

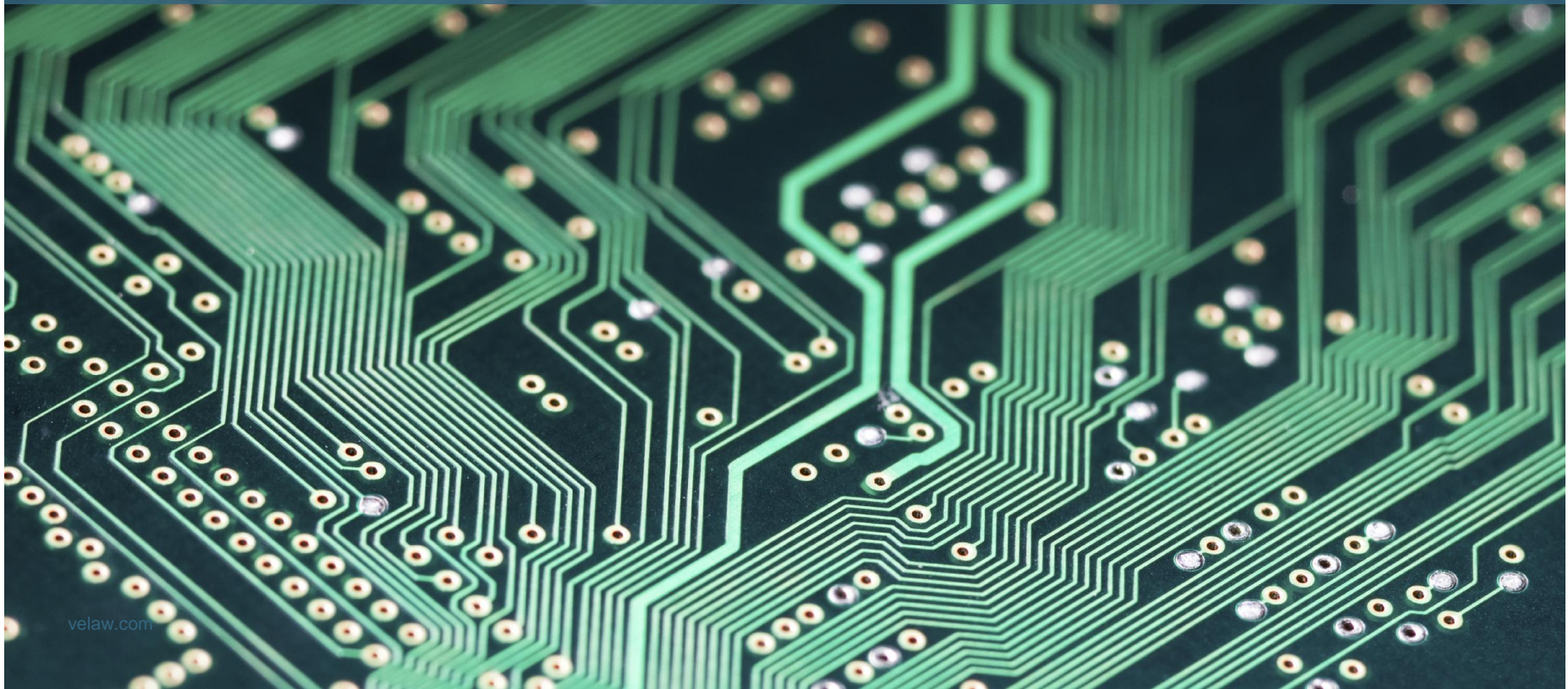
Vinson&Elkins

Established 1917

APRIL 11, 2017

PATENTS IN THE “AGE OF EXPERIENCE”: VALUABLE PROPERTY RIGHT OR USELESS RELIC?

Presenter: Craig Tyler, Partner



APRIL 11TH – ON THIS DATE IN HISTORY



1803



1876



1936



1985



1986



2007

DO WE NEED PATENTS ANYMORE?

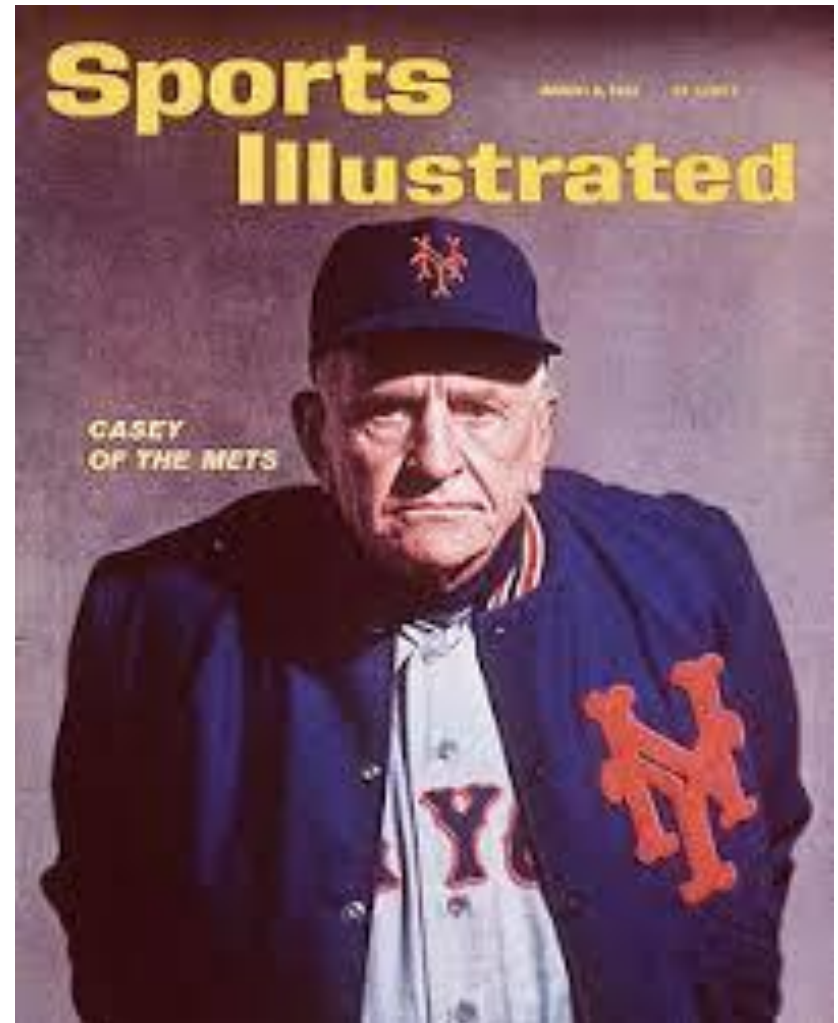
- “It’s not clear that we really need patents in most industries.”

