EUROLINUX meets EU legislators

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The meeting between 8 Eurolinux representatives and 3 members of the European Commission's Directorate General 15 took place on 1999-10-15 16-17 in Brussels in the DG XV office.

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1 DG XV (Noteboom, Mueller, Ravillard)

First we agree to limit the meeting to 1 hour and not to record the session on tape.

Then Mr. Noteboom introduces the action of the European Commission in order to harmonise and clarify the interpretation of software patent law and tells us he is very happy to host this meeting and that he hopes there will be more meetings. Mr. Noteboom wants a single entry point to communicate with the Free Software community.

Noteboom also points out that DG XV is not copying the US.

2 EuroLinux (Smets)

We come to introduce the EuroLinux Alliance position on software patents.

The EuroLinux Alliance is an alliance of commercial companies and open source associations concerned by the plans of the Commission to create a harmonisation directive about software patents.

Our position is:

1. We are not opposed to patents on innovative computing processes with industrial application as long as they stimulate innovation, stimulate technology transfer, increase competition, improve consumer protection and improve the safety level of information technology

2. We are firmly opposed to patents on computer programmes because this is a scientific nonsense (programmes are of the same nature as mathematical proofs) and a danger to the society (patents on programmes implementing social practices and business methods allow to get a property title on social practices and business methods)

3. We are concerned about legal strife. We think software publishers, distributors, should not come under the risk of being sued if they act in good faith. We think that open source development and the publication of source code should be protected and treated like scientific research.

3 DG XV (Noteboom)

Noteboom explains that Mr. Mueller will go to the US next week. Mr. Mueller explains that the US position to grant patents on business methods and mathematical formulas raises also concerns in the US.

4 SuSE (Pilch)

I represent SuSE. Our company is employing 200 people. We are the world's biggest Linux distributor. Linux is a major operating system whose core part was developed in Finland. It is the most widespread operating system among web sites. Linux has 25 million users world wide. The SuSE distribution is leading in quality and sales. SuSE sold about a million CDs last year. Linux experienced a tremendous growth, 178% per year according to IDC.

This is what we sell (Pilch shows a SuSE box). This package contains more than 1300 packages of different origins. About half of them from Europe. Many are commercial packages made by companies with quite a lot of people who rely on us for their distribution world wide.

Such commercial packages include:

- StarOffice, from Hamburg, one of the most serious contenders to Microsoft Office
- Blender, an advanced 3D and animation package from the biggest 3D studio in the Netherlands
- VShop, an ecommerce solution from Frankfurt, used by big websites such as Deutsche Bahn, Michael Schumacher
- Mpeg, an MPEG decoder made by Frenchmen
- Netbeans, a Java development environment from Czechia
- Sniff (Austria), Qt (Norway), Roxen (Sweden), Flagship (Germany), XOffice (France), Siag Office (Sweden)

Millions of people can install these packages worldwide. Thanks to us, there is no need for the publishers to set up their own distribution channel. We think we are like Airbus for a large section of the European Information Technology industry. We provide access to the world market and to the US market to small European companies.

Now, here is a letter from our CEO, Mr. Dyroff, explaining this in detail. (Mr. Pilch gives a letter.)

Our question is: is this (Pilch raises the SuSE box) illegal? Will this box infringe the new European patent law? As far as we see, it will. The SuSE distribution contains 1300 programmes, each of which with 1000 algorithms which may infringe with a tremendous amount of existing software patents (soon 100.000 in the US). This means that we would have to check more than 1.000.000 algorithms if we wanted to be sure this box is not an

infringement. Of course, this can not be done. On the other hand, if we don't do it, we may be sued for infringement and have to pay for the lost sales of another company.

Therefore, we would have to shut down our business or sell it to companies such as IBM. In either case, many very creative jobs would be lost.

We think that with the current law, software based inventions are already patentable in Europe. They can already force us to remove packages and this already has adverse effects on our business and on the openness of competition between different operating systems. That is very bad. But it is not as bad as having to close down.

That's why support the EuroLinux Alliance proposition.

5 DG XV (Noteboom)

Noteboom asks: How many times SuSE has been sued in the US?

