

# Drawing the Line(s)

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European Parliament

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*a status quo directive*

“Nothing that is not patentable now will be made patentable by the directive.”

Commissioner Charlie McCreevy, letter to the European Parliament, 8 March 2005

# *Whose “status quo”?*

- European Patent Convention (1973)
  - no patents on computer programs or business methods
  - but only “as such”
- TRIPs (1994)
  - patents for all “fields of technology”
  - but no evidence that computer programs were intended
- EPO Board of Appeals
- national legislation and case law
- EPO/national patent office practice

## *“technical”*

- restatement of the “status quo”
- no definition
- linked to undefined “field of technology” (TRIPs)
- no negative examples
- left to lawyers and judges

## *patent and business practice context*

- diverse uses of patents (not just “protection”)
- other means and motivations for investment and innovation: time-to-market, secrecy, complements, copyright, and competition
- importance of nonproprietary intellectual property: Internet, Web, open standards, open source software.
- licensing practices:
  - patent pools, cross-licensing, non-assertion agreements, mutually assured destruction

*the real status quo: business practice*

- Are software patents enforced/ asserted?
- Will the directive change enforcement?
- Will Europe “Americanize” patent practice?
  - Make patents easier to get and enforce/ assert?
  - But maintain “technical character” as a limitation?

# *Americanization?*

- In 1997 Green Paper and 1999 Communication to the Parliament, Commission advocated Americanization
- In 2002 directive memo, Commission cites undocumented finding in its own commissioned study:

"the patentability of computer program related inventions has helped the growth of computer program related industries in the States, in particular the growth of SMEs and independent software developers into sizeable indeed major companies."

## *a moving target*

- Since Oct 2003, three major U.S. studies critical of aspects the patent system
- Liability and indemnification become major issues for software
  - Kodak v. Sun, Eolas v. Microsoft, SCO v. IBM
  - ***Indemnification Becomes Open Source's Nightmare and Microsoft's Blessing*** (2004 Yankee Group report)  
<http://www.microsoft.com/windowsserversystem/facts/indemnification/indemwp.mspx>
- Trolls emerge from the technology bust

# *trolls*

- patent business, not products or services
- exploit inadvertent infringement
- manipulate or ambush standards processes
- take advantage of sunk investments
- take advantage of IPOs
- pursue submarine patents

## *evolving troll strategies*

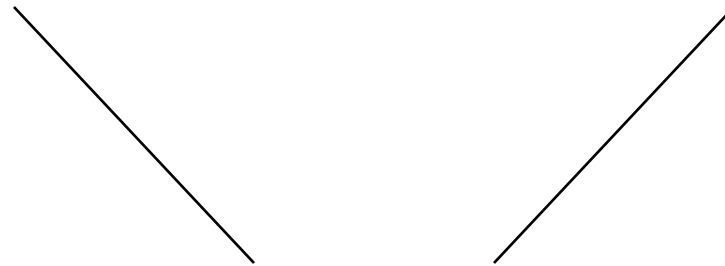
- targeting deep-pocketed companies with inadvertently infringing products on the market
- offer licenses to many small companies that cannot afford to fight
  - \$10,000-50,000 for assessment of validity and infringement
- Nathan Myrhvold's Intellectual Ventures: the cartel as troll
  - Investors are cross-licensed: Microsoft, Intel, Sony, Nokia, Apple, Google, and eBay.
  - <http://www.msnbc.msn.com/id/6478691/site/newsweek/>

# The Bottom Line

100 patent cases fully litigated each year

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2500 cases filed each year



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5,000,000 (?) notice letters received each year

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graph TD; A[5,000,000 (?) notice letters received each year] --> B[2500 cases filed each year]; B --> C[100 patent cases fully litigated each year];
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2500 cases filed each year

100 patent cases fully litigated each year

## The Bottom Line

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*25 X*

2500 cases filed each year

*25 X*

100 patent cases fully litigated each year

*What about software?*

## different ways to draw the line

patentable

technical contribution

computer-aided invention

device-dependent

“forces of nature”

not patentable

no technical contribution

(pure) software

context-independent

logical, social, economic

## *pure software*

- developed independent of any particular physical product
- not manufactured
- distributed on its own
- used on general-purpose computer/appliance
- includes operating systems, protocols, applications – everything within the programmable box/network

