Don't Steal My Avatar! Challenges of Social Networking Patents

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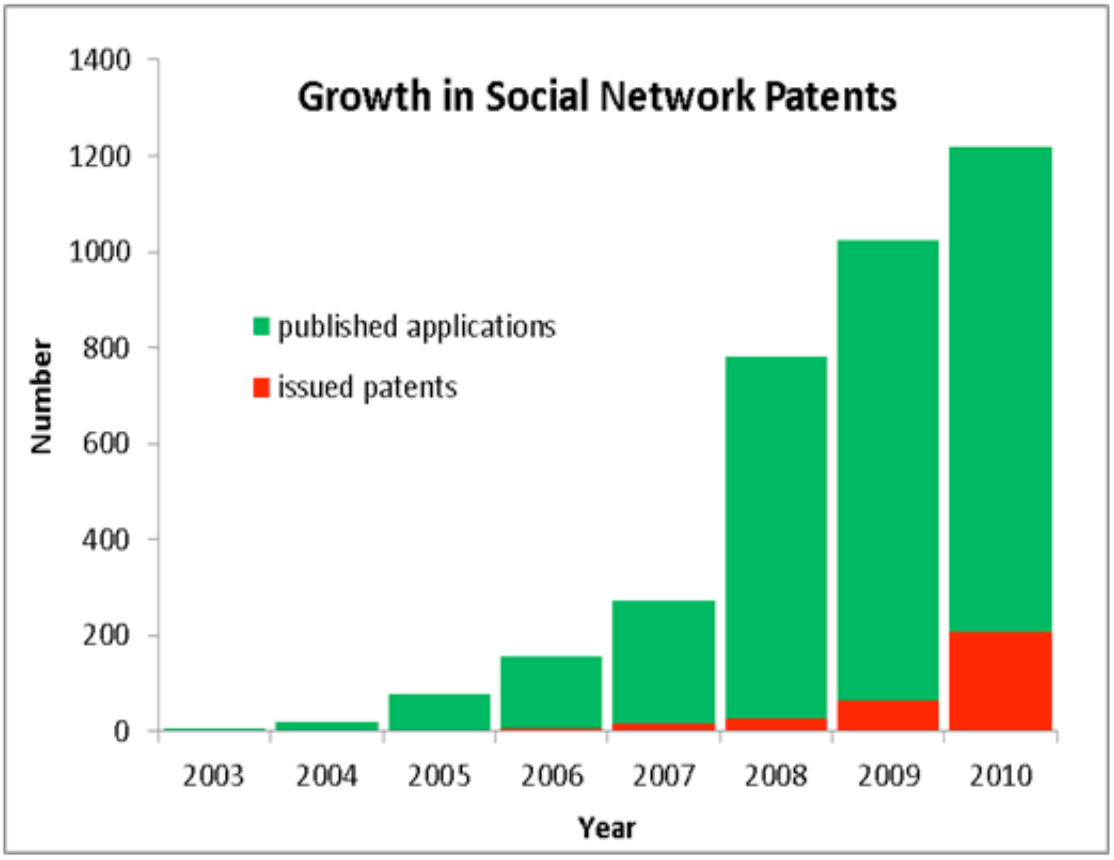
What do you think of my jumping buddy over there? Pretty cool, huh? Let's call him "George".

George is just one example of the enormous number of inventions being made to serve our newly emerging social networking economy. George was created using a patent pending process called **Evolver**. He's an avatar that can be transported to any number of different full immersion virtual world networking sites. Many new companies are forming to commercialize these new social networking innovations. They are also filing patent applications. They have many challenges ahead of them to get those patents.

Growth in social networking patents

Social networking is one of the fastest growing subject matter areas in the US patent office. The graph below shows the rate at which these applications have been filed and rate at which patents have issued from these

applications over the past few years.



The total number of patent applications published in a given year is shown in green. The total number of issued patents is shown in red. Social networking patents include any application or issued patent that has the phrase "social network" in it. That is an admiditly broad definition, but a cursory review of a random selection of titles shows that it does capture most of the relevant applications without dragging in too many unrelated ones.

