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Feld Thoughts

Brad Feld has been an early stage investor and entrepreneur for over 20 years. He is co-founder of Foundry Group and currently serves on the board of directors of Gnip, Oblong, and Zynga Game Network for Foundry Group. The posts published here originally appeared on www.feld.com.

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Monday, August 31, 2009

The Drumbeats Against Software Patents Are Getting Louder

There is a great article by Timothy Lee, an adjunct scholar at the Cato Institute, out today titled *The Case against Literary (and Software) Patents*. Lee, an adjunct scholar at the Cato Institute who is also a Ph.D. student in Computer Science at Princeton, totally nails it.

Here's the beginning:

> *"Imagine the outcry if the courts were to legalize patents on English prose. Suddenly, you could get a "literary patent" on novels employing a particular kind of plot twist, on news stories using a particular interview technique, or on legal briefs using a particular style of argumentation. Publishing books, papers, or articles would expose authors to potential liability for patent infringement. To protect themselves, writers would be forced to send their work to a patent lawyer before publication and to re-write passages found to be infringing a literary patent.*
>
> *Most writers would regard this as an outrageous attack on their freedom. Some people might argue that such patents would promote innovation in the production of literary techniques, but most writers would find that beside the point. It's simply an intolerable burden to expect writers to become experts on the patent system, or to hire someone who is, before communicating their thoughts in written form.*
>
> *Over the last 15 years, computer programmers have increasingly faced a similar predicament. We use programming languages to express mathematical concepts in much the same way that authors use the English language to express other types of ideas. Unfortunately, the recent proliferation of patents on software has made the development and use of software legally hazardous. That's why many of us are hoping the Supreme Court definitively rules out patents on software when it hears the case of Bilski v. Doll this coming term."*

And here's the conclusion:

> *"The writing of software, like writing in English, is a creative activity practiced on a vastly wider scale than other activities commonly afforded patent protection. Small businesses and*

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nonprofit organizations far removed from the traditional software industry have IT departments producing potentially infringing software. The Brookings Institution's Ben Klemens has documented that this is not a theoretical problem. Entities as diverse as the Green Bay Packers, Oprah Winfrey, Kraft Foods, and J. Crew have been sued for developing or using ordinary business software.

Regulations that work well when applied to a handful of large, capital-intensive firms can become an intolerable burden when applied to millions of small organizations and individuals. It's not reasonable to expect hundreds of thousands of small businesses to vet the software they produce for patent infringement, any more than it would be fair for them to face liability for publishing a brochure with an infringing turn of phrase.

The high overhead of the patent system demands that it be limited to relatively concentrated and capital-intensive industries in which most participants have the means to comply with the requirements of patent law. Patents on English writing would not meet this requirement. Neither do patents on software."

There's plenty of good stuff in between. Go read it. I just got invited to go to the Supreme Court and listen to re: Bilski. Psyched!

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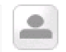
Makes sense to abandon software patents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I am also against software patents, since software is related to mathematics. Some of the patents are some very basic ideas with no deep insight. That idea could have easily occurred to many before Patents will essentially stop the growth of the algorithmic mathematics. Fortunately quick sort and FFT are not patented.

http://sunnyeves.blogspot.com/

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It's not so simple

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The distinction between software, firmware, and hardware gets blurrier all the time. How would you decide when something is software (which would not be patentable) or hardware (which would)? Perhaps instead we should make the duration of a patent (currently a constant 20 years) roughly dependent on how long it should take to commercialize. Things like software would have the shortest duration (3 years?), perhaps drugs the longest (30 years?).
Of course it would be helpful if some common sense were applied to the "nonobviousness" criterion for something being patentable, although once a method is revealed, it is often perceived as obvious.
On a slightly related topic, does anyone know how extending copyright duration *retroactively* "promote[s] the Progress of Science and useful Arts", or, for that matter, what definition of "limited Times" allows the time to be retroactively increased? (Quotes from Article I Section 8 of the US Constitution, the basis for US patent law.)

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