Do patents promote innovation? Open innovation communities—those that make technology freely available under permissive intellectual property licenses—have long argued that patents stifle rather than promote innovation. Indeed, it has become nearly conventional wisdom in open innovation circles that the patent system imposes undue burdens on open innovation communities in particular. This may be especially true because, for a variety of reasons, open innovation communities have traditionally failed to pursue patents. Consequently, some argue that the most promising way for open innovation communities to protect themselves is by bucking this trend and acquiring significant numbers of patents for defensive purposes. Some in open innovation communities appear to be following this approach.

What remains underexplored in this discussion is the extent to which patents actually threaten open innovation communities. Previous assessments often treat open innovation communities monolithically in terms of patent risk, but open innovation communities typically consist of a broad spectrum of participants with distinct risk profiles. This Article disaggregates open innovation communities and assesses the actual risks that patents pose to different categories of participants in open innovation communities. It argues that several factors diminish the actual patent risks in some cases, at least as they are generally presented. However, it also highlights certain previously underexplored patent risks that arise based on incompatibilities between the decentralized nature of open innovation and the centralized nature of patent rights. These risks, furthermore, suggest that using patents to combat patent risks may not be a viable long-term strategy for open innovation communities. Based on these conclusions, the Article then assesses other possibilities for better reconciling the patent system with the phenomenon of open innovation. In particular, it suggests as one such possibility a two-track patent system that would grant open innovators and others an independent invention defense to patent infringement in exchange for an agreement not to assert patents except defensively.