

Discussion between

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"Re: [Patents] avocats du brevet logiciel s'opposent a notre lettre"

PB

I do not agree with the arguments set forth. The anti-Americanism makes me laugh: the free model seems to me to have brought profit to the American company Red Hat, which has gone public thanks to the naïveté of developers who let themselves be seduced by the idea of freedom.

PH

Red Hat's success in the market shows that one can run a large company completely without intellectual property. Do you think that Intel is naive? They invested in Red Hat!

Besides, the value of free software to society is independent of the success of companies that represent it in the market. These companies are not the principal force behind free software, but they profit from it.

I also noticed that most of the signers came from public research institutions, funded by our taxes, and therefore lacking the concern for profitability of a commercial enterprise.

I see that many companies, not just Red Hat, but also proprietary software companies, profit from the existence of free software, and, more generally, from the existence of a public and open information infrastructure, and, of course, from an infrastructure of culture, civilisation, education, etc. It is false to say that these infrastructures are funded "by our taxes". One could as rightly say that private profit is made possible "by our public sector".

It is easy to give to the public domain that which is paid for by the citizens, and which they would normally own (cf. the rulings concerning inventions and software created by public employees, even outside of their working hours). At best, the free model looks very much like a booby trap, in which the

consequence, if one were to follow its proposals, would be a greater difficulty for creative European companies to find their place in the global market.

Even if your argument may be valid, it is too simplistic. Business is not everything. The prosperity of the information sector does not rely solely on software companies.

But your argument is not in line with the reality of most European businesses. These are small companies with 5-10 programmers who make a good living from copyright and don't want to get themselves sued by big corporations capable of maintaining legal teams and patent departments.

Let's not get hung up about this, let's trust in European creativity and learn how to encourage competitive activity without dogma...

Good suggestion, but the dogmatism seems to be mostly on your side, see below.

Most of the discussion on this list shows a great misunderstanding of the patent system. A patent is only valid if the invention is new and inventive.

... and, don't forget, has an industrial application.

Yes, there are some comments on our letter that ignore these criteria. But really, the enforcement of these criteria by the patent authorities is very unsatisfactory and unmeasurable. They have not found a way to prevent the majority of software patents from being patents on trivialities, obvious to the programmer's way of thinking, but not to the more stringent requirements of the legal system.

Algorithms, software, "ideas" that already exist or are obvious are therefore not patentable, and patents granted on them would be void. Furthermore, a patent does not prevent scientific exchanges, on the contrary. It simply allows the inventor to control the profits that result from its use.

Control = forbid others to use it.

Programming is a cultural practice, which can very well exist without any form of organisation as an industrial practice.

Industrial organisation often produces monopolies and worse results. Unfortunately, the current form of patent rights supports some behaviors that aggravate these problems, such as exclusive licensing. And a multitude of international treaties, which sovereign nations no longer have the right to change, prohibit us from improving the patent system and adapting it to the special needs of software.

Lastly, be aware that the principle of the patent as we know it came out of the French Revolution, and, contrary to what one reads sometimes, software is patentable in Europe. The EPO counts 13,000 patents granted for software.

Yes, but fortunately not yet as such. One cannot yet, therefore, sue a publisher for direct infringement. And many of the software patents granted now may be challenged under the current legal system. This system upholds our position, but practice, under the influence of the proprietary lobby, has strayed from the law.

The impassioned remarks that I read on this list are surreal! Software IS PATENTABLE, and IS effectively PROTECTED by COPYRIGHT. The fact that some creators choose to renounce the use of their rights is up to them.

Free software authors do not renounce it. But they renounce trade secrecy.

But to try to impose this choice smacks of totalitarianism.

Free software authors do not want to impose this choice on anyone.

But they do not accept being barred from programming. That is what the patent system does. Several free software programmers have been sued in the United States on the basis of a patent that they didn't know about and

from which they did not receive their inspiration. In the area of cultural practice, it is normal for many people to have the same ideas independently.

