

FTC 2002: Hearings on Anti-Competitive Effects of Patents

<http://swpat.ffii.org/papri/ftc02/index.en.html>

CALIU

info@caliu.org

english version 2004/08/16 by Hartmut PILCH*

2005-01-06

In the USA, recent trends toward extensive patentability and rigid IP enforcement laws have given rise to complaints about chilling effects on innovation and competition. In particular, concerns were raised about standardisation being disrupted by patents. Some people proposed to mandate by law that that standards be freely available and that any relevant submarine patents be disclosed early. In spring of 2002 the Federal Trade Commission conducted an expert hearing on this subject. Representatives of standardisation bodies explained that the proposed legal requirements could backfire, because they would deter companies from participating in standardisation. Some economists and programmers asked for restrictions on what can be patented or how patents can be used. Representatives of the USPTO and patent lawyers argued that everything was just fine and competition law should not interfere with patent rights. FTC has published many testimonies and reports as PDF files on its website. We are presenting an overview of these texts and what can be learnt for them for the patentability discussion.

Contents

1	2002-02-28 session	2
2	2002-03-20 and 04-11 sessions	3

*<http://www.ffii.org/~phm>

1 2002-02-28 session

We have not yet evaluated most of the speeches although they look very interesting. Just by chance we stumbled on a very statement of the IPR section head of CISCO, which shows how software patents are working.

- **FTC 2002-02-28: Second Hearing on IPR Problems¹**

Various speakers at the US Government's Federal Trade Commission dramatically point out the harm done by the patent system and in particular software patents in the US.

-

¹<http://www.ftc.gov/opa/2002/02/ipsecond.htm>

2 2002-03-20 and 04-11 sessions

The session transcripts we have read so far are the afternoon of March 20th 2002 and the morning of 11th April 2002. Here are the notes for some random documents.

IEEE²: Their patent policy is optional disclosure and Uniform-Fee-Only (UFO/RAND) commitment, following ANSI. They don't want the government to force standards to be free or to make full disclosure of pending patents required. Such requirements would be ineffective and place a further burden on standardisation participants.

Widge³: Against life (gene) patenting and DMCA. Patents may disincentive further reasearch and discourage exchange of information among scientists.

Webbink⁴: RedHat against software and biz patents. Complains of difficulty of search for prior art and too long term of patents. Does not want patents to be made stronger than competition law.

Telecky⁵: Texas Instruments feels very comfortable with patent thickets, broad patents, licensing, etc, thinks patentees should not be forced to disclose essential patents for standards. The USPTO works well but needs more funding/staff.

Stallman⁶: Speech at Cambridge (UK) 2002-03-12 see also RMS 2002-03-25: Software Patents - Obstacles to Software Innovation⁷

Sobel⁸: (I've only read the conclusion). Worried about narrowing of claims to protect competition. Proposes very strong patents

Snyder⁹: (I've only read introduction). Builds a model showing patents for drugs benefit consumers in the long run. Suggests the model could be applied to software.

Rogan (Head of US Patent Office)¹⁰: Impressive collection of common patent myths. Patents are not monopolies, so antitrust laws should not apply. Patents are more important than competition laws, since patents are in the US constitution. Expansion of subject matter is good because the US leads new subject matter worldwide. Expansion of subject matter was a great success, as can be seen from the soaring number of patent applications.

Bruce Barnes¹¹: Short text criticizing patent quality (many patents not new, not useful, not reworkable etc).

John H. Barton¹²: Worried about differences between USA and Europe in patent and competition law. Thinks european directive proposal is more restrictive than US law. Tells about ETSI patent policy for standards changed due to US corporations pressure, says a balance must be found, no opinion on how it should be done.

⁷<http://localhost/swpat/papri/rms-cam020325/index.en.html>

- John R. Boyce and Aidan Hollis (Univ. of Calgary)**¹³: Game-theoretical paper shows preliminary injunctions in trials for patent infringement cause patent inflation by incentivizing trivial patenting as a means to obtain temporary monopoly while the trial lasts, even if it is lost eventually. With preliminary injunctions, both companies in trial may get some benefit at the expense of consumers.
- John T. Mitchell and Video Software Dealers Association.**¹⁴: Possibly interesting piece on Copyright abuse.
- AIPLA (American Intellectual property Lawyers association.)**¹⁵: Unsurprising. Patent scope is adequate, antitrust laws should not “artificially” restrict patent rights, the courts should be free to decide, PTO should be given more money, etc.
- David A. Balto and Daniel I. Prywes(1)**¹⁶: Antitrust lawyer asks for guidelines for standards setting bodies. Proposes uniform-fee-only (UFO) style guidelines with few restraints on participants.
- Eric Buddington**¹⁷: Independent programmer complains about trivial patents, giving a couple of examples he’s come across. asks for abolition of software and business method patents.
- Michell A. Carrier**¹⁸: Proposes a criteria to decide when to apply antitrust law or patent law, according to the role patents or competition have in each different industry. For software it agrees that patents do not incentivate innovation, and competition does, but it says the patent system should not be changed, instead antitrust law should be applied to software patents (and other). Although it is full of citations and arguments, it seems to give no reason for not tuning the patent system so that software patents settlement and litigation problems are avoided upfront.
- GAMMAGE and BURHAM James A. Craft**¹⁹: Antitrust lawyer proposes to see whether patent pools harm competition or not by imagining whether there would be competition or not without the patent pool. Does not talk of software.
- Mark Ellis**²⁰: Nice piece on intellectual property difference with material property, and the abuses of copyright. Also explains software is information and math, and patents are unsuitable and dangerous. Points to harms of monopolism in software and music area, which are induced or aggravated by IP laws.
- Frank Fine**²¹: Review of European caselaw on essential facilities doctrine and compulsory licensing in the area of copyright.
- F. Scott Kieff (Harvard Univ)**²²: Proposes abolishing patent examination and shifting to a registration system with penalties for patents which are invalidated in court. Opposes adapting patent law to different subject matter, or investing more money on patent examination.
- Richard J.Holleman**²³: Defend current practice (ANSI like) in standards settings and opposes proposed requirements

Bob Hunt: You can patent that?²⁴: Analyses extension of patentable subject matter in the US, concludes there are no benefits to software and biz patents, asks for stronger obviousness requirements, more funding for the PTO, less burden to invalidate, etc.