

Why Software Developers Should Support a New, Limited Patent

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Will concentrate on software

- ◆ Software, business methods, and information storage claims cause much of the current stress on utility patents
- ◆ Vocal opposition by large community
- ◆ But my proposal not limited to software

Extend the general idea to your specific area

Current patent protection

Especially for software and other fast-moving technologies -

- ◆ Protects too much
- ◆ Lasts too long
- ◆ Comes into existence too late
- ◆ Hard to be sure you're not infringing
- ◆ Problems come from "all or nothing" nature of the system

Isn't copyright sufficient?

- ◆ Only protects the expression of a technique, not the technique itself
- ◆ Can be avoided by using a "clean room"
- ◆ Of limited value for self-revealing technology, particularly open source

A new technique in an open source program can be used by a proprietary software company without giving back to the community

Why not just extend copyright?

We saw the problems that can cause -

- ◆ Term of protection far too long
- ◆ *Whelan v. Jaslow* tried to protect "structure, sequence, and organization"
- ◆ No claiming, so difficult to determine what is protected and what is permissible
- ◆ No clear disclosure of technique

Sui generis protection

- ◆ Can combine desirable attributes of existing IP protections
- ◆ Can avoid known difficulties
- ◆ New alternative, so no need to "harmonize" existing patent laws

My proposed "mini-patent"

- ◆ Application for registration required
 - Disclosure of technology, same as for a utility patent, to be added to patent office database
 - Claiming, but must be supported by actual implementation
 - Nominal filing fee (\$500?) to cover processing
 - Check for filing requirements
 - Manual classification into database
 - Support for reclassification when a subcategory becomes too large

My proposed "mini-patent"

- ◆ Protection comes into being when first used if marked with registration number
 - "Anti-knockoff" model says that it has to be out there to be copied
 - No need to search to determine if possible infringement
 - Registration number gives access to disclosure and claims
 - Could use an indirect reference if many registration numbers

My proposed "mini-patent"

- ◆ Four-year term of protection
 - Allow head-start in the market
 - Protection during pendency of regular patent application
 - Protection against overall copying of a product can be extended by improving the product and getting new "mini-patents" on the improvements

My proposed "mini-patent"

- ◆ Substantial completion would be a "personal defense"
 - Plaintiff would have to show derivation from their product
 - Defendant would show effort made before exposure to that product and probability of successful completion without derivation

Addressing software developer concerns

- ◆ Only in jeopardy if actual derivation from existing product
- ◆ No speculative claims
- ◆ Product must be marked to be protected, so that scope of protection can be determined

Better examination for regular patents

- ◆ Alternative to patents means that they are not necessary to protect some things
- ◆ Can substantially boost patent fees without negative consequences on disclosures
- ◆ Can go from "A person shall be entitled to a patent *unless* ..." to "A person shall be entitled to a patent *if* ..."

Conclusion

- ◆ The new form of protection would:
 - Be simple and inexpensive to get
 - Protect against those copying a novel technique or device without distorting other protections
 - Increase disclosures of new technology in a form easy to access
 - Allow for examination of regular patents commensurate with the rights they grant
 - Not be susceptible to "patent trolling"

For more information:

<http://digital-law-online.info/papers/lah/mini-patent.htm>

- ◆ Original JPTOS and IEEE Spectrum papers
- ◆ Revised versions
- ◆ Related papers, such as the one for this presentation
- ◆ Comparison to other proposals
- ◆ In the future, statutory language