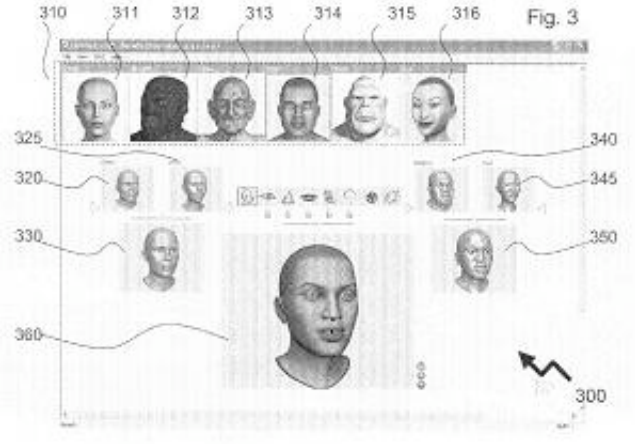
10 randomly selected "social network" patent applications	
Title	**Publication Number**
Mobile Communications Device Home Screen	20100105440
Collection And Display Of Athletic Information	20080200312
Method, Apparatus, And Computer Program Product For Providing Software Application Invitation	20090328158
Presenting Media Content To A Plurality Of Remote Viewing Devices	20090300670
System And Method For Placing A Widget Onto A Desktop	20080040426
Social-Network Enabled Review System With Subject-Owner Controlled Syndication	20080004942
Method And Apparatus For Determining The Significance And Relevance Of A Web Page, Or A Portion Thereof	20080005101
Access Provisioning Via Communication Applications	20090199269
Virtual Community For Incentivized Viewing Of Multimedia Content	20100325646
Terminal Apparatus, Information Providing System, File Accessing Method, And Data Structure	20100138777

There are at least 3500 social networking patent applications that have been published. The total number on file, however, might be twice this amount. This is due to the fact that the applications filed in the last year and a half still have not been published and the fact that the rate of filing has been growing exponentially. There is also a large number, maybe 25%, that have been filed with nonpublication requests. This is based on an extrapolation of the percent of issued patents that were filed with nonpublication requests. We won't see what's in these unpublished applications until if, and when, they issue as patents.

About 350 social networking patents have issued so far. A review of the file wrappers of the published applications indicates that a comparable number have been abandoned. The rest are under examination or awaiting a first office action. The **allowance to rejection ratio** of these applications is about 1:10. That means that applicants have to plan on getting 10 rejections for every allowance. The **abandon to response ratio** is also about 1:10. That means that examiners have to plan processing 10 responses for every case that gets abandoned. Based on these ratios, it could take another 10 years before all of the currently filed applications have been either allowed or abandoned. That means that many future social networking patents will issue long after their inventions become either widely adopted or faded to insignificance. That won't be healthy for our new economy.

Challenges in getting social networking patents

Social networking patents create a number of formidable challenges for innovators and entrepreneurs. These challenges include:



It's hard to describe what you invent: George up there is an animated, programmed, 3 dimensional color avatar with a significant amount of artificial intelligence. You can't put one of those in a patent application. You are limited to text and two dimensional, black and white drawings with a resolution no finer than 200 dpi (e.g. a fax). The image to the left is what one of those diagrams looks like from George's patent application, **US 2008/0309677**.

It works, but it's not pretty. Expressing dynamic social networking inventions as static text and two dimensional figures is one of the primary reasons patents costs so much to prepare. It's not easy to do.

It's hard to patent what you've described: George isn't patentable no matter how well you've described him. You can only patent machines, methods to produce things, manufactured objects, and compositions of matter. George isn't any one of those. Instead what you have to do is either patent the specialized machine (i.e. computer) that you create for George to live in or patent the computer implemented method that is used to make George. The figure above describes how George is made. It shows that these particular avatars are made by starting with a set of grandparent avatars 320 and then randomly selecting their features to make a set of parent avatars 330 and then randomly selecting their features to make your desired avatar 360 (e.g. George).

