Software II patenting

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November 17th, 2005

1 History: Software I patenting

Originally, patents were means for unprivileged inventors to protect themselves against unauthorized cheap mass production of their inventions that involved a lot of research effort. However, the market environment has changed quite a lot since the 19th century. The amount of work that is put into some patented inventions these days is not very much in average; most of the work is being spent on the implementation efforts. This is especially true for software, where the only work that really matters is the implementation, which is already protected by copyright. Patents always extend to a conceptual level. But what is actually protected by software patents is of minor interest for software development, so this particular means of protection misses the point.

To the largest extent the scope of patentability has been widened by the US Supreme Court in the eighties to include «everything made under the sun by man»[1], while it was limited to genuine inventions before. This had no effect on Europe, especially since the European Patent Convention Art. 52[2] from 1973 also rules out patentability of «programs for computers»[3] and other subject matters. Later in the 90ths these rules were blurred by TBA reinterpretation[4].

Since then the legal situation of software patents became uncertain in the European Union. The EPC rules them out, however, the European Patent Office (EPO) has already granted at least 30'000 ones based on case law, whose enforcability is questionable at the member states level.

The *F*oundation for a Free Information Infrastructure[5] has turned down any attempt to codify software patenting up to this point. They are currently expecting a third attempt to water down EPC restrictions, and there is unfortunately no doubt whatsoever that more will follow.

[1] cmp. Ecc. 1,3 or Ecc. 2
[2] Art. 52 EPC, *http://swpat.ffii.org/analysis/epc52/index.en.html*
[3] Lenz Analysis, *http://swpat.ffii.org/analysis/epc52/exeg/index.en.html*
[4] *http://www.european-patent-office.org/legal/gui_lines/e/c_iv_2_3_6.htm*
[5] *http://www.ffii.org*

An option for jeopardising patent law is trade agreements. In 1994, the USA successfully overturned the World Intellectual Property Organization which was handling patent law before by shifting the forum to GATT and the new World Trade Organization[6]. The Uruguay Round Marrakesh Agreement for establishing this organization also includes the agreement on *Trade-Related Aspects of Intellectual Property Rights*[7], which has been used as an advocacy instrument to extend the scope of patent law on a worldwide scale while the actual treaty merely codifies the status quo. The USA continue to push for a wider scope of patentability using Trade Agreements.

2 Enforcement Risks

Early in 2004, the European legislator acknowledged the *Intellectual Property Rights Enforcement Directive* which was about new enforcement measures on Intellectual Property rights in the lights of *product piracy* – patent enforcement was to our surprise included, despite severe industry resistance. However, criminal sanctions were explicitly left out, which is why a second regulatory act (IPRED2[8]) was proposed by the middle of this year. The proposal itself was in an incredibly bad state and even contained legally questionable formulae.

In September 2005, the *European Court of Justice* (ECJ) declared a number of EU regulations related to Criminal law invalid[9], and the Commission also announced procedural changes to IPRED2. So the Commission is currently in the process of redrafting the IPRED2 and other instruments of the new *IPR matrix*[10].

3 Reforming the EU patent system

3.1 The Community Patent

The main problem the current proposal for a Community Patent[11] is trying to solve is that basically a patent application at the EPO is equal to going from patent office to patent office and applying for a patent in each member state. So the idea is to establish a central EU patent system that can grant valid patents for the whole EU market.

[6] Bhagwati wrote «IPP is not a 'trade' issue; and the WTO ought to be about lowering trade barriers and tackling market access problems that will often go beyond border measures to 'internal' regulations: a thorny issue.» *http://www.columbia.edu/~jb38/FT Submission on IP & Medicines 091502.pdf*

[7] TRIPs, *http://swpat.ffii.org/analysis/trips/index.en.html*

[8] IP rights enforcement directive part 2, *http://wiki.ffii.org/Ipred2En*

[9] ECJ derails IPRED2, *http://wiki.ffii.org/Com051123En*

[10] see e.g *http://p2pnet.net/story/7088*

[11] Community Patent, *http://wiki.ffii.org/ComPatEn*

A request for a reform in the EU patent system extents to the way patents are granted and the governance of the system. Currently, the *European Patent Office* (EPO) is granting a lot of undesirable patents on various subjects. In that respect, the current EPO friendly proposal for a Community Patent is unsatisfactory, since the EPO has proven itself unwilling in the past to deal with these issues. The Commission will have to affirm these EPO interests. A Community patent will extent the powers of the European Court of Justice regarding patent law and increase EU-level control.

Further the proposed regulation reduces transaction costs, but necessary safeguards against undesirable patents are not provided, plus it introduces a period of retroactive liability of 10 years, which is yet unseen. The Community Patent process is currently stalled for the unresolved *language policy* requirements.

