

# **Openforum europe**

open, competitive choice for IT users

**EUROPEAN COMMISSION  
Internal Market & Services DG**

**Knowledge- based Economy  
Industrial Property**

**Response to Questionnaire on the patent system in Europe**

**Submitted by OpenForum Europe.**

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## **1. Executive Summary Conclusion**

Every effort should be made to improve the functioning of the present system, improving the quality of the patents granted and protecting the European Economy against monopolistic practices.

It is suggested that the present EPO system should be maintained until such time by which the complex issues involved in the development and agreement of a Community Patent system properly integrated into the European Community with full separation of powers, protecting the economic interests of the Community and individual players, small and large, have been fully worked out and agreed.

## **2. Introduction – OpenForum Europe and its View of the Market**

OpenForum Europe (OFE) is not-for-profit and independent of any organisation or company. Members include many of the largest and most influential suppliers as well as those from the user community. Whilst collating and analysing the different views of its members, OFE provides independent opinions and does not claim to represent the views of any individual member or community. OpenForum Europe is a strong visible supporter for Open Source Software but it does not claim in any way to reflect the views of the Open Source community. It is, however, fortunate in being able to draw upon the contribution, support and insight of many major companies and organisations, able to reflect diverse opinions and backgrounds.

The mission of OFE is to facilitate open, competitive choice for IT users. This is essential to achieve the vision of an open, competitive European IT market by 2010 in line with the i2010 Strategy Document. A crucial component to achieving this mission and vision lies in the development of an awareness of the value of Open Standards when specifying I.T. projects and strategies, for pragmatic business-orientated considerations, rather than any ideological perspective.

OFE is a strong supporter of the Open Source Model, which it sees as offering significant benefit in many situations. It does, however, recognise the ongoing viability and inevitability of the 'Mixed Software Economy' where proprietary software solutions coexist and are maintained alongside Open Source solutions. Such co-existence, however, requires an 'Open Environment' including full adoption of open standards for interoperability and avoidance of lock in to more hidden issues such as dependence on proprietary data formats, platforms, databases, browsers, macros etc. Choosing Open Standards maximises the future flexibility available to the specifying organisation; it ensures the organisation always remains the "owner of its own data"; it maximises the organisation's ability to encourage and then take advantage of choice and competition in the marketplace; it safeguards the organisation from being trapped by vendor lock-in; and it may often mean that the organisation can take advantage of elements of Open Source Software with industry-wide support as part of the delivery of the overall solution.

Such an 'Open Environment' provides the user with an 'Open Solution' - one which adheres strictly to international and industry standards for interoperability and data formats. Solutions which make use only of the definitions within those standards and use no proprietary extensions are considered more open than ones that do. Solutions which are hardware and platform independent are more open than those that are not. The openness of a solution can be gauged by the amount of 'lock-in' it encourages. The goal of defining openness is to reduce lock-in and dependence on a single product by ensuring that a competitive market exists with alternative solutions available from multiple sources.

OFE is actively involved in the creation of practical mechanisms to identify and remove perceived impediments to the commissioning of Open Solutions, to make the process as simple and as assured as possible for specifiers. OFE supported the recently introduced Certified Open as a mechanism which enables suppliers to identify the openness of their products to their clients and other users. Certified Open is designed to function in the 'Mixed Software Economy' in which software products of varying degrees of openness are integrated and interoperate together.

The 'Mixed Software Economy' represents reality, but also exposes the differing pressures caused from diametrically opposed basis of development, investment and business models. Nowhere is this more apparent than in the definition and application of open standards and in the treatment of intellectual property. The latter is clearly the focus of this Communication.

Representatives of the Open Source community reject any consideration that any software patent can be valid and supported. Key to this position lies, firstly, the possible imposition of limits on distribution via licensing or patent monopolies which threatens the basis of OSS licensing, and, secondly, in the barrier created for small businesses to compete and innovate in a world where patents are either not visible or are spurious. They point out that protection of the software author is already covered by Copyright.

Traditional proprietary software companies are, if anything, more fragmented in their views. Many of these companies had adopted patents on the basis of a commercial need to support and/or defend innovation, and return on investment. Others have more recently tempered this view and recognise the difficulties this could cause to small suppliers and limits to market growth, impacting interoperability and openness of IT systems. Non-application to certain sectors/uses is becoming more prevalent. A number of leading suppliers are making a practice of 'donating' a wide range of their patents to the market, creating patent pools, thus protecting some key aspects of interoperability for the future.

There is broad agreement, however, that absence of a pan European policy is a restriction and threat to European interoperability and implementation of European ICT policy, and to the growth of the European software industry. **The current US policy on allowing business method patents, often masquerading as technical software patents, is widely condemned and should not be allowed to become European policy by default.** Prescriptive and proactive action by the EC is necessary.

