

Let's ditch software patents

Our lives are cluttered with unnecessary traditions, ideas and institutions. Warm weather came early this year, but there's still time for a good spring cleaning. After purging old receipts, broken appliances and unloved outfits, what else should we toss? Outlook asked 10 writers what they thought we'd be better off without. From the Cabinet to premium gas to chick flicks, here are their picks.

By Christina Mulligan, Published: April 19

This spring, the United States should jettison software patents. It is impossible for software developers to avoid infringing them, no matter how hard they try, and patent-infringement lawsuits can cripple or destroy a business. The result is a game of Russian roulette in which developers desperately hope to avoid lawsuits, rather than a clear and fair system of intellectual property rights.

In research I did with the Cato Institute's Timothy B. Lee, we found that there is no quick way to look up whether your software code falls within a patent's claims. You have to check every software patent to be certain that you haven't missed a match. The nation's software industry would need more than 2 million patent lawyers working full time for a year to do this, at a total cost of more than \$400 billion. There are only about 40,000 patent lawyers and agents in the United States. It's completely impracticable to discover what patents any given software program might accidentally infringe.

And the chances that a large piece of software doesn't infringe someone's patent are virtually nil. About 40,000 new software patents are issued in a typical year. They regularly cover trivial or commonplace activities, such as paying for something online with a credit card. The patent on raising a pop-up window when you try to leave a Web page can be infringed in as little as three lines of computer code, while computer programs often exceed millions of lines. Any program has the potential to infringe hundreds, if not thousands, of patents.

It doesn't have to be this way. Eliminating software patents would still leave code protected by copyright, which can be infringed only by actual copying, not by accidentally writing something similar to an existing piece of code.

While small software developers live in fear of lawsuits, large companies have started to weaponize their patent portfolios so they can meet every suit with a countersuit. Google acquired Motorola Mobility for \$12.5 billion after Microsoft and Apple, with a few other firms, spent \$4.5 billion to purchase 6,000 patents from Nortel Networks. These billions could have been used to develop new products and inventions.

Recognizing the pernicious nature of software patents, Twitter is committing in its new Innovator's Patent Agreement to primarily use patents it acquires from employees defensively — not to sue, only to countersue. More companies should follow Twitter's lead. But it would be even better if they didn't need to waste money acquiring patents defensively at all. Then those billions of dollars could go toward what people are really interested in — new and better software.

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