



*Attorneys at Law*

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## **EDITORIAL:**

### **DO IT PATENTS WORK?**

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Ask anyone whether they are satisfied with the current state of patents in the American IT world, and you are not likely to find many fans of the status quo. And how surprising can that be, given that the authority to grant patents was included by the Founding Fathers in the Constitution?

Those who have some grey hair will be aware that the Patent and Trademark Office (PTO) has found the advent of high technology -- and particularly the unique nature of software -- challenging. The original spreadsheet program was launched, after all, at a time when software was not regarded as being patentable, which is in part why we are more familiar today with the brand name Excel than VisiCalc.

Once software was deemed to be worthy of patent protection, a backlog in filings built up as the PTO struggled to add staff that could understand software architecture. Many felt at that time that software patents were far too hard to obtain. Later, long delays melted away, and the first allegations that software patents were being granted too liberally arose, in connection with a feeling that examiners were still ill-equipped to evaluate them.

Several other cracks became evident in patents as applied to software as the pace of technology quickened. The very concept of a government-granted monopoly for a finite time period seemed absurd, when the period of exclusivity spanned 20 years. True, such a period remained sensible in the world of biotechnology, where drugs could have perpetual utility, and the R&D and approval process could take a decade. But in the world of software, obsolescence could occur before a patent was even granted.

Later, new trends emerged: the free software and open source movements brought an almost theological challenge to the concept of exclusive ownership rights, while the granting of "business methods" patents on processes that people found to be obvious outraged others. Eventually, the abuse of the standards process by some participants who failed to disclose patents was added to the list. Today, many feel simply that patents are too easily obtained, and too difficult to challenge.

Where can all this lead? Unfortunately, patents are a creation of government, and therefore inertia and process are serious issues. But even as new crises arise, there is some hope for progress.

In our November News Cluster, we focus on two current events: the well-publicized Eolas victory over Microsoft, followed by the W3C's successful quest for a review by the PTO, and the barely noticed release by the Federal Trade Commission of a comprehensive report suggesting meaningful reforms to the patent system. Whether the combination of the outcry over the Eolas patent and the FTC's good work will be sufficient to spark a change remains to be seen.

But those that have a serious stake in the game would be wise to seize upon this opportunity to speak out in favor of a serious effort to bring the patent system up to date. Perhaps the Founding Fathers would be proud of us if we do.

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