Katastrophe oder Reform? Kommende Entwicklungen in der Europäischen Patentpolitik

Hartmut PILCH
http://eupat.ffii.org/ont

17. April 2009

Es wird immer einfacher, breite Monopolansprüche international durchzusetzen. Ein monopolfreundlich voreingenommenes System der Rechtsetzung verschärft die Fehlentwicklungen. Zur Lösung der Probleme müssen wir ungewöhnlich weit ausholen.

Inhaltsverzeichnis

1 Probleme

1.1 Kurzfristig

2008 is poised to become the year of ratification of the repackaged EU Constitution and of an agreement for a European Patent Court which would authorise cheap and efficient enforcement of software patents. The patent establishment will then have its own patent court, by which it can decide the rules of patentability for years to come, without having

to fear embarassing parliamentary debates. Thanks to the IPR Enforcement Directive 2004/48 and to forum shopping by rightholders, the enforcement will be onerous, and thousands of ridiculous software patents granted by the EPO will become sharpened ticking bombs that destroy entrepreneurship and employment in a manner as has already happened with the Vistaprint patent.

Neither our Call for a Lean and Democratic Patent System nor our European Patent Conference nor other initiatives have so far achieved sufficient momentum to make much of a difference.

1.2 Langfristig

In the long run, the system is facing severe challenges and possibly decline. The European Patent Office (EPO) itself has eloquently expressed this thought in its 4 Scenarios report.

- The patent system is today working as a brake rather than a stimulus on innovation in many fields
- The copyright system has shown its value for promoting software development, in spite of a widespread belief that copyright is made for the aesthetic and not for the functional arts.
- The concept of patent is narrowly defined and not pliable.
  - A patent is a codified right to exclude others from implementing an idea which you were first to find or register
  - The period is set to 20 years and the rules are basically the same for "all fields of technology", i.e. an inflexible obligatory "one-size-fits-all" system.
  - Unlike copyright, patents cover the independent work of other people. The claims of patents are broad, limited only by the requirement of novelty plus a few other (mostly dysfunctional) constraints.
  - Obtaining a patent involves high costs for the applicant: (1) publication of business secrets (2) search of prior art, claim drafting, application procedures, litigation.
  - Other players have to monitor thousands of patents. It is costly if not impossible to avoid infringing on existing patents. Patent litigation, once it occurs, tends to put smaller companies out of business.
  - The costs of legal insecurity and licensing fees have been rising continuously, so that even the large companies are complaining.
  - The problems of the patent system are aggravated by an explosion in the number of patents. Globalisation brings in more and more players, e.g. from countries such as China and India.
  - With the progress of science and technology, much of the costly empirical research work has been successfully accomplished already. Much of today's innovation takes place in areas such as programming, based on well-known

models of nature, where, even though the effort behind each individual innovation is very low, the blocking effect of the concerned patents tends to be high. Typically such innovations can be described as "business methods based on beginner's knowledge of natural science". Previously it would have been possible to sort them out because they are not "technical inventions" (i.e. to not enrich the state of knowledge in natural science), but the patent world is reluctant to use this concept today, fearing that it would lead to a dramatic reduction in the number of granted patents.

- The patent system has never proven its usefulness as an instrument of economic policy. The doubts of economists about the patent system have never been refuted but only swept aside.
  - The patent system was introduced in Germany in 1877 "by lawyers and protectionists, against the will of the economists" (non-literal quote, to be verified), as Fritz Machlup, the leading economist and historian of the patent system wrote in a report for the US Congress in 1958.
  - Government-ordered reports by economists in Australia and Canada in the 1970s and 80s warned that the patent system would not promote innovation and should be rolled back or at least not extended to new fields such as genetics or software. Yet, only a few years later, the patent offices of the same countries announced extensions of patentability toward genetics and software.

- The patent system tends to become an unreformable state in the state.
  - Patent officials, patent judges and patent lawyers from the large corporations tend to form a closely-knit, powerful and rich community of gurus who are used to setting policies among themselves and who do not tolerate interference from outside.
  - the European Patent Office is a state-like entity which unifies the legislative, executive and judiciary powers in one
  - the EPO and other patent offices have enormously grown in staff. They are obliged to feed many thousand examiners and they live on the fees for the patents which they grant.
  - Even very conservative reform proposals, such as the demand that the letter and spirit of Art 52 EPC should be respected, have met extremely fierce resistance from the patent establishment. The European Parliament's majority proposed clarifications to the patentability rules in september 2003 and july 2005 which were brushed aside without discussion by the ministerial patent officials. In order to impose their own positions on the EU, these officials acted against explicit decisions of their national parliaments and even broke the procedural rules of the EU Council. They used rhetoric which was misleading in many ways.
  - Contrary to widespread popular belief, the patents granted by the European Patent Office and most national patent offices in Europe are not significantly

better in quality than the American or Japanese counterparts. In the long run, Europe is even worse off than the other two big patenting powers, because its patent system acts at an international level where democratic controls are weaker and once taken decisions more difficult to correct.

