



Defend Innovation: 7 Proposals to Fix a Broken Software Patent System

One-size-fits-all doesn't make sense for the patent system.

The traditional contours of patents simply do not work for software. Congress has already created carve-outs for certain industries, like pharmaceuticals; we think it's time to revamp the system for software. If the courts and Congress refuse to do away with dangerous software patents, let's at least make the system one that defends innovation, instead of hindering it.

1. **Shorten the patent term.** A patent covering software should survive for a term of no more than five years beginning the date the application is filed. International agreements could be read to require a 20-year term, but there are ways around this. For example, it's not clear those agreements even apply to software. Also, the proposal could be limited to U.S. inventors only.
2. **Shift court fees away from innocent parties.** Patent law should allow for the winning party, in cases where it was easy to see that the patent was invalid or there was no infringement, to obtain its fees and costs. If the trolls know they could be on the hook for that money, they will be less likely to file frivolous lawsuits.
3. **Open up the patent granting process.** Patent applicants should be required to provide an example of running software code for each claim in the patent and tell the Patent Office which claims are covered by which lines of that code. Think, for example, of early Patent Office practice requiring the submission of a "model" of the working invention to the Patent Office.
4. **Relax liability for inadvertent infringers.** Congress should pass a law letting alleged infringers avoid liability when they can show that they independently arrived at the invention they practice. If inventors can't understand a patent, then they cannot copy it. Likewise, if inventors don't know about a patent, they cannot copy it. An innocent infringer defense would protect those inventors and, consequently, shut down a major revenue stream for the trolls.
5. **Access to patents.** All patent owners should be required to keep their disclosures up to date, or else the patent will be made unenforceable. Patent owners should be required to update ownership and litigation records in a timely fashion. And, with the exception of relevant trade secrets, all licenses should be reported within six months of their effective date.
6. **Damages based on the role of the patent.** The law should be clear that damages may not be based upon the entire market value unless the patent's specific contribution is the predominant basis for the demand of a defendant's product or process.
7. **Software patents – what are they good for?** Congress should hold hearings and provide a study examining the issue. The study should include a review of relevant economic data and should take into account viewpoints from all parties affected by the patent system, particularly those who oftentimes do not practice before the Patent Office and who do not deal with litigation and licensing until they are facing the threat of a suit themselves.