Pilch replies: "Never".

Smets adds: "there is a story of a guy falling to the ground from the Eiffel tower. Someone asks him is everything fine? The guy answers everything fine, so far."

6 Infomatec (Perlzweig)

I work in the legal department of Infomatec AG. Infomatec is a technical pioneering company. Infomatec develops technology for for embedded systems. We are 500 employees.

Our strategic advantage is being one step ahead of our competitors. We could have easily patented our technological advantages but we want to focus on being one step ahead and improving our advantage rather than investing to secure what we already have.

What we already have is sufficiently protected by copyright. By the time we would get the patent, the technology would no longer be decisive in the market, so we think there is no need for patents. Moreover, we want to open the source of our products when the underlying technology is already common.

The proposed patent regulation poses a threat because it does not improve our legal security. On the one hand, we are not interested in suing others for patent infringement. On the other hand, we could not make our source code public any longer because others could easily discover patented matter in our products. This is because the mass of software code is so huge that it is impossible to be certain there are no patented algorithms inside.

The proposed patent regulation would then force use to withhold our knowledge instead of opening it when it is not cutting edge anymore.

Here's a letter from our CEO which states our position in detail.

7 Prosa (Didone)

I am Paolo Didone. I represent Prosa, an Italian company of 15 people who produce, sell and support open source software. I am one of the founders of Prosa. Our consumers include several universities, the the Vatican and many companies, especially in the telecommunications sector.

Open source software develops through a community effort by individuals and companies. It is only possible if everyone can publish and share knowledge.

We believe that this open source development process is important for the information society, and we are in line with a recent statement from Mr Liikanen. The open source process is very similar to academic and scientific research. It requires a public space where people can publish information and contribute freely, without having to fear to be infringing patent rights. If computer programs are made patentable, this can kill the open source development process. People will not be able to keep on open source development, and companies like Prosa may be forced to shut down.

Patents on programmes are dangerous for research, innovation and competition in Europe.

8 Linux-Verband (Siepman)

I am the legal specialist of the Linux-Verband (LiVe), an association of vendors and users of Linux in the german speaking area. The purpose of our association is to promote professional and commercial use of Linux and to uphold and maintain the free availability of the Linux system.

LiVe is very concerned about recent changes in the realm of patent law.

1. First of all we are concerned of de facto changes through a creeping metamorphosis of the European patent system.

2. Secondly, we are concerned about the proposed changes of the law system itself. These changes are not justified by any solid reasoning. As far as I know, no study of impact has been made to justify these changes. This lack of impact study has, by the way, been confirmed by the president of the French patent office at a recent international conference.

It seems to me that currently European legislators are disoriented and in situation of just copying American laws. The effects of patent law are just not even being taken into consideration:

1. First: the legal insecurity of software patents will be even bigger than in the area of trademark law. This will lead to law courts being swamped with pointless litigations.

2. Secondly, free software and open source will be especially vulnerable to attacks. SMEs which can not afford a patent department will be put at disadvantage. Additionally, since European enterprises are less experienced with software patenting than US companies, they as a whole will be put at a disadvantage.

Therefore I beg you to promote and conduct an open discusion of this subject on the Internet. I have been looking for this discussion but did not find anything. Therefore it is an important goal of LiVe to bring about this discussion in the coming months.

9 Net Presenter (Hoen)

I am Frank Hoen from Netpresenter, a small dutch software publishing company which invented push technology in 1995. We are a Windows company, which means we use Windows and our software is proprietary.

We have offices in the Netherlands, Germany and US. Our product is used to popularise internal corporate communication. We have 250 000 users including : Nokia, Shell, Philips, the Star Wars people and the Dutch prime minister.

In 1995, we tried to patent our software in the US but failed. Why? Because we could not pay. Even if we had patented we could not afford defend our patent. Meanwhile, other companies in the US have acquired patents in our field, and we can no longer sell our push technology software in the US, although we were the inventors of that technology. The same could happen in Europe. We could be squeezed out by multinational companies because they are the ones who have the more money in case of a lawsuit, not because they make better software.

Having no patents saves us time, money and allow us to compete better.

