FSFE Response to Patent Consultation

To the European Commission's questionnaire "On the patent system in Europe"

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Free Software Foundation Europe's response to the European Commissions questionnaire "On the patent system in Europe":

http://europa.eu.int/comm/internal_market/indprop/docs/patent/consult_en.pdf

Published by Free Software Foundation Europe

Short Contents

Preface

A proposal was made, in 2002, for a directive which would have allowed patents on software ideas. This was opposed by Free Software users, consumer groups, most of European industry (SMEs), and more citizens than usually take part in the EU legislative process. It was also eventually rejected by the European Parliament in July 2005.

The conclusions which lead to the Lisbon agenda were made before these events. The patent system(s) of Europe may have seemed ready for the Community Patent in 2000. Much has come to light, and much has been learned since.

We welcome the European Commission's decision to defer the Community Patent "until the time and conditions are ripe for that effort". The current time and conditions are not right for the Community Patent, but the problems are fixable. FSFE's specific concern is about patents in the field of software, and we look forward to assisting the fixing of that problem.

FSFE would also like to note that some stakeholders with limited resources for analysis and cross-referencing issues such as this have opted not to respond to this questionnaire. We therefore expect that stakeholders with with lower resources per-stakeholder will be under-represented by the responses to this questionnaire.

Section 1

We agree, as the questionnaire states, that "the patent system ... should be used ... for the benefit of all society". Thus, like all law, it should be applied where it benefits all society, and excluded from where it would cause overall harm to society.

Where the questionnaire speaks of "breathing-space" for patent owners, FSFE would like to note that non-industrial activities of citizens must not be restricted by being designated as the exclusive "breathing-space" of a patent holder. That is to say that democratised acts, such as software development and use, and the acts of presentation and publication of information, which society is able to participate in, should not become prohibited for the purpose of giving "breathing-space" to patent holders.

Also, for clarity, we note that we do not regard the list of four patent system features as being given in order of importance.

1.1 Do you agree that these are the basic features required of the patent system?

On the the four proposed desirable features for a patent system, FSFE would like to make one modification, one clarification, and one addition.

The modification is to the first point. FSFE does not believe that overall objectives of the patent system should be compromised by (or "balanced with") "the interests of the right holders". The existence of rights holders is an artificial measure which occurs to serve the goal of the patent system. Giving power of rule-drafting to a group which is created by the rules could only yield an outcome with a clear conflict of interest.

The only balancing to be done is balancing the harm/burden to society with the benefit to society.

The clarification is that to make "clear substantive rules", the set of 21 amendments which were submitted by members of all EP parties before the July 2005 vote on the "Software Patents" directive should be used. We believe that the European Patent Convention is clear, however, the actions of the European Patent Office and the expressed will of the citizens of Europe show that it should be made even clearer by the 21 amendments being incorporated.

The addition is described in our answer to 1.2

1.2 Are there other features that you consider important?

The addition is that patent law must advance society rather than inhibit it. Innovation, when it can be driven by public interest - via public participation as well as via the market - and when it is produced in a way that the public will benefit from it, should be encouraged.

The patent system should therefore enable people to further themselves, individually, or as a business. This should go without saying, but patent law proposals such as the now-rejected "software patents" directive show that this must be explicitly kept in mind.

1.3 How can the Community better take into account the broader public interest

To better take account of broader public interest, developers of European patent policy should look at the issues from the perspective of all stakeholders.

It must be kept in mind that some fields of endeavour are the exclusive domain of large companies. The manufacture of cars and pharmaceuticals are two examples. For these domains, medium-to-large financial, bureaucratic, and legal restrictions can be justified because those who bear the burden can be expected to have the necessary financial and legal resources.

In stark contrast, in the field of software, even small financial, bureaucratic, or legal restrictions would cripple most developers of software because most developers of software are individuals, small companies, medium sized companies, or companies whose core business is not software development.

Maximum transparency, the interests expressed by the public, and the involvement of the directly elected European Parliament, is also requested.

