

Patent Law's Unpredictability Doctrine and the Software Arts

By Greg Vetter

Regardless of one's stance on the controversy, most can agree that the issue of software patents just won't go away. The issue thwarts international patent law harmonization and resonates in the related debate over business method patents in the U.S. Software's unique characteristics as the soul of information technology lead the controversy, in most discussions, to patent eligibility, the gateway doctrine that in the U.S. sweeps from patent contention claims that are too abstract. Patent eligibility, however, is only one of five conditions of patentability in the U.S. Two others, non-obviousness and the disclosure requirement (by which I primarily mean enablement), need fresh thinking for software patents in light of this work's proposal: that the doctrine of unpredictability, originating in the chemical and biotechnology arts, should asymmetrically inform obviousness and enablement in the software arts. In an unpredictable field, enablement's sufficiency of disclosure doctrine becomes more stringent, and the obviousness inquiry adjusts for the greater difficulty. Courts' application of the disclosure requirement for software patents has been lax. This writing attributes part of this laxity to insufficient understanding of the degree to which software products and systems, and their information technology ecology, can be unpredictable. Once such unpredictable possibilities are understood as a matter of potential fact and as patent law doctrine, the unpredictability rubric should inform not only evaluation of a software patent's disclosure but also its obviousness. Moreover, at the wide intersection of business methods and software (since most business methods in a modern economy are implemented with software), a recognized software arts unpredictability doctrine may influence the debate over patent eligibility in those two related categories.