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The One Government Bureaucracy Richard Esptein Trusts

I missed it when it came out, but the libertarian legal theorist (and my fellow Cato scholar) Richard Epstein had an article last month defending software patents. He makes a number of dubious arguments, but I think the most striking is this one:

A natural selection device makes it more likely that the most important software innovations make it into the patent system. By any reckoning, patent prosecution—the fine art of getting a patent through the Patent and Trade Office—is not an easy endeavor. Indeed, it is one that on average has been made even more difficult with the passage of the misnamed and convoluted America Invents Act.

Firms that have modest inventions that are easy to invent around will not incur the cost of obtaining patents. It is much more likely that they will attempt to protect them by trade secrets or leave them totally unprotected. We should expect, therefore, that the subset of software innovations that do make it into the patent system are those that are worth enough to protect and to license. The best software patents may not be as good as the best pharmaceutical patents. But that is the wrong test to use. The correct question is whether they still produce positive gains.

It's worth examining the "natural selection device" in more detail. When a company applies for a patent, the application is examined by a government bureaucrat called a patent examiner. The bureaucrat looks for defects in the application—for example, evidence that the invention is obvious, or has already been patented by someone else. If he rejects it, then the company can tweak the application to address the bureaucrat's concerns and re-submit it. Firms with sufficient persistence—which is to say, firms with plenty of money to spend on patent lawyers—can usually win this war of attrition.

It doesn't make sense to describe a bureaucratic process like this as a "natural selection device." A top-down bureaucratic process like this is prone to a variety of systematic errors. They advantage insiders over neophytes. They are prone to errors due to the biases and limited knowledge of the decision makers. The decision-makers are likely to be subject to distorted incentives, such as the fact

that examiners generally get more credit for applications they accept than those they reject.

Indeed, if having bureaucrats carefully scrutinize applications and apply arcane legal rules guaranteed high-quality results, we should expect the "natural selection device" that is the Pentagon's procurement process to lead to only cost-effective projects being approved.

Every programmer who has even a passing familiarity with the patent system knows that vague and trivial patents are extremely common. Indeed such patents are often *more* desirable for applicants because more people are likely to accidentally infringe them, yielding more potential litigation targets.

Moreover, it's obvious from the data that the number of patents granted to a company has very little to do with how much it innovates. For example, when I ran the numbers earlier this year, Microsoft had been granted more than 19,000 patents, while Google had been granted fewer than 1100. Reasonable people can disagree about whether Microsoft or Google is the more innovative firm. But it's absurd to claim that Microsoft has been 17 times as innovative as Google has. The difference is that 15 years ago, Microsoft invested in the army of lawyers it takes to file thousands of patent applications. Google was too busy actually innovating to waste time filing thousands of patent applications.