Section 2

2.1 By comparison with the common political approach, are there any alternative or additional features that you believe an effective Community patent system should offer?

Yes. It is imperative that the separation of power, a foundation of European democracy, is maintained - and improved when possible. As such, one issue that FSFE sees is that Judges on any such "Community Patent Court" (the Judiciary) should not come from the Executive or Legislative bodies of the patents field. The mixing of legislative power into the European Patent Organisation (and executive body) is already being seen by some as the root of problems in European patent law.

FSFE is also concerned about the transfer of patent-granting power to the European Patent Office (EPO). The EPO has granted many patents contra to the European Patent Convention, and the non-legality of those patents has been confirmed by rejection of them in national courts. With this history, the EPO must clearly be given a more limited, supervised, and accountable role in the patent process.

Section 3

3.1 What advantages and disadvantages do you think that pan-European litigation arrangements as set out in the draft EPLA would have for those who use and are affected by patents?

The advantages of such arrangements can only really be judged by the content and substance. An agreement which protects Europe from the existence of software patents, either by legalisation or the granting procedure, would be beneficial because it would avoid imposing industrial restrictions on those who cannot bear such restrictions.

We feel, however, that arrangements made within the EU legislative process are more likely to produce such results.

The EU's legislative process already has problems with lack of citizen awareness and participation. Allowing the circumvention of this process for a process further removed from the people is an anti-democratic direction which should be avoided. Instead, democratic processes should be followed and ways should be sought to lower the barrier of entry for citizens and all stakeholders to participate in the legislative process.

One particular point is that any created courts must very carefully avoid conflicts of interest. Judges on such courts must not have prior history within any of the various patent offices or any organisation with a financial interest in any of the European patent systems.

3.2 Given the possible coexistence of three patent systems in Europe (the national, the Community and the European patent), what in your view would be the ideal patent litigation scheme in Europe?

FSFE would like to highlight Article 6 of the European Convention on Human Rights, particularly with regard to the right to an independent and impartial judiciary.

On litigation schemes, FSFE would like to make the comment that litigation schemes focus on dispute resolution. While this can be beneficial by creating case law, it is more important to have clear rules which can be interpreted clearly by citizens and lawyers without unnecessarily leaving open the need for court cases. Reliance on court cases favours a small section of society who can comfortably carry the legal and financial burden of carrying such a court case to it's conclusion.

Thus, FSFE would prefer that such bureaucratic barriers be avoided by the incorporating of the wording such as that from the 21 amendments proposed for the second reading of the patents directive in July 2005.

Section 4

4.1 What aspects of patent law do you feel give rise to barriers to free movement or distortion of competition because of differences in law or its application in practice between Member States?

The greatest barrier to free movement is the fear that can exist, among bodies who do not have the spare resources for defending – possibly spurious – patent litigation threats, of appearing on the radar of a patent holder.

The greatest distortion of competition is the use of industrial law against individual citizens and businesses who are not in the same industry as the patent holder.

Harmonisation could be beneficial if it included clarifications which could prevent the misreading of the EPC. To do this, the 21 amendments proposed by many MEPs before the July 2005 vote, should be incorporated.

4.2 To what extent is your business affected by such differences?

We are a user of software, and although FSFE is not in the business of developing software for profit, we nonetheless develop a lot of software because that is the normal way to use computers.

We have developed a website with a system for automatically updating new sections, we have developed infrastructure for sending and archiving email, and we have developed software for secure communication via encryption and key-signing.

Software patents could have the effect of preventing us from creating such IT infrastructures or from distributing the software we develop. Uncertainty in the law confounds this.

4.3 What are your views on the value-added and feasibility of the different options (1) - (3) outlined above?

Suggestion #1: subject matter is the core issue and must be more clearly addressed.

Suggestion #2: lacks definition and cannot be commented on.

