



Miles Nordin

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Evolving IP Marketplace—Comment, Project No. P093900
Room H-135 (Annex I)
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

To whom it may concern:

Your framing of the patent issue in terms of over- and under-compensation reflects a market-fundamentalist position which doesn't include our everyday experience with how patents are actually used.

Big companies gather portfolios of patents which they use as dynamite-vest insurance policies to assert their right to exist within an industry.

What's traded is not the patents, but a sort of radio bracelet that allows you to set up your shop in the middle of a minefield without being blown to bits.

But even that idea of Trade is too market-fundamentalist, because it suggests a perverse but vibrant market for minefield bracelets which does not exist. Money doesn't change hands. Rather, small companies with no portfolio are frozen out of their fields.

The benefit, or the motivation, for this is almost too horrible to speak of: big companies are protected from the terrifying threat that a brilliant small company with a great idea will disrupt their industry. When such companies come along, they can be frozen in the minefield, lassoed, and absorbed into one of the big guys. The patent system works, through portfolios, to limit and control exactly the kind of "Progress in science and useful Arts" it was intended to promote!

The only small companies that can survive are patent trolls. They're like industrial terrorists, with nothing to lose because they produce nothing, have no intention of operating within the minefield. They detonate enough small infringement cases to get concessions from the big guys, while being careful not to bid their ransom too high or they'll get bought out and absorbed, sharing the fate of other small companies which actually produce things.

The US constitution makes the existence of a patent system optional, but its purpose if it does exist is specifically proscribed: "To promote the Progress of Science and useful Arts." It is not, to protect market value. Not, to define tradeable assets and defend them from depreciation so they can be treated as capital. I think the approach in your framing of patent reform's goals is wrong because you seem to think that patent holders are the relevant stakeholders to

be queried before decisions about how to reform the system, while I think, based on the constitutionally-proscribed purpose of the system, they are not the ones who should drive change.

Patents should not be issued at all in industries where they are causing more harm to this proscribed goal than good, including but not limited to computer software. Discussing price misses the point—even a 1-cent non-discriminatory license for a patent on a software algorithm causes potentially insurmountable harm to many software projects with creative business models that look nothing like a factory making cotton gins or medicine. Many are not in a position to pay legal fees to accurately determine whether they need a license, much less negotiate one and make payments. They're routinely harmed by FUD—the worry of their customers that lurking patents might surface and kill their product, wiping out the customer's investment in configuration and training. The FUD actually works better, not worse, when you don't know exactly which patents might apply, so talking about the rise and fall of a software patents' monetary value excludes the most powerful prong through which it affects the industry. Engaging in the patent system is an encumbrance on such industries, retarding their progress, not promoting it.

But a case study in how current patent holders are using their portfolios in the software industry is even more damning, and underscores why they should have, if anything, less input on the reform of the system governing them than non-holders in the same industry.

Why not think of non-holders as “potential future patent holders,” since after all the system's meant to promote progress, and ask “what sort of rules would you like to govern patents you might some day register?” I think non-holders will tell you almost universally, “we want the registering of new patents to be impossible.” That's my wish, within my industry which is software.

Also, by the way I couldn't get your web form to work. When I used the browser input box, it turned my submission into one giant paragraph. When I tried to upload attachments, it gave error messages.

Sincerely,

Miles Nordin