Stopping Software Patents in Europe

Ciaran O'Riordan

November 18 2005

What I will speak on today

In relation to the recently-rejected Software Patents Directive, I will cover the following:

- Who says we are better off now
- How the European Parliament voted
- What each side lobbied for
- The future for software patents in the EU
- The bigger picture that software patents are part of
- What's next

Preface

It is rare that the citizens of Europe take part in European politics.

It is something that happens “over there” in Brussels.

Software patents is a pretty obscure subject, and we had protests of thousands in Brussels.

I think these are indicators that this subject deserves special attention.

Europeans should be happy

The Software Patents Directive is no more.

It would have validated software patents, and it was rejected.

We haven't solved the problem completely.

The European Patent Office is still issuing these invalid patents.

So we need to continue building awareness, because this will come back.

Why so happy?

We should be happy they're mostly gone, because...

- The USA told us they're a bad idea
  (Software patents are valid in the USA, so we are very lucky to have the ability to learn from their experiences.)
- Representatives of European Small- and Medium-sized Enterprises told us they are a bad idea
- Consumer groups told us they are a bad idea
- Free software organisations said they're a bad idea

US FTC Report

The Federal Trade Commission is a government body in the USA - they monitor interstate commerce

Similar in ways to the Competition Authority here.

They are not bound to any company or type of company.

What they care about is making the economy and the market function.

Their 2003 Report on Innovation - a 350 page report - examined the USA's entire patent system.

US FTC Report

In its conclusions about software patents, for harm to software users and industry, it listed:

- impeding innovation
- impairing follow-on incentives
- increasing entry barriers
- creating uncertainty that harms incentives to invest in innovation
- producing patent thickets

US FTC Report (cont.)

- defensive patenting is increasing the complexity of patent thickets
- forcing companies to divert resources from R&D into obtaining patents
- make it more difficult to commercialize new products
- raising uncertainty and investment risks
- patent hold-up has become a problem
- can result in higher prices being passed along to consumers

Of course, those are just the bad points.

US FTC Report's conclusion

For redeeming qualities of software patents, the conclusion of the report said:

- <blank>

Nothing. Not one redeeming quality.

This wasn't a software patent report. It was a general report of the patent system.

Jobs

The majority of jobs in the EU are provided by Small- and Medium-sized Enterprises (SMEs).

UEAPME is a union of European SME unions - for example, there are two SME unions in Ireland, and they're both part of UEAPME.

The organisations it represents contain 11 million companies, employing 50 million people.

> *"Small firms are concerned that introducing patents for software would seriously limit their ability to be innovative and endanger their survival."*

Consumers

BEUC, the Bureau of European Consumers Unions:

> *"The proposal as it stands will severely inhibit competition (and thus innovation) and will have many negative consequences for European consumers"*

BEUC is a union of national consumer rights groups.

Free Software Groups

Richard Stallman, who initiated the free software movement back in 1983, says:

> *"Software patents are the software project equivalent of land mines: each design decision carries a risk of stepping on a patent, which can destroy your project."*

Stallman is a notable software developer - he wrote a significant part of the software that makes up the GNU/Linux operating system, he holds 4 honorary doctorates, among other awards.

First reading

The software patents directive was first presented to the European Parliament in 2001 - under the auspices of harmonising patent law in the EU.

Being a difficult topic, the Parliament postponed the vote numerous times.

In September 2003, they voted, and adopted a large number of amendments to the Directive - to exclude software from patentability.

This was a big win for the anti-software-patent campaign, and the amendments were adopted by clear majorities of around 75

Second reading

In the second reading, those in favour of software patents must have known that they would fail to convince the MEPs that software patents are good.

So they instead changed their message to: “This isn’t about software patents. This is about Computer-Implemented Inventions (CIIs).”

...and proceeded to lobby for the same old idea, which the Parliament rejected in 2003, under this new banner: “CIIs”.

CIIs and "software patents"

This line fooled some MEPs, and left many with doubt.

But this line could not be kept straight.

One example is a study which was published by the Business Software Alliance, which began:

"...computer-implemented inventions [are] usually referred to as 'software patents' in United States..."

Another was SAP, who printed ads that we loved.

What was our line?

Under the anti-software-patent amendments, innovations which represented a new teaching in the use of forces of nature would be patentable.

Or said another way:

Innovations in applied natural science would be patentable.

I'll give a postive and negative example.

Positive example: (ABS)

Cars contain sensors, computers, and brakes.

If a car manufacturer develops a new way to slow a car, and if adding this ability to a car only requires some new software: will it be patentable by our version of the Directive?

Yes.

Why? Because the innovation is in the way that the brakes are used.

The innovation involves “forces of nature” - or “applied natural science”.

Negative example: XML

For computers to exchange information, they have to speak the same language.

If a software company develops a language, or a new way of using an existing language: will it be patentable by our version of the Directive?

No.

Why? Because the innovation involves no forces of nature or applied natural science.

Cost & Benefit analysis

Why should cars be patentable, but not software functionality?

I want to look at the cost/benefit analysis of patents in the software field.

Restrictions of the patent system

Patents inhibit the development of projects, and the combination of ideas.

In the automotive field, the restrictions of the patent system are borne by a few: they're an industrial regulation.

In the software field, the costs are borne by everyone that has a computer and a book on programming. If you've developed a website - like most MEPs have - you're a software developer.

So the cost is applied on a far greater scale.

Inhibiting development

I said that patents "inhibit development".