2 Lösungen

- Die nationalen Parlamente sollten durch eigene Gesetzgebung die Bedeutung der (nationalen Version von) Art 52 EPÜ in dem Sinne klar stellen, wie das Europäische Parlament dies 2003 und 2005 versucht hat (also im Sinne der Zehn Klarstellungen oder Zwei Regeln; zur Entwirrung könnte auch schon eine Streichung der redundanten "Als-Solches"-Klausel genügen)

- Entbürokratisierung des Patentprüfungssytems durch Einführung von Eigenverantwortlichkeit/Verursacherprinzip: wer die Ungültigkeit eines Patentanspruchs nachweisen kann, kann von dem umweltverschmutzenden Pantanmelder in der gleichen Weise eine Entschädigung abmahnen/einklagen, wie der Patentanmelder dies gegenüber Verletzern tun kann. Damit erhält der Patentanmelder einen Anreiz, möglichst seriöse und enge Ansprüche anzumelden. Zugleich entfällt die Notwendigkeit einer amtlichen Prüfung. Die Patentprüfung wird zu einer optionalen privaten Dienstleistung, mit der der Anmelder sich absichern und seine Ansprüche glaubhafter machen kann. Diese Reform liegt im Kompetenzbereich nationaler Parlamente.

- National parliaments must make its positions on European patent policy clear and find ways to ensure that their country's representatives in the Council of Ministers really work for these positions

- Further "patent harmonisation treaties" (e.g. ACTA, SPLT) must be avoided; the nation states and/or the European Union must retain the possiblity to adapt the system to changing needs

- The EU should build its patent system from ground up: create its own small-scale patent office and its own substantive law, e.g. by means of a Council Regulation that copies & pastes the European Patent Convention; the EU Patent Office should work like the Alicante Trademark Office; examination work should be outsourced to other organisations, including EPO and national patent offices

- The European Union must /not/ become a signatory "state" of the EPC/EPOrg, as that would mean an extra layer of undemocratic lawmaking; rather, the EU member states should withdraw from the European Patent Organisation; the EPO should become one of several service providers on the patent examination market

- The EU should not build any central patent courts; as written above, there is no real need for an official stamp of approval on granted patents, and for post-grant

jurisdiction, as for all other civil and penal jurisdiction, the supreme national courts must be the last instance; rationalisation must be sought through judicial cooperation and democratic lawmaking rather than through quasi-legislation by centralised courts; Centralised courts lack the legitimacy that can come only from a proper constitutional order.

- When a standard has been created according to certain procedures (e.g. those used by ISO, IEC, IETF, W3C etc), all involved patents must be available under reasonable license terms that do not exclude free/opensource implementations; patentees who do not explicitely participate in the standardisation process must lose any rights which they may have had with regard to the standard.

- To gain flexibility for reform of the IP system, adherence to the TRIPs treaty should no longer be a condition for WTO membership; a more flexible replacement should be found, otherwise withdrawal from WTO should be envisaged.

- Replacement of the patent system with a copyright-like "fast, cheap, narrow" IP right and possibly a set of sui generis rights within 30 years, according to a schedule of stepwise transition. Copyright and Patents could be integrated into one system. There could be special privileges (i.e. slightly broader rights, similar to patents) for those problem solutions that impart new knowledge about causalities of forces of nature.

- Create effective incentives so that make rightholders publish their identity and their licensing terms and give up or liberalise these terms earlier; e.g. do not impose any payment of copensation or damages for infringements of patents whose owners failed to clearly signal their policy; in general the longer the right lasts the more burden should be shifted onto its holder; copyright owners should, like patent owners, pay increasing annual fees, and liberal terms should be encouraged by the fee structure

- Critically review some of the pro-patent reforms of recent years, e.g. those aimed at promoting universitarian patenting or use of patents for accounting/fiscal purposes

- Change of the EU governance system such that the European Parliament alone is the master of legislation, whereas the national parliaments can, by 2/3 majority of one parliament or 1/2 majority of several parliaments, veto the Europarl decisions. The Commission becomes an executive organ elected by the member states, the Council becomes a diplomatic representation of the national parliaments; the people of the European Union should have the ultimate say through binding referenda which are conducted simultaneously in all member states; any new EU treaty that deepens or legitimates EU integration without effectively empowering the parliaments and people must be rejected; if the above can't be achieved for the EU as a whole, it should at least be achieved for the fast-moving sphere of patent/IPR legislation

3 Wie gelangen wir dort hin?

The above demands are quite far from current reality. Putting them into practise requires much more political momentum than opposing a bad directive.

Yet, the bad practise of the current patent system is continuously providing us with the opportunities for gaining momentum. We should specifically do the following:

- step by step build up the FFII into a well-organized force
- form a community of mutual assistance against the destruction of innovative enterprise cause by the patent system.
- improve our documentation, work with academia to better document patent cases, have young students of IP law regularly attend interesting patent hearings and report.
- communicate with the media, be available for comments whenever there is news for which we might be considered to be worth quoting, use the opportunity also to transport the general message at each occasion.
- publish calls to action where people can give us a mandate by their signature
- conduct conferences with academia and politicians to study the issues and to get our message transported
- make politicians who decide about EPLA etc aware that there is a debate on the future of the IP system
- observe legislative agendas in various parliaments, seize opportunities for motions.
- cooperate with various political parties in shaping their programs.

As PA Axel Horns warns his colleagues, the Schröder government decided, under pressure from the small coalitiion partner, to phase out nuclear energy in 30 years. It took a few decades for the ecological movement to get there. It is difficult to predict how long it takes in the case of IP system reform. The only way to find out is to do it.

4 Unterlagen

- Call for Better EU Patent System
- Call for Democratic Governance in the EU with patent system as test ground
- Industrial Copyright – wiki page outlining toward what kind of exclusion rights system we might want to move in the long term and collecting various proposals.

- Patent Examination Reform – argues for shift of liability burdens to the patentee, who should pay compensation to any private person who takes the trouble of finding out and pointing out the invalidity of the patent. Thereby patent examination becomes a private insurance service for those who make broad (or trivial) patent claims.