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Position Paper on Agreement on a Unified Patent Court

Insufficient legal protection for digital SMEs

The European DIGITAL SME Alliance is concerned that the Agreement on a Unified Patent Court (UPC) will undermine the legal protection of software developers against lawsuits based on possibly invalid software patents.

Under this agreement, companies may be convicted for an alleged patent infringement without first proving whether the patent in question is valid or not.

Threats to digital SMEs

The European software market is loaded with tens of thousands of software-related patents¹. Patents can cover several features in a computer program. For small and medium sized software developers it becomes increasingly difficult to avoid those patents by using alternative means. The existence of software-related patents is per se questionable: software is sufficiently protected directly or indirectly by the copyright law for computer programs under Directive 2009/24/EC.

More in general, the validity of software patents is quite uncertain when looking at the overall patent collection. More than 50 % of all oppositions or nullity procedures against software patents lead to a partial or total revocation of patents². Thus, there is no basis for trust on the reliability and completeness of the patent granting procedure.

All SMEs in the software sector can be accused of patent infringement and receive an injunction by a court. This poses a constant threat to the companies. The defence against a patent infringement lawsuit is costly and can take years. This situation is worse in countries like Germany, where the proceedings for patent infringement can lead to an injunction even though the lawfulness of the patent in question has not yet been determined. Injunctions

¹ The search for patents in the German Patent and Trademark Office containing the phrase „computer program“ in the patent claims led to 20.278 Hits on 10.11.2015.

² <http://www.epo.org/about-us/annual-reports-statistics/annual-report/2014/statistics/searches.html>: In 2014, in opposition procedures at the European Patent Office in 31% of the cases, patents were totally removed and in 38% of the cases at least partially removed

force companies to withdraw their product from the market. Years after such injunction, when the SME has accumulated huge losses, a court may judge invalid the patent in question. Hence, companies that own large patent portfolios can use the threat of patent infringement lawsuit to undermine the competition of SME software developers in the market.

Creating a long-lasting legal uncertainty

According to the Agreement on a Unified Patent Court, when ruling on an alleged patent infringement, the local and regional chambers of the Unified Patent Court will be empowered to decide in their own discretion, whether an objection for nullity of the patent shall be taken into account. The chambers will have different options:

- (a) They can decide about a counterclaim for revocation together with the question of patent infringement;
- (b) they can suspend the patent infringement process until the nullity proceeding is ruled or
- (c) they can decide about a patent infringement without considering the question of nullity.

Thus, the agreement fails to establish a legal precedence for the clarification of the validity of patents. Should the agreement come into force, it would extend the German approach of a conviction without prior clarification of the legal situation to all participating countries. Worryingly, the choice of an international agreement as operational tool will make it very difficult to review the content of the agreement over the next decades, thus worsening the consequences and perpetuating the damage to SMEs in the digital sector.

Unconstitutional rules of procedure

According to the agreement, an administrative committee composed by representatives of the signatory countries will be alone responsible for setting up the rules of procedure of the new Unified Patent Court. The rules of procedure deal with numerous matters of the procedure that concern the procedural rights of the parties.

The definition of this set of rules that regard the basic rights of the parties without democratic legitimation by the parliaments is, for countries like Germany, even unconstitutional.

Fragmentation of legal positions

Croatia, Poland and Spain are not signatories of this agreement.

The requests of the European DIGITAL SME Alliance

Digital SMEs need a European patent system that protects them from the attacks of owners of extensive portfolios often based on unlawful software patents. For small and medium sized software companies it is essential that the patent system prevent the implementation of questionable patents. Thus, the procedural law should ensure a complete examination of the patent, prior to the decision on conviction for an alleged patent infringement. An EU wide patent system should be based on EU law and not on an international agreement.

About the European DIGITAL SME Alliance

The European Digital SME Alliance (former PIN SME) is an association formed in 2007 to represent the interests of Europe's ICT SME sector. Currently ten national and regional associations are members, representing tens of thousands ICT SME companies in Europe. The European Digital SME Alliance aims to ensure that ICT SMEs get *talked to* rather than just *talked about*. It provides a voice for ICT SMEs in the policy and business arenas and is already represented in several EU expert groups and taskforces.

Membership

BASSCOM – Bulgarian Association of Software Companies (BULGARIA), CNA -Comunicazione e Terziario Avanzato, Confederazione Nazionale dell'Artigianato e della Piccola e Media impresa (ITALY), UKITA, United Kingdom IT Association (GREAT BRITAIN), CONETIC – Confederación Española de Empresas de Tecnologías de la Información, Comunicaciones y Electrónica (SPAIN), BITMi – Bundesverband IT-Mittelstand (GERMANY), GPNI – Groupement Professionnel National de l'Informatique (FRANCE), it-forum midtjylland (DENMARK), SwissMedia – Swiss IT & Multimedia Association (SWITZERLAND), Belgrade Chamber of Commerce, IT Association (SERBIA), Vojvodina ICT Cluster (SERBIA), STIKK – Kosovo Association of Information and Communication Technology (KOSOVO), Balkan and Black Sea ICT Clusters Network (ALBANIA, BOSNIA AND HERZEGOVINA, BULGARIA, GREECE, MONTENEGRO, ROMANIA, SERBIA, KOSOVO, TURKEY, REPUBLIC OF MACEDONIA, UKRAINE)