Judge Richard Posner, U.S. Court of Appeals for the Seventh Circuit

**“Never make
predictions**

**. . . especially about
the future”**

--- Casey Stengel



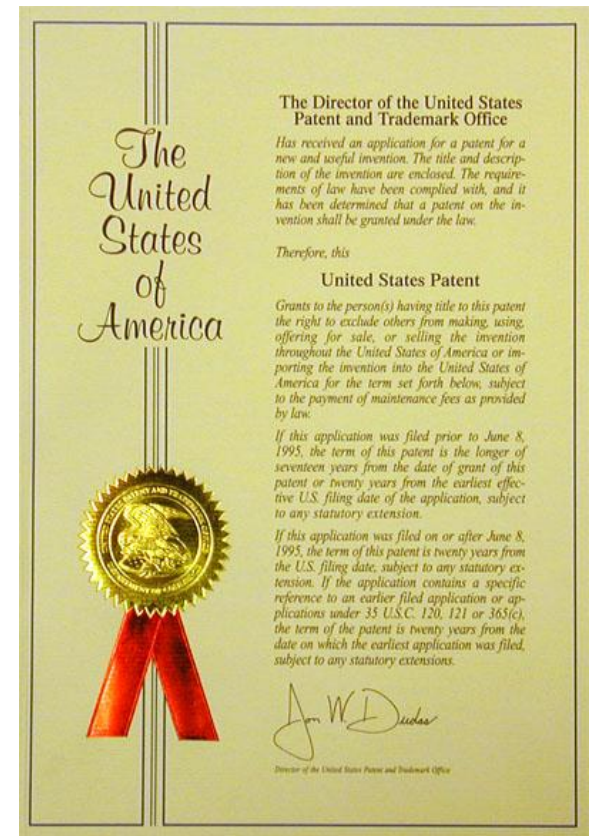
PATENTS = GOOD POLICY

- **Focusing on Ideas / Innovation**
- **Ideas must be implemented / executed to benefit society**
- **Three Options:**
 - Trade Secret
 - Public Dedication (Open Source)
 - Patent

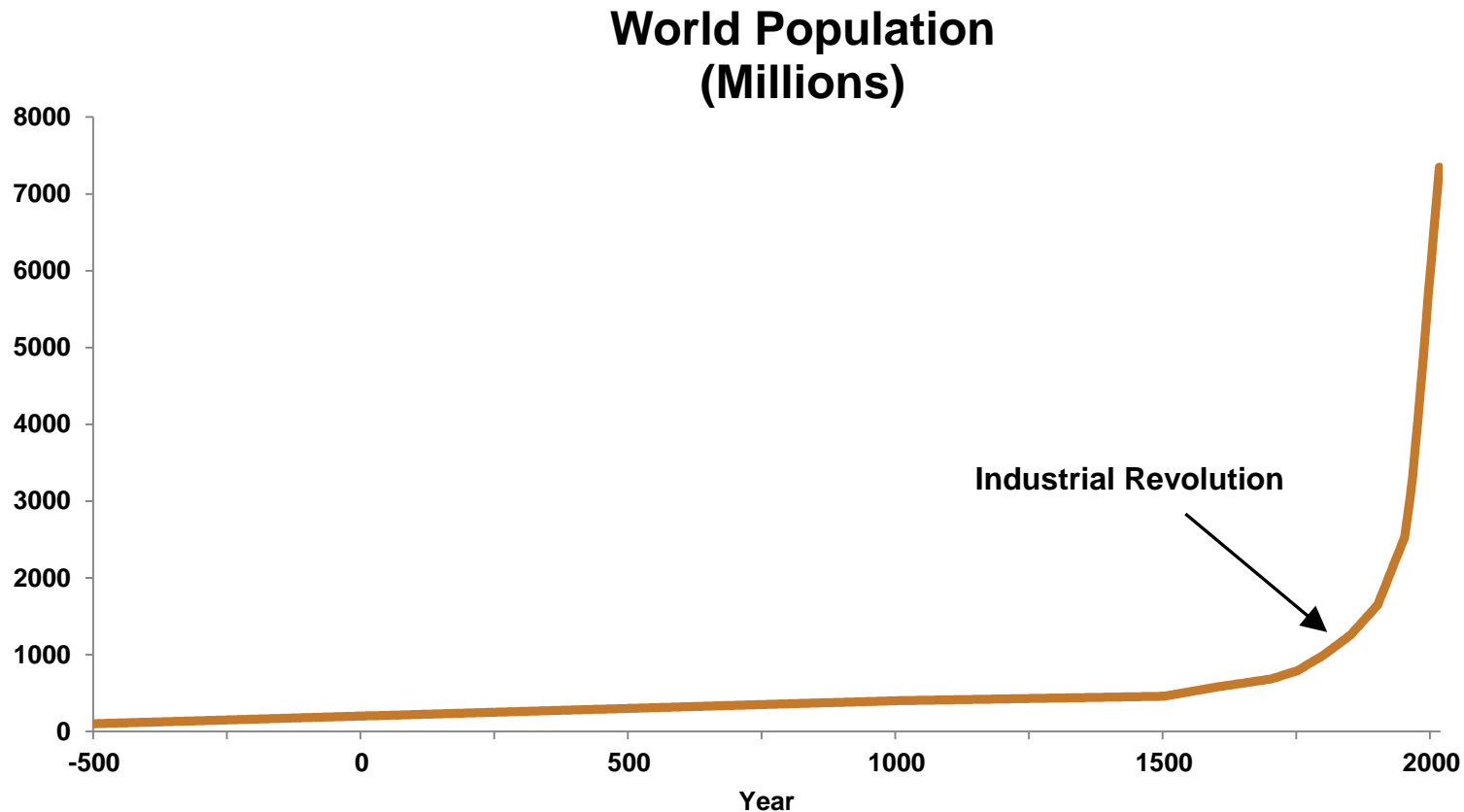


WHY OBTAIN A PATENT?

- Limited Monopoly for ROI
- Prevent the Invention from Leaving Business
- Sword Against Potential Competitors
- Shield / Bargaining Chip With Competitors
- Tangible Measure of R&D Output

