IPRED and Free Software

Response to the consultation on the Commission Report on the enforcement of "intellectual property rights"

Free Software Foundation Europe

March 31, 2011

The Free Software Foundation Europe welcomes the consultation launched by the European Commission on the application of the "Intellectual Property Rights" Enforcement Directive (IPRED).

Free Software is software that anyone is free to use, share, study and improve upon.[1] It has played a key role in the development of the Internet and of the Web.[2] A creative force for innovation, Free Software allows developers to work collaboratively. This work, covered by copyright, is protected by Free Software licenses which give rights to users and invite them to innovate, hack and create.

We would like to take the opportunity of this consultation to state our attachment to the promotion of freedom, innovation and creativity in our society. It is with these objectives in sight that we believe the European Commission's approach to copyright and patents should evolve, in order to take into account the potential of Free Software.

The current approach suffers from a narrow view of where creativity and innovation come from in our digital society and only favours proprietary software vendors at the expense of Free Software legal security.

[1] Free Software is also known as "Open Source" software or FLOSS. For a full definition, see http://fsfe.org/about/basics/freesoftware.html

[2] for instance, the Apache HTTP Server has an estimated market share of above 50% (source: http://news.netcraft.com/archives/2010/06/16/june-2010-web-server-survey.html)

Defective means of enforcing "intellectual property rights"

The report of the Commission states that

> [e]ffective means of enforcing intellectual property rights are essential for promoting innovation and creativity.

Free Software relies legally on copyright to give users and developers rights and obligations, and it is legitimate that these rights and obligations are enforced.

However, new means of enforcing copyright and patents created in the last decade within the European Union have not proven to be essential for promoting innovation and creativity. We argue on the contrary that European rules and practices in particular with regard to the patentability of software have led to legal uncertainty against Free Software, thus preventing innovation in Europe.

The policy proposed in this report is illegitimate

As the report notes,

> the Commission has not been able to conduct a critical economic analysis of the impact that the Directive has had on innovation and on development of the information society

The impact of the "intellectual property rights" Enforcement Directive and the European Union Copyright Directive on innovation is not established. The various interpretations of these directives among Member States show that they can be understood differently and thus can lead to the opposite effect that harmonisation seeks to achieve.

Thus we are of the view that the proposition of the Commission in this report to extend the scope of the named directives to other areas, all encompassed into the misleading category of "intellectual property rights", will not lead to a more innovation-friendly climate in Europe. To the contrary, extending monopolies on ideas and expressions is likely to have a chilling effect on Europe's knowledge economy.

Recommendation 1 *The Commission should conduct a study of the impact of these directives in order to properly assess their impact on the European information society. This study should take a broad view of the development of the information society, taking into account innovative and emerging models of managing society's knowledge and ideas, such as Free Software.*

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These provisions on the enforcement of patents lead to legal uncertainty for Free Software developers

As the report points out, there is currently a level of evidence that is required for rights-holders to issue injunctions against intermediaries. This level varies with the interpretation of what an intermediary is and what is its liability.

> The Directive interprets broadly the concept of 'intermediaries' to include all intermediaries 'whose services are used by a third party to infringe an intellectual property right'. This implies that even intermediaries with no direct contractual relationship or connection with the infringer are subject to these measures provided for in the Directive.
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> Nevertheless, the level of evidence required by the courts in the Member States is generally rather high. Furthermore, uncertainty remains over intermediaries and the specific measures to which they are subject by contributing to or facilitating an infringement, regardless of their liability.

Free Software is developed and distributed on the Internet through intermediaries of all kinds (including a significant number of not-for-profit organisations). Lowering the standards of evidence required to impose measures against infringement or possible infringement to intermediaries will lead to legal uncertainty around Free Software –especially regarding patent infringement– because Free Software relies on intermediaries of all kinds to host, develop and distribute their work.

Although software patents are not recognised under European Union laws, the European Patent Office issues thousands of them every year. The legal uncertainty around software patents could be used as an illegitimate means for proprietary software companies to pressure intermediaries in order to avoid competition from Free Software.

The legal uncertainty with software patents for Free Software developers takes various forms. At the time of writing the program, it is economically infeasible to be able to find out if it violates a patent or not. Thus, software patents are not an efficient incentive. This is even more true for small and medium businesses, of which consists the vast majority of Free Software companies, that cannot afford the cross-licensing agreements or the cost of litigation that only the largest companies can face. Software patents also put Free Software developers and users at risk at the time of distributing the program, especially when distribution concurs with the help of intermediaries.

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The level of evidence required is currently not a relevant hurdle to the enforcement for legitimate copyright and patent claims; and that in order to protect innovation, Europe should not lower its standards for the level of evidence required.

Also, we would like to stress the fact that innovation and creativity in our society relies heavily on network neutrality, as it allows European companies and citizens to unleash their innovative potential in the digital environment, creating new businesses and business models.

Recommendation 2 *Injunctions for infringement of copyright or patents should require a level of evidence that does not cause legal uncertainty for innovators. To extend the scope of injunctions and the definition of intermediaries is a cause of legal uncertainty for innovators that operate in open and distributed networks such as the Internet.*

Legal protections of DRMs hamper Free Software

"DRMs" are another means given to rights-holders to enforce their rights. They have been granted legal protection under various implementations of the European Union Copyright Directive. For instance, 2006 French Law DADVSI in its articles 13 and 14 contains clauses that criminalise circumvention of DRMs.

DRMs, or Digital Restrictions Management, are essentially incompatible with the principles of Free Software, insofar as they prevent users from being able to use their software for any purpose and to share copies. Recently updated licenses like the GNU GPL version 3 take this into account.

The IPRED article 3 argues that "[...] measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays"; and that "measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse". However, DRM measures erect unwarranted barriers to legitimate uses of digital materials. Not only do they put groups at a disadvantage that are already vulnerable, such as the visually impaired. They also have a chilling effect on the development of the information society as a whole.

The propagation of DRMs is a factor of disruption on the market: it favours proprietary software over Free Software. Additionally, forbidding circumvention of DRMs puts both Free Software developers and European users and consumers in general at risk, as they are facing legal threats and uncertainty due to activities which constitute normal and accepted use of software and digital goods in the modern European knowledge society.

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Recommendation 3 *European rules should be designed to allow the the circumvention of DRMs for the purposes of interoperability and consumer protection.*

About the Free Software Foundation Europe

The Free Software Foundation Europe (FSFE) is a non-profit non-governmental organisation active in many European countries and involved in many global activities. Access to software determines participation in a digital society. To secure equal participation in the information age, as well as freedom of competition, the Free Software Foundation Europe (FSFE) pursues and is dedicated to the furthering of Free Software, defined by the freedoms to use, study, modify and copy. Founded in 2001, creating awareness for these issues, securing Free Software politically and legally, and giving people Freedom by supporting development of Free Software are central issues of the FSFE.

http://www.fsfe.org

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