### 3. Patents in this Sector

In general, OFE is not against patents per se but is deeply concerned about the implications of a poorly designed Common European Community Patent System which fails to recognise the essential nature of software which, it has been shown, can be used to foster monopolistic practices which would militate against European economic interests and those of SMEs. OFE is seeking to find common ground across the spectrum of opinion about software patents from those who oppose the very concept of a software patent to those who support their use as a key part of their business practice. This can be achieved by defining common aims such as maintaining open competition and avoiding 'lock-in' and other monopolistic practices, protecting the interests of the smaller players as well as those of the larger.

It is vital to understand the essential nature of software in order to put the patents issue into its proper context. Software is composed of a series of instructions which affect data and other pieces of software to create physical and/or intellectual effects. The nearest analogy lies in DNA. A software object may consist of a multitude of components, any one of which may have been patented. Due to the inherent nature of the software process, it has become evident that certain types of software are of universal significance and can be used to create global monopolies, if patented in a particular manner. Key examples may be cited in the areas in which systems interoperate with each other and in universal file/data handling mechanisms such as

XML and data formats. Such potential global monopolies have significant effects on the ability of other players to compete and innovate. Consequently, European Patent Policy needs to be viewed in the light of competition and other policies designed to foster creativity, inventiveness and economic growth in Europe – and beyond.

There is wide-spread concern about the current American situation regarding patents on business-methods and poor quality software patents expressed by all of our supporters from all sectors of the commercial software industry, from the most independent Open Source developers to large-scale established corporations.

Recent and increasingly notorious legal actions in the United States, including NTP vs RIM ("Blackberry"), Kodak vs Sun, Eolas vs Microsoft, and others, have amplified currently held concerns across the entire spectrum of industry.

The depth of these concerns is grounded in the most fundamental essential nature of software, that inevitably any software project represents a combination of a very large number of densely interrelated intellectual elements. Each intellectual component may be abstract, capable of very different overlapping descriptions, and often associated with a comparatively low individual research/innovation cost or intellectual achievement. Especially when compared to the complexity and investment needed to achieve the successful marriage of all of the intellectual components into a fully functioning complete entity. This makes software as an industry particularly vulnerable to bad patents and bad patent policy.

In particular, software is especially vulnerable if patents are granted that confer market power out of all proportion to the individual research or innovation cost or the intellectual value of a disclosed contribution. Such imbalances are destabilising to the market industry and can threaten innovation, creativity and business growth. They may become more threatening still if the patents in question are asserted by non-producing entities ([NPEs](#), or more colloquially "patent trolls"), with no patent counter-liability to encourage them to behave responsibly or in alignment with the interests of innovation in the industry as a whole. Such unbalanced patents can also be especially dangerous in sectors of the industry marked out by a currently dominant incumbent commercial entity (which may in itself be particularly prevalent in software, due to network effects, and "lock-in" effects to retain old software compatibility), if patents are allowed to be used by such a player to anti-competitively entrench that dominance.

Finally, it is an accepted belief within the Open Source Community that in a software scenario the author's protection of rights can be maintained by copyright without recourse to patent protection. However this belief has been challenged. A legal view provided to OFE argues that Copyright protection is not adequate as it only protects the expression of the idea, not the underlying idea itself rather like using copyright to protect a blueprint – and finding other people are manufacturing your products. For example, embedded software that results in the ability to do multi-processing in a new, innovative way cannot be protected by copyright alone as if the code is re-written in a different way, the copyright will not protect the idea. The significance of this view is that the patent process is the only mechanism available to protect the inventor's intellectual property rights.

## 4. Implications

It is sometimes believed that because of the restrictions contained in Article 52 of the European Patent Convention, Europe is somehow less at risk of dangers from software patents than the United States. This is a misconception. Software-related patents have been and continue to be granted by the European Patent Office, that have the potential to be just as disruptive, and just as damaging to choice, competition and innovation, as any patents granted in the United States.

Indeed, as one of our largest corporate supporters notes, poor quality software-related patents already make reliable due diligence unachievable and practically impossible for standards-setting bodies trying to achieve readily reusable software standards. The defining difference between Europe and the United States is that so far to date there has been no continent-wide assertive litigation of such patents in Europe.

It is therefore OFE's most fundamental concern that any changes successfully simplifying and streamlining the patent litigation system, which may be highly desirable in their own terms, **\*may in practice be extremely undesirable, if they allow economically undesirable patents to be asserted and litigated more readily.\*** The consequence of the damage that such litigation could cause must not be under-estimated.

