Why a Patent License is Necessarily Implied But a Trademark License Is Not

(And as long as we’re not talking about exhaustion)

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### FOSDEM17

#### Submission notes

#### General

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Disclaimer
“Any language used by the owner of the patent, or any conduct on his part exhibited to another from which that other may properly infer that the owner consents to his use of the patent in making or using it, or selling it, upon which the other acts, constitutes a license and a defense to an action.....”

I’ll categorize it as two types

- Agreement about something, but it is silent on the right in question
- Conduct
Sleeve Compressing Tool
Pat. No. 2,612,932
“A grantor of a property right or interest cannot derogate from the right granted by his own subsequent acts”
Rights granted in FOSS licenses

- “Redistribut[e] and use in source or binary form ... with or without modification”
- “to deal in the Software ... use, copy, modify, merge, publish, distribute, sublicense, and/or sell”
- “copy, distribute and modify” the Program
Theory of implied patent license for FOSS says you can’t do these things without a patent license too

- Exactly what patents (after acquired)? Who knows.
- How much can you modify the software? Who knows.
Rights granted

- “Redistribut[e] and use in source or binary form ... with or without modification”
- “to deal in the Software ... use, copy, modify, merge, publish, distribute, sublicense, and/or sell”
- “copy, distribute and modify” the Program
You can do all of these things without the trademark (maybe?)
I say “yes” because the interest protected is different function vs. reputation
“assigns … all worldwide right, title and interest in and to the artwork ….”

Dry CD port for a backpack or bag
Pat. No. 6,889,883
And if I’m wrong, is “control” a silver bullet?
“Permission to use the marks along with the exercise of reasonable control over such use can lead to the conclusion that an implied license existed even where no written agreement was made.”

All the cases are where the plaintiff needed to prove there was an implied license, not a claim that none was granted.
Yeah, so there’s exhaustion.
I dunno.
Exhaustion is for existing goods, so it probably doesn’t apply here.
FOSSmarks

A practical guide to understanding trademarks in the context of Free and Open Source Software projects.

Trademarks and Free Software

Trademarks and FOSS are not contradictory; instead, the trademark is a legal tool that is strongly aligned with FOSS principles. A trademark is an assurance that the recipient of the goods or services is receiving a product of known qualities. Controlling how the trademark is used protects the community and its software, by preventing its use in ways that are harmful to the reputation of the community or the software. This is not a theoretical problem, it happens fairly often.

It may also be the case that the confusion isn't intentional wrongdoing, but a matter of differing views causing a fork. In that case, if both were to use the same trademark for the two projects, users wouldn't be able to sort out which was which.
References:

- Adam Pugh and Laura A. Majerus, Potential Defenses of Implied Patent License Under the GPL (Oct. 31, 2006)