CHANGING SIGNIFICANCE OF IP TO SOFTWARE FIRMS?

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OVERVIEW

- What data from the 2007 Berkeley Patent Survey showed as to SW entrepreneurs' use of and perspectives on SW IP
- What changes have taken place in the software industry in past decade that might affect how SW entrepreneurs might view IP today?
- What changes have there been in IP landscape in past decade that might also affect views on SW IP?
  - *Alice v. CLS Bank* has called many software patents into ?
  - *Oracle v. Google*: will it destabilize software copyright law?
- Need for another SW IP survey?

HOLISTIC, NUANCED PERSPECTIVES

- A significant finding of the 2007 Survey was that software entrepreneurs had a nuanced and holistic perspective about the role of IP as part of their business strategies
- First mover advantage and complementary assets were statistically more significant ways to achieve competitive advantage than IP
  - 2.23, 1.74 respectively where 2 is important, 3 very important
- ©, TM, and secrecy/difficulty of reverse eng'g were fairly close in having modest importance for SW entrepreneurs to attaining advantage
  - © more important (1.64), but TM close (1.57), secrecy/RE (1.57, 1.52)
- Patents were the least important mechanism
  - 1.18 where 1 was slightly important

SOFTWARE INDUSTRY CHANGES SINCE 2007

- As long as there has been a software industry, business models of SW firms has been mixed, especially products vs. services
  - Less need for © or other IP outside of product market segments?
- Software-as-a-service displacing sales of some software products
- Other types of cloud computing platforms, services as significant market sectors
- Other revenue models for Internet software-enabled platforms (e.g., advertising, subscriptions, cuts of transactions enabled)
- Embedded software in cars, toasters, etc., upcoming Internet of Things
- Greater reliance on technical protection measures, licensing
- Open source software industry relies on © in a different way
- Rise of app markets for mobile devices

JOSH LERNER & FENG ZHU STUDY (2005)

- Regarded *Lotus v. Borland* as "exogenous shock" to the SW IP landscape that "weakened" © protection
  - *Computer Associates v. Altai* & progeny as well
  - "If *patent and © are substitutes*, then weakening one form of protection should be associated with an increasing reliance on the other"
    - But are they substitutes? Should they be?
- They posit that software firms in the aftermath of this shock relied less on copyrights, shifted to patenting of software innovations
  - Substantial uptick in patenting by interface-reliant firms
- By mid-1990s, CAFC had adopted broad interpretation of patent subject matter under which virtually everything was patentable
  - Still true in 2005, so many 1000s of SW patents did issue until *Alice* (2014)

PATENT CHANGES SINCE 2007

- Supreme Court's patentable subject matter cases, particularly *Alice v. CLS Bank*, have called into question software-related patents that issued in the 1990s and early 2000s
- Dozens of software-related patents have been struck down in the course of litigations initially intended to enforce them
- Many more software-related patents that years ago might have been litigated have not been out of concern that they would be invalidated
- More mechanisms in place now to challenge patents on subject matter and other grounds
- Good news?
  - Yes, insofar as some weak patents are now doing less harm
  - Yes, insofar as most software companies did not own software-related patents, or think patents were an important way to get ahead anyway

COPYRIGHT SINCE 2007

- Until the CAFC's decision in *Oracle v. Google*, SW © case law has been remarkably stable since mid-1990s:
  - *Whelan v. Jaslow*'s broad interpretation of SW © was discredited
  - Supreme Court split in *Lotus v. Borland* undercut *Whelan*
  - *Computer Associates v. Altai* (2d Cir) & *Apple v. Microsoft* (9th Cir) signaled that the scope of © in software would be "thin," requiring exact or near-exact copying to infringe
  - Efficient, externally constrained, merged, standard, or public domain elements have to be "filtered" out before judging claims of infringement
  - Most cases involving interoperability issues decided in favor of Ds
- *OvG* treated G's defense as attack on SW ©s
  - Judge O'Malley would have upheld all of Alice's claims
  - Was she worried that without patents, ©s must fill the gap?
  - Back to *Whelan v. Jaslow* on every © issue in the case
- Manifesto article in 1994 predicted cycles of over- and under-protection
  - *Whelan* as over-, *Altai* as under-, *OvG* back to over-?

WILL *ORACLE v GOOGLE* DESTABILIZE?

- Maybe not:
  - *OvG* involves unusually complicated set of facts, application of SW © law far from straightforward
  - First case to consider its implications, *SAS v. WPL*, distinguished it
  - Virtually all circuits have adopted *Altai*, *Altai +*, or *Apple v. MS*
  - Virtually every legal point in *OvG* unsupported, unsupportable
- Maybe so:
  - Easy to find some SW patent to add claim to © case so appeals will go to the CAFC that has convinced itself it is following 9th Cir precedents
    - *Cisco v. Arista, Synopsys v. Atoptech*
  - "Thin" protection for SW © might seem more dangerous for SW industry, given that patents are no longer as easily available as in the 1990s

NEED FOR NEW SW IP SURVEY?

- Almost a decade since 1st Berkeley Patent Survey was conducted
- Would be desirable to have data from the same or very similar survey over time
- Would a new survey be an inversion of the Lerner & Zhu study?
  - If *Alice* has caused a substantial shift away from patents, will that mean that SW entrepreneurs will rely more heavily on © in coming years?
  - Would that be a good thing or a bad thing? Appropriate or inappropriate?
- Will SW ©s get "thicker," as the *OvG* case suggests, or will *Altai*-like "thin" protection continue to prevail?
  - If algorithms & data structures are too abstract for patenting, perhaps they should be too abstract for © as well