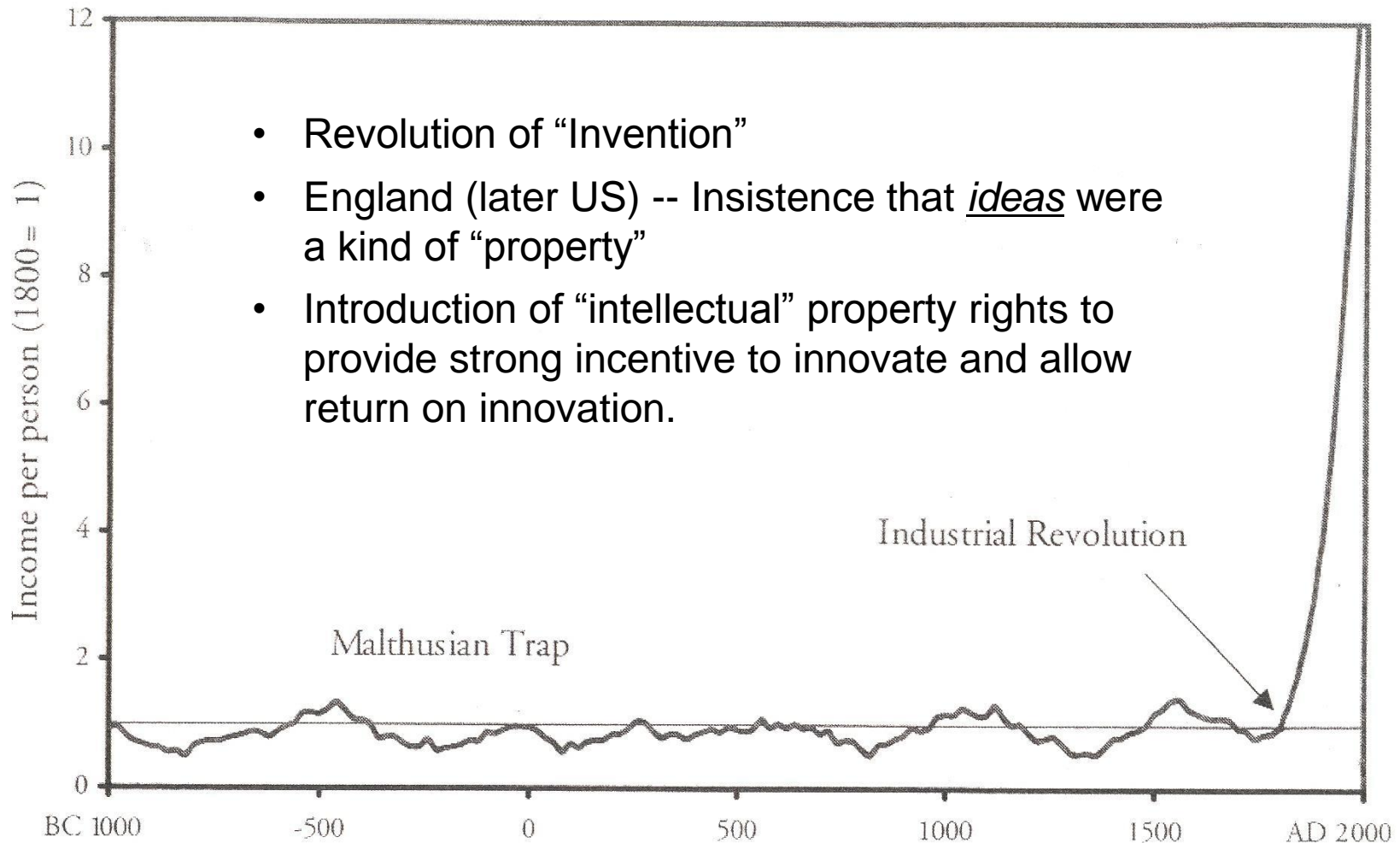


INDUSTRIAL REVOLUTION -- EXPLOSION OF WORLD'S POPULATION



Source: *A Farewell to Alms*, Gregory Clark

BREAKING FREE FROM THE “MALTHUSIAN TRAP” – DAY’S WAGE



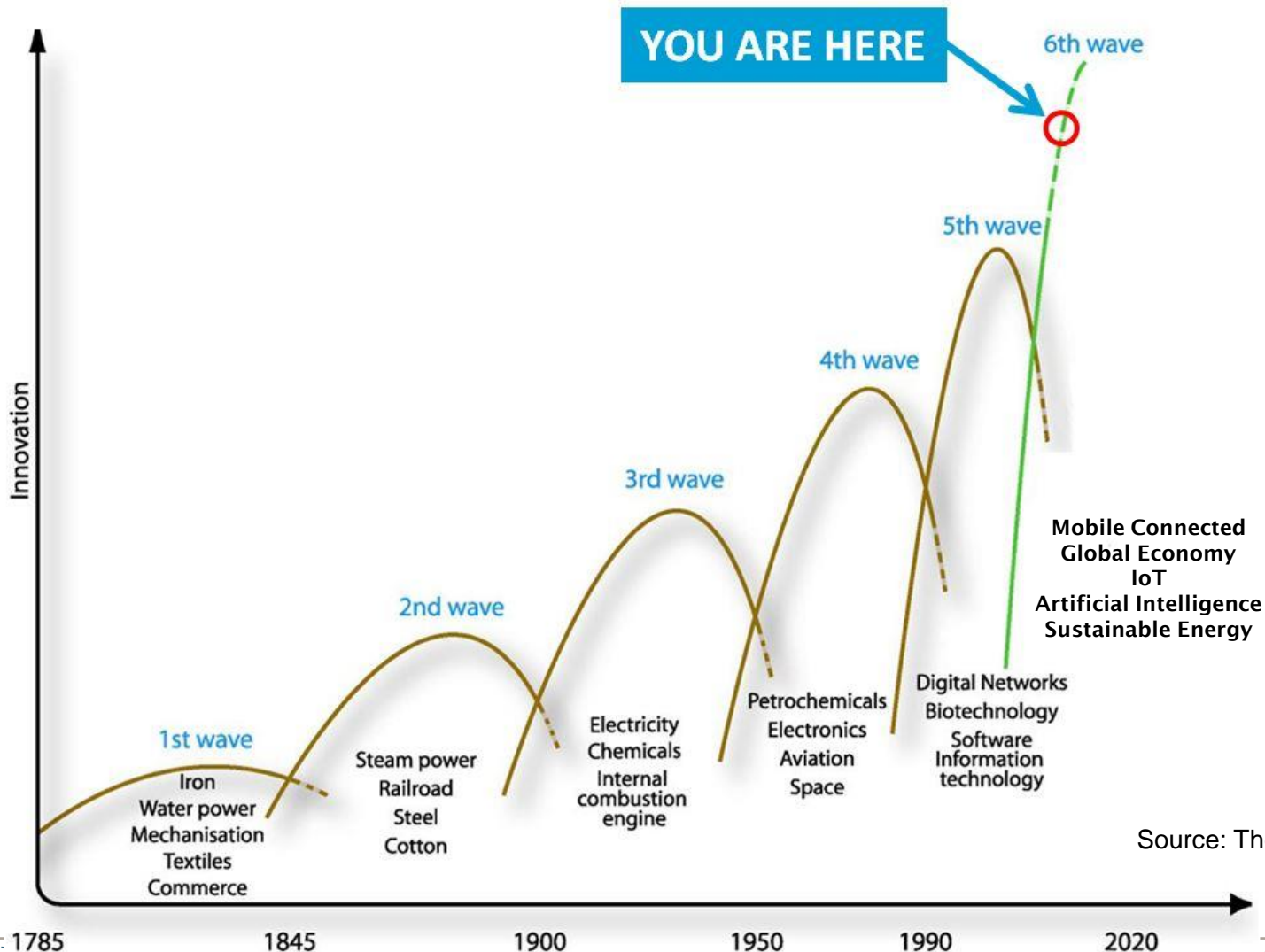
Source: *A Farewell to Alms*, Gregory Clark

IDEAS CAN BE A “PROPERTY RIGHT” THROUGH PATENT LAWS

“[I]n the world’s history, certain inventions and discoveries occurred, of peculiar value, on account of their great efficiency in facilitating all other inventions and discoveries. Of these were the arts of writing and of printing, the discovery of America, and the introduction of Patent laws.”

