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Open Invention Network Announces 'Linux Defenders' Prior Art Resource Program

Open Invention Network announced Dec. 9 the "Linux Defenders" program as a repository of prior art to help prevent the award of meritless patents for inventions based on the use of the Linux operating system.

The initiative, co-sponsored by the Software Freedom Law Center and the Linux Foundation, not only collects information on existing patents and publications, but adds a "defensive publication" option allowing ad hoc, current additions to the repository.

The information collected will be distributed both from OIN's Web site and in enhanced search form via a relationship with IP.com, a tool used by Patent and Trademark Office examiners in assessing anticipation and obviousness under Sections 102 and 103 of the Patent Act.

Background on OIN. OIN, based in Durham, N.C., is a non-practicing, patent-holding company similar to "anti-troll" patent aggregators like Allied Security Trust, Poughkeepsie, N.Y. (77 PTCJ 103, 11/28/08). OIN, however, does not specifically target trolls but instead hopes to provide preventative tools that can be used against any patent holder seeking to jeopardize the "ecosystem" of the Linux open development community.

The company was founded in 2005 with financial support from IBM, Novell, Philips, NEC, Red Hat and Sony (71 PTCJ 55, 11/18/05).

CEO Keith Bergelt told BNA that the company has acquired or been given over 150 patents in diverse areas related to Linux development. Its Web site—<http://www.openinventionnetwork.com>—lists 61 of those patents, some of which issued this year. Unlike AST's catch-and-release model, OIN does not return its patents into the market, but instead conveys a royalty-free, fully paid-up license to its investors and those companies who agree not to assert Linux-related patent rights.

Linux Defenders. Bergelt identified three separate components to the Linux Defenders program:

- By soliciting and collecting related prior art, the program will serve as an alternative to the voluntary peer-to-patent program, currently being tested by the

PTO, assisting examiners in the rejection of poor-quality patent applications (76 PTCJ 424, 7/25/08).

- The same prior art and options to submit additional prior art may be used in post-issue actions, which Bergelt claimed would essentially create a platform for the community to implement market-based patent reform complementary to potential legislative reform.

- The defensive publications component "will establish a body of new prior art," according to the press release. "We'll work with individuals who want to deposit" such contributions, Bergelt said, and help them if their current thoughts are only partially developed.

To this last point, Bergelt said that the open source community has been remarkably creative but has created no record of that creativity. He criticized the Free Software Foundation and its founder and leader, Richard Stallman, for creating an anti-patent view within the community.

Bergelt said that, "instead of railing against the patent system," OIN wants small- and mid-sized companies to have the ability to invent and create a record so that they do not have to worry about others getting in front of them. If the information is well-known, "codify it" by making it accessible to examiners and the patent community as prior art, he added, and give authorship to lead inventors.

Use of the Linux Defenders Web site will be free of charge to contributors.

OIN's Place in Patent Reform. Bergelt acknowledged that patent reform efforts in Congress have shown at least that OIN's open development viewpoint now has "lots of mind share." He expects enactment of patent reform legislation in 18-24 months, but "by its nature, the whole process is one of compromise, and we can't expect that legislation will solve our problems." OIN will have to participate in the process as well, he said.

Bergelt also noted with satisfaction recent judicial results in *KSR International Co. v. Teleflex Inc.*, 127 S. Ct. 1724, 82 USPQ2d 1385 (2007) (74 PTCJ 5, 5/4/07) (relaxing standards for finding obviousness) and *In re Bilski*, No. 2007-1130, 88 USPQ2d 1385 (Fed. Cir. 2008) (77 PTCJ 4, 11/7/08) (defining patentability test that imposes some constraints on software and business method patenting).

These and about five other cases, Bergelt said, show movement toward a more rational view of what should be patented and what should be the scope of those inventions that are patented.

The combination of legislation, judicial action, and programs such as Linux Defenders provide a type of “mosaic,” he said. He thought all three could work collectively to help the PTO so that only high-quality inventions are patented.

Bergelt wants to act now in anticipation of the invention road map to what will be relevant to Linux over the next five years. He saw the key areas requiring control over patentability as virtualization, wireless communication (data, voice, and video), device technology, and the Android mobile device platform

OIN is inventing through collaboration with university and starting dialogues with relevant government agencies, he said, with the goal to support freedom of action for everyone in the related development community.

BY TONY DUTRA

The OIN news release is available at http://www.openinventionnetwork.com/press_release12_09_08.php