Future Trends in Interface IP

James Grimmelmann

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Three big trends

- Software patents
- The America Invents Act (“patent reform”)
- The rise of platforms

1: Software patents

Software patents

- A high-controversy, high-uncertainty topic
  - Previous Supreme Court cases never really settled the question
- In the last decade, lawsuits mushroomed (e.g. NTP v. RIM)
  - Strong sense that patents are a key indicator of startup value
  - Strong sense that patents are a key threat to startups
  - Software patent quality crisis
- The stage was set …

Bilski v. Kappos

- Patent to manage commodity risk with hedging transactions
  - Federal Circuit rejects using "machine or transformation" test
- Supreme Court also rejects, holding that it is an "abstract idea"
  - It also says the machine or transformation test isn't "intended to be an exhaustive or exclusive test," only "a useful and important clue"
  - I have no better idea what this means than you do

Practical upshot

- The actual situation is changing much less than one would expect
- It remains possible to obtain utility patents that claim software
  - And this is unlikely to change
- What the law does shape is how the claims are written
  - This is mostly a matter of clever drafting
  - But has effects at the margin
- Business method patents are on shakier ground

2: Patent Reform

From “first to invent” to “first to file”

- Currently, the U.S. awards patents to the first person to invent
  - Defining “invent” is messy in contested cases
  - There is a one-year shot clock from the first public use
- The rest of the world awards patents to the first person to file
  - And starting March 16, 2013, the U.S. will be, too
  - Technically, it’s “first inventor to file”

But … there's still a shot clock

- Publicly disclosing the invention (e.g. by putting it on sale or publishing it) has an downside and an upside:
  - Downside: file within a year or be forever barred
  - Upside: someone else who files after you disclose loses to you
- In effect, public disclosure establishes priority, but also commits you
  - (Watch out for non-public disclosure, e.g. a secret commercial use, which starts the clock but doesn't provide priority)

What does this mean?

- First-to-file dials up the pressure to file quickly
  - Lest someone else have the same idea and beat you to it
  - Lest someone else publicly disclose first and pre-empt you
- But it also means that rushing to market is a viable strategy
  - If you hit the shelves before someone else files, they're barred
  - And you have up to a year to get your own application in
- This is all very complicated … when in doubt, consult a real lawyer!

3: Platforms

Here come the platforms

- You know about Windows, OS X, Linux, the web, etc.
- But iOS, (w/App Store), Android (w/Market), Kindle (w/Appstore) change the nature of the innovator's relationship to the platform:
  - Permission required to join the platform
  - Permission required to stay there
  - What does this mean for the inventor/designer?

Issue #1: additional constraints

- Standardized interface elements and behaviors:
  - Most stringent with Apple
  - Constrains space within which you innovate
  - Limits (but does not eliminate) protection available
- Functionality/policy limits
- Commercial limits can be stifling – and can change!

Issue #2: new IP enforcer

- Apple will enforce trademarks in the App Store by kicking you out
  - And *Apple* will decide whether you're an infringer
  - This is, of course, a double-edged sword
- Be alert:
  - To terms and conditions
  - To complaint/response procedures
  - Is there a Plan B?