A Patent Explosion

How much protection does technology software need?

It's in the news practically daily—Apple sued Samsung, Samsung sued Apple, Nuance and Vlingo sued each other. Google went to court. So did Microsoft. And that's just for starters.

The number of lawsuits concerning patents has skyrocketed in recent years. From 2001 to 2005, 77 cases were filed that involved patents in "computer hardware/electronics, software, and telecommunications." From 2006 to 2010, the number jumped to 182, according to PricewaterhouseCoopers. And the United States Supreme Court isn't sitting idly by. In 1992, intellectual property cases comprised just 2 percent of its docket; in 2011, it was 5 percent.

What's All the Fuss About?

A U.S. patent protects one's invention for a period of 20 years. Patents do not give the holder the right to make an invention; rather, the patent bestows on its holder the right to prevent others from making or selling the invention. It's easy to see, then, how patents can be used as a shield or a sword.

Software patents were not common until the 1990s. "In the 1980s and early 1990s, we were just entering the realm of personal computers and software," says Brooke Quist, a patent attorney and partner at Steptoe & Johnson. "Previously, software was generally protected using copyrights."

But by 2009, the United States Patent and Trademark Office was estimated to have issued approximately 40,000 software patents. By some estimates, there are now more than a million.

How Much Protection Does Software Need?

The problem, many argue, is that software does not require 20-year protection, with some believing that it may not require any at all. "The need for patent protection in order to provide incentives for innovation varies greatly across industries," writes U.S. Court of Appeals Judge Richard A. Posner.

This is evident when contrasting the pharmacology industry, for example, with the software industry. Big pharma spends years in R&D and testing, which can cost hundreds of millions of dollars. And the patent term begins to run when the invention is made and patented, years before the drug reaches the market.

Software, though, is different. "While drugs have specific language, software patents are generally vague and cover activities other people can come up with independently," says Daniel Nazer, staff attorney at the Electronic Frontier Foundation (EFF). Additionally, "software is building block technology," says Julie Samuels, also an EFF attorney. "You write code and someone improves upon it."

Patents as Barriers to Innovation

Nonpracticing entities, also known as NPEs or patent trolls, purchase patents not to produce the patent-protected invention, but to sue other companies for infringement. NPEs cost the U.S. more than $29 billion in 2011.

And it's not just NPEs that create the drain. Patents, even in the hands of operating companies, can be a barrier to innovation. Should rules regulating NPEs cover these companies as well? If the revised SHIELD Act (Saving High-Tech Innovators from Egregious Legal Disputes Act of 2013) becomes law, the answer may be sometimes yes.

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Fixing the System

Several fixes have been suggested, from requiring clear definitions and descriptions of software and inventions to shortening the patent term for software from 20 years to no more than five years.

Quist, for one, does not believe that limiting the patent term is likely. "Since software technology and processing components continue to improve and provide competitive alternatives, the value of a software patent is typically greater at the beginning of the patent term," she says.

However, more than 90 percent of all issued software patents are invalid because they are based on prior art, according to Walt Tetschner, speech industry analyst and editor of *ASRNews*. "What [the companies] essentially are doing is lying." Tetschner believes that subjecting applicants to liability for fraud would make them think twice before submitting questionable claims.

Also suggested on multiple fronts is fee shifting, allowing prevailing defendants to recover legal fees if the lawsuit against them was frivolous.

Addressing the patent problem in commerce instead of the courtroom, Twitter has pledged it will not use its patents offensively, only defensively, and Microsoft has implemented a searchable patent tracker, which lists all of the patents it owns.

We've seen some of the biggest changes to patent law in the past year, and few can argue that the evolution of the patent system is complete. As for the trend, "the requirements for subject matter eligibility are becoming more stringent," Quist says.

Perhaps that's how it should be. ☒

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