Moore: Viewpoint

Why is Microsoft suddenly so interested in patents?

Recently, Microsoft announced it was ploughing more money into patents. They have estimated that they will be filing a staggering 3000 new patent applications this year – up 50% on previous years. Why the sudden emphasis? There are probably two main reasons:

First, Microsoft has one eye on the open-source software market (see the Moore Viewpoint "Am I safe with Linux?"). Microsoft already believes that a number of its patents have been infringed by open-source products (at least 27 were identified last year by a company called Open Source Risk Management, as being potentially infringed by the Linux kernel). Now that Linux has become mainstream, it is going to be difficult for its proponents to take a "principled stance" against software patents as a defence to patent infringement proceedings (especially in the US) and the open source movement is likely to be faced with more litigation. It is therefore a sensible policy for Microsoft increase its armoury, even if it is not the patent owner who decides to strike first.

Secondly, and more importantly, Microsoft has had a few difficult years in the courts. It is clearly a dominant player, therefore it has to consider anti-trust issues in practically everything it does. Patents can only improve its position.

Ever since European anti-trust provisions were enshrined in the Treaty of Rome there has been a tension between the control of a monopoly and the lawful monopoly afforded by patents. On the one hand, for obvious reasons, monopolies tend to be distrusted by anti-trust authorities. On the other hand, for example, Article 30 (previously 36) of the Treaty of Rome is a specific exception to the fundamental principle of free movement in the common market. It states:

"[the doctrine of free movement]… shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of … the protection of … industrial and commercial property.."

There has been a gradual erosion of the carve out of the patentee's rights enshrined in Article 30, but it is still perfectly proper for a patentee (subject to limited exceptions) to simply curtail patent infringement.

So, the fact that Microsoft bundles its browser or media player with its operating system will draw the fire of the competition authorities. If, instead, Microsoft found a way of preventing its competitor from marketing their alternative browser because it infringed one or more Microsoft patents, then Microsoft has improved its chance of curtailing the competitive threat.

For more on software patents in Europe, see the Moore Viewpoint "European Software Patents, the story so far".

Moore
Enterprise House
4 Yeomans Grange
Sutton Coldfield
B75 7TP
UK

Telephone: +44 (0) 121 314 8018

Fax: +44 (0) 121 314 8022

E-Mail: enquiries@moorelegal.co.uk