

# Patents and Collaborative Development

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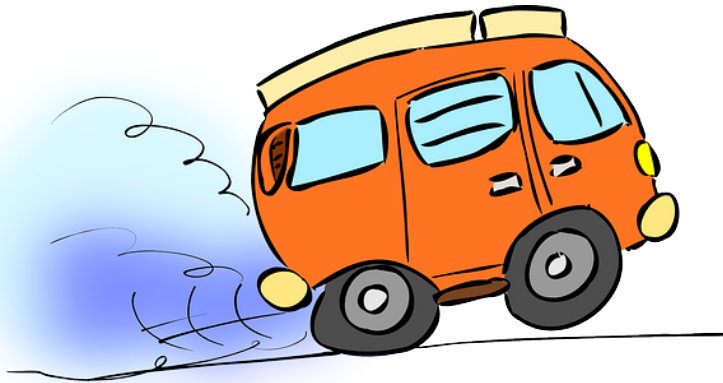
# Collaborative Approaches to Intellectual Property

Standard Essential  
Patents (SEP)



Open Source  
Software (OSS)

# OSS-FRAND Integration



Standard Essential  
Patents



Open Source  
Software

## The assertions we tested:

- “FRAND licensing is detrimental for innovation.”
- “Open source licenses are inherently incompatible with FRAND licensing.”
- “Open Source Definition (OSD)-compliant licenses have always contained a patent grant.”

# FRAND is Good for Innovation and Compatible with OSS



- Industries that have adopted FRAND-licensing are thriving.
  - No sign of any detriment, and positive indications of strong health.
- No real-world indication that FRAND is incompatible with or discriminatory towards OSS.
  - In 2011, only 7 out of the 67 then-approved open source licenses had terms conflicting with FRAND.
  - Permissive licenses are fully compatible with FRAND.

# The Open Source Definition

## License Principles from the Open Source Initiative

1. Free Redistribution

2. Source Code Must Be Made Available

3. Permission to Modify and Distribute Derived Works

4. Integrity of the Original Source

5. No Discrimination Against Persons or Groups

6. No Discrimination Against Fields of Endeavor

7. Distribution of Corresponding Source

8. License Must Not Be More Restrictive Than Necessary

9. License Must Not Be Technology-Specific

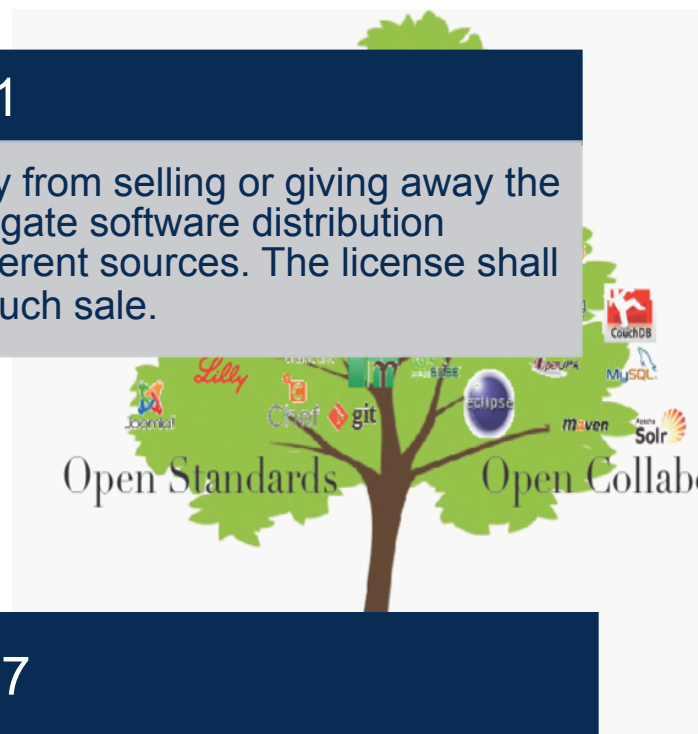
10. License Must Be Technology-Neutral

### OSD 1

- The license shall not restrict any party from selling or giving away the software as a component of an aggregate software distribution containing programs from several different sources. The license shall not require a royalty or other fee for such sale.

