The Past, Present, and Future of the Software Patent Problem

Colleen Chien
Assistant Professor, Santa Clara University School of Law
cchien@scu.edu

While many believe the patent system has hit a historic and unprecedented low, discontent with patents, and in particular with software patents, is nothing new. In 1994, every startup company that testified about software patents at a PTO hearing testified against them. In 1966, a Presidential Commission recommended prohibiting software patents because of the PTO's inability to vet them. Fears that trivial patents are choking innovation date back to at least 1883, when the Supreme Court railed against "speculative schemers who make it their business to watch the advancing wave of improvement and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax." In short, the problems that now confront the patent system are well-known. What is less well-known, however, is that many of the very reforms being considered - fee-shifting, an independent invention defense, abolishing certain types of patents - have been called for and in many cases tried before, under similar and different conditions. During this historic moment, what can the past teach the present and the future about how to solve the software patent crisis? Based on my research regarding what has been tried, what has worked, and what has not worked, quite a lot.