Suggestion #3: is the most problematic of all. The conflict of interests inherent in patent offices which are funded by accepting patents would be greatly amplified as offices could compete.

Adding a validation step involving the European Patent Office would be a sham. It would have no appreciable effect on the inherent problem as the European Patent Office has the worst history of all European patent offices for expansionism/inflationism of patent law with regard to subject matter and of lowering the standard for other criteria. European Patent Office practice is the exact problem which must be addressed before there can be the possibility to create added value.

4.4 Are there any alternative proposals that the Commission might consider?

Alternatives should begin with the 21 amendments which were proposed by members of all the EP parties for the July 2005 vote. From there, a system being developed must contain separation of power, transparency, and must be accountable when it strays from it's mandate.

Also, the current financial incentive for patent offices to accept applications must be addressed. One option is to have the same fee charged for patent application reviews, whether they are accepted or rejected. The system whereby patent offices receive greater income for accepting more patents creates a system which is very close to making the patent offices "sellers" of patents. To prevent patent offices from aiming to maximise sales, checks and balances could be introduced; but there is no evidence that these could be relied on, so it seems also necessary to fix the financial incentive.

Section 5

5.1 How important is the patent system in Europe compared to other areas of legislation affecting your business?

The patent system, if stretched to cover software, would pose great danger to all European software developers (businesses and individuals), harm to Europe's software infrastructure, and distortion of competition law. Saving Europe from this harm is a high importance to FSFE.

Using the patent system is a non-priority for us, and would get an importance of 1. Participating in the administration and monitoring of the patent system is of vital importance to us because changes in patent law propose a real and serious threat, and would get an importance of 10.

5.2 Compared to the other areas of intellectual property such as trade marks, designs, plant variety rights, copyright and related rights, how important is the patent system in Europe?

On this, we would draw attention to the fact that the US Federal Trade Commission, having reviewed the overall patent system in the USA, commented that the patent system would be better if it was more selective about what subject matter is covered, and it gave a wholly negative report on the outcome of the patenting of software and Internet ideas.

As mentioned in answer to question 5.1, using the patent system is of no importance to us (1), but preventing patent legislation from becoming harmful is of very high importance (10).

5.3 How important to you is the patent system in Europe compared to the patent system worldwide?

Patent legislation in Europe is of great importance. Europe has the opportunity, starting with the 21 amendments, to introduce highly beneficial patent legislation and to become a World leader of sensible patent policy. On this, the USA missed the boat.

5.4 If you are responding as an SME, how do you make use of patents now and how do you expect to use them in future? What problems have you encountered using the existing patent system?

We are not responding as an SME, and as a software developer and user we do not have a need for using the patent system.

We would like to comment that the barriers to entry which are inherent in all patent systems are too great for participation to be economically viable for us and most European software developers. This is not a complaint and is not something we ask the European Commission to fix. Software ideas and usage should not be patentable. This is only a comment to highlight the economic absurdity software patenting.

Instead, FSFE are used by the patent system. Because FSFE develops much of its own software infrastructure, the patent system could make FSFE a target for patent litigation and a potential market tool and even a potential revenue source for others.

5.5 Are there other issues than those in this paper you feel the Commission should address in relation to the patent system?

As mentioned in the preceding answers, other issues to be addressed are the sensible exclusion of software ideas from patentable subject matter, the separation of powers which prevents distortion of law in democracies, the abandoning of the European Patent Organisation's case law, and the implementation of an accountable system with proper checks and balances.

The costs, restrictions, and burdens created by the patent system do not seem to be fully considered. Bureaucratic processes are sometimes necessary, but they slow society and must be minimised. It must be kept in mind that every patent is a regulation. Every patent is bureaucracy.

Closing comments

In closing, we would also note that we are concerned about comments in the questionnaire which refer to "the field of intellectual property". The comments made here by FSFE are on patent law. The various laws encompassed by the term "intellectual property" are so diverse and often unrelated that comments on that field as a whole must contain great misunderstandings or over-generalisations.

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