware, services and advertising.

retaining all rights in the original IP owner could create bottlenecks in the development of new products and services)." Why would an IP owner's retention of rights create developmental bottlenecks? How can these bottlenecks be avoided?

3. *The troll debate*. What objections can be raised to the monetization of IP rights? Is there anything inherently wrong with using IP as a money-making investment? What types of litigation behavior might have made PAEs unpopular in many circles?
4. *Platforms*. How do the Apple App Store and Google Play exemplify a platform leadership strategy? What goals do you think Apple and Google have with respect to these platforms? What other online platforms have a similar strategy?
5. *Giving it away*. What would motivate the holder of a valuable IP right to give it away for free? Is this behavior irrational? How would you decide when a "give away" strategy is worth pursuing? Consider these issues when you read about open source software and patent pledges in Chapter 19.

Problem 1.1

Which IP licensing model would you recommend for each of the following companies? State any assumptions about the company's business that support your recommendation.

a. FryCo, a small chemical company that has developed an environmentally friendly nonstick cooking surface.
b. Twenty-First Century Films, an independent documentary film producer.
c. DeLuxe, a luxury brand known for its high-end leather accessories such as handbags, wallets and belts.
d. Droplet Labs, a start-up company that has patented a process for testing a single drop of a patient's blood for twenty different pathogens.

Problem 1.2

Your client Fizzy Cola is a producer of craft soft drinks based in Milwaukee, Wisconsin. Fizzy tells you that it would like to expand internationally to South America, the European Union, China, Japan and South Korea. What licensing and internationalization strategy would you recommend for Fizzy?

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