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From: Dirk Nissen
Sent: Monday, April 15, 2013 7:31 PM
To: SoftwareRoundtable2013
Subject: comments

Dear Sirs,

If I am allowed to introduce also some comment, I kindly request to find my comment below. (Sorry for my English.)

On the first topic

If the patent system creates uncertainty, if it makes developers stop reading patents, making the relevant choices, but makes them passive, just waiting if there comes a patent holder claiming infringement or not. If the system does not function properly, it damages the economy and patent holders together. It creates a distance between the language of the law and the patent system and the reality.

It should be the responsibility of the submitter of a patent claim to sharply limit the claim boundaries. Any doubt or vagueness should make claims more vulnerable to be declared invalid. Doubt should play in favour of the accused, also the accused of patent infringement. The system should only allow the submitter of a patent to limit and clarify his claims after the initial submission, if he did not have access to the relevant information when the claims was written and submitted.If there is any sign the submitter of a patent was vague on purpose, the patent should always be interpreted in a way that is in disadvantage for the patent holder and probably be declared invalid.

Improve the quality of the accepted patents by filtering out invalid and vague claims early on is important to limit the damage of this and other problems with claims.

Claims should be made in the relevant technical language. Elements of the used technical language should only be defined in the patent if it is not possible to use references to commonly used definitions of that language.

It is important to distinguish between a research effort that would, in a certain situation, give similar results given the same amount of resources are available, and between real patentable inventions. To accomplish this, any patent claim should contain a plan, a diagram, of how the invention was found. The plan should start by the definition of a problem. The problem itself not being part of the invention. And the plan would split up the problem in partial, smaller ones. For a valid

patent, the plan should show that at least one step in solving the problem was not obvious, not just a choice between a limited number of options that were available at the time of the invention. The USPTO should challenge that plan by producing alternatives that could use other, well known, methodologies and/or by defending that in all the different steps, selections were made out of some, at the time, classic ways to solve that kind problems. This procedure would not only filter out earlier bad patents, but also force clarification of the patent language and of the patent boundaries.

With the backlog of existing accepted patents, I think it will be very hard to have a solution within less than 20 years. As long as it is not possible to build a system that is clear for everybody that needs to use it, I think there is really no other choice then to turn the tables and create some legal certainty. A developer should be able to challenge the patent holders by publishing in a certain place and in a defined way information about his product. The publication should allow patent holders to check if the product uses technologies that may infringe their patents. But the text doesn't need to mention details like trade secret. If within a time frame a patent holder does not react following a defined procedure, the patent holder can no longer claim compensation for that product and future products of that manufacturer as far they use the same technologies.

On the second topic.

It is accepted that the, otherwise seen as essential competition mechanism, is temporally limited by the use of patents. It is an economic damage that is seen as acceptable against the advantages of the patent system. Future discussion should look in to the damage provoked by a patent that later on is declared invalid. And of that damages is acceptable and can be limited.

An other item to be looked in to is the (mis)use of patents in a way that disrupts the competition between third party's by using them selectively against targets and selectively in time. Shouldn't there be rules how patents are used to limit the damage to competition?

One party can have settled with the patent holder and an other party's may not have done that yet at the moment a patent is declared invalid. Shouldn't there be a way that every party that may need to challenge a patent is informed early on so there can be one decision early on with equal effects on every party.

Kind regards,
D. Nissen