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Examining the implications of patent trolling and the actions of 'patent assertion' entities (PAE) is a complicated issue in light of a previously erratic definition of patentability. This is especially true in the software industry where a significant portion of litigation is taking place.

If Duncan Hines gets a patent on chocolate cake, does that mean that Betty Crocker can't sell a chocolate cake mix? Do they have grounds to litigate because of a similarity of taste and smell (read: look and feel)?

Such comparisons illuminate one of the problems with software patents. People expect software to act in a manner that is conducive to the activity, regardless if it also looks and responds like another software package. It is beneficial to the user when all applications respond in a similar manner so as to reduce the learning curve of any new piece of software. Consider what the Graphical User Interface and Windows did for computing; providing templates and patterns of operation across many different applications. They did not stifle competition but rather made the (at the time) complicated machinery more approachable by the common user.

OK, so maybe chocolate cake may not be patentable, but people have tried. More to the point, how long have web pages been showing images on the page? An image is a grouping of pixels that represent something in photographic fashion, correct? How can a distinction arbitrarily be made to allow the size of the image be a determining factor of patentability? But, shrink an image down to a smaller size and give it a name (eg; thumbnail size) and suddenly there is a 'novel idea' in imagery, worthy of awarding a patent! Or, what is so novel about the idea that rounded corners of a hand-held device is more comfortable for the user? Ask any machinist why they deburr and round the corners of machined items; for them its a safety issue in that burrs and sharp corners can actually cause injury. In short, rounding corners has been in practise for quite a while longer than any of the current hand-held phones and other electronic technology.

While addressing the symptoms of too broad a scope for software (and other technology) patents, and their PAE's, do lay blame where blame is due and include the government Patent and Trademark Office in your deliberations. While litigation has merit in a vibrant and expanding industry, speculative PAE's should be limited to minimal damage recovery and reasonable licensing arrangements. Precedent might be set that all patents under litigation be subject to re-examination by industry experts, at least once, for novelty and non-obviousness.

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