Why Bill Gates Wants 3,000 New Patents

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"EXCITING," "uninteresting" and "not exciting" don't seem like technical terms. But they show up a lot in United States patent application No. 20,050,160,457, titled "Annotating Programs for Automatic Summary Generation." It seems to be about baseball. The inventors have apparently come up with software that can detect the portions of a baseball broadcast that contain what they call "excited speech," as well as hits (what I call "excited ball") and automatically compile those portions into a highlights reel.

If the patent is granted, after a review process that is likely to take three years, it will be assigned to the inventors' employer, Microsoft.

The staff of the United States Patent and Trademark Office has been deluged with paperwork from Microsoft of late. It was one year ago that the company's chairman, Bill Gates, announced plans to pick up the pace, raising its goal of patent applications submitted annually to 3,000 from 2,000. The company is right on target.

It must feel like a bit of a stretch to come up with 60 fresh, nonobvious patentable ideas week in, week out. Perhaps that is why this summer's crop includes titles like "System and Method for Creating a Note Related to a Phone Call" and "Adding and Removing White Space From a Document."

I have not seen the software in use. But if I were in a position to make a ruling, and even if I accepted the originality claim on its face, I would process these swiftly: Rejected.

Microsoft's other pending applications - 3,368 at last count - should receive the same treatment. And while tidying up, let's also toss out the 3,955 patents that Microsoft has already been issued.

Perhaps that is going too far. Certainly, we should go through the lot and reinstate the occasional invention embodied in hardware. But patent protection for software? No. Not for Microsoft, nor for anyone else.

Others share this conviction. "Abolishing software patents would be a very good thing," says Daniel Ravicher, executive director of the Public Patent Foundation, a nonprofit group in New York that challenges what it calls "wrongly issued" patents. Mr. Ravicher, a patent lawyer himself, says he believes that the current system actually impedes the advance of software technology, at the same time that it works quite nicely to enrich patent holders. That's not what the framers of the Constitution wanted, he said.

Earlier this month, the European Parliament rejected a measure, nicknamed the "software patent directive," that would have uniformly removed restrictions on those patents among European Union members.

All software published in the United States is protected by strong copyright and trademark protection. Microsoft Excel,

for example, cannot be copied, nor can its association with Microsoft be removed. But a patent goes well beyond this. It protects even the underlying concepts from being used by others - for 20 years.

As recently as the 1970's, software developers relied solely upon copyrights and trademarks to protect their work. This turned out rather well for Microsoft. Had Dan Bricklin, the creator of VisiCalc, the spreadsheet that gave people a reason to buy a personal computer, obtained a patent covering the program in 1979, Microsoft would not have been able to bring out Excel until 1999. Nor would Word or PowerPoint have appeared if the companies that had brought out predecessors obtained patent protection for their programs.

Mr. Bricklin, who has started several software companies and defensively acquired a few software patents along the way, says he, too, would cheer the abolition of software patents, which he sees as the bane of small software companies. "The number of patents you can run into with a small product is immense," he said. As for Microsoft's aggressive accumulation in recent years, he asked, "Isn't Microsoft the poster child of success without software patents?"

So why didn't Mr. Bricklin file for a patent for VisiCalc in 1979? Patents for software alone were not an option then. He consulted a patent attorney who said that the application would have to present the software within a machine and that the odds were long that the ploy would succeed. The courts regarded software as merely a collection of mathematical algorithms, tiny revelations of nature's secrets - not as an invention, and thus not patentable.

The legal environment changed not because of new legislation, but by accident. One important ruling here and another there, and without anyone fully realizing it, a new intellectual-property reality had evolved by the end of the 1980's. Now software could enjoy the extraordinary protection of a patent, protection so powerful that Thomas Jefferson believed that it should be granted in only a few select cases.

Making the best possible argument for Microsoft's newly acquired passion for patents is a job that falls to Brad Smith, the company's senior vice president and general counsel. Last week, we discussed the changing legal landscape in the 1990's. Microsoft had not taken an interest in patents in its early years because, as Mr. Smith said, "We thought we could rely on copyright." The courts changed the rules, and Microsoft had to respond like everyone else.

Why did Microsoft increase its patent-application target so sharply just last year?

"We realized we were underpatenting," Mr. Smith explained. The company had seen studies showing that other information technology companies filed about two patents for every $1 million spent on research and development. If Microsoft was spending $6 billion to $7.5 billion annually on its R&D, it would need to file at least 3,000 applications to keep up with the Joneses.

That sounds perfectly innocuous. The really interesting comparisons, though, are found not among software companies, but between software companies and pharmaceutical companies. Pharma is lucky to land a single patent after placing a multihundred-million-dollar bet and waiting patiently 10 years for it to play out. Mark H. Webbink, the deputy general counsel of Red Hat, a Linux and open-source distributor, said it was ridiculous for a software company to grab identical protection for work entailing relatively minuscule investment and trivial claims. He said of current software patents, "To give 20 years of protection does not help innovation."

If Congress passed legislation that strengthened and expanded copyright protection to include design elements as well as software's source code, formalizing the way the courts interpreted the law in the 1970's, we could bring an end to software patents and this short, unhappy blip in our patent system's time line.

Eliminating software patents would give Microsoft another chance to repair its relationship with open-source users. Recently, the company has stooped to what can only be labeled fear-mongering, telling its customers who may be tempted to switch to open-source alternatives to think twice before leaving Microsoft's protective awning.

Last year at a public briefing, Kevin R. Johnson, Microsoft's group vice president for worldwide sales, spoke pointedly

of "intellectual property risk" that corporate customers should take into account when comparing software vendors. On the one side, Microsoft has an overflowing war chest and bulging patent portfolio, ready to fight - or cross-license with - any plaintiff who accuses it of patent infringement. On the other are the open-source developers, without war chest, without patents of their own to use as bargaining chips and without the financial means to indemnify their customers.

What would Jefferson think if he were around to visit Microsoft's campus, seeing software patents stacked like pyramids of cannonballs?

By RANDALL STROSS
The New York Times [2]

List of M$ Patent Apps [3]

Microsoft

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