

Eurolinux Position on the Community Patent

<http://www.eurolinux.org/news/cpat01B/index.en.html>

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2003-09-21

European patent politicians tend to portray the Community Patent project as a key to progress and prosperity in Europe. The innovativity of our economy, according to this view, seems to be a largely function of cheap availability and uniform enforcability of patents throughout the European Interior Market. The Eurolinux Alliance believes that the Community Patent according to current plans would stifle innovation and harm European citizens. Instead it must not be built as an extension to the current system maintained by the European Patent Office, but as a new lean, decentral, unbureaucratic foundation in the spirit of the Polluter Pays Principle. The Eurolinux position statement comes with an online signature guestbook.

Contents

1	Appeal for a Lean and Balanced Community Patent	2
1.1	The EPO cannot be trusted to handle the Community Patent	2
1.2	Polluter Pays Principle instead of Examination Bureaucracy	3
1.3	Independence of Jurisdiction and Legislation	3
1.4	Solution to the multilinguality dilemma	4
2	Signatories	5
3	About EuroLinux - www.eurolinux.org	5
4	Press Contacts	6
5	Legalese	6

1 Appeal for a Lean and Balanced Community Patent

In its current form¹, the Community Patent directive proposed by the General Directorate for the Internal Market (EC commissioner Frits Bolkestein) poses a serious threat to innovation in Europe.

European patent politicians tend to portray the Community Patent project as an issue of vital importance to progress and prosperity in Europe. According to them, innovation and prosperity in Europe depend on the availability of a cheap patent that can be uniformly enforced throughout the different jurisdictions of Europe. We believe that this view is too much focussed on the patent owner's perspective. While the benefits of cheapness and uniformity are evident, they may be difficult to realise without adding extra burdens to citizens, on top of those burdens which are already generated by the patent system itself. Rather than just go on and on optimising the existing patent system for the benefit of patent owners, we should take a break and ask: how should a Community Patent be constructed, if it is to generate maximal public benefit at minimal public cost?

1.1 The EPO cannot be trusted to handle the Community Patent

Before patents generate any benefit, they first impose a burden on society by restricting freedom. Freedom is a primordial value of democracy and market economy, which may not be restricted without clear evidence that such a restriction benefits the public. However, old and new economic studies show that in many areas, especially those related to software, logical problem solutions and sequential innovation, patents run counter to their purpose: they tend to stifle innovation and even diminish overall property assets (by interfering with copyright) . Research in the economics of gene patenting points in a similar direction. Art 52 and 53 of the European Patent Convention reflect this common sense by limiting patentability to the field of *technical inventions*, i.e. teachings about the use of controllable forces of nature, and explicitly excluding all kinds of rules of organisation and calculation as well as discoveries and other items, whose patentability tends to do more harm than good.

The European Patent Office (EPO), which was entrusted with observing and maintaining the letter and spirit of the EPC, has however deliberately violated the law, scorned the constitutional order of the EPC member states and worked against obvious public interest for the sole benefit of the EPO itself and the patent community, thus generating legal insecurity and giving rise to public criticism and distrust in the European patent system.

It is clear that something has gone utterly wrong with the construction of the EPO. A lack of institutional balances has led to self-centeredness, unaccountability and even habitual moral insensitivity. The Community Patent can hardly be successful, if it is

¹europat_20011105-7.html

built on an unhealthy organisational foundation. Rather than granting new powers to an organisation which has already systematically abused its old ones, a new lean organisational framework with proper checks and balances should be designed.

In the following we suggest some possible elements of such a design. While perhaps not all of these will be politically acceptable at the moment, they illustrate a general direction. The point is that, however the system is designed in the end, it should be lean, decentralised and democratically controllable.

At the same time, we demand that the EPO be put under scrutiny, that those responsible for the malpractices of the EPO be disciplined and some chief culprits be removed from their posts. However this campaign should not stand in the way of the Community Patent project. The CP project should be carried out on its own foundation, free from burdens of the past.

1.2 Polluter Pays Principle instead of Examination Bureaucracy

It is time to draw consequences from the apparent failure of the examination system. After decades of futile attempts of improvement, things are only getting worse: we have ever-long periods of waiting for examinations leading to trivial and often even invalid patents.

Rather than letting a heavy-weighted office accumulate a long backlog of patent applications only to cheat the public with an invalid validity stamp, patent descriptions should just be published directly according to some formal requirements, as is already practised in France and Australia now.

In order to protect the public from unjustified patent claims, the work of invalidating such claims could be rewarded by an incentive, payable by the owner of the invalidated patent through some procedure. Like in other ecosystems, the polluter should pay, and there should be no big organisation that profits from pollution.

On the other hand, if serious patent owners need really strong validity proofs for infringement proceedings, they can raise the invalidation reward sum. This will create a market for patent validity insurance companies, which may in turn choose to perform some kind of patent examination. Many further variations, refinements and compromises on this “polluter pays principle” are possible.

If the Community Patent is to be administered through any bureaucracy at all, such bureaucracy should be operated through the national or even regional level rather than through a central authority.

1.3 Independence of Jurisdiction and Legislation

As with national patents, Community Patent jurisdiction should not be handled by patent offices but by independent courts.