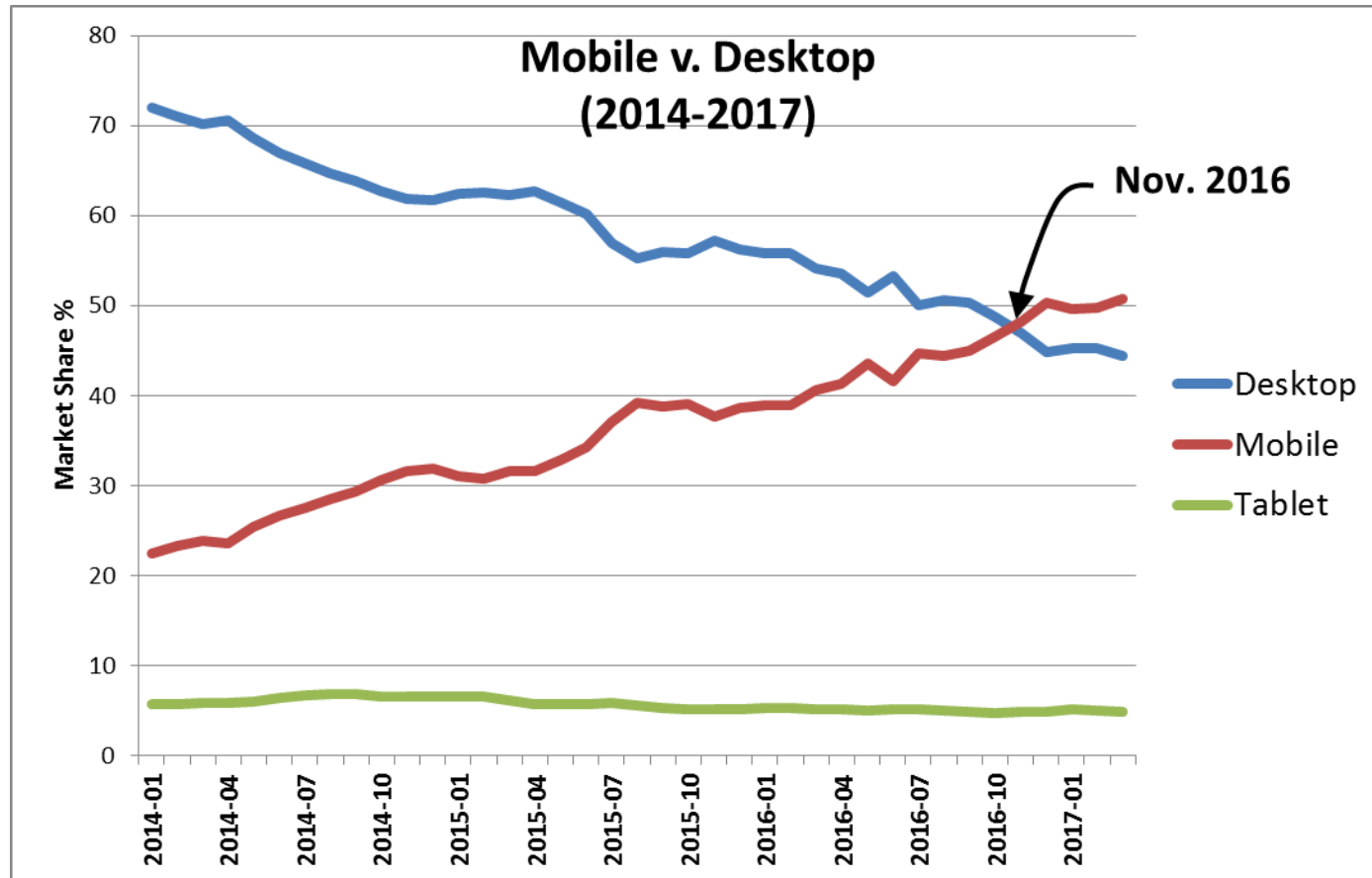
“Next came the Patent laws. These began in England in 1624; and, in this country, with the adoption of our constitution. Before then any man might instantly use what another had invented; so that the inventor had no special advantage from his own invention. The patent system changed this; secured to the inventor, for a limited time, the exclusive use of his invention; **and thereby added the fuel of interest to the fire of genius**, in the discovery and production of new and useful things.”

