10 September 2012

Text of letter sent to all UK MEPs on the Legal Committee

Commission proposals for a Unitary Patent system and Software Patentability

I am the chair of the Open Source Consortium, a UK based representative group for SMEs delivering services based on open source software and open unencumbered standards.

I am writing to you in your capacity as a member of the European Parliament's Legal Affairs committee.

As you will be aware, the Committee will be meeting next week to discuss the European Commission's proposal for a unitary patent system and for proposal to extend patentability of software.

Please oppose both measures by supporting amendments: 59, 80 and 81 in the first case and 63 and 64 in the second.

Unitary Patent System

In its current form, the proposal would mean that Parliament hands control over an important part of Europe's innovation policy to the European Patent Organisation (EPO).

Granting sole jurisdiction over patent disputes to the EPO poses a grave risk to due process as it removes jurisdiction to a court outside the European legal system. The European Court of Justice has already issued an opinion (Avis 1/09) that this proposal is not compatible with European Law.

Under the guise of administrative convenience the system will lead to the extension of patentability of software in Europe through current practice of the EPO. This would be despite proposals being rejected under normal scrutiny and being contrary to both the letter and spirit of European Patent Convention, Article 52 (c).
Those opposed to extending patentability of software and the wider IP legal community have common cause.

In May 2012 the President of the European Patent Lawyers Association, Dr Jochen Pagenburg wrote to President Van Rompuy to express concerns about the manner in which this proposal is being elaborated. His particular concern seem to be that the proposal would run contrary to developing:

> "a patent litigation system which would work in practice and thus become attractive for the users after its entry into force. It was the general hope of the future users that it would be affordable not only for big industry but also for SMEs as it had been promised over all those years in every document of the Commission and the Council"

We are asking you to ensure this situation does not arise by supporting amendments to the proposal by supporting amendments: 59, 80 and 81.

Software Patentability

The European Parliament has already rejected patents on software twice, 24 September 24th, 2003 and 6 July 2005. For the sake of Europe's IT economy, we ask you to stand by these decisions, and support amendments numbered 63 and 64.

In jurisdictions where patents are granted for pure software the problems arise from the quality of the patents being granted and the cost of challenging them.

Patent litigation is a rich person's game leading to outcomes that were never intended by legislatures. It is expensive to challenge decisions once obtained. For example, in the USA, Tom-Tom the small Dutch in-car navigation system manufacturer had to acquiesce to claims of infringing a patent whereas Motorola had the money and resource to overturn its validity.

The future we would face is being acted out in the USA now as illustrated by recent and current litigation:

- In Oracle v Google a case regarding rights and licensing of regarding Java, claims of infringement for a number of patents and these were either found to be invalid or inapplicable. An initial claim of of several $bn was rejected in its entirety. However tThe outcome of the case is irrelevant. Two large corporations spent a lot of money and resources litigating and that would have been impossible for smaller organisations e.g., Tom-Tom)
-

- In Apple v Samsung (despite being thrown out of Court in the UK and laughed out of Court in south Korea) the problem is not the the large

award arising from the publicly and widely reported poor practice of the Jury but the months if not years of subsequent litigation, counter litigation, appeals and other actions including looking to use the International Trade Commission as an anti-competitive device, casting a wide shadow and certainly doing nothing for competitive innovation.

I have written in identical terms to the other UK MEPs on the Legal Committee as this matter transcends political boundaries and if implemented will increase the challenges for innovative SMEs working in the knowledge economy.

I would be happy to address any further questions you might have of me.

Yours sincerely

Gerry Gavigan
Chair, Open Source Consortium
gerry.gavigan@opensourceconsortium.org