Given that the European Community is currently not a full-fledged democratic state with a reliable balance of powers, restraint should be exercised with regard to creating a central European Patent Court. Even in a democratic nation state like the USA, the

creation of a central high patent court (CAFC) in the early 80s marked a turning point from a balanced patent system to an uncontrolled vicious circle of patent inflation.

Especially as far the limits of patentability (invention concept) and other questions with constitutional implications are concerned, balance rather than centralisation of judicial power is needed. Regional diversity can function as a corrective. Establishing a separate system of administrative jurisdiction over patent offices, in which public freedom interests are given a voice, could also help. Any divergences of doctrine that develop can be addressed by legislation from time to time.

1.4 Solution to the multilinguality dilemma

While the burden of having to provide translation for 22 languages may be formidable, requiring all Europeans to be fluent in English or any specific set of official languages just transfers the same burden from patentees to citizens and runs counter to the EU's professed commitment to cultural diversity.

However there seem to be some alternatives which have so far not really been considered.

Machine translations could be accepted, if they reach a certain level of reliability. By using intermediate languages such as UNL or Lojban² (Logical Language), a patent applicant can create an unambiguous semantic representation that can be reliably machine-translated into any number of languages. Such a semantic representation could moreover prove helpful in disambiguating claims and descriptions during patent litigation.

Another approach would be to stipulate that a Community Patent is potentially valid in all countries but can be enforced in each country only after a translation in that country's language has been published.

These approaches can also be combined in many ways, e.g.: machine-translated claims accompanied by a high-quality semantic representation in an intermediate language must be made available at once, perfected versions in certain national languages later or only before legal action in the concerned country.

The EU could use the opportunity to advance language computing in Europe and to establish a model for other fields.

Finally, when thinking about the problem of multilinguality costs, people should bear in mind that this problem does not exist with copyright. It is the concept of explicit claims which creates the burden in the first place, and it doesn't help much to blame Europe's linguistic diversity for the high transaction costs which any idea ownership system will inevitably impose on the public. The litigation risk associated with patents is so high that no insurance company will cover it. The larger the market, the greater the insecurity about the validity of patent claims. Thus in Europe the multilinguality dilemma is only one minor cost factor that adds up to the many reasons for adopting a restrictive approach to the question of patentability: use patents only for true *technical inventions* (new teachings of applied physical causality), and leave everything else, especially the

²<http://swpat.ffii.org/letters/lojban/index.en.html>

fruits of purely mental creation in whatever embodiment (book, computer program, electronic device, theater performance), to copyright and similar non-registration regimes.

2 Signatories

François Pelegriani (ABUL.org³)

Frédéric Couchet (APRIL.org⁴)

Stéfane Fermigier, Bernard Lang and Jean-Paul Smets (AFUL.org⁵)

Frank Dittmann (Deutsche Gesellschaft für Kybernetik e.V.)

Siegfried Piotrowski (Europa-Klub e.V.⁶)

Pascal Ricard and Sylvain Perchaud (Europe Shareware⁷)

Hartmut Pilch and Thomas Winischhofer (FFII.org⁸)

Bernhard Reiter and Peter Gerwinski (FSFE.org⁹)

(HispaLinux¹⁰)

Anne Østergaard and Erik Josefsson (SSLUG.dk¹¹)

Luuk Van Dijk (VOSN.NL¹²)

Clemens H. Cap (professor of informatics at Rostock University)

Charles Durand (professor at Université de Technologie de Belfort-Montbéliard)

Rodolphe Quiedeville (Lolix SA¹³)

Walter Lückemann (Tibosoft GmbH¹⁴)

Emanuel Raviart (Easter-Eggs SA¹⁵¹⁶)

There is also a simple guestbook¹⁷, which allows visitors to add their signature and comments¹⁸.

3 Press Contacts

France and Europe: Jean-Paul Smets-Solanes¹⁹, +33-662057614

³<http://www.abul.org/brevets/>

⁴<http://www.april.org>

⁵<http://www.iful.org>

⁶<http://www.europa-klub.de>

⁷<http://www.europe-shareware.org/>

⁸<http://www.ffi.org/index.en.html>

⁹<http://www.fsfe.org>

¹⁰<http://proinnova.hispalinux.es/>

¹¹<http://www.sslug.dk>

¹²<http://www.vosn.nl/>

¹³<http://www.lolix.com>

¹⁴<http://www.tibosoft.de>

¹⁵<http://www.easter-eggs.com/>

¹⁶20 employees, of which 15 participated in an anonymous vote on whether Easter Eggs should support this statement and all voted yes.

¹⁷<http://www.eurolinux.org/news/cpat01B/list/index.en.html>

¹⁸<http://www.eurolinux.org/news/cpat01B/form/index.en.html>

¹⁹<mailto:jp@smets.com?subject=http://www.eurolinux.org/news/cpat01B/index.en.html>

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4 Permanent URL for this PR

<http://www.ffii.org/assoc/home>

5 Legalese

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Windows is a registered trademark of Microsoft Inc.

MacOS is a registered trademark of Apple Inc.

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²⁰<http://www.ffii.org/phm/index.en.html>

²¹<mailto:jgb@gsync.escet.urjc.es?subject=http://www.eurolinux.org/news/cpat01B/index.en.html>

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