I see in the comments of intellectual property lawyers a kind of totalitarianism. They seem to think that everything of value in the world comes from the private sector and that we should privatise all aspects of life, even those where the concept of property obviously can not be easily applied. In order to apply it anyway, they create a bureaucracy of prohibitions. And if this system becomes more and more costly and impractical, too bad.

What is this, if not proprietary totalitarianism?

Personally, I see in this system all the symptoms of the Soviet disease:

- dogmatism - prohibitions - rigid institutions, removed from democratic control (in this case by international treaties) - expansionism (created by the dynamic of the legal-industrial complex) - wooden language (always the same formulaic statements without individual thought) - self-perpetuation far removed from economic and technological reality

(this assumes that these authors who pride themselves on giving up their rights really do own these rights: often, they give up rights that in fact belong to their employer or to the state. It is easy to let everyone use something that belongs to someone else...)

That is true, but it is not relevant to our discussion.

For universities, it is normal to publish the results of research so that everyone may profit from them.

Even if commercialisation is possible, it is often a bad choice, because

- the commercialised product is secret and therefore removed from the cycle of research and improvement by colleagues in the field -

commercialisation is complicated and expensive. It creates administrative costs -- especially when there is a patent system in place.

If you wish to let just anyone come in through your window to live in your apartment, you are allowed to do so, and it is generous. But from there to claim that property rights don't exist, there is a gap which intellectual honesty forbids one to jump.

I don't know against whom you make this argument. People have often tried to incriminate Richard Stallman for usurping the fruits of others (such as AT&T) in creating "only" clones. These people forget/ignore that

- cloning is done for interoperability more than for lack of inventiveness. The "market" of proprietary software is full of barriers to entry. You have to be "compatible" if you want to gain access. All new developments start out as cloning. - in many areas of programming, the work is in the details, not in some "basic research" separate from the "product" itself. - there is a lot of inventiveness in the GNU system. Also a lot of new specifications formed in the process - It is thanks to GNU that Unix continues to be an important force in the market and commercial Unix companies can make money.

These are exactly the same arguments that underdeveloped countries use against the general principle of patents.

Please cite an example! Anyway, we are not against patents in general.

Are you so unsure of our innovative capacity in Europe? Would Europe become the third world of software creation?

No, Europe has many small small companies that are very advanced in their fields. And these companies feel threatened by an American-style patent system. cf <http://www.freepatents.org/pr1.html>

Isn't it preferable to enter the game of competition on equal terms? It has been proven that innovation comes much more from new companies than from well-established companies.

Perhaps. But innovation is not a scarce resource in the field of software. It is in most cases an everyday activity. In these cases, patents serve only to hinder competition.

To try to hinder competition is a normal impulse of every business, but the public must grant privileges only if it receives something important in return. Everyday innovation does not merit such privilege. Often, it would be better to punish it, because it serves to subvert standards. Look at Microsoft's arguments in court for the "right to innovate".

New companies must still be able to combat the economic power of more established, often less creative, companies. Patents and IP rights are the only tools that permit them to fight the imperialism of corporations that dominate the market with mediocre products.

That may be possible in the case where the small company concentrates all its effort on one single technology and has no need to program in fields outside of that one. It is a rare case. In most cases, a program is a complex system that touches on many patents at once. So, most small European businesses such as exist would instead be pressured to submit to a large corporation with a large patent portfolio.

The free model is nothing but a temporary illusion, whose limitations the RedHat experience well illustrates.

What do you mean? The Free Software Foundation was founded in the early 80s, and before then open source software played an important role. With regard to Redhat, see above.

Is it not significant that the Free Software Foundation - a private American company - presents itself as the objective owner of the rights to so-called free software?

No, it does not hold those rights but it is a collective agency that defends those rights.

There are many agencies of that sort. We might also need such a collective agency for the interests of groups threatened by the patent system.

I hope that we can arrange a conference to study the possibility of limiting the negative impact of the patent system on software development.

I also hope that my explanations incite you to explore with a little less prejudice the economic reality of free software and of software in general.