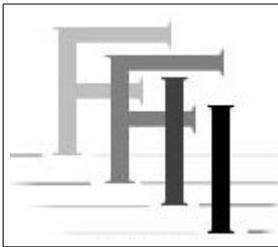**Contributions to the UN Internet Governance Forum Meeting Athens, Greece** (Oct 30 – Nov 02, 2006) -- "Openness"
by Pieter Hintjens, FFII President

The FFII is a not-for-profit association registered in twenty European countries, dedicated to the development of information goods for the public benefit, based on copyright, free competition, open standards. More than 850 members, 3,500 companies and 100,000 supporters have entrusted the FFII to act as their voice in public policy questions concerning exclusion rights (intellectual property) in data processing. http://www.ffii.org

The Digital Majority (Tue July 05, 2006)

There are two kinds of people. Those who get it, and those who don't.

Until recently I thought the term "digital divide" meant that some people could afford ADSL while others could not. But that's bogus. Somalia, one of the poorest countries on the planet, also has the lowest mobile phone costs anywhere on the planet. With no monopolies to fight, no governments to pay off, no trades unions to placate, Somali mobile phone operators buy the cheapest Chinese equipment, set-up networks, pay local war lords for security, and connect people up to the global GSM network at prices that would make a European telco manager faint.

I'm not suggesting we hand over security to war lords. I am pointing out that the digital world is within reach of the world's poorest people, and they are rapid and ambitious technology adopters.

There is a digital divide, but it separates those who get it from those who do not. That Somalian, paying a cent a minute for a mobile phone call to his cousin in Atlanta, gets it. The IP lawyer, advising his client that the best protection against a patent suit is more patents, does not.

Well, one could argue that the IP lawyer travels business class and stays in hotels that cost $1000 a night, while the Somali is very lucky if he earns that much in a year. So perhaps from the point of view of working the system and getting the most into one's own pocket, the lawyer definitely does get it.

But I'm talking about something other than raw egotism translated into greed for money and power. I'm talking about the new digital age.

The most noticeable thing about the people who get it is that they have a hard time thinking of this as a "new age" of any kind. They either never experienced, or have happily forgotten, the pain of 56k modems, of telex, of three-month waiting times for new phones and fifty-dollar phone calls. They use IRC and wiki, not teleconferences,

and they swim in a sea of digital information as if they were born to it.

Those who don't get it, on the other hand, are constantly challenged by this new world. They spend their lives thinking, "how can we make money when everything is free?" And usually their best answer is, "stop things being free, lock them down, and charge for them." Those who get it have exactly the opposite response: "do it better, charge for the added value." And doing it better is a smarter, more sustainable strategy than creating lock−in. This is why Google, who get it, are implacably grinding down Microsoft, who do not.

The digital age is an equaliser. It's a meritocracy in which the best minds win. A single person can, with the right words, challenge an empire. This has often happened in history but today it happens daily, hundreds and thousands of times. The digital age creates level playing fields, a grand game in which anyone can compete, but only the best win.

Someone complained to me the other day that her son was spending all his time in online games. I told her, "in ten years time, by the time he graduates, online games will be where many people do their business". Well, perhaps twenty years. But if you want a glimpse of the electronic business world a generation from now, you could do worse than look at online games.

And there are two kinds of people, those who get this, and those who do not.

As far as I can tell, almost every institution, every company and every professional that started before the digital age hit us (around five pm on Wednesday, 1995) does not get it, and almost every institution, company, and professional that started thereafter does get it.

Take any IT firm, and look at their policy on (for example) software patents. Remove the cultural layer… in the states, software patents are a fact of life, like cancer, and people have learnt to live with them. What remains is a clear pro or con attitude. The firms that predate that fateful Wednesday tend to see patents as a great way to own the software landscape. The firms that are fully digital understand that any friction costs, from patents to random legislative red tape, is a problem.

So it goes for professionals and institutions.

There is one flaw in my argument, which is that software patents create a huge amount of money, for those who deal in them. The software patent trade has been compared to a massive scam, worth hundreds of billions of Euros, perpetuated on the IT industry by a group of patent specialists, first in the USA, and now in Europe.

And surely there are many of these scam artists, who call themselves "IP specialists", who definitely do get it and simply don't care. Raw egotism translated into greed for

money and power can take even the best morals and turn them into road meat.

