Europe's anti-CII lobby should target the real enemy

The new year has begun with proposed European legislation on computer implemented inventions stalled yet again. This is testament to the highly effective efforts of anti-directive groups. If only they could see they have identified the wrong opponent, Europe's competitiveness could be greatly enhanced

Since December, events surrounding the passage of the proposed directive on Computer Implemented Inventions (CII) through the European legislative process have again descended into farce. This will come as no surprise to those who have observed the painfully slow progress made since the directive was first presented back in 2002.

In May 2004, though, it had all seemed so different. Then, the directive received a major boost when the Council of Ministers rejected many of the amendments to it that had been proposed by the European Parliament the previous September; amendments that had actually reduced the scope of existing protection to the extent that patents relating to inventions such as digital and video cameras would no longer have been enforceable.

The Council of Ministers chose to ignore the calls of the anti-directive lobby to support what MEPs had done and instead decided to overturn many of the changes that had been made. In so doing, they restored the directive so that it again fulfilled its original purpose, which was to clarify the confusion over the patenting of certain types of software in Europe in light of conflicting provisions of the European Patent Convention that seemed both to allow and disallow the practice.

But before the compromise text could go back to the European Parliament for consideration, the Polish government withdrew its previous support, meaning that the revised directive no longer had the national votes necessary to proceed. In the resulting chaos, a group of 62 MEPs opposed to the legislation petitioned for it to be completely withdrawn and rewritten from scratch. Currently, confusion reigns: something that seems to suit the anti-directive lobby very nicely indeed.

Well organised

For those who support a strong and effective intellectual property regime in Europe, the fate of the CII legislation is yet another example of how well organised and effective the opponents of increased IP protection are. They have a way of tapping into the psyche of European policy makers, as well as public opinion, that leaves their rivals standing. Something at which they excel is the personification of their campaigns. So that, for example, the message they are currently using is that the CII directive is all about giving more power to the likes of Goliaths such as Microsoft at the expense of the plucky Davids of the European software industry.

Given the Commission's recent antitrust investigation into Microsoft and the subsequent record fine of Euros 497 million imposed on the company for abusing its dominant market position in operating systems – not to mention the requirement that it provide secret server communications protocols to competitors and offer a version of Windows without an integrated media player – it seems unlikely that Brussels would concoct a piece of legislation designed specifically to benefit Microsoft. But no matter: the company is always an excellent target. Not only is it a huge and very rich corporation. It is also – God forbid – American. By claiming the legislation is all about software and aligning it with the needs of people such as Bill Gates, the anti-directive lobby successfully manages to equate it with the agenda of US big business – a beast sure to raise the ire of any self-respecting European.

Such political skill is highly admirable – if only the people and organisations that support the CII directive could display more of it – however, in this case, it is also very damaging. Because in almost every way, the anti-CII lobby is wrong. And the organisations that will suffer as a result are not the likes of Microsoft but are instead those small European businesses that the anti-lobby claims to be so concerned about: businesses that, at the moment, are operating in an environment that is heavily weighted in favour of the strong and the rich.

The need for clarity

To start with, let's be clear about one thing. The Computer Implemented Inventions directive is not a piece of legislation that, as its opponents claim, would allow pure software patents. In fact, it explicitly rules them out. Instead, it offers patent protection to inventions that use software to achieve their effect. This is something very different. Such inventions are found, for example, in cars, aircraft, mobile phones, TVs and many types of medical equipment. And far from being a bulwark against such patents, Europe has been granting them for years.

So why the need for a Directive? Basically, the wording of the current legislation is ambiguous. It seems to say that computer implemented inventions are both acceptable and unacceptable at the same time. Such ambiguity causes uncertainty and confusion. The result is that of those thousands of computer implemented inventions so far granted patent protection in Europe, more than 50% are owned by US companies – businesses that are far better versed in patent law and strategy than their European counterparts. By providing legal certainty, the aim of the directive is to provide a level playing field on which European companies can have the confidence to invest the time and effort needed to get patent protection for their inventions.

The alternative to the directive, of course, is not the abolition of patents for computer implemented inventions (something that would be impossible), but a continuation of the current situation, which is heavily weighted in favour of big multinationals, such as Microsoft, which can afford the fees to hire attorneys able to draft patents that will get through the registration process at the EPO.