Very nice, but tell me something. Can you look at George and tell he was produced this way? No? Neither can I. And that brings us to one of the biggest upcoming challenges of social networking patents, enforcing them.

It's hard to enforce the patent that you get: Patents are only enforceable within the physical boundaries of a nation. But where exactly is George? Is he in the microprocessor? Maybe you could pin him down there. But in the age of dynamic distributed cloud computing, where exactly is the microprocessor? It could be anywhere. And what makes you think there is only one? There could be thousands, each processing a small part of George. And why would George stay in any one of them for more than a few clock cycles? George's computational requirements might be constantly shifted between different available resources.

You get the idea. Pinning George down isn't easy. For patent enforcement, however, it's critical.

Traditionally, patents on George, or in this case, methods to make George, claimed the "static computer readable medium" (e.g. disk) that it was stored on. This approach, however, is rapidly becoming obsolete now that static computer readable mediums are no longer needed to store, distribute or execute computer implemented inventions. A new solution must be found if social networking patents are to be at all enforceable and hence commercially relevant. It's a problem that the patent bar, patent office, courts and inventors are wrestling with right now. Some people are having success, but as yet there is no magic bullet. Success is highly dependent upon your particular case and the skill of your patent agent or attorney.

Conclusion

The social networking economy is upon us. New companies are being founded to commercialize products and services for this economy. They are filing patents and getting them. The challenges of drafting, getting and enforcing these patents, however, are formidable. You need to translate dynamic, multidimensional programmed inventions into static text and two dimensional drawings. You need to describe the actual physical

machines that produce your invention and you need to find some physical anchor for your invention in the nation that you will be enforcing your patents in. These are indeed formidable challenges, but they are not insurmountable. Solving them will be critical to the future growth of this economy.

About the Author

Mark Nowotarski is the President of Markets, Patents & Alliances L.L.C. and is a registered U.S. patent agent specializing in business method patents. He currently serves clients in the financial services, medical devices, consumer products and manufacturing industries.

Mark is also co-editor of the Insurance IP Bulletin. The Insurance IP Bulletin is dedicated to providing useful information to innovators in the insurance industry regarding the protection of their inventions with patents and ways to effectively promote their innovations.

Mark is a former Associate Director of R&D for Praxair. There he was responsible for the development and successful worldwide introduction of new products into the health care, electronics, and manufacturing industries. He was a leader in the reengineering of Praxair's patent system, and was responsible for technology planning for their home health care division.

Mark is an inventor on 17 US patents. He was appointed Corporate Research Fellow for the commercial impact of his inventions (+$300 million in sales).

Mark has a Master's degree in Mechanical Engineering from Stanford and a Bachelor's degree with honors in Aerospace, Mechanical Sciences and Engineering Physics from Princeton. His academic awards include the Sigma Xi award for most outstanding Mechanical Engineering research at Princeton and the Union Carbide Award for Academic Excellence and Leadership in Mechanical Engineering, also at Princeton.

Tags & Categories

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1. **JB January 24th, 2011 12:59 pm**

   The backlog delays are a big problem. I've got one application that was originally provisionally filed in 2006 and later (after PCT) nonprovisionally filed in Feb. 2009. Just called the PTO last week and was told it's at least 22 months away from a first Office Action. Way too slow for inventors and companies trying to navigate the landscape.

   The Solution: Patent applications don't get picked up for examination until someone (the applicant or anonymous third party) pays a fee. If the invention is never commercialized and neither the applicant or anyone else asks for an examination, why spend any PTO resources on it?

2. Blind Dogma **January 24th, 2011 2:00 pm**

   JB,

   You may be aware that your solution is already underway (and still the problem exists).

   An examination fee is paid with the submission of the application. We already "pay a fee". Or do you mean that we should pay a *second* fee and call it a "*but we really mean it* fee?