Sometimes I wonder how such people can wake up in the morning and look in the mirror. Perhaps at some point they just don't identify with ordinary people any longer. Perhaps they really believe they are special and gifted and have the moral right to manipulate legal and political systems, whatever the cost to the common people. I wonder how they feel when they realise that no amount of money can buy immortality, friends, love, or even health.

Anyhow, I'll assume that the directors of large IT firms, their lobbyists, the bureaucrats at the Commission, and the many honest and hard-working IP lawyers that want software patents are not like this. I'll assume they are honest and really believe what they are saying, and they still want to introduce a system that ultimately makes it impossible to write, distribute, sell, or use software without paying an unpredictable friction cost to unknown parties, for an undefined period.

The only excuse I can find for these people is that they don't get it.

To anyone who gets it, software patents are an insane concept. There are many other insane concepts in this new digital world. For example, the idea that copyright ownership can last forever. Or the idea that we can no longer buy music, only rent it. Or the idea that a firm can pay to get laws that forbid people making interoperable products. In fact, anything that unbalances the playing fields is, from a purely economical point of view, pathological. The more level the playing field, the more wealth for all.

I think the number of people who get it exceeds the number of people who do not.

Certainly in IT, it's a minority of firms that want software patents. 80% of the IT market consists of small to medium-sized firms (SMEs), and except for the flock of firms sponsored by Microsoft to speak for software patents, and the patent-holding specialists that produce nothing except lawsuits, IT SMEs come down solidly against such ideas, mainly because insanity is a bad business strategy when you're small. For large firms, insanity sometimes seems to work, at least for a while.

So I come to the point of my story, which is this. People often ask, "what defines the FFII?" The answers one hears are many. We stand for freedoms of certain types, but also rules. We stand for copyright, definitely, unless it's the Disneyesque copyright that lasts five hundred years. We stand against software patents, unconditionally, but we have nothing against patents in other domains. We support open standards but we don't actually define them. We represent open source developers and we also represent closed-source developers. We're agnostic as to how people turn bits into cents so long as they don't cheat.

So here's my answer. The FFII represents those who get it. We are the unseen future,

the generation of programmers, engineers, businessmen, writers, artists, journalists, lawyers, politicians, and the other individuals and firms who have staked their future in a fair digital playing field. We are the Digital Majority.

Compromise is not an option. There is no acceptable level of friction any more than there is an acceptable level of cancer. We spend our lives removing friction, eliminating transaction costs, competing ruthlessly to be better, faster, more efficient. When someone comes along and tells us, "this new law is going to turn you all into my serfs", and gets a massive, concerted, and well-organised hostile reaction, they should not be surprised. I mean, how stupid do you have to be?

We are the Digital Majority. Time is on our side. The ones that don't get it will grow old and die. Every baby born today is a natural FFII supporter, except for the 1% sociopathic parasites that we will always have to fight into a corner. We are the Digital Majority and we will continue to fight to shape this world into what we consider right and proper, based on our solid and honest understanding of economic efficiency and value, our inbuilt sense of fair play, and using our talents for communication, for organisation, and for collaboration.

Software Patent Myths (Apr 14, 2006)

I'm been collecting some of the more amusing myths about software patents. Here is what I have so far, with a short argumentation against each one.

- **The patent system exists for the benefit of society.**
  The "broader benefit of society" is sometimes held up as the basis for the patent system, but in reality patent offices and patent law exist for the benefits of their "clients", which means patent owners.

- **Patents are good for innovation in any domain.**
  Every domain has different needs. Would patents help artists, composers, filmmakers, writers, cooks, atheletes? Patents are not a universal panacea. Before we can contemplate their introduction into a domain we need real proof that they are needed to solve serious problems. It's not enough to say, "we're creating a new kind of property, hurrah!"

- **We can measure innovation by counting the number of patents.**
  This is confusion of correlation and causality. In the software industry, the more patents a firm files, the less innovation it does.

- **If you are against software patents, you are against all patents.**
  Just as patents are not a universal panacea, they are not a universal plague. In some domains they can work very well. The term "the anti-patent crowd" is a slander.

- **If you are against software patents, you are against all intellectual property.**
  Yes, naturally. Except that copyrights and trademarks are still "intellectual property", last time I checked, and I've not seen anyone sane take an anti-copyright or anti-trademark stance. Even the GPL is fully based on copyright. Let's get this straight: anti-software patent means literally, "anti-software patent", or alternatively, "pro-copyright". OK, we have that clear.

