

The problem with patents

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A near hysterical debate has broken out in the world of patent law surrounding the news that one of Paul Allen's companies, Interval Licensing LLC, has filed infringement lawsuits against a variety of web companies including Google, Yahoo, AOL and eBay.

Whether this debate is fuelled by the identity of the patentee, or by fears that consumers will be penalised with technology price rises through a huge corporate patent battle, who knows? But talk alone won't make any difference to the outcome of this or any other future court case.

The ability to stamp ownership on a new invention by use of a patent was first used for medicines in Britain in 1600, and the first US patent laws were enacted by Congress in 1790 as part of the Constitution.

So the patent system has been around for hundreds of years, but it doesn't take much to realise the continuing development of all types of technology, products and services over the past five centuries has led to the patent arena becoming ever more complicated and competitive.

Individuals and small businesses that have produced ground-breaking innovations have helped shape how we live today. Their inventions deserve the chance to be protected and the patent system enables them to obtain reward for their creative contribution, regardless of whether or not they have the resources themselves to bring their ideas to market.

If components invented and patented by prior innovators are used by major companies as part of a new product or service, is it "fair", or economically desirable, for such companies to profit from products based on someone else's invention without returning something to those responsible for the innovation?

Conversely, is it fair or economically desirable for larger companies who are themselves investing billions in research and development and pushing the boundaries of IT, computer or internet technology for example, to be held to ransom by those who may have obtained a patent for a minor invention relating to just one part of many thousands of components the company might be using as part of the whole?

If you answered no to both questions, you are beginning to understand the problem. In my view, discussion of these issues often involves an irregular verb - "I am an innovator"; "you are a technology licensor"; "he is a patent troll".

The patent system isn't perfect, and some may feel it has not moved with the times enough, particularly as we move to a world where things that go clunk are replaced by things that go beep, and products can be re-engineered simply by transmitting code unseen into a black box that remains physically unchanged.

But it is a system that seeks to find an elusive balance between the merits of rewarding and giving a leg up to innovators, and unchecked Darwinian market competition. Most would agree that an ability to protect their own innovation has helped many smaller companies compete effectively with established larger companies, thereby bringing new technology to market.

There are ways the patent system can be made to work better for all innovators, whether large or small. More awareness of the patent process would help. The internet, which as it happens exists in its present form due to a number of innovations patented by some of my clients, is a great tool for sharing information. Many major patent offices (for example the European Patent Office and the US Patent Office) make full information available online as applications are being examined and those who do not yet, such as the UK, are expected to catch up.

Patent offices, and the courts are required to make decisions based on objective evidence rather than hearsay or rumour. They have finite facilities and resources for searching. There are provisions for third parties to submit evidence of prior art, anonymously if they wish and free of charge, during examination and for opposition after grant.

If everyone who asserted that a granted patent covered something that was clearly known had provided the patent office with objective evidence of this assertion, the problem would not exist.

Patent offices are always keen to increase their awareness of material to consider when searching and would no doubt be receptive to those with larger collections of evidence providing it was presented in a suitable form.

In conclusion, consider this: If exactly the same patent had been granted on the same facts but was owned by a well-respected Nobel prize-winning physicist and it was Microsoft who was on the receiving end of the suit, would there have been the same outrage as that surrounding Paul Allen's decision to sue?

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