Europe's patent crisis

Viewed in isolation, the failure of the CII Directive was not a body blow to European patent owners. The problem is that it was just the latest in a string of reverses that threaten to leave Europe's businesses way behind their global competition

By **Joff Wild**

Three and a half years after it was originally presented, the European Commission's proposed directive on patent protection for computer-implemented inventions (the CII Directive) finally died an unlamented death at the beginning of July.

Since its introduction in February 2002 as legislation designed to harmonise Europe's approach to the protection of computer-implemented inventions, the CII Directive had sparked a debate of increasing ferocity – and no little animosity – between those who saw it as an essential exercise in clarifying practice and those who felt it would lead to a US-style system of software patents. Typically, the European Parliament's decision to reject the legislation led both sides in the debate to claim success.

"This is a great victory for those who have campaigned to ensure that European innovation and competitiveness is protected from monopolisation of software functionalities and business methods. It marks the end of an attempt by the European Commission and governmental patent officials to impose detrimental and legally questionable practices of the European Patent Office (EPO) on the member states," said a spokesperson for the Foundation for a Free Information Infrastructure (FFII).

Meanwhile, the pro-CII Directive lobbying organisation the Campaign for Creativity saw it completely differently. "Today we – you! – saved patentability of computer-implemented inventions. Nothing that was patentable yesterday will be unpatentable tomorrow and vice versa. At the 11th hour the European Parliament resoundingly rejected attempts by the anti-patent groups to narrow the scope of patentability for high-tech inventions. Your businesses are safe," read a message on the Campaign's website, posted on the day the vote was held.

In some ways both sides were right. Those that opposed the Directive now know that it will not come into force. Those that supported it can console themselves with the knowledge that despite the efforts of some prominent MEPs – among them Michel Rocard, a former prime minister of France – there has been no change to the current protection regime for computer-implemented inventions in Europe. As a result, the EPO will continue to grant patents in this area even though their enforceability in different member states remains open to question.

So while there are no real winners and losers with regard to the specifics of the CII Directive, what is clear is that this was a piece of legislation that most in Europe's patent-owning community supported and that, despite this, it failed to get the approval needed to become law. If this were just a one-off case of a pro-patent intiative failing in Europe, then perhaps it would just be a case of shrugging shoulders and moving on. But it was not. Instead, the rejection of the CII Directive was just the latest in a string of reverses for patent owners that, some believe, threaten European industry's ability to compete in the global marketplace. Crisis may be too strong a word for it. Then again, though, maybe it is not.

Stalled or stopped

In 2000, European leaders meeting in Lisbon declared that by 2010 Europe should have the world's leading knowledge-based economy. In subsequent statements they acknowledged that a robust and affordable patent system was essential to this goal being achieved. And

yet since 2000, a series of initiatives – such as the Community patent, the London Agreement on Patent Translations and the European Patent Litigation Agreement, as well as the CII Directive – designed to make patenting in Europe less expensive and more certain, either have been rejected outright or have got so bogged down in negotiations that they are nowhere near being agreed. And this is taking place against a backdrop where organisations that are opposed to many of the basic tenets of patenting increasingly get their voices heard not only in the mainstream media but also in the corridors of power.

Ian Harvey is the former CEO of BTG plc and current chairman of the UK's Intellectual Property Institute (IPI), as well as being an adviser to the British government on IP policy; he believes that patent owners in Europe face real problems. "There are certain elements in Europe that have a strongly anti-capitalist view, and they have latched on to IP – and patents in particular – as a stick with which to attack big business and capitalism," he says.

Simon Gentry, who has been on the front line in Brussels over the last year heading the Campaign for Creativity's pro-CII Directive push, also sees a strong ideological element to European anti-patent sentiment. "If you do not believe in private property then you are not going to believe in patents," he says. "In the European Parliament, the Greens, the Communists and some Socialists have real problems with what they see as the ownership of knowledge, and this makes them very receptive to the arguments of organisations such as the FFII."

For those thinking this is just a problem for companies interested in computer-implemented inventions, Gentry sounds a warning. "Look at the 7th Framework Programme on EU funding for R&D projects that is being debated at the moment. Under current proposals, organisations that invent something using public money would be allowed to get a patent on it. However, the Greens are now campaigning for an amendment that would specifically outlaw such patenting."

