Still Knowright in 2010 Situation of European Software Creators Highlighted

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Here are some fresh impressions from the Knowright 2010 which was conducted with participation of FFII in Vienna these days. FFII already participated in Krakow in 2008 and will again participate in Krakow in May 2012.

This page is work in progress, please check it out again later.

1 Still Knowright in 2010

Jens Gaster, a copyright law scholar and policymaker at the Commission's patent unit who participated in his capacity as a scholar, both in his own presentation and in response to other presentations and questions from the audience, gave detailed explanations of the current state of the European Union Patent and Patent Court System. Read also the detailed account of Florian Müller (p. **??**) and the presentation of Benjamin Henrion (p. **??**). Member states have reached a detailed consensus, expressed in a Council document of 2009-12. Only Spain opposes, and only because it wants its language treated on a par with EN FR DE. Since the Lisbon treaty went into force, the EU has a clear mandate from its member states to establish a patent court. The treaty is not about substantive patent law and the Commission continues to maintain the line of commissioner McCreevy who said that he would never again permit the issue of software patentability to become a subject of EU legislation. This court would inherit EPO caselaw, but its judges would be independent from the EPO and in the long run develop its own caselaw, which might be less pro-patent than that of the EPO. Some pharma companies are worried because they are afraid that the new court might shoot down their trivial patents too rapidly, giving them no chance to keep up these patents with prolongation tactics.

Once the patent court is established, national parliaments are no longer free to pass clarifying legislation on Art 52 EPC. Even now such legislation would raise eyebrows,

but member states would be free to pass it. However once the EU patent court is there it is the EU patent court alone that decides about interpretation of the EPC, and even though there is no EU law in this area, an attempt of a member state to pass a clarifying law would entitle the Commission to intervene (under Art 114 TFEU). Thereby Gaster indeed admitted that the installation of the EU patent court has the effect of transferring all legislative power on substantive patent law from the member states to an international court. Moreover he admitted that the articles of the treaty that encourage the EU to establish a patent court (TFEU 118 and 262) by design give the European Parliament almost no influence both on the construction of the court and on the rules that this court sets. However Gaster does not seem to view this as a problem about which the Commission needs to be concerned right now. The fault, if any, is to be found with the Lisbon treaty and the states that signed it. Once Spain has given up its opposition and the ECJ has responded favorably, i.e. probably not later than this autumn, the Parliament will be asked to give its signature for a done deal.

2 Make Polluters Pay

Georg Jakob and Hartmut Pilch explained some of the principles of a lean and democratic patent system as advocated by the FFII.

Rather than create burdensome centralised procedures just to (presumably) make some symptoms (such as caselaw divergence in borderline patents) of a disease less costly, better focus on curing the disease.

Even centralised patent examination, for which a central authorities was founded in 1978, is no longer needed.

It would be much more effective to simply let people register patent descriptions and, a bit later, claims, and to allow freelance patent examiners (i.e. everyone) to write cease-and-desist letters by which they charge examination fees for invalid claims.

Georg presented these ideas with neat slides visualising the basic ideas of fast, cheap and narrow IP rights.

The ideas received enthusiastic comments from some scholars.

Gaster remarked that they stood in contrast to some existing treaties, such as e.g. the EPC, which could be changed only by an consensus of all member state governments.

3 Abuse of patents and competition law

Michal Du Vall from Krakow University showed that most cases of patent abuse are difficult to solve by means of competition law but could have been easily solved by not granting the (mostly shaky and software-related) patents involved.

4 A software developer's view on software patents

Peter Gerwinski showed, with a didactically well-crafted presentation, that even most of those software patents that are claimed by patent lawyers to be of "high quality"are, upon closer look at the claims, ridiculously trivial and uninteresting from the viewpoint of a software developer.

Based on a rich experience as a professional programmer combined with experience in reading patent claims, Peter has in many ways a clearer understanding of patents than most lawyers, even patent lawyers, let alone economists and other people who speak about patent policy at conferences such as these, and was able to let the audience benefit from this experience.

5 Escalatig software patent warfare in Europe

Florian Müller, founder of the Nosoftwarepatents.com campaign, gave a speech about his recent work on cases where software patents are being used in Europe for anti-competitive purposes.

6 Privacy Protection and Data Retention

Summarising the recent decision of the German Constitutional Court which declared the German transposition of the EU Data Retention Directive invalid, prof. X from Vienna explained that "Data Retention is Dead, Long Live Data Retention", i.e. that the court struck down only the transposition law but at the same time confirmed that the EU directive itself is compatible with German constitutional law, thereby making it "stronger than ever".

In the same panel, prof. Y from Finland spoke about virtual identities of citizens and managment of their identities by state authorities ("e-government"moving toward "information government") as well as data protection measures and guidelines in this area, some of them created by the EU but all unable to catch up with realities.

In the discussion it was consensually remarked that different EU Council formations create laws with different directions and that we will therefore have laws requiring more data collection alongside with laws requiring more data protection up to the point that navigating this jungle of laws becomes unfeasible.