“WAVES” OF INNOVATION



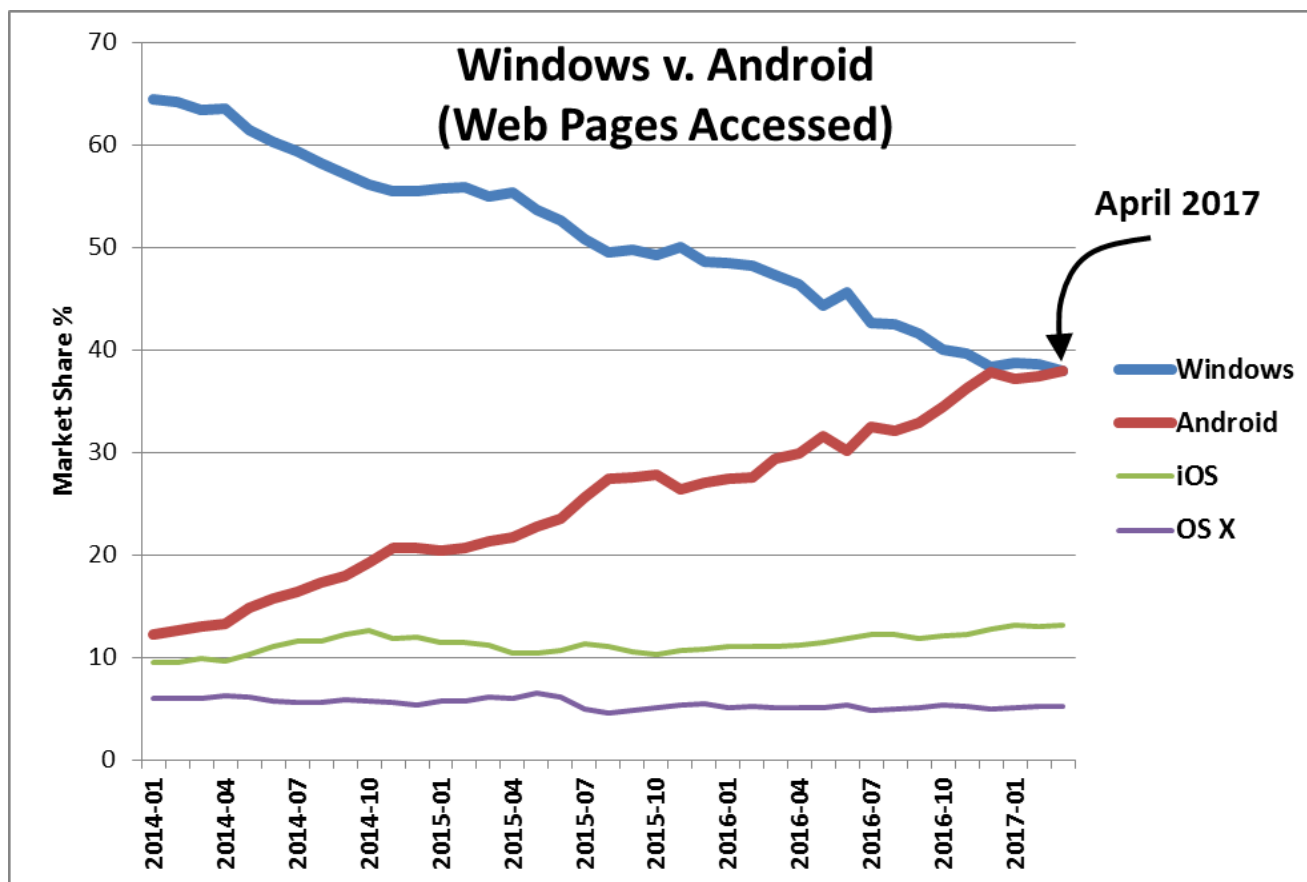
Source: The Natural Edge Project

MOBILE EXCEEDS DESKTOP



Source: Statcounter.com

ANDROID USERS VISIT MORE WEBPAGES THAN WINDOWS USERS



Source: Statcounter.com

INFORMATION AGE V. EXPERIENCE AGE

The Facebook logo, consisting of the word "facebook" in white lowercase letters on a blue rectangular background.

v.



snapchat

Accumulated Digital Profile

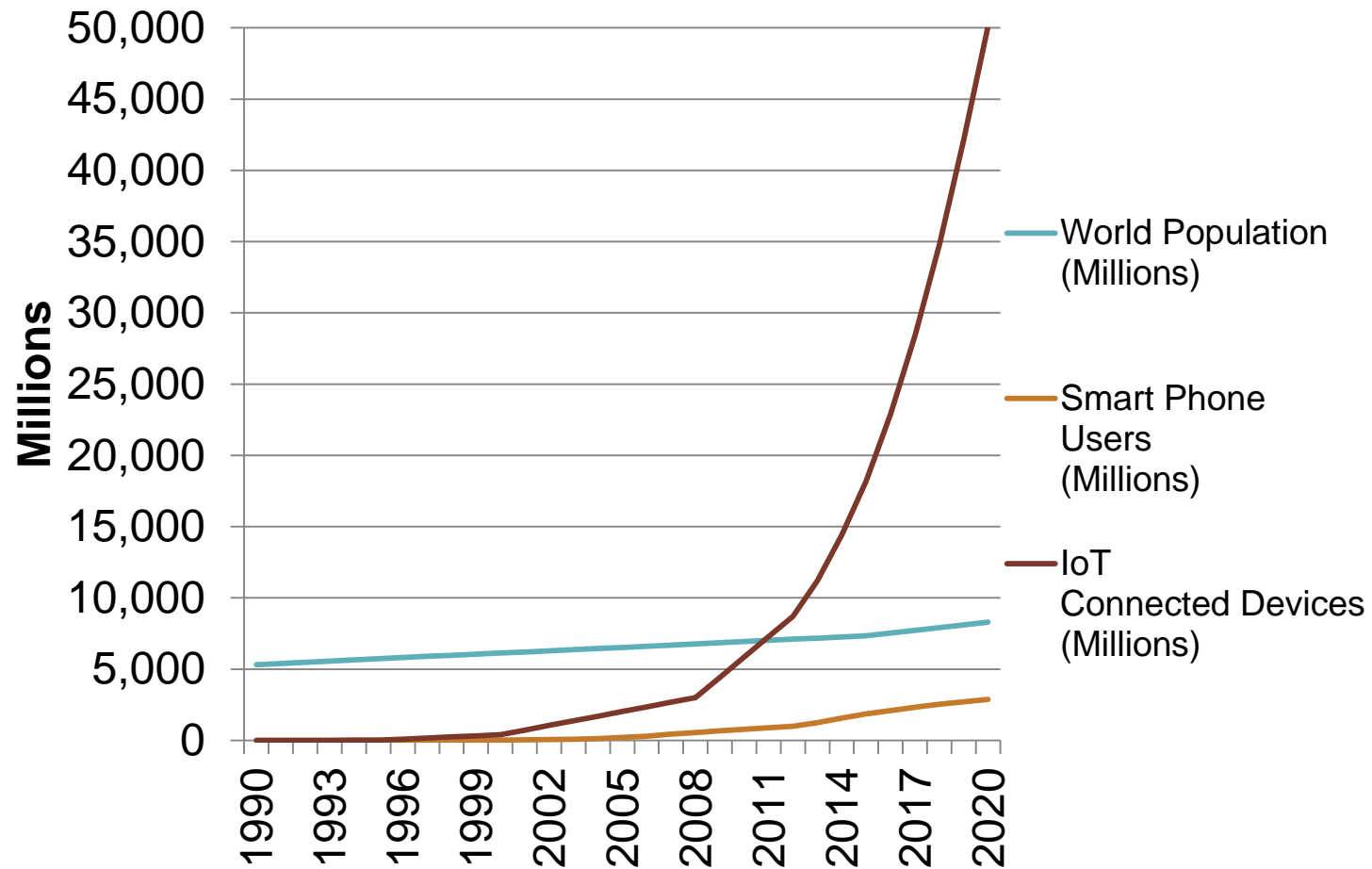
- Sum of saved text, photos, videos, web pages

April 2016: Added “Facebook Live” Real-time streaming

Real-Time Visual Experience

- Mobile connected camera televising life-in-the-moment

INTERNET CONNECTIONS EXPLODE – CONNECTED DEVICES (IOT)



NAVIGATING AND USING THE WORLD'S KNOWLEDGE



- **Web Browsers**
- **Search Algorithms**
- **Artificial Intelligence**
- **Digital Assistants (Siri, Alexa)**
- **Software Bots**