Disconnection

But while ideology may be behind at least some of the opposition to the CII Directive and other IP initiatives, it is surely not an adequate explanation for why Europe's leaders have stood idly by as plans for, say, the Community patent and the EPLA have hit the rocks. Instead, Harvey puts it down to what he describes as the general lack of knowledge that exists about patents in Europe. "People generally just do not understand the role that patents play in developing new products and in staying competitive. There is a real disconnection between the few who do see this and the general public," he explains.

Harvey contrasts the situation in Europe with the way in which other parts of the world view IP issues. "In countries like the US and Japan, and increasingly China, patents are seen as a central plank for economic growth, and policy is shaped in a way that reflects this," he says. It is a point of view that Thierry Sueur, the vice president of IP at French company Air Liquide, shares. "In China and I was amazed to see that the teaching of intellectual property is compulsory – even at elementary schools. In a few years, everyone there will know about IP and they will use this knowledge as a means of competing. The Chinese, the Americans, the Japanese: they have no doubts about IP. Unfortunately, the Europeans do," he says.

But on a continent that is home to hundreds – if not thousands – of innovation-based global companies, as well as any number of inventive and successful SMEs, why is this the case? Ciaran McGinley, Head of the President's Office at the European Patent Office, believes it is down to the way in which patent owners put their message across. "Most people that talk about patents in Europe are insiders and that means that they discuss the subject in a very technical way and do not address issues relating to the general social good," he says. It is a situation, McGinley explains, which means many who should be actively participating in debates about the patent system are not engaged. "In most capital cities, the politicians see patents as nothing more than a technical issue and therefore as something that they do not need to be involved with."

Emphasis on owners

But if European leaders are not involved, the danger is that vital decisions about patents in Europe are left to experts who have little experience of *real-politik* and politically astute groups that have an anti-patent message which is not being effectively countered (in the debate over computer-implemented inventions, for example, anti-CII Directive groups consistently referred to it as the Software Directive, so associating the legislation with pure software, even though this was specifically declared unpatentable in the text of the Commission document).

For this situation to change, says McGinley, patent owners have to get far more active. "We do not want an expert-led patent system but

Stuck on the blocks

As other economies seek to build strong patent systems, initiatives in Europe designed to simplify the patent infrastructure and to make it more accessible have stalled.

The Community patent

A unitary right, granted by the European Patent Office, to cover the entire single market in a way that would significantly reduce the cost of obtaining protection across the EU and introduce more predictability for litigants. Although national governments have identified it as a priority, and industry organisations have given it their full backing, current negotiations are bogged down in arguments relating to translations and, to a lesser extent, enforcement.

The London Agreement on Translations

Agreed by 10 countries in 2000 and designed to cut the cost of patenting in Europe by 50% through significantly curtailing the need to translate patents into the official languages of all countries for which patent protection is designated in a European patent application.

To come into force eight countries must ratify and three of these must be the UK, Germany and France. While the UK and Germany have ratified, the French are more reluctant, citing worries about the effect the Agreement may have on the French language and its role in the dissemination of scientific knowledge.

The European Patent Litigation Agreement

The EPLA envisages the creation of a European Patent Court that would have exclusive jurisdiction to hear cases concerning actual or threatened infringements of European patents, and actions and counterclaims for the revocation of European patents, as long as the defendant were domiciled in a contracting state of the European Patent Convention. Any decision to revoke a European patent would be applicable in all contracting states to the EPLA, so making the European patent a unitary right in those countries that signed up to the Agreement.

The EPLA has yet to be ratified by national governments. One of the biggest obstacles to this happening has been the European Commission, which is reluctant to endorse the plan, on the basis that it represents only a second best option to the Community patent and may, in any case, run contrary to EU law.

CII Directive timeline

The debate around the Computer Implemented Inventions Directive went on for over three years. Here are some of the highlights of the process:

February 2002

The European Commission publishes a proposal for a Directive on the Patentability of Computer-Implemented Inventions. Under EU law, the Directive must be approved by both the European Parliament and the Council of Ministers before implementation can begin.

