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USPTO's Violation of the First Amendment, Competition Laws, and Spirit of Creation

Posted in America, Intellectual Monopoly, Patents at 4:04 am by Dr. Roy Schestowitz

Job cremation

***Summary**: The USPTO (shown above) comes under more fire as a so-called 'reform' fails to make it harmonious with science, technology, and human rights*

THE USPTO IS happily granting software patents/monopolies and processing some patent-pending ones on green energy, demonstrating that it is still dissociated from the betterment of society and instead dedicated to protectionism.

The First Amendment is said to be violated by some particular types of patents, according to *TechDirt* which argues:

> ## Do Patents On Medical Diagnostics Violate The First Amendment?
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> We've been following the extremely worrisome Prometheus Laboratories v. Mayo Collaborative Services case for a while now. This is the case in which Prometheus patented some basic medical diagnostics tests, and then sued the Mayo Clinic for daring to do similar diagnostics without paying up. Tragically, CAFC, the court of appeals for the Federal Circuit, has ruled that it's just fine and dandy to patent a diagnostic test. The Supreme Court agreed to hear the appeal on this in the upcoming term, and folks at the Cato Institute have filed a very interesting amicus brief, arguing that such a diagnostic test should not be patentable on two key points. I don't know that it'll convince the court, but they try out the argument that doing so would actually be a First Amendment violation, and even cite the famous Eldred case to make their argument (emphasis mine in the quote here):

As we explained yesterday, antitrust concerns too help shed doubt on the legitimacy of the patent system. Google may have bought some more patents from IBM (mentioned in the context of software patents in [1, 2, 3, 4, 5, 6, 7]), but deterrence does not work when Microsoft uses patent trolls to wage anti-competitive legal wars. This whole systems looks more and more like s sham. Even NPR did a show about it about 3 days ago. To quote a part of it:

> BLOCK: What is the broader goal in terms of job creation here?
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> SYDELL: Well, this is what they say. What they say is if we speed things up and we get that backlog cleared up, then there are all these startups that are just waiting to move to the next phase of financing and get their products to market. And they'll be able to do that and they'll hire people in the process. So that's what they're saying.
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> BLOCK: And what about those businesses, Laura, or inventors, entrepreneurs – do they think that the law will, in fact, encourage hiring, make them hire more people?
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> SYDELL: No, I'm not hearing that largely at all. I'm hearing a lot of skepticism about the bill. I think one of the problems that entrepreneurs and startups face is that there are a lot of bad patents that are out there, particularly in the realm of software and business method. And the bill doesn't really do anything to address that.
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> So one of the problems that you have is you have a lot of these, they call them patent trolls. They're companies that buy up patents, particularly broad patents. They buy them up and they go out and they sue startups and they demand licensing fees. And this has put a lot of startups out of business. And this bill doesn't really do anything to address that problem.
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> The Patent Office has granted, for example, in 2000, they granted a patent for a method of making toast. Really, seriously.
>
> BLOCK: Laura, what other solutions would there be to this problem of bad patents that you're talking about that wouldn't involve Congress?

SYDELL: The courts could step in. And, in fact, it is the courts who initially pushed to have, for example, software patents and business method patents granted. So they could pull back and there is some evidence they are. But I think it could be a long time before they address it directly. And people are concerned about that.

I think a lot of people wish Congress would revisit this soon. And they're worried that because they just granted and created this new act it'll be a long time before Congress steps in again, which really would be the fastest and most efficient way to address the problem.

BLOCK: NPR's Laura Sydell. We were talking about the new U.S. patent bill that was signed into law by President Obama today.

There are more news articles about it, e.g. [1, 2], but only few mention software patents. The government which signed this ridiculous bill ignores the real issues, spews out a load of nonsense which contradicts research, and one GNU/Linux advocate had this to say on Saturday:

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Patent "reform"? Not really.
From: Homer
Date: Saturday 17 Sep 2011 14:38:53
Groups: comp.os.linux.advocacy
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Apparently "patent reform" happened already, and nobody noticed. But
what exactly happened, and what effect will it have on patent trolls
like Myhrvold, Apple, Microsoft and Oracle, perhaps the biggest threats
to Linux, Free Software and innovation in general?

[quote]
Late last night the Senate voted 89-9 to pass the America Invents Act
that would radically reshape patent laws, and President Obama is
expected to sign it without delay. It's the first such significant bill
in 60 years, and it has one key component: It moves the onus from merely
"inventing" a patentable idea first to becoming the person who actually
files for an innovation first.

