From: james.babcock [e-mail redacted]
Sent: Saturday, September 25, 2010 2:46 PM
To: Bilski_Guidance
Subject: Do not make software patentable, from a practicing software engineer

I am a professional computer programmer (my job title is Senior Software Engineer). In other words, I am exactly the sort of potential inventor whom software patents are meant to encourage and benefit. However, I am firmly opposed to software patents, because in practice, they harm my interests and discourage me from inventing instead. Every time I create something, I face the risk that it infringes on a patent I don't know about. There is little or no corresponding chance that I will be able to file a patent and profit off of it. Software patents are ostensibly meant to benefit me, and others like me, but they have actually achieved the opposite; they are a constant threat to my livelihood, which I cannot mitigate or avoid. I can't even look up what's been patented, because doing so would expose me to triple damages. They hinder interoperability. And worst of all, most of the software patents that have been granted to date, and which might be granted in the future, cover inventions that are already standard practice or would be considered obvious by a practitioner in the art.

Software patents also hinder standardization and interoperability. Consider, for example, patent 5758352, Common name space for long and short filenames. This patent is owned by Microsoft and has been the subject of extensive litigation, but the invention it actually describes is completely worthless; there are far better methods known and published for doing the same thing. Or rather, it would be completely worthless except for one thing: it is impossible to interoperate with Microsoft Windows without infringing on it. Windows will only read and write data from devices that are formatted in the way described by the patent, so every other operating system, camera, flash memory card, or portable device must either license or infringe upon the patent, or it cannot interoperate with Windows. This is a common and general strategy used by multiple software companies, and it is causing severe interoperability problems in Internet video formats, and Office document formats. Additionally, the industry has standardized on formats that were known to be inferior

for digital images and compressed archives, solely because there was doubt about whether the better formats might infringe patents.

Finally, I do not believe the USPTO is capable of determining which software patent applications are truly novel and non-obvious to skilled practitioners. The field of computer software is *much* more complex and fast-moving than any of the other fields that are subject to patents, and it is not possible for any one examiner to keep track of it all. As a result, it has issued many patents which cover obvious solutions which any software engineer, faced with the same challenges, would have come up with. Software engineering, by nature, involves creating and using extremely large numbers of small inventions in each project. This creates a serious hazard, because each of those small inventions potentially infringes on a patent. While a pharmaceutical maker only needs to check for one patent to determine whether their product is legal to put on the market, a single software product contains thousands or tens of thousands of minor inventions on which the USPTO might have granted a patent. There is a fundamental mismatch between what the USPTO considers non-obvious and what practitioners in the field of software engineering consider non-obvious, and the USPTO's standards to date have been much too loose. This is not a minor concern. In the course of my career, I am not only certain to have infringed on patents, I am certain to have infringed on *dozens* or even *hundreds* of patents. Most of these patents go unenforced, because most attempts at enforcement fail in court. But this situation creates an unreasonable burden on the court system, and unreasonable risks for software developers.

Software patents are a serious and unreasonable burden on the very people they are meant to protect. Please rescind all of the software patents you have granted so far, and please do not issue any more of them.

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The opinions expressed in this message are my own, and not necessarily those of my employer.