

Free Software Foundation Europe (FSFE)

Statement to the 14th session of the Standing Committee on the Law of Patents (SCP/14) – Opposition Systems – Geneva, January 25-29, 2010

We thank the Secretariat for the valuable overview of opposition systems provided in document SCP/14/5. Free Software Foundation Europe that in technology, and software in particular, functioning and accessible pre-grant opposition systems are vital.

Those jurisdictions which allow for the patenting of software, frequently see patent applications relating to technology where substantial prior art exists. All too often, such patents are granted.

As just one example, in November 2009 the US Patent and Trademark Office granted a patent on a procedure to temporarily give a normal computer user administrative rights. This technology has been in use in UNIX systems since 1980, and today forms an integral part of both GNU/Linux and Mac OS/X operating systems.

Another example is a patent on one-click ordering which was granted to the online book-seller Amazon in 1999. This technology had in fact been developed and used by Hearst corporation in 1995.

When the developer of the one-click ordering technology was later asked why he hadn't patented this "invention" himself, he replied: *"It only took me an hour to build. If I went down to the patent office after every hour of programming, I wouldn't get very much done."* [\[source\]](#)

Besides illustrating the fundamental difficulties of granting patents in such a complex and dynamic field of software, such incidents negatively affect everyone concerned: A monopoly right is granted where it should not have been. The patent holder, licensees and third parties will have less faith in the quality and reliability of patents in the future.

Most importantly, numerous parties who have based their business around a technology which was freely available at the time will be negatively affected, leading to a subsequent decrease of innovation and economic activity.

This harmful effect can in part be mitigated by providing third parties with an easy means to stay up-to-date on recent patent applications in combination with a well-defined, low-cost process for third parties to submit information which may affect the granting of a patent.

But even the most well-designed process would take a substantial toll on any innovator or SME, as the subject matter is complex, takes highly educated personnel and thus draws upon the very same scarce resources that SME and innovators require to innovate. This is one of the ways in which the patent system can stifle innovation, and one of the mechanics that inherently favour larger entities.

It would therefore be essential to provide SMEs and small innovators with an incentive to provide this crucial input to the patent offices in order to facilitate their research or else the process is in danger of becoming an obstacle to innovation itself.

This cost would have to be borne by the patent system itself, and would need to take the shape of a redistribution mechanism from larger to smaller entities, a mechanism that will be very

hard to get right.

Whether the creation and maintenance of such a mechanism is warranted by an increase in innovation in the field of software should be closely monitored.

In order to obtain a balanced view, we would consider it beneficial for WIPO to develop or update guidance on the participation of third parties in this monitoring process. This guidance could form part of the organisation's technical assistance effort, which are key to raising patent quality around the world.

Karsten Gerloff,

President, Free Software Foundation Europe,

Geneva, January 27

A digital version with links to references studies and information is available upon request, all FSFE statements also available at <http://fsfe.org/projects/wipo/>.