

We are grateful for the Bundeskartellamt's work regarding the proposed creation of CPTN Holdings LLC as a joint venture by Microsoft, Apple, EMC and Oracle. We highly appreciate that the Bundeskartellamt is actively gathering the views of market participants, and are taking the opportunity to provide the following input according to the best of our knowledge of the situation.

Due to the short time afforded for an answer, we are only able to provide a preliminary assessment. In our effort to support the competition authorities in their mission, we are further hampered by a lack of publicly available information on various aspects of the planned transaction, such as the patents being sold, or the details of the proposed licensing arrangement between Attachmate and Microsoft.

1 Effects on FSFE's activities

In which way could in your view the CPTN-Transaction have effects on your activities?

Free Software Foundation Europe is a non-profit, charitable organisation dedicated to the promotion and spread of Free Software, which is a basic necessity for a free information society.

Free Software has a key role in today's society, providing the basis for the Internet and the World Wide Web. As detailed in our original statement of concerns to the Bundeskartellamt on December 22, 2010, Free Software is pervasive in both the public and the private sector, and acting as the innovative underpinnings for much of the IT industry.

From this perspective, we are highly concerned that the proposed transaction would create a climate in which Free Software would likely fail to thrive and reach its full potential. We fear that the transaction would

- further increase the already substantial business risk from patent litigation for independent software developers as well as small and medium enterprises (SMEs);
- cement the dominant positions of the CPTN partner companies in their respective fields;
- lead to a further concentration of market power in the hands of companies which already hold a dominant position in their respective fields;
- and allow the CPTN partner companies to leverage their dominance in a number of fields into new areas, such as mobile technology.

While FSFE itself does not produce or distribute significant amounts of software, our mission to promote and spread Free Software would suffer a serious blow if the already rampant patent litigation activity against Free Software would be further stepped up. Beyond FSFE's own mission, we are concerned about the effects of the transaction on the Free Software ecosystem as a whole.

2 Microsoft

How do you evaluate the modifications to the transaction according to which Microsoft will not acquire any patents but just patent licenses for the Novell patents?

Though the questionnaire does not specify this, it is our understanding that the patent license from Attachmate to Microsoft will be a non-exclusive license. Anything else would be equivalent in effect to having the patents held by Microsoft directly.

The modification of the transaction regarding Microsoft perhaps reflects the thoroughness with which the competition authorities have assessed the transaction, and their discussions with the CPTN participants. We welcome the scrutiny exercised by the competition authorities with regard to this transaction. From our point of view, the value of this modification is hard to assess without information

on the details of the planned arrangements between Attachmate and Microsoft. *We regretfully note that the modification does very little to allay our concerns about the potential uses of these patents to limit competition* in a number of product areas and geographic markets.

Even a non-exclusive license for Microsoft to the patents in question would be likely to strengthen Microsoft's dominant position in desktop operating systems and desktop productivity software.

Furthermore, there is no information available on the degree to which Microsoft's commitment to pass the patents on to Attachmate is binding. More to the point, there is no assurance that Attachmate will not simply choose to sell the patents on to any interested party after the dissolution of CPTN.

Attachmate is privately held, and the company's investors have no reason to refrain from selling the assets on at any time if they so desire. The company has no known track record in the field of Free Software, which makes its future behaviour even harder to predict.

The proposed modification also fails to address the *concerns*, voiced in our original submission from December 22, 2010, *that the sold patents will be used to engage in disruptive litigation against users and producers of Free Software, or the threat of such litigation.*

An uncomfortable precedent is provided by the various lawsuits pursued by SCO¹ against companies using and distributing the GNU/Linux operating system. While SCO's claims to hold copyright to part of the GNU/Linux operating system was eventually ruled baseless, the lawsuits served to create a climate of fear, uncertainty and doubt, slowing the adoption of Free Software as a consequence. Microsoft's history, as detailed in our original submission from December 22, 2010, of using undisclosed patent claims to pressure device makers into licensing agreements over their use of Free Software in their products, is a particular cause for concern. Depending on the nature of the patent license given to Microsoft by Attachmate, Microsoft could engage in such litigation itself. There could also be an arrangement between Attachmate and Microsoft to this effect.

Our concerns would be allayed if Attachmate, along with Microsoft and the other CPTN investors, were to issue a legally binding statement not to assert Novell's patents against Free Software, making its patents available for unlimited use in Free Software, including under GPL and other copyleft licenses. This would merely formalise the status quo, under which Novell chose not to assert its patents against Free Software implementations.

Under the proposed arrangement of the transaction, the sold patents and patent applications would remain subject to all licenses, covenants not to sue, and similar restrictions. In keeping with this approach, we merely propose to add one more restriction in order to preserve the status quo, namely that Attachmate should enter into a binding commitment to make the patents available under conditions that allow their implementation in Free Software, including under the GNU GPL.

3 EMC

On the basis that EMC will not acquire the above-mentioned 31 patents relevant for virtualization – would you still expect any negative impact of the transaction in this field?

This question is difficult to answer without knowing the patents concerned, or their relative value to companies which are active in the field of virtualisation.

We would in particular be interested in learning how those 31 patents were selected; by whom they were selected; and who will receive those patents in EMC's stead.

Similar concerns apply here as those raised under Question 2 with regard to Microsoft. With a

1 As a starting point, see http://en.wikipedia.org/wiki/SCO_Group#SCO-Linux_lawsuits_and_controversies

substantially strengthened patent portfolio, EMC would be in a better position to threaten Free Software competitors, or even take legal action against them. Hence we recommend to use the same remedy here as proposed under Question 2, namely ask EMC to commit, in a legally binding fashion, to not using the acquired patents against Free Software.

