Software Patent Litigation: What have we learned?

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Open Invention Network
LISA, November 11th, 2015
I am not a lawyer.
This is not legal advice.
300,000 patents were granted in the US in the last year.
99 problems,
but an invention ain’t one
U.S. Utility Patents Issued Over Time, courtesy of www.patentfreedom.com
About 50% percent of those were given to inventors outside the US
Global Trends
## Software Patents Issued To Date

<table>
<thead>
<tr>
<th>Country</th>
<th>Patents Issued</th>
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<tbody>
<tr>
<td>US</td>
<td>799,050</td>
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<tr>
<td>Australia</td>
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<td>European Patent Office</td>
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<td>China</td>
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<td>Japan</td>
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<td>Great Britain</td>
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<td>Germany</td>
<td>606</td>
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</tbody>
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*From lens.org, on Jan. 30<sup>th</sup>, 2015*
Trolls are bringing 11% of UK suits

Foreign inventors are very successful in the US courts
Barristers & Bottomfeeders
65% of litigated NPE suits have software-related claims

Contingent fee representation is on the rise
The economy even affects lawyers
“Even with a 40% contingent share, we need at least $5 million in damages to break even.”

The Rise of Contingent Fee Legislation, David L. Schwarz (2012)
Many firms go after weaker defendants first
Smaller firms go with quantity over quality
Even if you win, getting sued sucks
Judges & Juries
In the 90’s defendants needed to find prior art or prove that their work was out of scope

"Understanding the realities of Modern Patent Litigation" (2014 : Allison, Lemley & Schwartz)
Nautilus v. Biosig ruling: vague patents aren’t enforceable
Alice v. CLS Bank ruling: generic computer implementation isn’t patentable
"The Supreme Court recently reaffirmed that fundamental concepts, by themselves, are ineligible abstract ideas."

Federal Circuit, Digitech Image v. Electronics for Imaging, Inc.
McRO v. Activision:

“This case illustrates the danger that exists when the novel portions of an invention are claimed too broadly.”

Judge Wu
More experience with patent suits makes judges less likely to rule for patent-holders.

Four out of five software patents could be bogus?
Juries are another story...
Judges tend to rule for the patentee only half the time
Juries rule for the patentee over two-thirds of the time
Today over 70% of patent cases are heard by juries
It used to be closer to 5%
What’s working and what isn’t
Germany, New Zealand and India have put strict limits on patentability
Sometimes democracy works!
And sometimes it’s a little trickier...
"...each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step and is capable of industrial application."

From the Trans-Pacific Partnership Agreement
The Open Invention Network: 1800+ FLOSS companies and projects that don’t sue each other
We also coordinate defensive publishing
Homework
Patent-busting sites
http://linuxdefenders.org/
https://trollingeffects.org/
http://patents.stackexchange.com/
Join OIN
Pass local laws
Further reading

The Trans-Pacific Partnership Agreement, http://ur1.ca/o9dwh


Software Patents: A One-Year Review of Alice v. CLS Bank, Jasper L. Tran, 2015

Inter Partes Review: An Early Look at the Numbers Brian J. Love & Shawn Ambwani, 2015
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US Transparency Legislation, courtesy of www.patentprogress.org

U.S. Utility Patents Issued Over Time & Operating Company Parties in NPE Lawsuits Over Time, courtesy of www.patentfreedom.com


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