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Online Patents: Leave Them Pending

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Abstract (Article Summary)

Last month, Amazon.com founder Jeff Bezos won a court battle guaranteeing patent rights for his "one-click" technology. He later issued an letter saying the experience had convinced him that the current patent system "could end up harming all of us"; he recommended Congress consider reforms. While his letter raises more questions than it answers, he's right about one thing: Congress needs to take a stand on patents before they get out of control.

A patent is a form of regulation. It is a rule imposed by the government saying who may use what ideas, and for how long. This rule gets imposed after an inventor petitions the government, and after an underpaid, overworked patent examiner decides whether the invention is novel, nonobvious and useful. If the patent is approved, the government will defend the inventor's monopoly for up to 20 years.

This unregulated world, however, is ending. Patents are rapidly filling cyberspace. Though software was for many years unpatentable, a series of judicial decisions changed that. Some 40,000 software patents now float in the ether. And though most patent lawyers were surprised by the decision, in 1998 the U.S. Court of Appeals for the Federal Circuit ratified the "business method patent," which gives patent holders control over ways of doing business in cyberspace. It is under this theory that Priceline's patent for the "reverse auction" was sustained, as well as Amazon.com's patents for its one-click technology and its "associates program."

Full Text (978 words)

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Last month, Amazon.com founder Jeff Bezos won a court battle guaranteeing patent rights for his "one-click" technology. He later issued an letter saying the experience had convinced him that the current patent system "could end up harming all of us"; he recommended Congress consider reforms. While his letter raises more questions than it answers, he's right about one thing: Congress needs to take a stand on patents before they get out of control.

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For most of the Internet's short history, this kind of regulation was rare. The protocols of the Internet itself were not patented; nor was the original software that made the Internet run. Rather than a regime of regulated use, the original Internet left ideas in the open. Anyone could take and improve upon the inventions without getting approval from anyone else. This environment has produced the most extraordinary innovation that we have seen in a century.

This unregulated world, however, is ending. Patents are rapidly filling cyberspace. Though software was for many years unpatentable,

a series of judicial decisions changed that. Some 40,000 software patents now float in the ether. And though most patent lawyers were surprised by the decision, in 1998 the U.S. Court of Appeals for the Federal Circuit ratified the "business method patent," which gives patent holders control over ways of doing business in cyberspace. It is under this theory that Priceline's patent for the "reverse auction" was sustained, as well as Amazon.com's patents for its one-click technology and its "associates program."

Will this regulation weaken innovation in cyberspace? No one is sure. Patents create incentives, but they also impose costs. The question is whether the benefits outweigh the losses.

Supporters point to the importance of patents in "real space" to justify their extension to cyberspace. But we have no experience with business-method patents in real space, and thus no history to guide us. And the many years without software patents means that there is no good database of "prior art" and so no good way to decide whether an idea is really new. Thus, even a proponent of strong patent protection would have good reason to be skeptical about these two types of patents.

The skeptics gained an important ally in Mr. Bezos this month. After being prodded by publisher Tim O'Reilly to justify the enforcement of the one-click patent, Mr. Bezos published his letter. His suggestions for reforms included substantially shortening the term for business-method and software patents, and opening up a process for public comment before a patent is issued.

Mr. Bezos is an important and credible critic of the existing patent system. But one need not be an opponent of patents to agree with the most significant point in his letter: Congress should do something. What is most striking about this explosion of regulation in cyberspace is that it is not the product of legislators or policy makers. No agency decision or Congressional act launched patents into cyberspace. The explosion of patents has resulted entirely from court decisions. And while the courts may well be right about how best to interpret laws written long before the Internet existed, it does not follow that their decisions are the best policy for patents in cyberspace.

We know this because in practically every other context of e-commerce regulation, the practice of our government has been not to apply the old rules but to wait and see. Thus Congress supported a moratorium on Internet taxation until we understood what taxing cyberspace would do. The Federal Trade Commission held off regulating online privacy until it saw whether businesses would regulate itself. And the Federal Communications Commission has refused to enforce open-access requirements in broadband cable, in part because we don't yet know how the market will evolve. In each area, the government has hesitated before regulating -- at least until officials are satisfied the regulation will do no harm.

The same strategy should govern patents. No one predicted the extraordinary innovation that the patent-free Internet produced. It surprised us, and this surprise should indicate that there is something to learn. But we learn not by training the mandarins of our culture -- lawyers and judges -- on the question of whether "patenting this is just like patenting that." We learn by studying the economics of the field. Such study takes time. It requires serious and balanced inquiry by investigators without an interest in the result.

This is what Congress should begin right away. But until this study is complete, Congress should also consider a proposal floated (if not endorsed) by economist Joseph Farrell: Congress should declare a moratorium on the offensive use of software and business-method patents. Only when we are reasonably confident that regulation will do some good should Congress allow regulation to go forward.

There can be no doubt that the present trend is changing the environment for innovation in cyberspace. Before we allow that change to occur, we should have good reason to believe the change will do some good. Good reason is something more than a lawyer's argument from analogy. It is a judgment, based in economic facts, about how a government-granted monopoly will affect innovation. Congress has not made that judgment, and the judgment of patent attorneys is no substitute.

Mr. Lessig is a professor at Harvard Law School and author of "Code and Other Laws of Cyberspace" (Basic Books, 1999).

(See related letter: "Letters to the Editor: Patent `Anything Under the Sun' " -- WSJ April 14, 2000)

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