FFII Discussion: Replace Patent Law with Copyright!

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Draft proposal for long-term political demands to be endorsed by the FFII and other signators concerning the future of the system of exclusion rights to be accorded to creators and innovators, and demands for schedule of steps to be taken, in Europe and elsewhere, in order to move us toward this future.

1 History

- 2006-09-17 Karl-Friedrich Lenz comments on this proposal
- 2006-09-16 Inspired by PA Horns, phm drafts this call in German and English
- 2006-09-15 PA Horns: Pirate Party movement creating german organisation, lashed by FFII

2 Problems

- The patent system is today working as a brake rather than a stimulus on innovation in many fields
- The copyright system has shown its value for promoting software development, in spite of a widespread belief that copyright is made for the aesthetic and not for the functional arts.
- The concept of patent is narrowly defined and not pliable.
  - A patent is a codified right to exclude others from implementing an idea which you were first to find or register

- The period is set to 20 years and the rules are basically the same for "all fields of technology", i.e. an inflexible obligatory "one-size-fits-all" system.
- Unlike copyright, patents cover the independent work of other people. The claims of patents are broad, limited only by the requirement of novelty plus a few other (mostly dysfunctional) constraints.
- Obtaining a patent involves high costs for the applicant: (1) publication of business secrets (2) search of prior art, claim drafting, application procedures, litigation.
- Other players have to monitor thousands of patents. It is costly if not impossible to avoid infringing on existing patents. Patent litigation, once it occurs, tends to put smaller companies out of business.
- The costs of legal insecurity and licensing fees have been rising continuously, so that even the large companies are complaining.
- The problems of the patent system are aggravated by an explosion in the number of patents. Globalisation brings in more and more players, e.g. from countries such as China and India.
- With the progress of science and technology, much of the costly empirical research work has been successfully accomplished already. Much of today's innovation takes place in areas such as programming, based on well-known models of nature, where, even though the effort behind each individual innovation is very low, the blocking effect of the concerned patents tends to be high. Typically such innovations can be described as "business methods based on beginner's knowledge of natural science". Previously it would have been possible to sort them out because they are not "technical inventions" (i.e. to not enrich the state of knowledge in natural science), but the patent world is reluctant to use this concept today, fearing that it would lead to a dramatic reduction in the number of granted patents.

- The patent system has never proven its usefulness as an instrument of economic policy. The doubts of economists about the patent system have never been refuted but only swept aside.
  - The patent system was introduced in Germany in 1877 "by lawyers and protectionists, against the will of the economists" (non-literal quote, to be verified), as Fritz Machlup, the leading economist and historian of the patent system wrote in a report for the US Congress in 1958.
  - Government-ordered reports by economists in Australia and Canada in the 1970s and 80s warned that the patent system would not promote innovation and should be rolled back or at least not extended to new fields such as genetics or software. Yet, only a few years later, the patent offices of the same countries announced extensions of patentability toward genetics and software.

- The patent system tends to become an unreformable state in the state.
  - Patent officials, patent judges and patent lawyers from the large corporations tend to form a closely-knit, powerful and rich community of gurus who are used to setting policies among themselves and who do not tolerate interference from outside.
  - the European Patent Office is a state-like entity which unifies the legislative, executive and judiciary powers in one
  - the EPO and other patent offices have enormously grown in staff. They are obliged to feed many thousand examiners and they live on the fees for the patents which they grant.
  - Even very conservative reform proposals, such as the demand that the letter and spirit of Art 52 EPC should be respected, have met extremely fierce resistance from the patent establishment. The European Parliament's majority proposed clarifications to the patentability rules in september 2003 and july 2005 which were brushed aside without discussion by the ministerial patent officials. In order to impose their own positions on the EU, these officials acted against explicit decisions of their national parliaments and even broke the procedural rules of the EU Council. They used rhetoric which was misleading in many ways.
  - Contrary to widespread popular belief, the patents granted by the European Patent Office and most national patent offices in Europe are not significantly better in quality than the American or Japanese counterparts. In the long run, Europe is even worse off than the other two big patenting powers, because its patent system acts at an international level where democratic controls are weaker and once taken decisions more difficult to correct.

3 Demands

- National parliaments should legislate to clarify meaning of Art 52 EPC in the sense approved by the majority of the European Parliament in 2003 and 2005 (e.g. according to the Ten Core Clarifications)
- Liberalisation of patent examination system, introcution of polluter pays principle: whoever can show a patent to be invalid has thereby rendered the public a service for which he can charge reimbursement from the patentee. The patentee thereby has an incentive apply for narrow claims and to make sure they are valid. Patent examination thus is no longer obligatory; instead, it becomes a private insurance service, performed at the request (and expense) of the patent applicant. This can be done by laws enacted at the national level.
- National parliaments should form committees for innovation policy which send representatives to the Council of Ministers who should be able to speak for their country

- Further internationalisation of the patent system by EPLA, ComPat or SPLT etc must be avoided, unless they are subject to legislative review by a democratically elected Parliament. In other words Community Patent is ok if and only if the related patent laws can be made and reviewed by the European Parliament alone.

- Full sovereignty in patent legislation must be taken back to the level where democracy and division of powers exist, i.e. currently the national level. Alternatively the European Parliament could be invested with the full legislative power regarding questions of substantive patent law.

- Governance problems of the European Patent Organisation must be solved within 10 years, otherwise withdraw from the organisation. The patent part of the TRIPs treaty should be deleted within 20 years, otherwise withdraw from WTO. Replacement of the patent system with a copyright-like "fast, cheap, narrow" IP right and possibly a set of sui generis rights within 30 years, according to a schedule of stepwise transition. There could even be a sui generis right for those achievements that enrich our knowledge about causalities of forces of nature, which is exactly what, according to the Dispositionsprogramm decision of 1976, the patent system was supposed to be.

- No more tax money for patented research, no more obligation for professors to patent under the name of their university, no "novelty grace period".

4 How to Make this Come True

The above demands are quite far from current reality. Putting them into practise requires much more political momentum than opposing a bad directive.

Yet, the bad practise of the current patent system is continuously providing us with the opportunities for gaining momentum. We should specifically do the following:

- step by step build up the FFII into a well-organized force

- form a community of mutual assistance against the destruction of innovative enterprise cause by the patent system.

- improve our documentation, work with academia to better document patent cases, have young students of IP law regularly attend interesting patent hearings and report.

- communicate with the media, be available for comments whenever there is news for which we might be considered to be worth quoting, use the opportunity also to transport the general message at each occasion.

- publish calls to action where people can give us a mandate by their signature

- conduct conferences with academia and politicians to study the issues and to get our message transported
- make politicians who decide about EPLA etc aware that there is a debate on the future of the IP system
- observe legislative agendas in various parliaments, seize opportunities for motions.
- cooperate with various political parties in shaping their programs.

As PA Axel Horns warns his colleagues, the Schröder government decided, under pressure from the small coalitiion partner, to phase out nuclear energy in 30 years. It took a few decades for the ecological movement to get there. It is difficult to predict how long it takes in the case of IP system reform. The only way to find out is to do it.

5 Related Documents

- Industrial Copyright – wiki page outlining toward what kind of exclusion rights system we might want to move in the long term and collecting various proposals.
- Patent Examination Reform – argues for shift of liability burdens to the patentee, who should pay compensation to any private person who takes the trouble of finding out and pointing out the invalidity of the patent. Thereby patent examination becomes a private insurance service for those who make broad (or trivial) patent claims.
- German pirate party's patent page
- Swedish pirate party's patent page
- Previous Calls to Action ...