

**Why Technologists want fewer patents.
*We shouldn't grant monopolies on concepts.***

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The last time the Supreme Court heard a case on what kinds of innovations deserved patents was in 1981 -- the year IBM launched the first personal computer using a disk operating system from a young Microsoft. The Internet as we know it was still years in the future.

This month, the Supreme Court agreed to reconsider what can be patented. At stake are tens of thousands of existing patents and a rethinking of why we have patent protections in the first place.

One measure of how badly the patent system needs reform: IBM, for years the company that's been assigned the greatest number of patents now says too many patents are being granted. IBM is also the leader in "business method" patents that the court could now invalidate. Several justices have doubted that software can be protected by patents. Industries from high-tech to biotech and financial services are watching the case of *Bilski v. Doll* with intense interest.

More broadly, patent law is at the shifting tectonic plate between the fading Industrial Age and today's Information Age. Like other areas of intellectual property, patents regulate information about how inventions work and how this information can be used and shared.

According to the Constitution, the goal of patent law is "to promote the progress of science and useful arts." Until the digital era, patents were typically for new machines or improvements to existing machines. In recent years, courts have also upheld patents for new ideas about how to do things, loosely linked to any physical machine, other perhaps than a computer. These include patents for techniques in finance, accounting and insurance. As one Silicon Valley lawyer says, "Unlike in the Industrial Revolution, many of today's inventions would not hurt if you dropped them on your foot."

This cuts both ways in the debate over patents in an era when the best way to boost innovation may be more sharing and less protecting of information. The greatest innovations today are better methods rather than new machines. The patent application in the *Bilski* case is typical: It was for a method for hedging risks in the sale of commodities. This created real value, but that shouldn't be enough to justify a patent limiting the spread of information. The U.S. Court of Appeals for the Federal Circuit, after approving many such business process patents, tried to limit them to methods that are tied to a particular machine or that transform something into a different state.

The Patent Office now gets some 500 million applications a year, leading to litigation costs of over \$10 billion a year to define who has what rights. As Judge Richard Posner has written, patents for ideas create the risk of "enormous monopoly power (imagine if the first person to think up the auction had been able to patent it)." Studies indicate that aside from the chemical and pharmaceutical industries, the cost of litigation now exceeds the profits companies generate from licensing patents.

The makers of almost every new product have to jump through hoops to make sure they haven't violated a patent, which is one reason that patent king IBM is willing to toss in its crown. "In the Industrial Age, innovation primarily was the result of work by individuals or small groups within an enterprise," explains IBM lawyer David Kappos. "The nature of innovation has changed. Today, we benefit from inventions made possible through highly collaborative and interconnected technologies.

Many of the products that consumers demand are complex and include contributions from multiple innovators that incorporate hundreds if not thousands of patented inventions."

Mr. Kappos notes that this "increases the need for predictability and clarity in determining the valid scope of patent rights." As things now stand, the vagueness of patent law means the "precious time of skilled scientists and engineers is too often spent defending against costly and time-consuming litigation, instead of creating innovations that drive economic growth." Incentives still need to be available for individual inventors and start-up companies, giving venture capital a key role in funding businesses based on new ideas.

The Supreme Court may decide that more progress would be made with narrower definitions of what is patentable. A book on the U.S. approach to patents, "Jefferson vs. the Patent Trolls" by Jeffrey Matsuura, makes the key point that "intellectual property rights were not goals in and of themselves, but were instead a mechanism through which society attempted to facilitate creative collaboration."

Thomas Jefferson, the nation's inventor-president, would support patent reform in an era when new information technologies build on themselves. An idea, he observed, is a rare thing whose value increases as it's shared. "No one possesses the less because everyone possesses the whole of it," he wrote. "He who receives an idea from me receives it without lessening me, as he who lights his candle at mine receives light without darkening me."

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