For most fields, this can be a benefit because it produces lateral innovation.

If you block off one path, product developers will have to find new ways of solving the same problem - and hopefully this will lead to someone finding a better way.

For software, where compatibility and interoperability will make or break a product, this lateral innovation is not useful. So you get the cost, and it's for no benefit.

Benefits of the patent system

For automotives, the benefits are applied evenly across all those who are affected by the costs: anyone with a car manufacturing plant.

If a market leader says “No one can develop software to read our document format” - this is a problem.

If anyone other than the market leader says “No one can develop software to read our document format” - nobody will care.

Exclusionary tools, such as patents, only benefit those who are already established enough to be self-sufficient.

Preventing useful software

Software patents even specifically inhibit the development of useful software.

For software to be useful it must be compatible with existing software. For software to compete, it must be similar looking and similar acting to the market leader.

If I write a word processor - it has to look and act like Microsoft Word, and it has to read and write Microsoft Word files. Otherwise it is almost useless for most people.

Patent Licensing Firms

(Patent Zombies)

We can tell that the cost / benefit balances are all wrong because now in the USA there is a new software business model which involves staying away from software.

There are companies buying the patents of dead and dying dot-coms - and then hunting commercial software developers.

By developing no software, they do not face the risk of being sued themselves. Bad for the economy, but good for the company owner.

I call them zombies since they harvest the dead and dying. More people call them parasites, since they feed off the profits of real businesses.

How is the free software movement now?

- We have figured out the legislative process - how it works in practice.
- We have got experience of working within the process.
- We have people in Brussels, and national organisations.

Bigger pictures

It's good that we've emerged quite healthy, because this is far from over.

It was never exclusively about software patents.

It is about creating barriers to participation in the development and distribution of software.

Why make barriers to participation?

If you were a very big company, and you were losing market share to smaller companies, and to free software based companies, you would like the table to be tilted in your favour.

What do big companies have the small ones don't?

Money and lawyers.

So the obvious path is to find a way to make software development require money and lawyers.

SMEs

In the end, some MEPs believed that the SMEs were split - they believed that some were pre and some were anti.

This may have been because they SMEs depend on some larger companies, or were hoping to curry favour, or are hoping one day to get bought out.

Also, there are business models that use software patents (albeit, models which harm the economy - the zombies / parasites I mentioned).

But the union of 11 million SMEs was very clearly anti.

Why SMEs care

Most of those lobbying against software patents, were not there for free software.

Most were SMEs who just want to compete, they want to enter the market, or who want to have more options when procuring software.

The common bigger picture that we're working for together with the SMEs, is software independence, or software freedom.

FFII

Another organisation that workded on this was FFII.

FFII was one of the biggest lobby groups. FFII is an associate of FSFE, like IFSO is, but FFII is not a free software organisation.

Since FFII's pursuit of a free information infrastructure usually matches what FSFE is doing in the pursuit of software freedom.

Why we care

Some popular pieces of free software include

- GNU/Linux operating system
- Mozilla Firefox web browser
- OpenOffice.org office suite

Free software is often developed by small companies, by medium-sized companies' whose core business is not software, by individuals, even by college students.

Some amounts are written by very large companies, but not most.

Value of free software

BEUC, the consumer rights organisation I mentioned earlier, says "Open source and free software provide consumers with more choice than ever before, and empowers the creative users to participate in future development of these products"

Individuals and businesses are increasingly using free software. So FSFE and IFSO are working to protect the freedom to write software, so that the value can continue growing.

There are CDs down the back - everyone can take a full working copy of the operating system home with them.

What's happening now.

Courts are finding in our favour.

The European Patent Office is still granting software patents, but holders of these patents are not threatening anyone since they know they would never stand up in court.

There have been a small number of cases, and as far as I know, all have gone in our favour.

What other problems?

For large companies that want to introduce barriers to software development, software patents were the Olympic gold medal.

They'll keep trying to find new ways to make software patentable, but they are also trying to find new ways to make software development risky and expensive - through means other than software patents.

IPRED2

One such attempt could be the second proposal on enforcing "intellectual property rights" - often called IPRED2.

This is a Directive which aims to criminalise most infringements of copyright and patents.

Right now, software developers in Europe are safe because patent holders don't want to bring their pieces of paper to court.

There's probably 95% chance their patent will be thrown out.

Criminalisation

...but if it was a criminal offence - instead of a civil offence - to infringe a patent?

The chances of a software patent being found valid are probably only 5% or so, but if that small chance carried with it a criminal record, and the possibility of jail time, fines, and closure of business.

Maybe people would be too afraid to take that chance.

If the 5% chance that a judge would decide that a software patent was valid could get you a criminal record, and a big fine or closure of business - will people and companies take that risk?

Supporting our work

Most of FSFE's funding for it's anti-software-patent work comes from a membership program called the Fellowship.

http://www.FSFE.org

If you would like to support our work, please join the Fellowship and ask others to do likewise.

If you would like to take part in the work, contact IFSO and come to our meetings.
FSFE and IFSO can provide information on - when you want to hear the free software side of the debate, we're always willing to help out: `contact@ifso.ie`

Conclusion

I said I would talk on:

- Who says we are better off now
- How the European Parliament voted
- What each side lobbied for
- The future for software patents in the EU
- The bigger picture that software patents are part of

I will welcome questions on these and related topics, during the panel session.

http://www.FSFEUROPE.org
http://www.IFSO.ie