3.2 The EPO reform

Currently, the *European Patent Office* (EPO) is not under control of the *European Union*, but an independend international body of several EU-member and non-member states. It is also in fact an unique institution lacking basic standards regarding division of powers and checks & balances – basic requirements of democratic governance.

The problem would be less drastic if the EPO had not proven to be severely biased in that respect, causing the maximal possible cost on the patenting and challenging party, for its own interest. So the aim[12] must he to increase the demand of examination of patents before granting them, and handing judicative and executive to other EU bodies.

4 Perspective

4.1 Industrial Copyright as an alternative

The dichotomy of «copyright for literary creation, patents for technical invention» has visibly broken down due to the appearance and the debate about IP rights applied to software. Recent experience shows that industrial copyright often comes closer to the market requirements than patent law.

Patent law is slow: The examination and granting procedures are bureaucratic and take 3 years and more, invalidation or re-examination of patents also takes a lot of time. Patent law is expensive: The users of the patent system face high transaction costs which are a source of income to the system.

[12] EPO reform, *http://wiki.ffii.org/EPOreformEn*

Also, potential innovators become patent attorneys or examiners, which distracts manpower. Patents as de facto monopoly rights are associated with an economic wellfare loss as they restrict the freedom of the market. Patent applicants want broad claims and the patent system is designed for these. Broad claims seriously distort a market.

The alternative here is a reform of the Intellectual/Industrial Property system (I2P)[13]. Future exclusion rights should be *fast*, *cheap* and *narrow*. The patent system as we know it is unable to meet these requirements.

4.2 Promotion of a Free Information Infrastructure

The future planning of FFII includes, amongst other things, of course future activities against software patent legislation. Up to this point, we have successfully abolished every attempt to establish a software patent infrastructure. However, we still have not successfully removed the threat of case law. To our knowledge, the only way to achieve this is to get a reaffirmation for Article 52.2 EPC in an EU directive. We have an economic majority on our side to achieve this goal. Hartmut Pilch presented a set of ten core clarifications[14] as a guide for future regulations on this matter.

FFII is not only involved in software patenting regulation. There are other priorities necessary for the promotion and development of a true *Free Information Infrastructure* based on open standards and fair market competition.

5 Software patent timeline

1883 *Paris Convention* for the Protection of Industrial Property.

1958 Machlup, F.: *An Economic Review of the Patent System* for US-Congress[15]

1973 The *European Patent Convention* excludes software from patentability.

1981 US Supreme Court: Diamond vs. Diehr

1986 The *European Patent Office* (EPO) starts granting patents on computer programs disguised as mostly pointless real-world processes.

1994 TRIPs and forum shifting from WIPO to World Trade Organisation.

1998 The European Patent Organisation (EPO) starts to accept claims on computer program products officially.

[13] I2P, *http://wiki.ffii.org/IndpropEn*
[14] *http://swpat.ffii.org/papers/europarl0309/amends05/juri0504/core.en.pdf*
[15] *http://www.mises.org/etexts/patentsystem.pdf*

2000 The EPO attempted to delete all the exclusions listed under Art 52 of the *European Patent Convention*. Due to public resistance which they apparently did not anticipate, this effort failed.

2002 The EU commission proposes a directive which codifies the current EPO software patent practice.

Sep 2003 In its 1st Reading the *European Parliament* (EP) reaffirms the non-patentability of software.

May 2004 The *EU Council of Ministers* politically agrees on a common position that discards the amendments made by the European Parliament.

Dec 2004 The *council president* adds the software patent directive to the agenda of the *Comittee of Agriculture and Fisheries*. The Polish minister of Science and Information Technology, Wlodzimierz Marcinski, successfully requests to withdraw the item from the agenda.

Jan 2005 Software patents appear on the agenda of the *Comittee of Agriculture and Fisheries* in the Council again, and again it is Poland that successfully requests a withdrawal. However, the Council refuses to restart negociations.

Feb 2005 After heavy negotiations as well as ignoring and reinterpreting opinions of some countries while other countries decided in rebellion against their national parliaments, the council formally confirms the common position.

Jul 2005 The EP rejects the directive on the patentability of computer-implemented inventions 648:14.

6 IPR Enforcement timeline

1886 The *Berne Convention* regulates authors rights, which also cover *computer programs* up to today. The *United International Bureau for the Protection of Intellectual Property* (BIRPI, predecessor of the WIPO) is founded.

1994 TRIPs: Article 61 sets minimum criminal enforcement requirements

Apr 2004 EU rapidly approves the *Intellectual Property Rights Enforcement Directive* (IPRED1) with the caveat that there shall be no criminal sanctions.

Oct 2005 The Commission put forward a second part of the *Intellectual Property Rights Enforcement Directive* part 2 (IPRED2) which contains criminal measures and sanctions for violating intellectual property rights.

Nov 2005 The Commission publishes a document claiming that the formal procedure underlying the IPRED2 proposal has to be changed to Art 95 TEC.