

The Folder's Tale

At any ordinary conference you'd expect a flashy promotional folder. But EUPACO is a little different... it's not about selling a message, it's about bringing people together to discuss real issues and come up with concrete answers. These issues are not academic. They affect real people, real lives. And this folder tells a real-life story that may be worth hearing.

Once upon a time, there was a small technology firm that specialized in designing new and useful software products for big businesses. When the dot-com boom crashed and the market froze for a couple of years, this firm was left with a pile of cash and some clever people. It decided to invest in the growing market for mobile phone applications.

After eighteen months of R&D, of making prototypes, running trials, developing marketing, building the software and partnerships, the firm had a nice product ready to go. This product was called "sms@" and was based on a new and useful concept. For free, you could create a mobile site – say an information site for a conference – and tell people, "to get information, text 'eupaco' to 3791".

The firm thought of the investment they'd made, and how to keep competitors from imitating them, and so they called the EPO and asked, "how do we patent this software?" The EPO replied, "software can't be patented!" (Yes, it was naïve to ask the EPO but small firms are pretty innocent.) And in any case a European patent cost about ten thousand Euros. They decided they would compete by making their product better.

And the product sold. It was easy to use, useful, people liked it. The mobile phone operators did what cartels do, making it really expensive to connect to their networks. But slowly the product took hold and began to earn revenue.

Then, one day, the firm's boss got a phone call from a patent lawyer. Did they realise that their product infringed on a patent? Stories broke in the press about these new patents in the mobile application market. The firm spoke to others in the same market, and found that many had gotten the same phone calls, and some court cases were even under way. It's one thing to tell a company their product is infringing. It's another to call their customers and threaten to sue them. Especially when the patent is still pending... What the patent claimed was this: someone sends a text message, which gets processed by a software application (as all text messages do), the application looks up the mobile phone number in a database, and gets an email address. It then sends the person an email.

Needless to say, any mobile application that integrates with the Internet does this kind of thing all

over the place.

The patent holder and his lawyer made it plain: license the patent, or suffer the consequences. And with a large cash reserve the patent holder proceeded under threat of litigation to bend the market into obedience. Some smart firms with large mobile businesses jumped to the front of the queue and negotiated a cheap license. Some saw the patent as an opportunity and became OEMs for the "technology". Still others decided to oppose the patent at the EPO and went to look for specialists to help them.

And some firms, like the one in this story, looked at the patent licensing terms, the already high costs of doing business in this market, and the growing threat of litigation, and decided that the risks were greater than the benefits. After two and a half years and enough investment to pay for ten years of EUPACO events, the firm shut down its mobile products, fired the sales team, and put the developers onto other work.

All that was left was a stack of nice folders and an unwelcome lesson in the power of the patent system. We can read the arguments why patents are needed but this story shows how destructive patents can be, in the hands of people who see markets as things to exploit, not construct. When that market – as in software and in mobile applications and in most high-tech industries – is built by the smallest, most creative, and most fragile firms, who cannot use patents, and yet who cannot opt-out, we get little system failures like this one. These failures don't show on the records, they don't make it into the press. And of course it's impossible to generalise from a sample of one. But my question is: if you were advising that small firm, what would you have told them to do? It seems that there were only two choices: make patents (and become a licensor-of-IP), or make products (and become fair game). The "proper" way (buy patents *and* make products) is both too expensive, and provides no defense against firms that make patents but not products.

You probably guessed that this was my firm and my team, and it was my painful decision to kill the product we'd put so much into. This story is part of the reason iMatix got involved in the patent debate. For me, the key question is "how can the patent system and little firms that make products live in the same economic universe". It's a question that underpins the patent system's value in our diverse modern economy driven more and more by micro-businesses. It's a question that policy makers must take with deadly seriousness, and it's a question that I hope EUPACO will help to answer.

--- Pieter Hintjens, CEO of iMatix Corporation, President of the FFII, Founder of EUPACO.

See <http://www.fr.datanews.be/services/20061201007/1>