From: Miles Fidelman [e-mail redacted]
Sent: Sunday, September 26, 2010 9:33 PM
To: Bilski_Guidance
Cc: [e-mail redacted]
Subject: input re. Bilski v. Kappos

TO: USPTO
FROM: Miles R. Fidelman
SUBJECT: Comments re. Guidelines for Software Patents
DATE: 26 September 2010

I offer the following comments from the perspective of a 35 year career in the computing and networking industry, including roles as a developer, systems engineer, entrepreneur, purchaser of software, business developer responsible for securing contract development work and sponsored R&D funding (particularly from the US Department of Defense), and manager of software projects and products.

The U.S. Constitution empowers Congress to "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." It is my observation that current practices, regarding software patents, act in direct contradiction to these aims. In particular, it is my observation, from first hand experience, that:

1. It is virtually impossible to develop software if an engineer must check each and every line of code to determine if it might be subject to a patent or copyright. In practice, of course, engineers do not perform such checks - potentially exposing every software package written to legal challenge.

2. Given the wide dissemination of ideas, concepts, examples of software code, and so forth - disseminated through education, professional journals, and the Internet - it is extremely rare, if at all possible, to find examples of code so unique that prior art can not be found.

As a result, it seems that software patents primarily serve to:

1. Enrich litigators, engaged in asserting and refuting patent claims that most often turn out to be unpatentable examples of prior art.

2. Chill innovation by smaller firms that do not have the financial resources to defend against otherwise unsupportable claims.

3. Allow established vendors to suppress competition - by asserting patent claims to delay market entry by competitors (particularly new and small firms that are the source of most innovation in our economy, but can not afford to maintain legal staffs comparable to those of established players).

Thus, it is hard to make a case that software patents serve the Constitutional purpose of "promote(ing) the Progress of Science and useful Arts." Quite the contrary, there is a strong case to be made that software patents IMPEDE progress in software development.

Note that a similar argument can be made against the issuance of software copyrights. However, to the extent that such copyrights typically apply to a complete product, representing a specific combination of otherwise prior art, a stronger case can be made for such copyrights.

Based on the above, I encourage the USPTO to cease issuance of software patents entirely, or in the alternative, to be extremely restrictive in establishing guidelines for said issuance, and in reviewing applications.

Sincerely,

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