10 EuroLinux (Smets)

Our position is based on detailed studies, especially these here (Smets hands over a pile of printed articles, including his Software Useright study)

Our studies show a lot of potential inconsistencies in software patent law.

They are in line with these statements from Hal Varian (Prof. of microeconomics at Berkeley), Dr. Ingo Kober (President of the European Patent Office), 10 european industry leaders, Oracle, Adobe, Borland, etc

EuroLinux proposes a consensus position:

- OK for patents on innovative computing processes with industrial application as long as they satisfy the constraints of article 7 and 8 of the TRIPS treaty and article 100 of the Rome treaty
- A No-No position for patents on computer programmes

This position makes software related infringement based on contributory infringement rather than on direct infringement. Software publishers and service companies can

only be sued if they are notified first. This saves everyone from legal harassment by only allowing to attack people who act in bad faith.

This position has many advantages:

- it makes is easier for inventors and proprietors to collect patent license fees
- software publishers risk nothing as long as they accept automatic patent license fee collection
- legal costs for patent management can be lowered which makes European software industry more competitive than in the US where legal costs for patent management are tremendously high
- it creates two independent markets, one for copyright licenses, the other for patents licenses, which makes the software market much more competitive than if patent licenses and copyright licenses were always bundled.
- It makes less work for DG XV who will not need to convince the EPO to change article 52.2

It is therefore a win-win position.

11 DG XV (Noteboom)

Noteboom takes note of our position. He says that the European Law should be well designed enough for at least the next 20 years and that there are important economic issues raised in our position which should be studied by the Commission.

12 Side talks

12.1 Inventive step not an obstacle

Mr. Mueller suggests that European standards on inventive step are higher than those in the US. We explain various reasons why these standards present no real obstacle to obtaining a patent, either in the US or in Europe, and we say that we are currently filing a test patent at the EPO to prove this.

12.2 Patent organisations want to make programs patentable

Mr. Noteboom also tells us that he thinks the paragraph 52.2 of the Munich convention will be changed and the exception of programmes will be removed, although this does not depend on DG XV or EC decisions.

12.3 Utility directive may be changed

Mr. Ravillard says that he has drafted the new directive on European utility certificates without listing computer programs on the list of exceptions, but that this draft is by no means final and that it is possible that computer programs may be put back on the list.

12.4 "Equality" with Hardware or with Books?

Mr. Noteboom states that a lot of people, in the industry and in the general public, have complained that in Europe software inventions are not treated on equal terms with hardware inventions, and that the US have a more "liberal" patent law which eliminates such "inequalities".

We explain that computer programs are not like hardware inventions but much more like books. If programmes are patented, a book with a programme printed on it will be an infringement. Mr. Noteboom does not think so because he believes a book with a programme printed on it is not of the same nature as a CD or a floppy with a programme printed on it. We explain that a booke can be automatically scanned through an OCR and that the programme printed on it can be compiled and run. We also explain that even musical compositions and textbooks can be and are often constructed as computer programs and that composing these works has technical aspects, just like composing software, so that, if computer programs are to be patentable, for equality reasons, works of music and literature will also have to be patentable.

Mr. Noteboom and Mr. Mueller find this view surprising and difficult to accept. As law experts, they may never have come into contact with real computer programs, but only with shrink-wrapped software packages sold in computer shops, where, for marketing purposes, software is dressed up like hardware. Unfortunately we have no time to further deepen this issue.

12.5 No more conferences, unless hosted by Eurolinux

We ask whether DG XV would be willing to organise a conference of all the interested parties so as to further clarify remaining issues. Mr. Noteboom says that DG XV would send a speaker to a conference if EuroLinux organised one, but would not itself organise any more conferences.

12.6 EU lawmakers reluctant to innovate

We suggest that the European Union should make a patent law that is more advanced than its US counterpart, and that the IT industry's well known "winner takes all" principle also applies to IT lawmaking: The European software makers will be at a disadvantage, if the EU imitates the US, and at an advantage if the US imitates the EU. Mr. Noteboom replies that it is very unlikely that the EU can do anything that will be imitated by the US, because in general the EU lags a few years behind the US.