4 Concerns by product and geographic market

If according to you the transaction raises concerns, please explain in detail, which of the CPTN-Investors would acquire or strengthen its dominant position on which product and geographic market?

This is hard to assess in detail, as vital information about the transaction is not publicly available. This concerns in particular the list of patents to be acquired by CPTN. There is also a marked lack of clarity on how the patents will be distributed among the CPTN participants, and on the nature of the "serpentine draft process" referred to in the questionnaire.

Even without more detailed information, it is clear that the acquisition of Novell's patents will allow the CPTN participants to confirm and perhaps increase their dominant position in different markets. While it is not possible to make a definitive judgement without knowing the patents to be transferred, we can assume that each CPTN participant will select those patents that are of the greatest interest to it. These will likely be those patents that either strengthen the participant's dominance in a given product area or geographic market, or allow the participant to leverage existing dominant positions in one area or market to another.

Microsoft holds a dominant position in desktop operating systems and office productivity software, in nearly all markets around the world. Any patents transferred from Novell into CPTN in this space would serve to bolster Microsoft's near-monopoly position, and allow the company to further leverage its dominant position into other areas, such as the mobile space.

Oracle acquired a strong position in middleware with the purchase of Sun, in particular with Java. Oracle is currently actively enforcing Java-related patents in court against the Android mobile operating system, which is distributed under Free Software licenses.

Apple is also currently actively enforcing its patents against the Android mobile operating system, while defending a leading market position for its own iOS mobile operating system.

The mutual cross-licensing which is an inherent part of the modified CPTN transaction makes clear that the CPTN investors are keen to reduce competition among themselves, while excluding others from using the technologies in the Novell patent portfolio.

5 Further remarks

Are there any further remarks or aspects for the competitive assessment of the CPTN-transaction which you would like to bring to our attention?

As we have detailed above, a lot of the factors that will determine the transaction's impact on competition in the various markets affected remain unknown. We therefore consider it important that the details are properly examined and their impact assessed before allowing the transaction to proceed.

While we appreciate the close attention with which the Bundeskartellamt is analysing the transaction and its consequences, we regret to note that modifications to the transaction fail to address most of the concerns expressed in our original filing from December 22, 2010:

- We requested that the list of patents to be sold should be made publicly available. The list has

not been published, largely preventing us from commenting in detail on specific competition issues which may arise as a consequence of the transaction.

- We asked for a specific provision which would (legally) oblige new patent holders to allow their use in programs distributed under the GNU General Public License and other copyleft licenses. No such provisions have so far been introduced, nor are equivalent measures in place to prevent substantial damage to competition in the software market from arising as a consequence of the transaction.
- We voiced our concerns regarding the behaviour of Microsoft during and after the transaction. The modification of the proposed transaction, under which Microsoft will sell its patents on to Attachmate and only retain (exclusive? non-exclusive?) licenses, fails to ensure even a preservation of the status quo exemplified by Novell's defensive stance on patents. Instead, the transaction will still result in a boost to Microsoft's dominant position in desktop operating systems and office productivity software in most geographic markets, and further enable the company to leverage its dominance in those areas into the mobile space.

However, we do appreciate the added clarity provided regarding the structure and governance of CPTN.

We believe that the transaction and its financial aspects merit further scrutiny. In particular, the financial relationship between Attachmate and Microsoft should be investigated. The price which CPTN is paying seems very high for the patents on offer. Novell's original SEC proxy statement show that previous bidders were offering substantially less for the company's patent portfolio than the USD 450 million which CPTN agreed to pay.² The CPTN investors will clearly be hoping to recoup this outlay. Given that they are offering much more money for the patents than previous bidders, it is natural to ask whether they are planning to recoup the acquisition price in ways that are not available to other bidders lacking the specific market positions of the CPTN investors. This consideration gives us cause to be concerned about the lack of transparency in the setup and financing of the CPTN joint venture.

We are also convinced that conditions need to be imposed to safeguard competition in the various affected software markets, by making the patents available for implementation in Free Software, including under the GNU GPL and similar licenses.

In order to be effective, such conditions would need to stipulate that the patents should be made available for implementation in Free Software without requiring implementers or distributors to pay royalties. Per-copy royalties are fundamentally incompatible with the GNU GPL, which is the most widely used Free Software license, and covers key programs such as the Linux kernel and much of the GNU operating system.

One of the key characteristics of the GPL – and a central reason for its effectiveness – is that it prohibits the licensor from imposing on the licensee conditions above and beyond those of the license itself. A requirement to pay royalties to a patent holder would be such an additional condition. Requiring distributors of software to impose such conditions on recipients would require distributors to violate the license. This concerns in particular the Linux kernel, which is the core component of both the GNU/Linux operating system and the Android mobile operating system. Both those systems are key competitors in their respective fields, the desktop/server area dominated by Microsoft, and the mobile

² Recent events also provide the opportunity for a loose comparison. On April 5, 2011, it was widely reported in the press that Google is planning to acquire a portfolio of 6,000 patents from Nortel, a telecommunications company. Google is offering USD 900 million for the entire portfolio. This would indicate a value of USD 150,000 for the average Nortel patent. In comparison, CPTN is offering USD 450 million for 882 patents, valuing the average Novell patent at USD 510,000. Although the value of any particular patent is notoriously difficult to determine, we find it hard to believe that the average Novell patent really is 3.4 times more valuable than the average Nortel patent.

space, where Apple's iOS leads on market share.

In closing, we should like to thank the Bundeskartellamt for its detailed attention to the transaction, and applaud its effort to take into account the views of market participants. We remain available to support the Bundeskartellamt's work in this matter.

With kind regards

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