Software Patents: Playing a Double Game

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“Today we are announcing a new innovation initiative. We are pledging the free use of 500 of our U.S. patents, as well as all counterparts of these patents issued in other countries, in the development, distribution, and use of open source software”. This is how IBM recently announced that a substantial number of its patents could be used freely. The news created quite a stir, above all, because just one week later Sun Microsystems announced the freeing of 1,600 software patents. What’s more, it coincides with the reopening of the debate in the European Union on the convenience of software patentability.

Why is there so much controversy? In the first place, it is not at all clear that computer programmes meet the requisites for an innovation to be patentable. A serious doubt has also been cast on whether patents in this sector are really necessary to stimulate the advancement of technology.

In the world of software, innovations are incremental. I mean, building a computer programme is like a game of Lego: you get a new application by adding on pieces to components of previous programmes, which on many occasions are the property of other companies. If you want to use the patent of another company, you must first get its consent and then pay for the right to use it.

With this framework of property rights on different components the process gets very complicated as it is rather difficult to detect potential offences.

For this reason, enterprises in the sector have adopted the strategy of aggressive patenting, which means registering absolutely any advance they make. The more patents you have, IBM is a good example, the more power you have to negotiate with enterprises that sue you for infringing some of their patents. One can be sure that the company that reports an offence breaks many other patents belonging to IBM. So, the company that has most patents is the one that has the power to use more innovations of other companies without having to pay them any royalties. He who has nothing registered is highly vulnerable.

The other strategy some companies follow is that of open source software, which consists of publishing the source code...
of their programmes. By doing so, anyone can copy, modify and distribute a computer programme without having to pay royalties for it.

Inevitably, open source also uses patented innovations and this is where its weakness lies. Some estimates, for example, point out that the Linux operating system—the most renowned example of open source software—may be breaking as many as 300 patents.

IBM strategically plays a double game. It is the company that holds most patents, but at the same time it is one of the most forceful supporters of Linux. In fact, it has already donated open source code valued at 40 million dollars to an open source group and has revealed the secrets of a programme called Cloudspace, in which it invested 85 million dollars. These movements contribute to the popularity of Linux, which IBM has bet on, but there is still a lot of catching up to do given that Microsoft Windows corners 90% of the market.

On the other hand, the fact that this commitment comes from IBM, and this is their end game, these gestures may encourage more companies to adopt some sort of collaboration attitude in developing the new software.