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Request for Comments on Discretion to Institute Trials Before the Patent Trial and Appeal Board

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Discretion to Institute Trials Before the Patent Trial and Appeal Board

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Comment from Giovanni Barberi

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General Comment

Patents & Pirates

Today is common to call Pirate an illegal copy of a medium. Smuggler would be a more precise metaphor, but Pirate was probably chosen to make feel more guilty whoever copied any copyrighted material.

Paradoxically, it turns out that patents and pirates share common roots!

The concept of Intellectual Property was completely unknown, until the French and American Revolutions set the private property, of any kind, as a fundamental value. In search of a legal framework to protect the ownerships of inventions and trade-marks, the only one that was found suitable, quite ironically, was that of the regulations applied to the "pirate enterprises".

http://en.wikipedia.org/wiki/Letter_of_marque

In a time where the economy was mostly limited to the goods of the land, one of the few "start-up" an entrepreneur could conceive was a pirate , or privateer, firm. It involved buying one or more ships, assembling a crew and, since it was a perfectly legal company, apply to the King for the exploitation of the traffic moving in the Kingdom's waters.

This involved paying a fixed amount and a percentage of the pirated goods.

To formalize the task the King gave a Letter Patent
http://en.wikipedia.org/wiki/Letters_patent.

That's the word, patent in Latin means open, so Letter Patent can be understood as public endorsement.

Obtaining a patent today implies the same procedure as well: submitting an application and paying an annual fee in exchange of the right of exploitation of the invention (this right used to be referred to as a "monopoly").

Logically, "pirates " should be called the holders of the inventions , not the breakers, and privateering attitude can be seen in many patent holders, which threatens to destroy an entire industry with the monopoly obtained with some patently dumb inventions.

Actually there is vast agreement that the patent system is broken, and I think one of the reasons stems from this unacceptable ancestry: the Letters Patents were just a mean to create income: like the salt monopoly, the customs fees, or the tax on curtains (this was in Holland). Today the granting of a patent is still a source of income, with starting and annual fees, so it is in the interest of the State to grant as many patents as possible. In Europe the conflict of interests is even more explicit: the European Patent Office is fully financed from the patent fees.

It goes that almost every patent application becomes granted, with only a limitation of the scope of the claims.

The three main criteria for an invention to be patentable are: to be new, to show a real inventive step and to be reproducible. But we don't see any of these in most granted patents: some companies owns tens of hundreds of patents, but don't show any real innovations in their products lineup.

A patent should be granted only to outstanding technology breakthroughs, the selection and filtering process by the patent office should be a daunting task, maybe even making the PO liable of damages in case of a patent granted without a sufficient evidence.

Gianni Barberi

note 1: I must admit that the idea of all this came after observing the attitude of Microsoft, who extorts the Android producers with a bunch of obscure patents.

MS has always copied: MSDOS from CP/M, Windows from Mac (in turn from Xerox), PocketPC from Palm; has never produced a mobile phone even less something like an Android phone. And indeed the latest Windows 8, in the Metro UI has copied some functionality from Android, most notably the multi-tasking behavior, where the user doesn't need to close an application.

But MS goes, systematically , after every producer asking a fee, just like pirate catching ships, or a racket man offering "protection"; and indeed they talk about "protection against legal actions"

note 2: a vivid representation of pirates, smuggling and counterfeiting in the middle 1700 can be found in "Travels through France and Italy" by T. Smollett
<http://www.gutenberg.org/ebooks/2311> LETTER XII and following