So why do companies such as Microsoft support the legislation? Basically because, though they can live with the current system, they prefer the certainty that the directive would bring. It would make their lives simpler too. But this is not really about Microsoft; it is about European industry. Which is why organisations such as EICTA – which represents 10,000 companies, employing two million Europeans in the communications technology and consumer electronics industries – are so supportive. EICTA argued in November 2004 that if the CII

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directive were not approved, the consequences could be catastrophic: "European industry would lose considerable market share to those who do not invest in R&D and simply copy. Licensing of patents on computer-implemented inventions would be impossible. As a consequence, the viability of European industry would be seriously affected. Europe risks losing thousands of jobs including many highly skilled sustainable R&D jobs." Is this really what the anti-directive lobby wants?

Copyright no protection

The fact is that without patent protection, the very companies they claim to be so concerned about are highly vulnerable. Any big-time predator that likes the look of what a start-up has spent time and money in developing can basically appropriate the technology, use it in its own products and not have to face any legal consequences.

But there is copyright law, the anti-lobby protests. Well, actually, no there isn't. Copyright is the perfect tool with which to fight software piracy because this kind of criminal activity is all about literal copying. When it comes to more subtle forms of appropriation, however, copyright law is basically useless. It offers no protection at all, precisely because it requires that exact and deliberate copying be proved. In the real world, any predator with even an ounce of intelligence, decent engineers and the money to hire a good lawyer can get round this. And many do every single year.

By contrast, the broader scope of patent protection gives the innovator much greater security because it protects the idea underpinning a product, not just its literal expression. This, in turn, allows companies much greater scope to attract the capital investment needed to take products to market – something that is crucial to all small businesses.

However, the availability of patents for computer-implemented inventions would not force anyone to actually get them. If a company or an individual is opposed to patenting, then that is fine: they can publish their research and put their faith in copyright law to help out should problems arise.

After all, once something has been invented and enters the public domain, it cannot be invented again – any company seeking to get a patent on a development that is already known and understood is unlikely to succeed. Which is why, in that famous case so often quoted by opponents of the CII directive, BT failed to enforce the US patent rights it claimed to hyperlink technology: the New York judge hearing the action threw it out of court at the first hurdle. It is also why the open source movement is flourishing in the US, despite the punitive patent regime that European free software groups claim exists there.

The real problem

In truth, the anti-directive lobby does not have any real arguments against patents for computer implemented inventions *per se*. How can it when such patents so clearly protect and reward innovation? But that is not to say they do not have a few valid points to make. Where their case does have real strength is when it addresses the expense of obtaining and then enforcing patent rights in Europe, and how the current system penalises small and medium-sized companies that do not have the resources to get the protection they need.

It is nearly four times as expensive to get patent protection in Europe as it is in the US; while the enforcement system remains fragmented: you can get one decision from a judge sitting in a Munich court and a completely contradictory one delivered by a judge at the High Court in London. This causes uncertainty and undermines the idea of pan-European protection, even before you take into consideration the cost of having to go from forum to forum to litigate: in the UK especially, the litigation process can be complex and adversarial, making it difficult for smaller companies to enforce their rights without eating up a large proportion of overall income. The Community patent was supposed to solve such problems but the countless compromises over translation requirements mean that it is likely to make pan-European patent protection, if it ever becomes a reality, as prohibitively expensive as it is now.

However, these are all flaws in the patent system, not in patents themselves. It is ridiculous to remove a small company's ability to compete on equal terms with multinationals, and basically leave it with no means of protecting its investments, on the basis that it might not be able to afford to do so. Instead, surely, it makes much more sense to invest time and effort in demanding that politicians make reform of Europe's patent system a priority. Europe needs cheaper patents and a fairer way of handling patent disputes; the EPO needs more examiners to cut down on delays and more panellists to help speed up the oppositions process.

The anti-CII directive lobby has shown it is well organised and consistently demonstrates an ability to mould public and political opinion. It is also very well resourced. If it wanted to campaign on a manifesto that demanded fairer access to a European patent system designed to meet users' needs, it would find every company operating in Europe on its side, Microsoft included.