- **Software is an industrial material like steel or plastic.**
  The day I can get abundant free steel or plastic from total strangers, please tell me and order me a few thousand tonnes. Software is a cultural product, not an industrial product. Software factories work about as well as art factories.

- **Software innovators need patents to get investment and to compete.**
  You are reading this thanks to an Internet built by people who largely had no investment, let alone software patents. Software innovation needs only cheaper communications, good open standards, and larger markets.

- **Software patents are good for large software firms.**
  Big Software has been conned into thinking it wants software patents. They are starting to regret this. The only people who really think software patents are a good idea are NPEs (non-producing entities) and their friends. And NPEs mostly use their patents to attack the Big Software firms that lobbied for them in the first place. Nice irony, unless you own MSFT stock.

- **A portfolio of software patents is a good defensive measure.**
  No, a portfolio of software patents is a good offensive measure. Only an NPE can attack using patents without risk of counter attack. Software patent portfolios are a waste of money for software firms, though they may look good in the hallway.

- **Copyright is not sufficient protection for software innovators.**
  The software business has never needed protectionism, it needs lower barriers and cheaper communications. Copyright appears to have worked very well so far. The only serious problem with copyright that I'm aware of is that it does not create billable hours for IP specialists.

- **Software innovators can choose between copyright and software patents.**
  Actual quote from the EPO. Nice theory, except that software patents undercut copyright and render it useless.

- **It is the high cost of software patents that is a problem.**
  "It is the high cost of handguns that prevents every household from owning one and thus protecting themselves". Yes, I can see the logic in this statement. Sir, I have this bridge that is for sale, can I interest you?

- **Software patents should be easier to enforce.**
  "Handguns should be easier to use, then we would see safer streets". The idea of cheaper offensive weapons is not very reassuring. Unless you are one of the NPEs that have a nice patent portfolio.

- **The problem is low-quality patents, not software patents as such.**
  The only good software patent is a dead software patent. Even the most original and sophisticated software patent can throttle an entire industry if it claims a fundamental idea.

- **With better peer review and prior art searches, we could guarantee good software patents.**
  If we can't trust the patent offices to grant only high-quality patents, how can we trust them to set-up a real peer-review system? And since software patents are mostly obfusticated, how can prior-art searches help? What happens to the art that stretches from the 1960's to 2000, and never got onto the Internet? Big Software is scared their expensive patent portfolios are getting devalued by all those junk patents, and this myth is an attempt to delay real reform of the patent system. I say, hunt down all the software patents, line them up, and shoot them.

Rabbits and Foxes (Apr 06, 2006)

A couple of weeks ago, at a very large event in Brussels, I sat and watched several government officials, from the US and EU, debate innovation policy. This sounds very grand, but what they actually said, to paraphrase, was "we want to stimulate innovation by spending money and protecting intellectual property".

At an FFII meeting last week, I realised what governments have been thinking. Patents = innovation. This seems obvious but it took me a while to grasp. Governments actually believe that more patents means more innovation. The number of patents has grown tremendously over the last decades. The amount of innovation also appears to have grown tremendously over the last decades. But, I wondered, what is the cause, what is the effect, and what is our perception of the two? Let me tell you what I think.

First, I think innovation has nothing at all to do with how much money is spent or how well IP is protected. Most innovation comes from the simple economic principle of specialisation. That is, as Adam Smith pointed out a long time ago, the basis of all wealth. We specialise, we compete, and we trade. And we innovate in order to do these better.

How can you pay people to specialise, compete, or trade? The concept is ridiculous, and indeed, in my twenty-five years of writing software for money, I've not once seen research grants actually prodding people to do anything except get better at asking for research grants. There is competition for grants, remember.

Paying grants and subsidies for research is like feeding animals. Yes, you can raise a huge herd of tame sheep like that, but the real action happens in the wild, and you cannot feed wild animals without turning them stupid, fat, and lazy.

I'm not suggesting that our (cough cough) government-funded researchers are stupid, fat, or lazy, but… well… it's all relative.

What government *can* do to promote innovation is to lower the cost of communications, to increase the size of the market, lower taxes, and remove barriers to competition. Then, I believe, you actually have to tie people down and hack their arms off if you want to prevent innovation. And no, I'm definitely not promoting arm-hacking. It is a figure of speech.

So, if patents (software patents in specific but all patents in general) do not promote innovation, what do they do?