## 5. Conclusions

The recommendations, and contribution being made by OFE are based on the following key conclusions,

1. The 'mixed software economy' where proprietary and open source software coexist represent reality and any EC policy needs to reflect this position, and the viability of both business models.
2. The current US policy which is widely condemned must not be allowed to become European policy by default. However, the current position in Europe, where poor quality software patents have been and continue to be granted, have the potential to be just as disruptive and just as damaging to choice, competition, and innovation.
3. OFE is providing recommendations on the implementation of a policy which tightly controls patent application in the belief these will allow a minimum set of principles for coexistence of proprietary and open innovation models and not distort market or development choices by specifying different approaches for different technologies.
4. Our belief is that failure to do so will itself limit the overall opportunity for the European software industry. Compromise, where possible, is therefore necessary.
5. OFE is also concerned that this European software Industry must not be exclusively defined as reflecting the traditional interests of a small number of global companies who have European presence. OFE believes the needs of the SME solution providers, where 'niche' IPR present their core value attracting venture capital - and those where their value is a services led integration of solutions, must be recognised and supported.
6. Equally the policy needs to reflect forward thinking and innovative growth, not just protection of past individual large company interests.

As the recent Ranxanby vs Pfizer pharmaceutical patent cases illustrates, there is something very wrong in an Internal Market if the same product can be judged to be infringing in one territory (England and Wales), but not infringing in another (Austria).

There is also much to be said for any measures that improve legal predictability and legal coherence across the European Union, and any measures which reduce waste and miscommunication.

However, OpenForum Europe believes it is important that there are points which should not be lost in this discussion, which are of even more fundamental importance:

- A more efficient common European system, if it encourages bad (economically harmful) patents to be asserted more broadly and more aggressively, may do more harm than good. The definition of such a system will need to be very carefully defined in order to balance competing interests, and provide an effective decision making process.

- Action is urgently needed to address deficiencies in the existing system, particularly in the areas of inventive height; patentable subject matter; and the interaction of patents and standards, the proper use and acquisition of prior art in developing technologies beyond the existing patent record to prevent obvious patents.
- If a system is to be accountable, and in particular if it is to be accountable to advancing the economic and policy goals intended for it, then the overall structure must be a European Union one, part of the EU legislative/executive/judicial system, subject to review and fine-tuning within that system based on the objective of the overall economic good in the public interest. A system beyond EU oversight, drifting along on quasi-judicial autopilot, arguably has already shown how it can become increasingly inward-looking, wanting in legitimacy, and divorced from policy implications.

## 6. Summary of Recommendations

In making these recommendations OFE thanks the contribution made by its members and partner organisations who have assisted OFE in seeking a compromise position supporting both the needs of the Open Source and proprietary software communities. OFE makes four key overall recommendations as a basis for further discussion in moving to a pragmatic EC policy.

### 6.1 Inventive Height

Too many low-quality patents contain nothing of useful value; but nevertheless multiply the number of potential patent threats faced by a company (or a product, or a software standard), increase the examination overload on patent offices, and increase the difficulty and expense a company must put into researching its innovation landscape.

It would be better if a greater "inventive height" were required for a patent application to be successful. Rather than patents being awarded for any practicable concept not prefigured explicitly in the prior art, OFE believes that one approach may be to ensure that patents are awarded only for innovations which have required significant resources to research and develop thereby justifying what may arguably be a disproportionate grant of monopoly, and which actually do genuinely represent something unexpected or surprising or that would not readily be re-invented independently by someone appropriately skilled in the art.

We recognise however that this may not allow for inventions that were a result of 'a flash of inspiration' and therefore raises the question of the objective standard to be used to ascertain whether something is unexpected or would not be readily re-invented. That said, the onus must be on those proposing any extension of patentability, to show how the granting of exclusion rights in this field are economically beneficial to all industry and society and not simply the patent customer alone.

This is the required level of inventive step which on the face of it appears to be mandated by the classic word formulae of patent law; and can be found in the level of inventiveness formerly required by the German patent system before the adoption of current practice with the European Patent Convention. But it is a significantly more stringent requirement than delivered by the present formalised procedure-based requirements of current practice. OFE commends the consultation recently launched by the UK Patent Office in this regard.

Further Inventive height can only be maintained where prior art is fully and properly considered – not just the existing patent record particularly in any area of relatively new technology but especially in the area of software technology where much of the prior is in the open source community that eschew filing for patents.

## **6.2 Patentable Subject Matter**

"At the time the EPC was under consideration it was felt in the computer industry that such patents were not really needed, were too cumbersome (it was felt that searching the prior art would be a big problem), and would do more harm than good" Justice Prescott Q.C. - in CFPH

The restrictions on patentable subject matter contained in Article 52 of the European Patent Convention are there for good economic reasons, to prevent the encroachment of the patent system into areas in which it is believed that patents would do more harm than good. Lax and/or inconsistent attention to these restrictions, especially as perceived in the practice of the EPO in recent years, are therefore a cause for real concern.

