

July 12 hearing on European patent policy
Florian Mueller speech manuscript

Ladies and Gentlemen,

Some of you may already know me as the founder of the NoSoftwarePatents campaign, but let me start by introducing myself a little more specifically. I'm an independent software developer. Commercial software, that is - not open source. In addition, I am here to represent three companies: 1&1 Internet AG, which is Europe's largest Web hosting company; Materna GmbH, an IT and telecommunications company; and MySQL AB, Europe's largest open source software company. All three of those companies hold European software patents and are well aware of the problems that patents create in their markets.

My corporate partners and I definitely don't share the enthusiasm for the EPLA that some others have expressed.

All that talk about optimizing the European patent system is nothing more than a pretext. Only in five to ten percent of all cases, parallel litigation involves the same patent in more than one European country. In all other cases, even the estimates of the proponents of the EPLA - such as an impact assessment by the European Patent Office - suggest a doubling or tripling of the total cost of litigation. That would disadvantage smaller companies in two ways: the prospect of expensive litigation would force them to settle on unreasonable terms if someone threatens to sue over an alleged infringement, and if they would like to enforce their own patents, they might not be able to afford it. In some industry segments, the patent system already has the effect that "might makes right", and the EPLA would exacerbate that very problem.

The actual motivation behind the push for the EPLA is this: it's all about handing control over the judicial system - as far as patents are concerned - to the same group of people that governs the European Patent Office. Many patents that the EPO grants are declared unenforceable by the national courts that presently rule on infringement matters and make the final decision on the validity of a patent within their territories. In particular, national courts don't tend to support the EPO's practice of granting disguised software and business method patents. That fact is the only reason we don't have US-style problems with software patent litigation in Europe yet.

There are special interests that previously tried to make software and business method patents enforceable in Europe, and a little more than a year ago, the European Parliament put an end to that effort by rejecting an ill-conceived proposal for a software patent directive. The EPLA is just another attempt to give software and business method patents a stronger legal basis in Europe than they have now.

Under the EPLA, the same group of people who control the EPO would get to appoint, and to periodically reappoint or dismiss, the judges. That same group negotiated the rejected software patent proposal in a working party of the EU Council, so we know all too well where they stand: they are infinitely more interested in growing the patent system than they are committed to Europe's economic growth. Even worse, employees of the EPO would be allowed to serve simultaneously as judges on the EPLA court. For the sake of judicial independence, the proposed EPLA must not come into effect.

From a software patents point of view, the EPLA would have far worse consequences than the rejected patentability directive would have had: not only would software patents become more enforceable in Europe but also would patent holders in general be encouraged to litigate.

If the objective is to make Europe's economy more competitive, we don't need a system that makes litigation a more attractive option. We don't even need cheaper patents: if SMEs have problems with the patent system, it's not because of their own access to patents but due to the patents others can use against them. What we really need is fewer patents, and I don't see a strategy on the part of the Commission to counter the trend of patent inflation.

Last year, the EPO received more than 180,000 patent applications. If the past is any indication, those 180,000 applications will result in about 90,000 new patents. (The EPO granted "only" about 50,000 patents last year, but that's because it has a backlog and hasn't been able to catch up yet. Examination takes several years.)

The fewest of those new patents relate to true inventions that justify the grant of a 20-year monopoly. In most cases, someone invented a patent instead of patenting an invention. Addressing that problem should be a far higher priority to the Commission and to Europe's legislators than strengthening the position of certain types of patent holders.

Thank you.