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The Future of Patent Law
- standards and interoperability

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1. Software Patents: the arms race is on

1.1 Don’t believe it when they tell you software is not patentable

- No doubt about patentability in US, including computer-implemented business methods
- Requirement of „technical nature“ in Europe more restrictive; however:
  - thousands of software patents granted by EPO

1. Software Patents: the arms race is on

1.2 Software patents are strange animals:

- Often broadly worded to cover whole classes of technical functions
- Unrelated to actual source code
- Sometimes not rigorously examined, due to lack of experience of PTO and difficulty in determining the state of the art
- US marketability decisive for product launch

1. Software Patents: the arms race is on

1.3 Interoperability can mean patent infringement

- Microsoft relied on patents to stop competitions from offering Windows-compatible products

1.4 Significant opposition from 'Open Source' movement and smaller market participants

- Historical lobbying effort defeated EU software directive; however practice of EPO remains unchanged
- Open Source excludes all products that need third party licenses

2. The real issue: Patents on technical standards

2.1 Business background

- Standards often not mandatory and not set by public authority but merely factual through success of one system in the market
- „Standard wars“ to achieve critical mass for own system
- Once standard is established, significant benefits accrue for patent owner

2. The real issue: Patents on technical standards

2.2 Standard setting and licenses

- Official standard usually requires statement of intention to licence on RAND terms (reasonable and non-discriminatory)
- Factual standard may lead to dominant market position and to issue of abuse of market power
- Abuse of market power can be present if dominant position is extended to markets for complementary products through tie-ins or refusal to license

3. A look into my crystal ball: the future direction of patent law

3.1 Patents are here to stay

- Firmly anchored in legal and economic system; "property" that may enjoy constitutional protection

3.2 Patentability of software may become more restrictive but is highly unlikely to be abolished

- Requirement of novelty and inventive step for technical component
- More thorough search, greater inventive step required

3. A look into my crystal ball: the future direction of patent law

3.3 Compulsory licensing may become more common

- Where standards are involved
- Where dominant market positions can be found
- Where other public interests are at stake:
  - research and education?
  - industrial policy?
  - financially disadvantaged user groups?

3. A look into my crystal ball: the future direction of patent law

3.4 IBM proposal: The European Interoperability Patent

- No injunctive relief, only license payments
- In return no requirement for translation of future commuity patent
- Could lead to a two-tier system of exclusive and mere licensed rights
- Not intended to supplant current patent law but to supplement it

3. A look into my crystal ball: the future direction of patent law

3.5 Outlook

- The patentees face public pressure, the outcome is likely to be a limitation of patent rights
  - through compulsory licenses awarded by courts or administrative agencies
  - A new type of non-exclusionary patent
  - limitations on protectability
- While software patents are likely to stay with us for the foreseeable future, mechanisms are developing to limit market power derived from them.

Thank you for your attention.

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