Action on European Software Patents

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The prospect of new law on EU software patents—defeated last summer by Parliament's rejection of the Computer Implemented Inventions (CII) Directive —is again stirring in the European Commission after the initiation of a consultation period on patent harmonization known as the Community Patent. Although the consultation did not reference software patents explicitly, it is nonetheless a potential precursor to a fresh attempt to address the patentability of software. The Commission signaled the possibility of action on software patents by noting in the consultation that EPO case law should be applied to the Community Patent. When the Commission indicated that they would not submit further versions of the CII Directive, opponents had claimed victory yet such celebration could be premature.

In July 2005, the Parliament overwhelmingly rejected a heavily amended version of the CII Directive, the original intent of which was to set in stone the existing case law-based CII patenting situation, governed by European - but non-EU - legislation. The Directive was opposed by the open source lobby, which worked for the inclusion of over 200 amendments limiting the scope of patentable inventions involving software. Software patents' future is now bundled with that of the Community Patent.

The Community Patent notion has repeatedly failed for decades in Europe. The Community Patent seeks to create a uniformly recognized and cost effective way to obtain EU patent protection, a goal over which there is little objection. Harmonization promises a number of benefits, including lower overall cost of patenting by removing onerous translation requirements. However, there have been a number of sticking points unrelated to software that have derailed the Community Patent, including the perennial Community problem of which languages ought to be used.

The current system in the EU has not prevented software patents from being awarded by individual member states, but none has been enforced or tested in the courts. States vary widely on the stringency of laws for software patents. Moreover, arguably, the EPO itself grants software patents. The European Patent Convention excluded software from patentability, but software directed to a technical process (which also makes a contribution to a technology area) is patentable as so-called "computer implemented inventions." Due to internal quality issues at the EPO, thousands of pure software patents have been granted because of this position.

If, as indicated in the consultation, EPO case law would be applied to the Community Patent, this would further institutionalize—but also harmonize—the patenting of software and software-related inventions. Given that software is already patentable as "computer implemented inventions," its inclusion in the Community Patent would create needed uniformity in software-related patent protection.

Opponents, however, point to the US's untidy experience with software patents as a cautionary tale. In an extension of these opponents' view, following the US on software could lead the EU down a path to broad business method patents, patents on natural phenomena, patents on panini. Such patenting is of course seen as suffocating to industries that typically require a lighter touch to IP protection.

In addition, anti-software patent groups believe any expansion of the patenting of software could ensnarl new patents in litigation with any of an estimated 30,000 existing software patents. Opponents also argue that EU has not demonstrated substantial changes to its patent review process in order to satisfy concerns that obvious and broad software patents are not being granted. If the more limited "computer implemented inventions" standard were to be used in the Community Patent, there is little confidence that the EPO will rigorously hold to its limited definition and not grant patents for pure software. Some smaller developers have argued that software is sufficiently protected by copyright law which protection is less expensive than patenting.

Harmonization: Disadvantages and Benefits

If harmonization proceeds without internal reform at EPO, weak patents are likely to result. Moreover, if Europe chooses to hew to the "computer implemented invention" definition, the differences between the U.S. and European approaches to software patents may cause some collisions, particularly in e-commerce technologies.

The argument that employs the US example as deterrent to all software patenting, however, is less convincing. While reforms are needed to reduce the litigation burden of weak software patents in the US, empirical evidence is lacking for the case that 20 years of software patenting has retarded American industries' dynamism. The US patent office has undertaken steps to improve the legitimacy of software patents and has opened a dialogue with the open source community, and it should be possible for the EPO to follow a similar path.

Harmonization on software patents would increase the predictability and efficiency for US companies in Europe. More than 40 percent of CII patent applications in Europe are from US firms. Harmonization of software patents in Europe has the potential to improve the competitive environment by standardizing companies' expectations.

Acting to harmonize and clarify software patentability within the EU would be better than missing another opportunity to reconcile the inconsistent treatment of software and software-related patents across Europe. The majority of the opposition's concerns about software patents can be addressed by improving how the EPO grants such patents.

Prospects

The failure of the CII Directive was in part due to the Council and the Commission's mishandling of relations with Parliament during the process. If this is corrected and the Community Patent effort can be successfully promoted as harmonization necessary for economic competitiveness, there is a faint light of hope for its success. Unfortunately, the Commission's consultation process has also drawn complaints of mismanagement. The

Foundation for a Free Information Infrastructure (FFII), a leading anti-software patent group, complained about the accessibility and vagueness of the consultation's documentation and prompted the Commission to extend the consultation period.