As far as I can see, the relationship between innovation and patents would apply to all industries, but software is special for a couple of Very Big Reasons. First the rate of innovation in software is several orders of magnitude greater than in any other industry, because it is a self-hosting technology. Improvements in normal industrial

products do not automatically improve the processes that produced them. But if I build a faster compiler, this lets me compile my compiler faster. Secondly. software is the basis for our entire modern service economy. We are all software users and the rate at which we depend on a flourishing and open software industry is increasing all the time.

Any slowdown in the rate of software innovation is a serious threat to our modern economy. So, when I hear, for instance, a large software firm admit that software patents make it impossible to produce new standards today, this does two things. One, it scares me. Two, it tells me that software patents are having a real effect on innovation.

I'll sketch what I believe are the eight stages of the software innovation and patent boom and bust cycle.

- First stage: software comes into its own as a domain of technology. Up to about 1980, software was still seen as a branch of mathematics. By 1985 this was no longer the case.
- Second stage: large software manufacturers convince the patent offices to change the definition of "subject matter" so that software becomes patentable. In the USA this happened in the early 1990's. In the EU this happened informally, through half-licit legal interpretation.
- Third stage: large patent holders push for software patents to be granted more easily, and patent offices start to grant patents on non-software methods, mainly business methods. In the USA this happened from 1999 onwards, and in the EU more or less in parallel with software patents. Governments, seeing the boom in patents, rub their hands with glee, thinking this is the precursor to a new golden age.
- Fourth stage: specialist patent firms understand that soft patents (software and method patents) are an excellent opportunity, and start to invest massively in these patents. This happened in the USA and EU more or less at the same time, from 2000 onwards. Again, the growth in patents impresses everyone except the engineers and specialists who are actually involved in innovation, who start to get very concerned.
- Fifth stage: patent holders, who represent a new and wealthy propertied class, lobby for better enforcement of their patents, no matter how trivial or obvious, once granted by the patent offices. The enforcement happens through the courts. In the EU, patent owners lobby for EU-wide standards on enforcement. In the USA, national enforcement was never an issue. In the EU it is the burning issue today.
- Sixth stage: software patents start to attack the process of innovation and people panic. Discussion starts about whether this was all such a good idea, and how to raise the quality of software patents. The USA has started to enter this debate, and the EU has been wallowing in it, largely thanks to the FFII, for years.
- Seventh stage: legislators understand, too late, that there is no way to separate

the bad software patents from the good. Any filter or gate or barrier that lets through good software patents (if such animals exist), also lets through an infinite horde of bad ones. Industry starts to clamour for a general ban on software patents. In the USA and EU, we are several years away from this.

- Eighth stage: legislators are faced with the task of undoing everything that has happened since stage two. I don't want to speculate on how this can even be done. Can software patents, once granted, be revoked without creating incredible outcry?

In the meantime, we have a period of at least ten years in which innovation in the software world is effectively dead. Programmers will, of course, continue to program. But the open market will die. Small numbers of monopolies will replace the current software industry. Open source may well get patent exemption, but this would be as good as a declaration of war on small commercial software firms.

Overall, it is a tragic and bleak picture of the future.

I will now try to give you an analogy for this scenario. In the 1980's, scientists studying the population curves of snowshoe rabbits and foxes (ok, it was lynxes but no-one except Canadians and Scots knows what lynxes are) in the Canadian north, found the populations went up and down in cycles. Basically, rabbits breed faster than foxes, so a rabbit population can grow in one season much faster than the fox population, stopping only when they reach the limit their grassy ecosystem can support. The rabbits have a great first couple of years, but then the fox population catches up, and suddenly there are too many predators for the rabbits. The rabbit population crashes, and a little later, so do the foxes.

What I'm saying is that innovation is rabbits, and soft patents is foxes. Software patents eat innovations. They hunt them down, jump on them, bite through their necks, rip their bodies to shreds, and feed them to their young. It's really like that, but with more violence.

Now, the government official responsible for Rabbit Production, who comes for a couple of months to monitor the rabbit population, sees that the rabbits are breeding wonderfully (he's obviously not an Australian), and the foxes too. He sees that the more foxes, the more rabbits! It's amazing! He goes off and starts a fox farm, releasing even more foxes into the wild, because he's jumped to the conclusion that rabbits generate spontaneously from foxes. Correlation and causation are two entirely different things, but the rabbit man does not understand this.

And our large software firms, who are buying patents as fast as they can. What are they? Well, imagine very large, very juicy, and very, very stupid rabbits, who have found nothing better to do than help the government official breed foxes…

You can hardly be angry with Big Software. The bigger they come, the harder they fall.