...

But "first to invent" has some big pitfalls, including the ability of an
inventor to totally gut the hopes of someone else with a similar or
identical idea, and who then files for a patent--because the original
inventor, without necessarily having to make any move toward realizing
the innovation, can claim they invented it. A complex legal battle may
then ensue, and perhaps the second filer may choose to settle privately,
license the idea, or fight the situation in an expensive court case.

This trolling completely destroys the idea that a successful new thing
is built on 1% inspiration and 99% perspiration--a troll, perhaps even a
rich troll who's made money from previous innovations they've dreamed up
(or, more materialistically, bought from someone), can simply keep the
legal upper hand by saying they're the real innovator without actually
building anything.
[/quote]

http://www.fastcompany.com/1779071/first-to-file-a-patently-obvious-reform

Sorry (and excuse the pun) but this is patently wrong. Invention is
invention, not manufacturing; it's the idea (strictly - the method) not
the implementation. If you're not the first to have a particular idea,
then you're not its inventor. Period. This "reform" simply transforms
"invention" into a brawl, where being the first to find or create
something doesn't necessarily secure ownership - you can be mugged for
it by someone more powerful.

Is this really all the "America Invents Act" has to offer? Is this the
best "reform" congress could come up with? Pathetic.
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/Real reform/ would have been a re-examination and redefinition of what
exactly is patentable, a more rigorous patent examination process (or,
let's be honest, /any/ patent examination process), and stricter (or
again - /any/) remedies against those who persistently file trivial
claims.

/Real reform/ would have made patents non-transferable, thus completely
solving the problem of patent harvesting by non-practising entities.

/Real reform/ would have made it impossible to patent something as
trivial and non-inventive as a "rounded rectangle" or a "record button".

But no, that's not what the "America Invents Act" has done at all. All
it's done is make innovation impossible for anyone who lacks the
financial means to bribe the USPTO, and allows the wealthy to steal
others' ideas. The US patent system was already an abomination, but now,
incredibly, it's actually an order of magnitude /worse/.

Apart from anything else, it seems to completely undermine the premise
of "prior art", since apparently the only thing that counts now is being
the "first to file", regardless of who actually came up with, or even
implemented, the idea first.

Consider the case of IP Innovation LLC and the Technology Licensing
Company (ex-Microsoft employees, and likely just two of Myhrvold's many
shell companies) vs.  Red Hat & Novell, where the litigants claimed
they'd "invented" multiple workspaces. Of course, their definition of
"invented" was "harvested patents from Xerox".

Unfortunately for the patent trolls, those patents were granted in 1991,
some 6 years /after/ multiple workspaces ("screens") had already been
implemented on the Amiga, and so they lost the case. Indeed Commodore
implemented the concept as a commercial product in 1985, a full year
before it was even first implemented internally by Xerox PARC, and the
Amiga implementation was based on ideas devised by Jay Miner (of the
original "Amiga Corporation") as far back as 1982, some two years before
it was even first imagined at Xerox PARC.

But that prior art would apparently mean nothing in the new patent
regime, since neither Jay Miner nor Commodore thought to patent the
concept of multiple workspaces, despite clearly being the inventors and
first implementers of the concept. Xerox PARC was the "first to file",
and that's all that matters in a gun-slinger economy. Anyone with enough
money can now file patents against other people's prior art, use them as
weapons to extort money, from anyone - including the /actual/ inventors,
then pass those weapons on to other gun-slingers to do likewise.

Meanwhile those same gun-slingers remain free to claim "invention" of
every trivial speck of dust in the world, completely unchallenged until
they turn up in the "great" troll-friendly State of Texas, and either
win on the basis of the corrupt court's pro-patent bias, or bleed their
victims dry in the process.

So much for "patent reform".
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It's all about inflating the elevating the amount of patents (under the assumption that patents have real value, as legal types wish us to believe), but if the assumption is that this bill will give more jobs to patent lawyers, maybe they have a point. Just creating more and more monopolies is like overprinting money, which devalues the currency but works well for the mint. Watch McKool Smith in the news last week, pulling $391,000,000 from an actual practicing company based on this press release:

> Attorneys from McKool Smith have secured a $391 million court judgment in favor of firm client Versata Software Inc., a pioneer in front-office enterprise software, following a successful patent infringement lawsuit against global software giant SAP America Inc. and its German-based parent company SAP AG (NYSE: SAP).

That is some really expensive "patent infringement". Notice that SAP America Inc. is the target. The USPTO really needs to get its act together or go away. ■