Abstract

Problem of Reinforcing Software Patent

- focusing on the online transmission of computer program -

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The proposal to amend the Patent Act to expand a patent right to online transmission of computer software has been driven solely by the Korea Patent Office, inspired by the Japanese Patent Act amendment in 2002. However, it is questionable if the proposal was based on the actually existing needs. None or little software industries have called attention to the arguable problem of weak (or none) patent protection on the online transmission of software and the modernization of the Patent Act as proposed by the KPO. In other words, the necessity of the amendment is not real, but simply coined by the KPO. In the process to push the amendment, the KPO has carried out biased survey to produce favorable opinions from the software industries, and acted like a private agency having vested interests. The KPO driven proposal is risky to cause conflict with copyright protection on computer program and deliver a wrong signal to market. Moreover, the proposal to extend the "assigning" under the meaning of the Patent Act to cover "the providing through telecommunication network" is at odds with the reality that almost all of the commercial software products themselves are not assigned or sold, but just licensed to. Further, the amendment may create an unintended, overly broad patent right - "the transmission right" or "the right to making available to the public" of the Copyright Act. More significantly, the proposal may hinder innovation of software that has shown successful innovation without proprietary incentive of patent, and is very likely to put into jeopardy the free and open source software ecosystem, which is based on the freedom right of sharing (modified) software because the proposal tries to directly ban the sharing of software. The winners-take-all model of patent does not permit independent innovators, and this absolute monopolistic nature of patent

imposes upon every software innovators a strict duty of care to avoid patent infringement. The resulting problem of restriction on competition and overly high cost of patent escaping would make much economical for software industries to ignore patent right and eventually disregard the patent system. For "promoting the development oftechnology" as set forth in the Patent Act, excluding computer program from the patentable subject matters and protecting innocent, independent inventors is far more desirable than the KPO's proposal.

Keywords

computer program related invention, software patent, innovation, absolute monopoly, free and open source software, computer program copyright

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