

Aborted Whitehouse Study on Software Patents 1998

<http://swpat.ffii.org/papri/whitehouse98/index.en.html>

Workgroup

swpatag@ffii.org

english version 2004/08/16 by Hartmut PILCH*

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In summer 1998 a policy study division of the Whitehouse under President Clinton attempted to study the problem of failures of the patent system in the software and business method field but then was successfully pressured by IBM lobbying to desist from the project. The outlines of the project became public later.

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1 Report in GregNews

This report must be taken with a grain of salt. Gregory Aharonian¹ has been selling his patent busting services as the solution to all software patent problems and been attacking

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

“both sides” of the software patent discussion for not believing in this solution. However, Aharonian is not the only one who says that the planed Whitehouse report was given up due to lobbying by IBM.

Date: Wed, 18 Nov 1998 11:34:58 -0500
From: Gregory Aharonian <srctran@world.std.com>
Reply-To: patent-news@world.std.com
To: patent-news@world.std.com
Subject: PATNEWS: IBM kills White House software patent study

!19981118 IBM kills White House software patent study

I rarely get a chance to tirade against both sides of a patent issue, but fortunately the hypocrisy governing the software patent world manages to allow me to do so from time to time. In this case, IBM lobbied the White House to kill an (idiotic) software patent study that the OSTP (Office of Science and Technology Policy) contracted to a DC think tank. I just heard about this recently, even though it ocured last summer. Obviously certain White Housers hold my software patent studies in contempt. Last time I agree to lecture near WGBH as a favor.

Not that IBM has much choice but to fight reform. IBM supposedly pulls in on the order of a billion dollars a year by licensing its patents. The NY Times recently reported that IBM's third quarter net profits were about \$1.5 billion dollars, say 6 to 10 billion a year. Licensing thus is a substantial part of its income, royalties based on a patent portfolio of questionable validity in general. Any serious reform of examination of computing patents would significantly lower the size of IBM's patent portfolio, making it harder to use its %(q:bully-stick) licensing tactics, which would lower its profits, which would lower its stock prices. Thus the responsible fiduciary thing to do is fight patent examination reform. But the patent system isn't there for IBM's sole benefit, so for the White House to buckle under such lobbying pressure is a disservice to the American public.

2 Overview of the Proposed Study Project

*Innovating in the Digital Economy:
Patent Quality and Business Effect*

A Project of the Critical Technologies Institute

Background

The patenting system is designed to protect and foster the fruits of intellectual labor. In making the environment more secure for inventors, it increases the incentives to invent by making the potential rewards for doing so easier to capture. The presumption is that this will benefit society as a whole by making it valuable to seek applications for the invention, thereby ensuring its wide diffusion and dissemination, and by enhancing the capture of those aspects of the invention that possess the characteristics of a public good. The transaction therefore involves issuing a patent granting a limited monopoly to the patent-holder in exchange for full disclosure of the inventor's art.

It is by now a truism to note that rapid technological change is one of the hallmarks of our time. Do patents and the patenting process work as well-for both inventors and society – in current areas of innovation as they are perceived to have worked for the products and processes of the industrial revolution?

This issue has become critical in the burgeoning “digital economy” that depends on advances in software and electronic commerce, including new business models that must of necessity be implemented on computers and networks. These fields have become economically important in their own right while their products provide the motive force to the digital revolution which has transformed so many traditional industries and give birth to new ones.

Software and “business methods” pose challenges to the patent system in several respects. Innovation in these areas is often more abstract than for traditional industrial products and processes, which may make examination of applications (and subsequent litigation) more difficult. The pace of change is so rapid that the patent system is stressed to respond in a timely and accurate fashion to the requirements of these fields. The difficulty of understanding prior art is exacerbated by the wide distribution of effort and the under-documentation of state-of-the-art that are characteristic of the industry. An inability to keep up with the pace and to ensure the quality of the patents that do issue may prove detrimental to the fields' development and to the interests of inventors, investors, and society.

Typically, in the early days of an applied technology the patents will tend to be fairly broad in scope, becoming narrower as the field develops. Scope, therefore, is a major dimension contributing to a perception of patent 'quality'. A quality patent is one that is considered to be appropriate in scope for the art being claimed within the context of developments in its field. It will provide sufficient disclosure to be enabling, and the claims will be seen as a development not obvious to one sufficiently practiced in the art. Such a patent will be viewed as being defensible without dominating the possibilities

for other instantiations of the art from being developed. It will be forthcoming in a timely fashion given the needs of that branch of technology.

In the software field, the issue of patent quality is a pressing one. Concerns have been raised about quality in terms of patent scope, but also in terms of defensibility, perceived nonobviousness, degree of enabling disclosure, potentially chilling effects on both innovation and technological uptake, and of cost and timeliness. There appears to have been no systematic analysis of software patent quality to date. It is the purpose of the research outlined here to begin an initial exploration, to discover what may be known or knowable about software patent quality, and to indicate areas where further effort might be required to come to a fuller understanding of the issues.

The Study

The fact that concerns are expressed by some does not mean that there is a public policy case to be made for making adjustments in the present approach to software patenting. An assessment needs to be made about the systematic nature of complaint. How ubiquitous are the concerns? What points of commonality exist and in what areas are concerns most frequently raised? To what extent can different perceptions be attributed to the strategic and tactical positions held by the complainants?

This project has been conceived as a preliminary study of a fact-gathering nature. It is intended to

- *canvass informed opinion on the issue of patent quality in the realms of software and electronic commerce; and*
- *perform an exploratory analysis of empirical data sources available.*

The approach will emphasize taking a wide cut, providing an overview, as opposed to a more intensive case study approach.

The principal questions to be addressed are:

1. *What is the perception within the industry of the quality of patents that have been and are being issued?*
2. *What has been and is likely to be the economic cost to the private and public sectors of deficient or problematic patents?*

The project will seek to gain an understanding of the perceptions of industry practitioners and those intimately engaged in the patenting process. At the same time, objective data sources will be analyzed to shed light on the responses received. The intent is to assess effects of patents, for good or ill, on both the environment for invention as well as on the post-invention conditions for exploiting the inherent promise of the technologies involved.

3 Annotated Links

- **IBM and Software Patents²**

IBM's patent department is actively lobbying Europe to legalise software patents. They have invested millions in fighting example cases to leading European lawcourts such as the EPO's Technical Boards of Appeal and the German Federal Court in order to soften and eventually remove European restrictions on patenting software. They have also threatened European politicians that IBM might close down local facilities if software patents are not legalised in Europe. IBM has also prevented the US government from conducting studies on the value of software patents for the national economy. In the wake of the Opensource hype, IBM's rhetoric has become relatively moderate, but nonetheless it is supported by real pressure. IBM has acquired approximately 1000 European software patents whose legal status is currently unclear. Given the great number of software patents in IBM's hands, IBM is one of the few software companies who may have a genuine interest in software patentability. Once software patents become assertable in Europe, an IBM tax of several billion EUR per year may be levied on European software companies.

- **NRC 2000: The Digital Dilemma³**

The software patent chapter of this NAS report of 2000 is reminiscent of the aborted Whitehouse report of 2000, and both were slammed as "idiotic" or similar by Aharonian.. Perhaps the same people were involved.

²<http://localhost/swpat/gasnu/ibm/index.en.html>

³<http://localhost/swpat/papri/digidilem00/index.en.html>