few producers



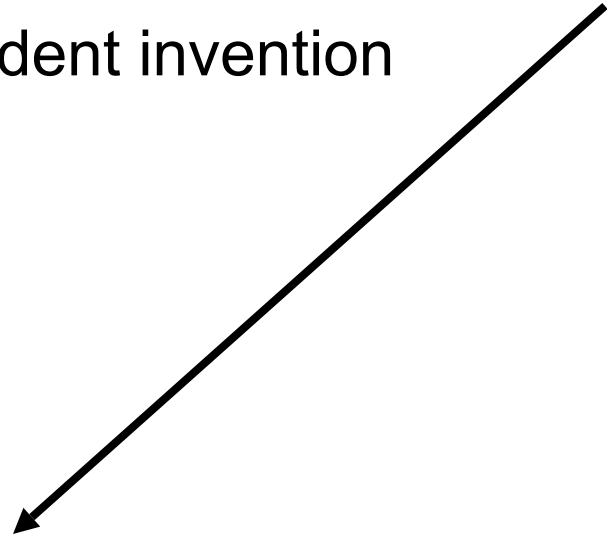
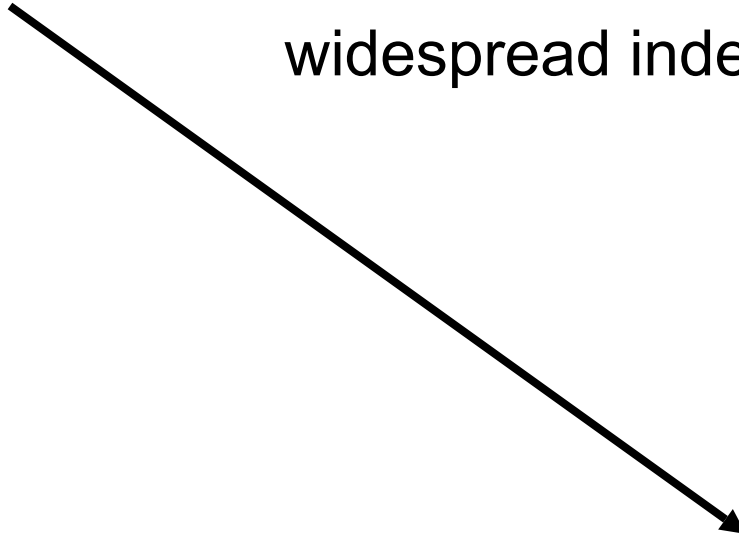
physical product



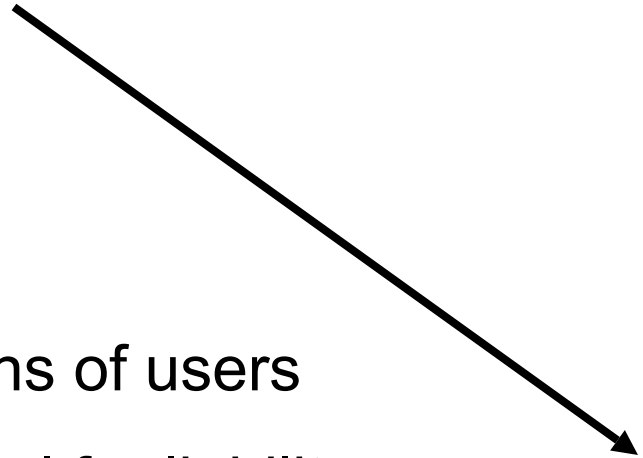
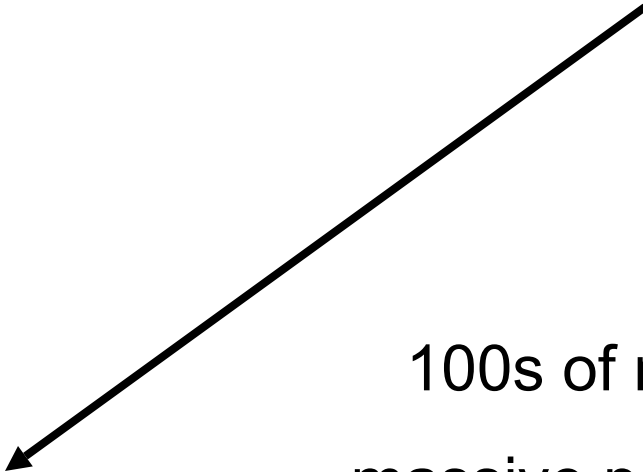
limited exposure in commerce

millions of producers

widespread independent invention



ubiquitous complex information products



100s of millions of users

massive potential for liability

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The European E-Commerce Emergency

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*an opaque policy environment....*

“Against such an articulated background, it is only natural to be confused. Policy analysts, lobbyists and decision makers, all struggle with scattered, fragmented, and contradictory data.”

*Business Methods, E-Commerce, and Finance, EPO  
Strategy Research Brief #7/2005*

*What policy for the knowledge economy?*