The companies and organisations from which OFE gains advice and support are united in the view that there is no economically beneficial case that can be made for computer-implemented business method patents. They also welcome (at least as a minimum, in some cases) the rigorous interpretation of Art 52 EPC by the High Court of England and Wales handed down in the recent case CFPH's application, underscoring that a patent application should not be granted if its inventiveness relates only to areas of excluded subject matter. Any claimed "technical effect" (such as increased speed, or more efficient memory usage) will not save an application unless that technical effect is relevant to a non-excluded area of subject matter; and that on the contrary such an effect should be considered to relate to the excluded subject area of computer programming if (paragraph 103 CFPH) to allow the patent application would foreclose in all circumstances the use of a computer program, without limitation to the end-use to which the program was put.

Some, particularly in the open-source development community would prefer to go further, and believe that the general good would be best served by still stricter exclusion of the patentability of purely software-based techniques or representations. However, OFE notes that even just the application of the CFPH requirement across the EU would be sufficient to remove any threat of patent infringement from very many software companies and development projects, greatly improving the certainty of the legal environment for very many businesses.

Patent law could also benefit from the experience of copyright law in allowing provision for interoperability through reverse engineering to prevent barriers to innovation and creation of virtual bottlenecks in ICT systems. Original Patent law did not foresee the combined effect of patent monopolies compounded with the network effect delivered by IT and telecommunications systems.

## **6.3 Accountability**

The lack of engagement of the European Patent Office with regard to either of the long-running and deep-seated concerns above evidences the lack of open accountability to the underlying economic and policy objectives in the European patent system as presently constituted.

In a national system, such accountability would normally be achieved by the checks and balances of the usual separation of powers. A patent office, working under the general direction of the elected government executive, has its decisions and general intellectual approach subject to independent review and correction by the constitutionally separate judiciary, interpreting written law and precepts that are in turn subject to review and correction by the constitutionally separate legislature. In this way mechanisms exist to review and correct policy failures, and to ensure that policy delivery remains accountable to policy objectives.

OFE believes that a prerequisite for legitimacy, credibility and confidence in the patent system is for its structures to be embedded in a clear and transparent system of governance, reflected in matched corresponding executive, judicial and legislative structures. In contrast, the present arrangements in Europe appear to leave the EPO as judge and jury in its own court, unchallengeable and unaccountable.

As judgements in national courts have made clear, the EPO effectively has the status of a final court, unchallengeable as to its methods, practices and decisions in any other European court, including the European Court of Justice and the European Court of Human Rights; even though it would be a brave assertion to suggest that the EPO can count on personnel of the extraordinary and unparalleled experience, legal authority, and good sense expected in the members of a national supreme court.

With no countervailing European patent litigation system, there is no body of judges able to take a corrective definitive judicial view, applying the greater care and rigour to be expected from experienced judges. And due to the formal independence of the EPO from any other structures, there is only roundabout scope for legislative correction and oversight.

This would seem to indicate the need for the patent system to be re-integrated as an EU system, with judgements and executive procedures subject to judicial review up to the ultimate level of the European Court of Justice; and with a requirement on judges to uphold duly enacted European Union law (something which appears to be hard to mandate if the proposed EPLA system has an [EPOrg](#) rather than an EU basis). Furthermore, to maximise confidence, any appointments of judges tasked to deal with European wide patent litigation should be based on the principle of independence from the administrative body responsible for issuing the patents, whether at a national or European level.

## **6.4 Patents and Standards**

There is a particular danger with patents in the area of standards, because (unless the company owning the patent agrees to waive its rights) a standard containing a patent is no longer open for implementation by all-comers. To be compliant with the standard, the software must implement the patent; but implementation of the patent requires the consent of the patent owner. It is OFE's view that there must be no discriminatory constraints on the re-use of any common standard if we seek to preserve a competitive framework for European I.T.

Corrective action is required at two distinct levels, if this is to be achieved. Firstly, official and semi-official European standards setting agencies need to be much more strongly aware of the implications of patents in standards, and the importance of requiring interested participants to irrevocably renounce any subsequent discriminatory assertion of their patents, if the standard in question is to be a true standard. There should notably also be no discrimination against any particular business models, or any particular copyright licensing models. For interoperability standards, any patents present must further be made available on royalty-free terms or at least reasonable to the point where they do not act as a barrier to adoption either by developers or by end user licensing to allow open source development.

Secondly, measures are particularly necessary to prevent subsequent "patent ambush" of adopted standards by companies which previously chose not to participate and not to disclose their patents during the standards-setting process. OFE has in particular expressed its full support for the objectives behind the European Interoperability Framework for Pan-European eGovernment Services issued by IDABC and suggested a phased approach for its successful implementation.

The real and serious risk of patent 'ambushes' in common and public IT standards indicates that there is an urgent need from the EC for leadership on what steps can be taken in both the short and long term to resolve such inhibitors to progress.

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