AGE OF EXPERIENCE

- **Businesses Must Deliver Consumer Experience, Not Just Products / Features**
- **Consumers Demand Innovation to Provide / Enhance Experiences**
- **Real Time Connections Nullify Geography**
- **Everything (Including You) is Connected**
- **World's Information is Immediately Available But Overwhelming**
- **Algorithms and Artificial Intelligence Assist with Selection and Use of Information**



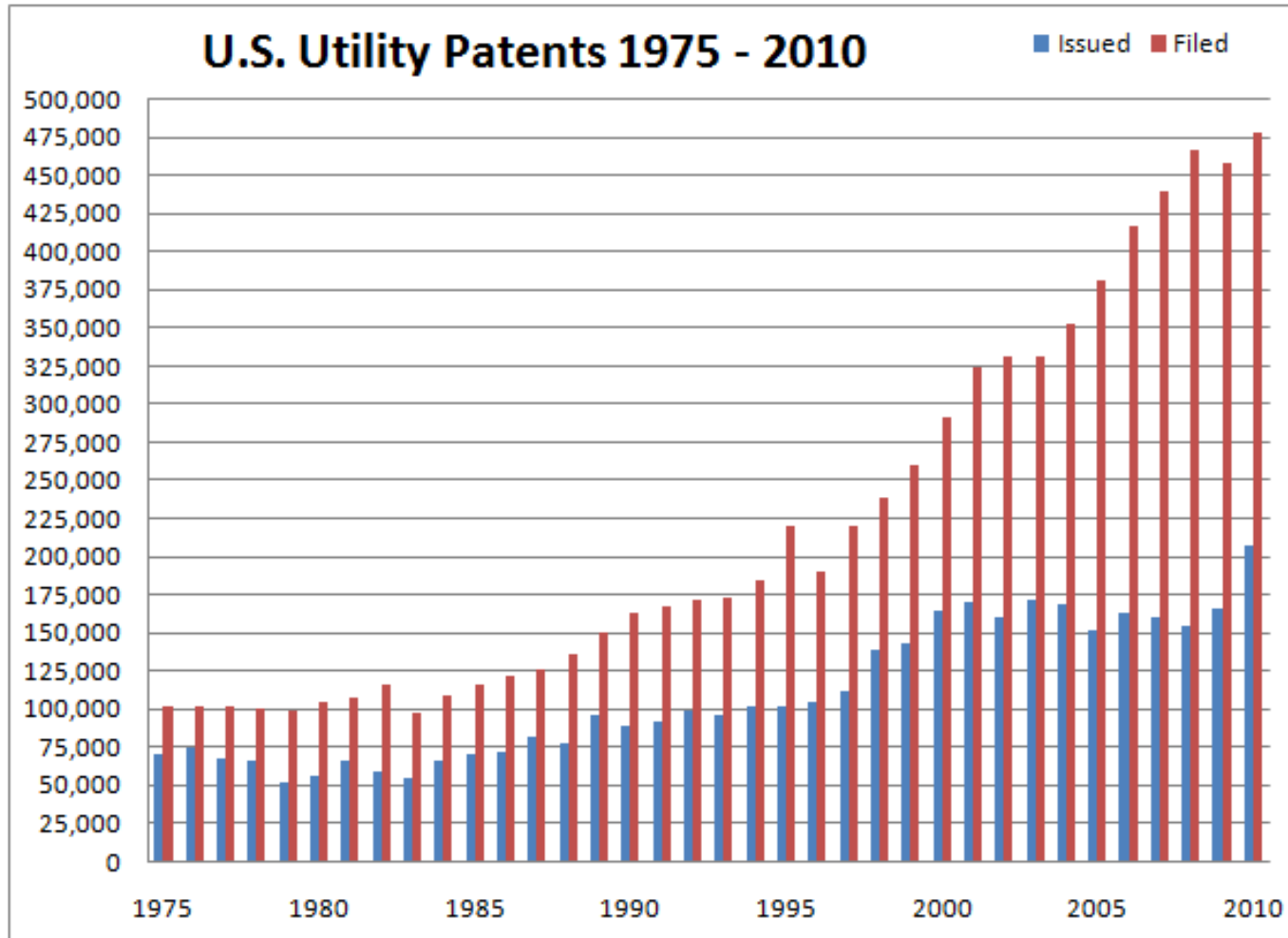
PATENTS RIGHTS DURING THE INFORMATION AGE – 1994



- *In re Alappat* (Fed. Cir. 1994)
- *In re Lowry* (Fed. Circ. 1994)
- *State Street Bank & Trust v. Signature Financial Group, Inc.* (Fed. Cir. 1998)

