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Sent: Monday, September 27, 2010 5:25 PM
To: Bilski_Guidance
Cc: [e-mail redacted]
Subject: USPTO interim guidelines request for comment

Dear USPTO,

I write to submit my comments to the USPTO, which seeks guidance from the public on which patents to accept, following the Supreme Court's decision in *Bilski v. Kappos*.

Software patents hurt individuals by taking away our ability to control the devices that now exert such strong influence on our personal freedoms, including how we interact with each other. Now that computers are near-ubiquitous, it's easier than ever for an individual to create or modify software to perform the specific tasks they want done -- and more important than ever that they be able to do so. But a single software patent can put up an insurmountable, and unjustifiable, legal hurdle for many would-be developers.

The Supreme Court of the United States has never ruled in favor of the patentability of software.

Their decision in *Bilski v. Kappos* further demonstrates that they expect the boundaries of patent eligibility to be drawn more narrowly than they commonly were at the case's outset. The primary point of the decision is that the machine-or-transformation test should not be the sole test for drawing those boundaries. The USPTO can, and should, exclude software from patent eligibility on other legal grounds: because software consists only of mathematics, which is not patentable, and the combination of such software with a general-purpose computer is obvious.

The history of intellectual monopoly provides no evidence that patents encourage innovation.

On the contrary, the historical evidence shows that patents encourage predation by monied interests. The wealthy Marconi wrested the patent for radio from Tesla, who lacked Marconi's financial and legal resources. Marconi's innovation was the addition of a ground wire to Tesla's invention. When Marconi's company sued

the United States government for the use of radio during the world war, the Supreme Court responded by posthumously reverting the patent to Tesla. RCA created what they called the "screw Farnsworth lab" to circumvent Farnsworth's patent for television, and they litigated Farnsworth into the poor house. James Watt spent more than half of his time litigating against other inventors with superior steam engine designs while his patent was in effect. When his patent expired, he went into business consulting on steam engine operation- -a business model not unlike that of businesses that support open source software today. Most recently a patent troll obtained the patent for a gout medication that used to cost ten cents per pill; now it costs nine dollars a pill. A few years ago Blackboard, a developer of course management systems, sued Desire2Learn in Canada and lost, but last year launched another lawsuit against the firm when it was awarded patents in Canada. The first episode, which threatened open source projects like Moodle and Sakai, unleashed a wellspring of anger from academics and open source developers concerned with instructional technology.

These stories of stifled innovation and opportunity, of economic inefficiency and of intellectual monopolists expending resources litigating instead of innovating can be multiplied endlessly. In virtually every case, the small inventor and innovator lose to monied interests.

The loss to the public has been incalculable. The history of intellectual monopoly law offers no hope that were the USPTO to allow software patents, the same dismal events would not repeat themselves, this time against a backdrop of great economic uncertainty.

Sincerely,

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