



SOFTWARE PATENTS: MICROSOFT JUMPS THE SHARK

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On Monday, May 14, Fortune magazine ran an article by Roger Parloff titled "Microsoft takes on the free world". The title apparently alluding to Microsoft throwing down the software patent gauntlet at the feet of the entire free and open source software community. If the title weren't enough, the article itself is filled with markers of impending doom. There is "a shadow" hanging over Linux, cast by the "behemoth" Microsoft. We are told that "If the company gets its way, free software won't be free anymore." Microsoft has now "for the first time" revealed the number of patents it's alleging and it's a "breathtaking" "overwhelming" number. Quoting Eben Moglen in response the article says it's "a tinderbox" on which a "war" will be fought and "Waterloo" is waiting for someone. Microsoft tried to build a bridge to the free software world, but it has failed and we are all one step closer now to "patent Armageddon". Even the subtitle has an implicit threat aimed at the reader ("users like you, maybe").

This article has been written with a great deal of skill. It has painted the scenario in a dramatic manner and one which highlights some dire consequences. It even ends on an enigmatic phone call to Mr Ballmer, in which he ominously declines to cross a bridge (that would be the "sue your customers" bridge, not the One-Step-Closer-to-Patent-Armageddon bridge – that's been crossed already). In the days that followed other articles appeared in which the party line was put by many of the individuals quoted in the original Parloff article. Later in the week Rob Enderle put his own two bits in and by the end of the week Bill Hilf has put his side of the story.

One might be forgiven for believing that a wave of fear would flood across the nation at the prospect of the "Free World" having a "breathtaking", "overwhelming" number of patents lined up against it. On the contrary, judging by the press, the implicit threats in the article have been met not with hysteria, but with derision. The response which best summarises the many articles I have seen in response is the insightful think piece by Tim Bray, which, if you will indulge me, I quote here in full:

"Litigate or shut up."

This general response, in hindsight, is hardly surprising. The Parloff article, while exhibiting skill at dramatic effect, is not so hot on the fundamentals. Anyone reading it can see it doesn't add up. Microsoft's got its "overwhelming" number of patents, but it doesn't want to tell us what they are, basically because it's afraid they're invalid (there may be other reasons for not disclosing them, but this is the one stated). The Parloff article makes it clear that Microsoft has ruled out litigation, at least for the time being. Mr Ballmer's ominous declension almost looks staged to address this. Boiled down to its essentials the face of the article states that Microsoft wants a royalty for patents which it's worried are invalid and which it's not going to sue over in any event. This is hardly persuasive. I am reminded of an Alexei Sayle skit in which he, as a failed stand over man, throws the "be a shame ..." line, while dropping a ceramic vase onto the carpet. It bounces.

Having had the benefit of reading (or skimming) many of the responses to the Parloff article, the distinct impression I get is that Microsoft has overegged the pudding on software patents. We all know that Microsoft has latent strength. In fact, that strength simply highlights Microsoft's obvious failure to act – we can presume they have a good reason (other, that is, than an inherent love of peace and harmony). The Parloff article does not demonstrate a latent strength, it displays a patent weakness. For software patents I expect May 14, 2007 will be remembered as the day Microsoft jumped the shark.

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