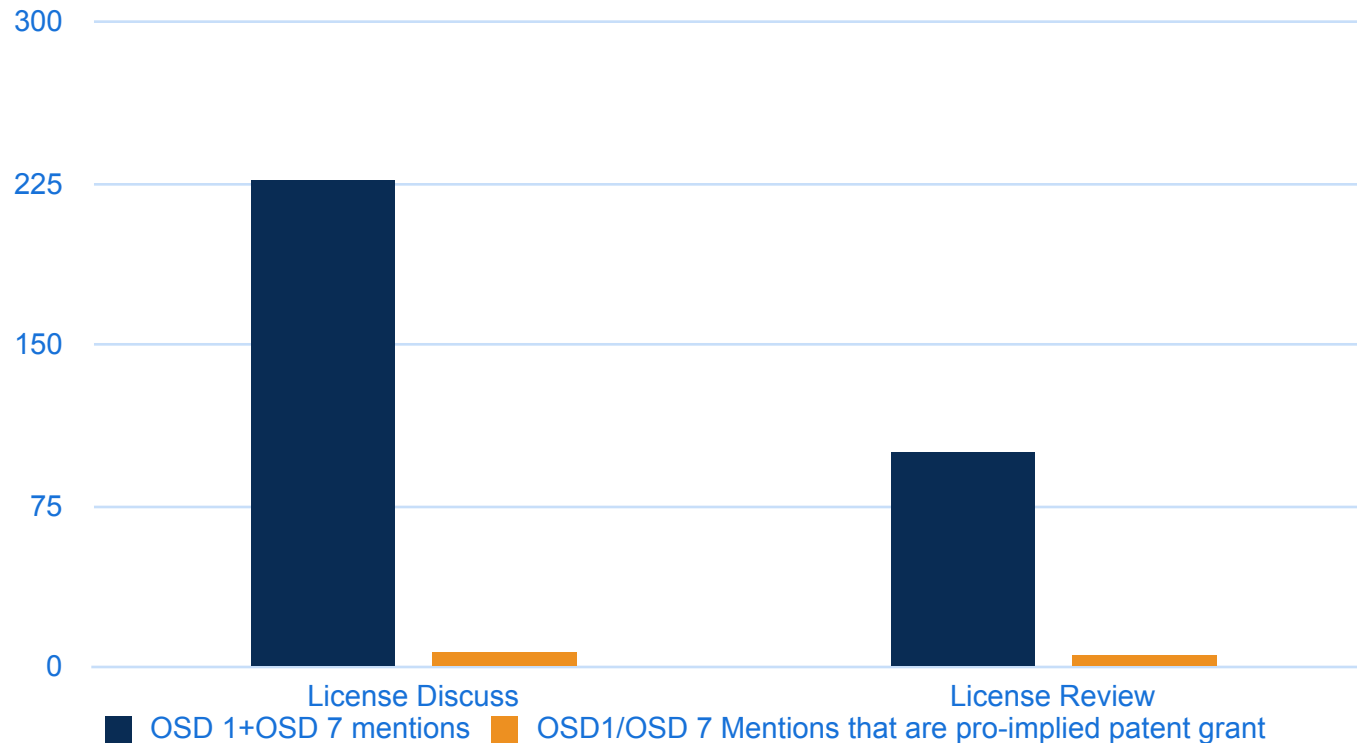
### OSD 7

- The rights attached to the program must apply to all to whom the program is redistributed without the need for execution of an additional license by those parties.



# OSI Archives Do Not Show Consensus on Patent Rights

- Examined OSI License Review and License Discuss archives from April 1999 through June 2018.
- Searched for posts discussing OSD 1 or OSD 7.



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# There Is No Implied Patent License From OSD Compliance

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- **Judicially implied licenses are “rare under any doctrine” and rely on a theory of legal or equitable estoppel.**
  - ***TransCore LP v. Electronic Transactions Consultants Corp.*, 563 F.3d 1271 (Fed. Cir. 2009).**
  - ***Wang Labs., Inc. v. Mitsubishi Elecs. Am., Inc.*, 103 F.3d 1571, 1581 (Fed. Cir. 1997).**

# Implied Patent License Inquiry is Narrow and Fact-Specific



Bottom line: in absence of express patent language, courts will be hesitant to imply a patent license.



# What do drafters of key licenses have to say?



**No patent rights granted**

# Forced OSS Patent Grant Disturbs Innovation Ecosystem



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# OSS-FRAND: A Win-Win Situation

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**OSS licensors can choose to grant a patent a license or not.**

**Let's preserve ability for OSS and SEPs to work together.**



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