3. **JB January 24th, 2011 2:19 pm**

   @Blind Dogma- Sorry, I've read the PTO might have been testing something. My suggestion is after a patent application is filed it is not picked up for examination until a specified fee (e.g., an examination fee or new fee) is paid by either the application (she thinks worth pursing) or a third party (doesn't want to see this application pending forever and hanging over his head). The fee can be paid anytime after filing up to X years (e.g., 20 years). If the fee is never paid, the application is never examined.

4. **Mark Nowotarski January 24th, 2011 3:38 pm**

   JB,

   Director Kappos mentioned in a meeting I was at last week that the USPTO will be shortly introducing an accelerated examination process that only requires the payment of an increased fee. There will be no need to submit and application support document along with a prior art search. The director indicated that examination will be complete (i.e. two office actions) within a year.

5. **Mark Nowotarski January 24th, 2011 3:40 pm**

   JB,

   Your idea on allowing third parties to pay an examination fee is intriguing. Wouldn't it be great if third parties could pay for accelerated examination. Of course, there is still the 18 month delay until publication, but after that, why not?

6. **Gene Quinn January 24th, 2011 3:53 pm**

   Mark-

At the Innovation Alliance conference on Friday Director Kappos said Track 1 (i.e., fee for advancement) is imminent.

-Gene

7. **JB** **January 24th, 2011 4:01 pm**

   @ Mark – I had an email or face-to-face (cannot recall) conversion with former commissioner John Doll a few years ago (we used to work together in the former Group 110) about the idea about not examining an application until an additional fee was paid to separate the chafe from the wheat. He mentioned third parties would be concerned about an application pending for an extended period of time without an examination and thus creating some uncertainty. So we should let anyone pay that fee to initiate an examination to get it resolved. The goal would be to avoid spending PTO resources on any application that no one really cares about.

8. Blind Dogma **January 24th, 2011 9:59 pm**

   "*fee for advancement*"

   Gene,

   Is the corollary, "*Pay for Delay*"?

9. Blind Dogma **January 25th, 2011 7:31 am**

   "*The goal would be to avoid spending PTO resources on any application that no one really cares about.*"

   JB, would you like another glass?

   If, as you say, no one really cares about [the application], why would someone have drafted and submitted said application?

   The obvious answer is that indeed, someone cares about it. Your initial assumption is faulty.

   And once again, people need to realize that in the *current* settings, the examination fee *has* been paid. Somehow people have it stuck in their heads that the backlog would be released simply with the payment of yet another fee.

   Maybe I am not charging enough for my delicious treats…

10. Blind Dogma **January 25th, 2011 7:35 am**

    The silver lining, of course, is that people are actually paying attention to what applications are out there.

    Perhaps those people will be spurred to innovate in different ways in addition to the common mindset here of instigating corrective action (the underlying current that any applications *must* somehow not be truly innovate runs deep).

    Just imagine – people not only recognizing innovation, but being spurred to innovate more. We should try to capture this great idea and make some laws to promote it. Oh wait, we already have.

11. **JB** **January 25th, 2011 9:49 am**

    @blinddogma- Regarding, “If, as you say, no one really cares about [the application], why would someone have drafted and submitted said application?”

    When someone files a patent application, it’s often to secure a filing date so they can begin to try to commercialize. It really just an option to pursue different claims in the future. Few know upon filing that the invention will be commercialized.

    How many file provisional applications yet never file the corresponding non-provisional? How many nonprovisional applications are abandoned for failing to pay a few or file a response? How many granted patents expire for failing to pay a fee?

    My proposal would allow inventors to secure a filing date, but postpone additional costs until they (or a third party) determine there might be something there. This will allow the PTO to focus examination resources upon those applications that someone confirms will likely be commercialized.

    How many will sit unexamined after filing? Whether its 5%, 10%, 25% or more, it will help reduce the backlog which directly impacts those filings that are commercially important resulting in uncertainty in the marketplace.

12. Blind Dogma **January 25th, 2011 10:19 am**

    Thanks JB,

    I appreciate the additional clarity.

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