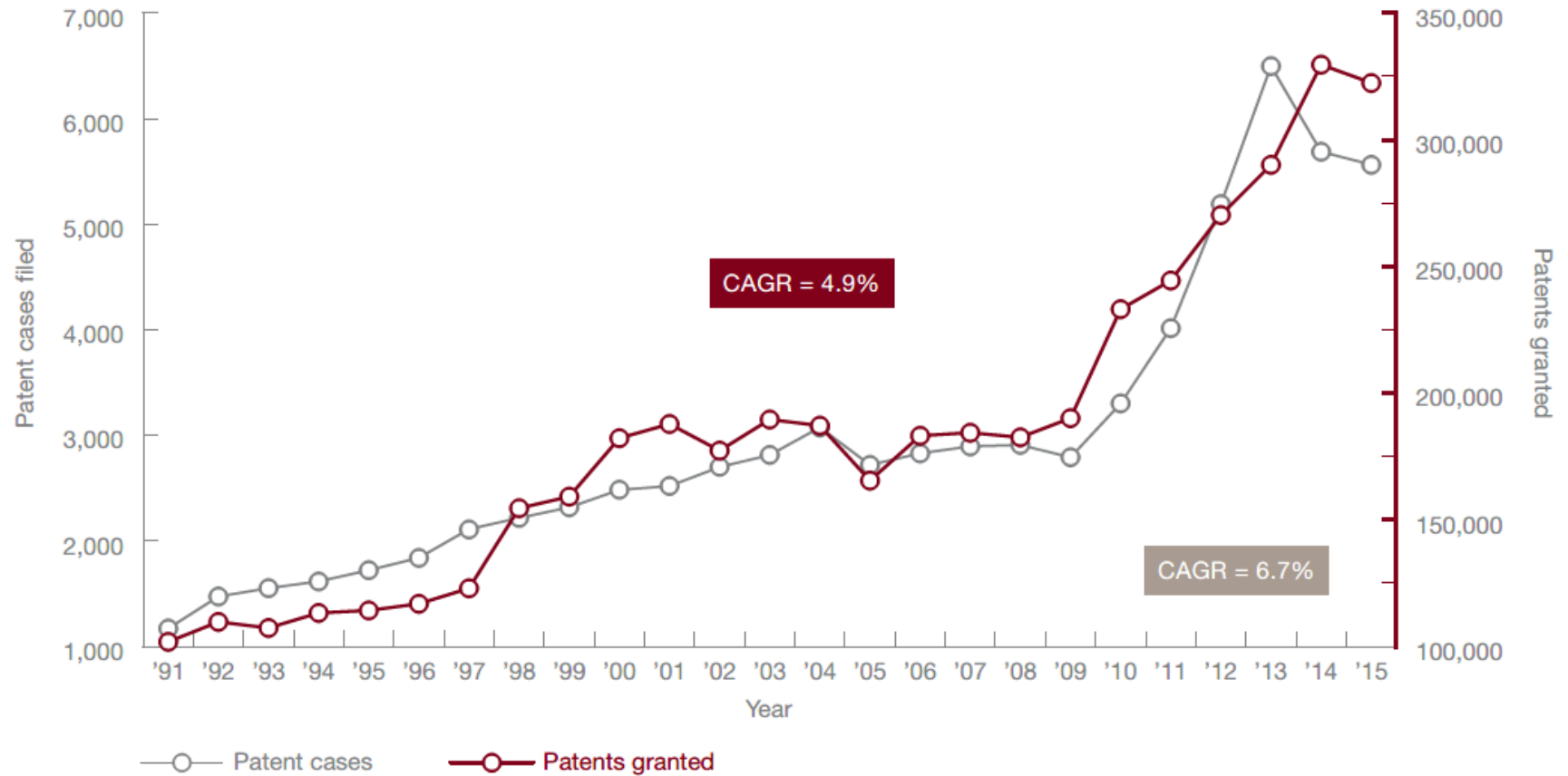


PATENT FILINGS EXPLODED DURING THE INFORMATION AGE



Source: Price Waterhouse: 2016 Patent Litigation Study

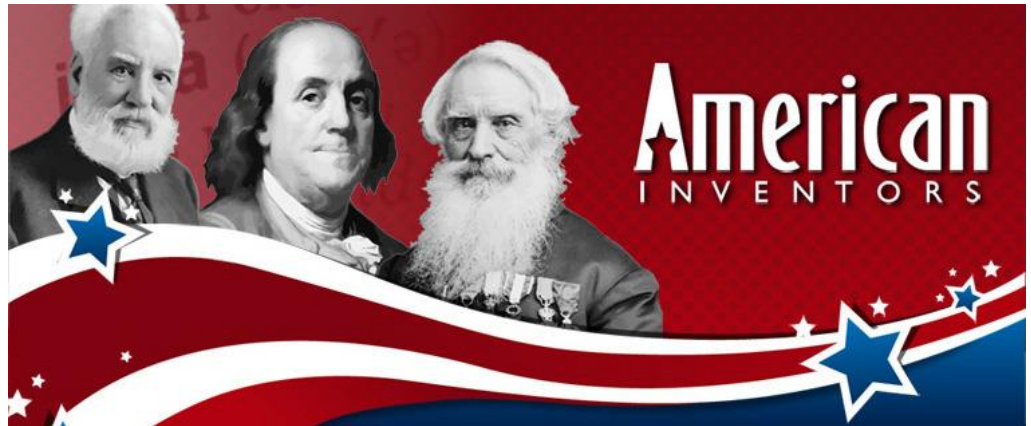
PATENT LITIGATION EXPLODED AS WELL



Source: Price Waterhouse: 2016 Patent Litigation Study

PATENT OWNERS: FROM HERO TO VILLAIN

1994



2006



EROSION OF PATENT RIGHTS

- *eBay v. MercExchange* (2006)
- *MedImmune v. Genentech* (2007)
- *KSR v. Teleflex* (2007)
- *Microsoft v. AT&T* (2007)
- *Bilski v. Kappos* (2010) –
- *Uniloc v. Microsoft* (Fed. Cir. 2011)
- *America Invents Act* (Effective 2012)
- *LaserDynamics v. Quanta* (Fed. Cir. 2012)
- *Octane Fitness v. ICON Health* (2014)
- *Alice Corp. v. CLS Bank International* (2014)
- Abrogation of Rule 84 and Form 18 (2015)
- *Apple v. Samsung* (2011-2017)
- *TC Heartland LLC v. Kraft Foods Group Brands* (2017)
- Additional patent reform?

HAVE PATENTS OUTLIVED THEIR USEFULNESS?



- Only people who really need patents are patent attorneys!
- Suzanne Harrison *Edison in the Boardroom Revisited*:
 - only 5 % of patents “strategically valuable”
- Technology is advancing and now *execution* is trumping *ideas* in the online world
- Patent system outdated and inconsistent with current technology:
 - Technology obsolete before patent issues
 - Products are developed quickly, and standing still can be the death knell of a company
- Open Source is the future
- Patent system being abused
 - Patent trolls stymie innovation
 - Patents should spur bursts of innovation; instead, they are used to lock in incumbents’ advantages.
- Patent system no longer necessary to incentivize innovation in Age of Experience
 - Customers demand innovation
 - Connectivity / availability of information promotes sharing of ideas

BUT

- If it's worth stealing (copying), it's worth protecting
- Good policy is still good policy, even if abused
- When patents do matter, they REALLY matter
- Still effective metric / proxy for R&D innovation
- Nearing the end of the bad patent bubble
- Age of Experience demands Innovation
 - Innovation that delivers “experience” easier to copy
- Open Source companies still patenting
- China
- Europe



