

*progressive broadening of debate*

- 1997 Green Paper: consider eliminating computer program exclusion in EPC
- 1999 Communication: clarification and promotion of patentability needed
- 2002 Directive: harmonization within Europe and emulation of the U.S.

1960

1966 President's Commission

1970

1972 Gottschalk v. Benson

1973 European Patent Convention

1980

1981 Diamond v. Diehr

1982 CAFC (special appellate court)

IBM antitrust case dropped

1990

1994 USPTO hearings

fee funding of USPTO

2000

1998 State Street

2000 Business Method Initiative

customer service orientation

2003 FTC report

Internet bust

## *trends*

- presentation of patents as assets >> patents as liabilities
  - interest in valuation
- recognized value of openness
- broadening political interest
- economic analysis
- strategic importance:
  - Internet-related standards
  - knowledge (generating) infrastructure

*recent economic approaches to patent policy*

- FTC study and report (2002-03)
- OECD project (2002-)
- EPO hires chief economist (2004)
- EC solicitations (2004)
  - value of the patent system (DG Internal Market, July 2004)
  - longitudinal study of effects on software (DG Information Society, August 2004)

## *evolution of USPTO mission*

- 2001 and before:
  - “to help customers get patents”
- late 2001:
  - “to promote industrial and technological progress in the United States and strengthen the economy”
- 2002:
  - “to ensure that the intellectual property system contributes to a strong global economy, encourages investment in innovation, fosters entrepreneurial spirit, and enhances the quality of life for everyone”

*recognition of value in openness*

- demonstrated potential of nonproprietary platforms, esp. the Internet and the Web
- openness as a strategy
- conflict with standards: Rambus, GIF, JPEG, P3P, Eolas, MARID....
- conflict with open source: W3C patent policy

*impact of more patents on other means of  
motivating innovation*

- first-mover advantages
- trade secret protection
- complementary goods and services
- copyright protection
- competition

## *emerging issues*

- complex technologies
- transaction costs
- cross-licensing
  - plus side payments
- thickets
- trolls
- expanding liability
- indemnification
- Microsoft: file format patents, new licensing program, patent strategy toward open source

# *patent litigation does not scale down well*

average legal costs/fees for single-patent litigation

amount in controversy	costs per side	X 2 = total for both sides	total costs as % of amount in controversy
less than \$1M	\$0.5M	\$1M	>100%
\$1M to \$25M	\$2M	\$4M	...
more than \$25M	\$4M	\$8M	<32%

Report of Economic Survey 2003  
American Intellectual Property Law Association

*other factors disadvantaging small firms*

- distraction
- loss of time for key technical and business personnel
- no in-house expertise
  - inability to routinize/automate patent management
  - inability to spread cost, risk, and personnel
  - limited in-house experience

*the emerging model:  
cross-licensing with side payments*

- this is NOT traditional patent policy
  - practice adapting to reality of complex technology
- the case for
  - rewards past investment
  - “net users pay net innovators”
- the case against
  - cross-licensing cancels out exclusivity incentive
  - side payments allow incumbents (dinosaurs?) to tax newcomers
  - allows for self-renewing advantage through overlapping patents

*the rise of the licensing firm (“trolls”)*

- enhanced power and availability of patents
- focus, in-house legal expertise
  - contingency fees in U.S.
- no need for cross-licenses
  - portfolio-building is an ineffective defense
- → era of giant trolls?

*the hidden life of patents*

- 100 full trials/year
- 2500 suits filed
- tens of thousands of demand letters & notice letters...
- ....or is it hundreds of thousands?