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The Conservative Case Against Software Patents

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My piece on software patents for the print edition of *National Review* is now available online:

Large companies like to focus on patent trolls, but they are just one manifestation of the patent system's flaws. Large companies have been stockpiling vast numbers of dubious patents themselves. Consider the contrast between Microsoft and Google. The United States Patent and Trademark Office has granted Microsoft more than 18,000 patents. In contrast, as of August, Google has been granted fewer than 800 patents. Microsoft is an innovative company, but few people would say that Microsoft has been 20 times as innovative as Google. Rather, Microsoft had a big head start in building the large legal bureaucracy required to file dozens of patent applications each week.

Building such a bureaucracy isn't just slow and expensive; it also requires a shift in corporate culture. The time and attention of a company's most productive engineers is a scarce and valuable resource. It takes a systematic campaign of reeducation to persuade those engineers that filling out patent paperwork is a higher priority than improving the company's products. Such a shift is much less costly for a mature company such as Microsoft, which has more money and engineers than it knows what to do with, than for a rapidly growing company such as Google over the last decade. Microsoft now has so many software patents that it has become impossible to build a mobile-phone operating system without infringing some of them. Just 7 percent of consumers chose to buy phones running Microsoft's Windows Phone 7 operating system in the second quarter of 2011, compared with the 40 percent who chose Android phones. Yet manufacturers of Android phones have to pay royalties on Microsoft's patents — and they pass these costs on to consumers.

This represents a fundamental shift in the software industry. One of the industry's traditional strengths has been its low barriers to entry. Over and over again, tiny software companies such as Microsoft, Google, and Twitter have dislodged incumbents many times their size. But while a small team of brilliant engineers can build some of the world's best software, it has no hope of keeping up with big companies' rate of patent filings. Patents threaten to turn Silicon Valley into a place where new firms must develop large legal bureaucracies before they can challenge incumbent firms.

I also discuss the early history of software patents, the controversy over DataTreasury's check-clearing patents, and the continuing grassroots opposition to software patents among rank-and-file programmers.

I'm grateful to Reihan for recruiting me to write the piece. For historical reasons, opposition to software patents has been more intense on the left than the right, but the case against them is throughly bipartisan and pan-ideological. Software patents offend conservative values like free markets and the rule of law as much as they offend liberal values. And reform is much more likely to happen if there's consensus on the need for reform across the political spectrum.