PDAS – STORY OF INNOVATION



1976



2001



2007



1992



1996



1999



2000

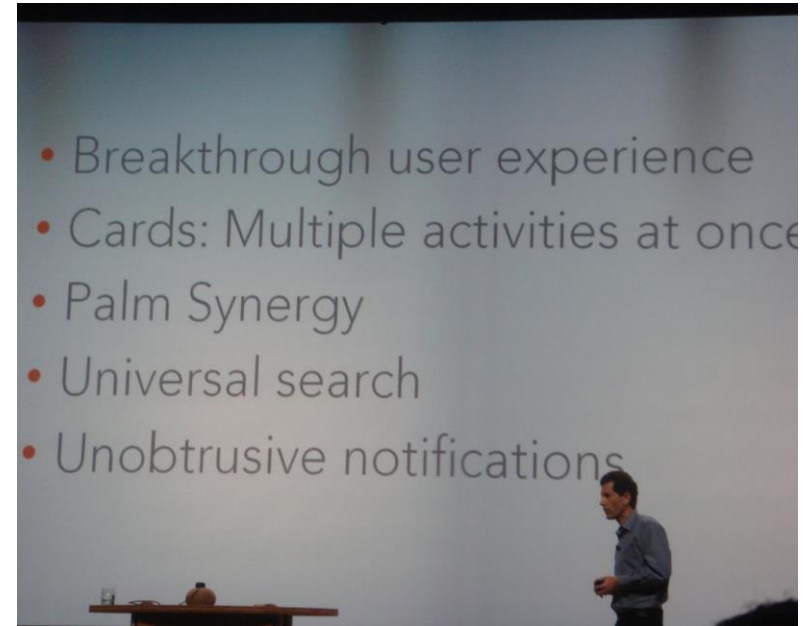


2009

APPLE 2007 IPHONE LAUNCH V. PALM 2009 PRE LAUNCH



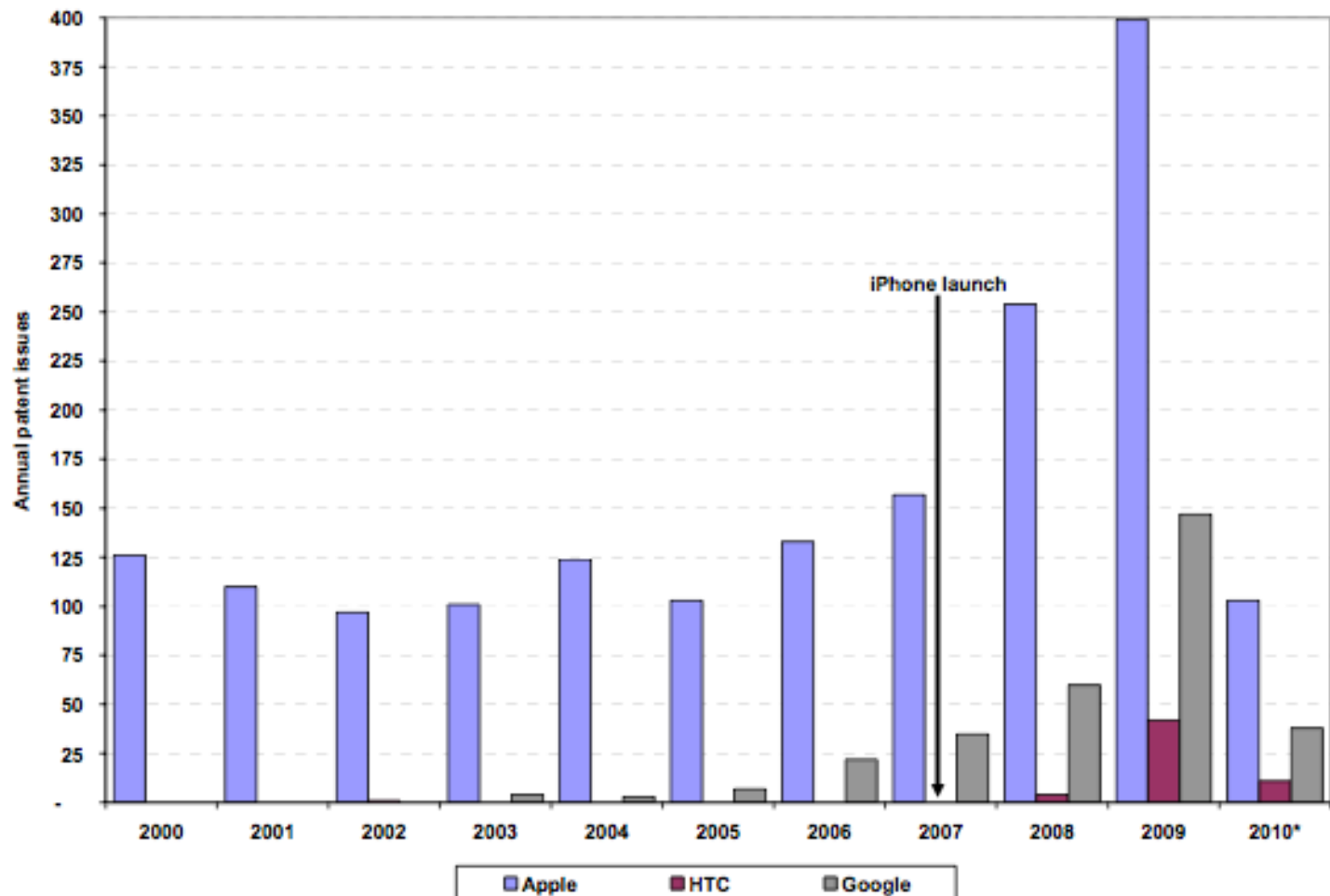
2007 Apple “iPhone” Launch



2009 Palm “Pre” Launch

APPLE'S PATENTING

Figure 7: Yearly patent filings by Apple, HTC and Google with the US Patent Office



Source: US Patent and Trademark Office (USPTO)

KEY QUESTIONS – SHOULD YOU PATENT?

1. What provides your company a competitive advantage?
2. How central is an innovation to your competitive advantage?
3. Can you obtain a patent covering the component of your innovation that makes customers want to buy your product / service?
 - Related: Can you cover the value / experience that the customer sees in the product, and not just the product itself?
4. How easy is it for a competitor to identify and reverse engineer your innovation?
5. How easy it is for a competitor to execute that innovation once they have reverse engineered it?
6. To what extent will your customers accept a competitor's copy?
7. At what stage is your company?
8. Are your competitors aggressively patenting?
9. Are your competitors aggressively litigating patents?



BIOGRAPHY



M. CRAIG TYLER
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Education

The University of Texas School of Law, J.D.,
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The University of Texas at Austin, B.S.,
Mechanical Engineering, 1992

Craig has significant experience in complex intellectual property litigation involving complicated technology in a variety of industries. Craig focuses on litigating and trying trade secret and patent infringement/validity matters for clients in the LED, LCD, software, Internet, telecommunications, medical device, pharmaceutical, gaming, e-learning, semiconductor, VoIP, computer-associated hardware, and oil and gas industries. In his 20-year career, he has litigated more than 160 technical cases involving claims of trade secret misappropriation and/or patent infringement cases, including eleven trials, in state and federal courts.

Craig also provides guidance, counseling, and coordination of IP (patent, copyright, trademark and trade secret) enforcement and defense efforts throughout the world. Specifically, he has assisted clients with patent-related issues in Japan, Taiwan, China, Germany, the Netherlands, the UK, France, Australia, and Canada.

Craig has extensive experience in related technical litigation matters, such as breach of contract, trademark infringement, Lanham Act, copyright infringement, enforceability of covenants not to compete, and unfair competition claims. He has in-depth experience and training in ex parte/emergency proceedings for temporary and preliminary injunctions involving trade secret misappropriation, breach of contract, and patent infringement claims in both federal and state courts in Texas and other states.

An accomplished appellate lawyer, Craig has experience before the Court of Appeals for the Federal Circuit and the Court of Appeals for the Fifth Circuit.

In addition to his courtroom litigation experience, Craig has significant experience in AAA and JAMS arbitration proceedings. He has prosecuted patent and trademark applications before the United States Patent and Trademark Office, negotiated complex software and patent license agreements, drafted employment agreements concerning ownership of intellectual property, and counseled clients regarding the ownership, development, and protection of their intellectual property.

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