

GOVERNMENT POLICIES ON OPEN SOURCE

Pamela Samuelson,
Open Source Class,
October 17, 2005

GOVT STRATEGIES

- Use of purchasing power
 - Whether to favor, disfavor, or make decisions about whether good or bad to use F/OSS
- Use of “bully pulpit”
 - Making recommendations to others about F/OSS
- Funding software R&D
 - Whether to condition gov’t funding on use of open source licenses
- Funding studies about F/OSS or software industry, with or without policy recommendations
 - Is there a market failure that needs to be cured?

OTHER REGULATORY MOVES

- Antitrust policy
- Contract and licensing rules
- Intellectual property rules
- Tax rules
- Standard setting
- E-voting
- Industrial policy
- Exercise of police power (eg, CALEA)
- Export control/national security

COPYRIGHTS

- Copyrighting computer programs
 - Should source code disclosure be required?
 - Is mass-market distribution of programs a “publication” of the code?
 - Should APIs be disclosed? protectable by ©?
 - Should interoperability be privileged or not?
 - Should reverse eng’g to get access to interfaces, etc. be lawful?
 - Should policies of IP override K provisions purporting to take away IP user rights (eg, first sale, RE)?
 - Should there be a default rule in favor of user modifications?
 - What “derivative work” means in © and GPL?
 - XML schemas, data exchange formats ©?

INTEROPERABILITY

- Difficult to define term precisely, but is a kind of interconnection between two or more entities that affects whether they can exchange information and interact effectively
- Interface specifications are a key enabler of interoperability
- Sun definition of interface: natural boundary between entities, plus a set of rules, such as specifications for successfully interacting across that boundary
 - e.g., software-to-hardware, software-to-software

ROLE OF IPR FOR INTERFACES

- Many interfaces (e.g., APIs) are published as open standards, and others can implement interface without IPR barriers
 - Public domain or available RF (royalty free)
- Many software interfaces are maintained as trade secrets, but may be reverse engineered
- *Computer Associates v. Altai* (2d Cir. 1992): appellate court ruled that interface specifications necessary to interoperability are not protectable by copyright law
- However, interfaces, if novel & nonobvious, may qualify for patent protection

WHY WORRY ABOUT INTERFACE PATENTS?

- Strong incentive for firms to patent interfaces because gives exclusive right to control product & complements
 - Strong presumption of validity
 - Very costly to litigate
 - Unlikely that outsiders can work around the patent (as can with other weak patents)
 - Can't make competing or complementary product without patentee's permission (which he/she may be free to withhold)
 - If defendant's product successfully interoperates, easy to know of and prove infringement of interface patent
 - Interface element patented may be arbitrary, not meaningful innovative advance

INTRINSIC VALUE

- Market power of interface patents may be out of proportion to the intrinsic value of the innovation
 - Tiny, arbitrary, trivial component of an interface may, if patented, have a market value that derives mainly from being a chokepoint once the interface has been widely adopted and irreversible investments have been made to implement the interface standard
 - Disproportionate rent can be captured from this patent as compared with the degree to which it is intrinsically valuable because it improves functionality
 - Example: Rambus charges > 4X more if standard
- Yet some interface patents may be necessary to spur innovation (e.g., DRM patents)

THE WEAK PATENT PROBLEM

- Steep increase in patent applications in recent years; often to build portfolios
- Burden on examiner to find prior art that invalidates the patent; can't use common sense
- Incentives within PTO to increase output
- Much of software prior art is not "published" in patent law sense, or is unavailable to examiner
- Lots of weak patents are issuing, especially in software
- Ineffective regime to challenge patent validity after it has been granted
 - Some proposed reforms, but slow movement in Congress

SUN'S POLICY PREFERENCES

- No patents on interfaces
 - Cohen article argued this, but CAFC won't accept
 - argument that TRIPS would preclude
- Higher standard of nonobviousness for interface patents (e.g., put burden of proof on applicant to show nonobvious advance)
 - no basis in current law & policy for this distinction
- No injunctive relief if a patented interface becomes a standard
 - CAFC unlikely to find persuasive

OTHER POSSIBLE AVENUES

- Regulating IPRs in SSOs
- Antitrust/competition law policy oversight
 - EC forced IBM to disclosure interfaces
- EU proposed interoperability exception
- Reinvigorating nonobviousness standard
- Improved post-grant review process
- Liability rule, rather than property rule if interface patent found valid & infringed
 - Damages instead of injunction
- Fair use, reverse eng'g limitation