

Microsoft's critics miss the point entirely

Brad Smith and Horacio Gutierrez would have known exactly what they were doing when they agreed to speak to *Fortune* magazine about Microsoft's relationship with open source software. In talking about 235 infringed Microsoft patents in open source offerings such as Open Office, the Linux kernel, Linux graphical user interfaces and assorted FOSS programs, the two of them would have anticipated the waves of attack they would be subjected to from the company's vast legions of critics. So the question is: what did Microsoft's general counsel and its head of licensing stand to gain from opening themselves up to such abuse?

For many in the open source community and beyond, the answer is obvious. They see it as another case of what they consider to be Microsoft's bully-boy tactics. The company, they claim, is sending out a message that it is about to open the floodgates on a wave of litigation designed to bring the open source community to its knees. After all, isn't this exactly what CEO Steve Ballmer has been implying for months? In February, for example, he told financial analysts in New York: "Open source is not free, and open source will have to respect the intellectual property rights of others, just as any other competitor will." Seen in that context, what else could Smith and Gutierrez be planning,

Microsoft's critics ask.

The main problem with such an analysis, however, is that it ignores the simple truth that Microsoft is probably as eager to avoid the court house as any defendant would be; even more so, in fact. General counsel Smith actually says in the interview that the company had considered litigation as far back as 2003, but had ruled it out: "It was going to get in the way of everything we were trying to accomplish in terms of [improving] our connections with other companies, the promotion of interoperability, the desires of customers." Which is fair enough, bearing in mind that at least half of the Fortune 500 companies are thought to use Linux in their data centres, not to mention the thousands of other smaller outfits that do the same. After all, it is never a good idea to sue those whose business you rely on.

But there will be more to Microsoft's calculations than just wanting to avoid confrontation with customers. There is also the small matter of what would happen if the company actually lost a suit. Even supposedly rock-solid cases can fall foul of the whims of a US jury and there is very little that is rock solid about most patents relating to software. To go to court would be a huge risk, as Microsoft would actually have more to lose than its opponent.

If the worst came to the

worst, an opponent would face a damages payment and the prospect of negotiating an ongoing licence fee. On the other hand, should things go wrong for Microsoft, further legal action would become much more difficult, while the Supreme Court's decision in *KSR v Teleflex* raises the greater likelihood of falling foul of an obviousness claim, leading to the invalidation of the patent being litigated; something that could potentially prove devastating. Microsoft would be unwise to open itself up to such possibilities, especially when, to the disappointment of many, its business continues to thrive.

It would be even more unwise to take such action knowing that this is exactly what many on the evangelical wing of the free software movement want to do. They want their day in court and they want to argue that software should not be patentable. Why on earth give them the chance?

Instead of seeing bad faith in the *Fortune* piece, therefore, maybe it would be wiser to take it at face value: two of the most senior players on the legal staff at Microsoft outlining how the company plans to deal with the challenge open source presents. If Microsoft does believe that free software infringes on its patents, there is nothing remotely unreasonable in saying so. Neither is it unreasonable not to specify in precise terms what patents these are. Outside of issuing a writ, no company does this – doing otherwise is an open invitation to a string of declaratory judgment actions. However, in negotiations it seems that the company is very happy to discuss specifics. "We do. But in private conversations in the process of licensing discussions with companies that are looking in good faith for ways of resolving the situation ... we walk through a number of exemplary patents

and go as deep as they want us to go. Our experience has been every time we've done that, it doesn't take companies a long time to figure out that there is an issue here," Gutierrez told Roger Parloff, the *Fortune* writer who interviewed him.

Neither should Microsoft be condemned for putting up two such senior figures as Smith and Gutierrez to outline an approach to what is a complicated situation. The company's preferred option, it seems, is to negotiate solutions. This is what lay behind its deal with Novell last year, under which each company promised not to sue the other's customers. Microsoft has also approached a number of individual companies, while others have made their own approaches to Microsoft. This is all to the good and shows that Smith, Gutierrez and the people they report to are prepared to play a long-term game, despite the fiery words of Mr Ballmer.

Outside of the software utopians, Microsoft knows that, by and large, it is dealing with businesses that are using free software not for ideological reasons, but because it solves a problem at a good price. Many of them also have their own proprietary software; quite a few have dozens, hundreds, even thousands of software patents. All such companies have a stake in maintaining the *status quo*. While Microsoft would have most to lose from any unsuccessful legal action it pursues, all software patent-owning companies – and, we reiterate, there are a number of very big ones that also use and advocate open source – would be losers the day the Supreme Court issues a decision which finds what they own to be unpatentable. Given this, quiet, responsible deal-making is by far the best option. ■

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show of solidarity between the EPO and the European Commission throughout the Patent Forum, historically the two bodies have not always seen eye to eye. Many observers would say that behind the scenes they still don't.

The world is evolving fast

and Europe needs to be ready for it. Imagining this future is a brave first step, but there needs to be more. Without involving other influential bodies and translating ideas into actions, the EPO's scenarios project is nothing more than an intellectual exercise that will do little to prepare Europe for the next 20 years of change. ■