September 2003

The European Parliament has its first vote on the Directive and proposes a series of major amendments that would have the effect of reducing existing protection for computer-implemented inventions in Europe.

May 2004

The Council of Ministers rejects most of the amendments proposed by the European Parliament and essentially restore the Directive to its original state.

November 2004

The Polish government announces that it it can no longer support the text of the Directive agreed by the Council of Ministers because it believes the wording would introduce a US-style software patent system into Europe. This change of position means that the Directive no longer has the support necessary in the Council of Minsters for it to proceed.

February 2005

The Legal Affairs Committee of the European Parliament asks for the Directive to be sent back to the Parliament for a First Reading. If the Commission agrees, the whole legislative process would effectively begin again.

March 2005

Commission President Manuel Barroso rejects the request.

March 2005

The Council of Ministers adopts a common position on the Directive by a qualified majority, with Spain voting against and the Austrian, Italian and Belgian delegations abstaining. The Council's common position is submitted to the European Parliament for a second reading.

June 2005

The Legal Affairs Committee of the European Parliament rejects a series of amendments put forward by former French Prime Minister Michel Rocard that would have significantly watered down the common position on the Directive agreed by the Council of Ministers. The Directive moves to a full vote of the European Parliament.

6th July 2005

The European Parliament votes to reject the Directive by a huge majority of 648 votes to 14, with 18 abstentions.

one which is society-led; people have to believe in it and understand that it creates economic wealth. Companies have to get far more active in spreading this message." That means, he continues, providing detailed information on how much is being spent on securing patents; the amount of money being generated by patents; and the number of people employed as a result of patents. It is this kind of data, McGinley concludes, that really gets policy makers' attention.

Thierry Sueur, who is also the deputy chair of the patents group at European employers' organisation UNICE, agrees that this is something to which IP owners must devote more attention. "There is a lack of information relating to patents and a lack of resources dedicated to getting more. We have not been working as we should and so we have been failing to get our message out: we need to work more with economists and commission more academic work that demonstrates the importance of patents. This is what the politicians will listen to." Another challenge, Sueur says, is to get senior managers and CEOs to start talking about the subject. "They have to speak with the politicians and explain that these are not technical issues, they are about job creation and competition with the rest of the world. If politicians are convinced of this a solution will be found."

Sueur is confident that this will happen but Simon Gentry is not so sure. Although he credits last-minute lobbying from small, medium and multinational companies for the European Parliament's decision not to back amendments to the CII Directive that would have significantly reduced levels of protection in Europe, he is unconvinced that this marks a long-term change in the way rights owners will conduct the IP debate. "They are going to have to invest time and money over the next 10 years, both in Brussels and nationally, to build an understanding of IP. But my fear is that now the CII debate is over people will just go back to sleep." That, though, would be a major mistake. "There are so many groups lobbying against the patent system and their fundamental objections are not going to go away. Yet there is no organisation anywhere in Europe collecting data, marshalling academic papers, holding meetings or stimulating research on IP at a pan-European level." And that means, says Gentry, that when patent owners try prove an argument, they cannot.

The blame game

Go to any conference in which Europe's attitude to IP is discussed and you will hear at least one presentation and listen to many conversations that are based on the premise that politicians and the general public just do not understand. It is a sentimnent that few would dispute. But what is never discussed, it seems, is why. Are European leaders inherently incapable of seeing the advantages a strong IP infrastructure can bring to the continent's economy? Or is it more the case that Europe's IP owners have been disastrously poor at understanding the political process and in influencing debate? Ian Harvey, for one, believes that those in the IP community have to do a lot more. "Most IP people have tended to beam out a dry, technical message about patents. And it is one that those on the outside find difficult to understand. We have to find new ways of getting the message across that capture the imagination and demonstrate just why IP is so important: we have to start creating real value in the IP brand," he says.

Of course, to do this successfully will require financial and time commitments that until now only very few have been prepared to give. But Thierry Sueur believes there is no other choice. "We have to dedicate more resources into projecting the message. For everyone to rely on two or three colleagues, on maybe one or two full-time people, this is a nonsense," he says. It is a sentiment that Europe's IP owners would be wise to take on board. For too long they have blamed others for their current troubles. Now it is time for them to look at themselves. ■

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