

## Appendix A: The Case for reinstating the EP's first reading



A directive which effectively forbids software patents is of course the most desirable outcome. Although a European directive cannot influence the European Patent Office (EPO) directly, it does apply to the national courts where patents have to be enforced.

If software patents are unenforceable, people will be less inclined to ask for them and threats using such patents will be less interesting, given that the chance for them to be invalidated in a court case will be very high. The EPO has also already publicly stated it will comply with the directive, whatever the outcome.

The arguments in favour of this approach are:

- ◆ The Parliament has until now always sent strong and consistent signals regarding software patents. First the amendments of first reading, then the restart request (including a confirmation of this request in plenary) after it became clear the Council's Uncommon Position was leading nowhere.
- ◆ Although second reading makes it more difficult for the EP to assert itself due to the "majority of component members" requirement, at the same time this means that all adopted amendments carry more weight. This is especially the case if similar amendments were also adopted in first reading.
- ◆ The Council is internally divided, so is the Commission, and the latter has further weakened its position by not giving any substantial explanations for refusing the EP's restart request. If the Parliament clearly votes against software patents twice, it will be in a very strong negotiation position.

In such a situation, it may very well be possible to have the Conciliation procedure result in a clear and coherent text which can be supported by a majority in the EP's third reading. As such, if the Parliament believes it can achieve the necessary majorities for reinstating a text in the spirit of the outcome of the first reading, then this is definitely the way to go.

## **Appendix B: The Case for rejecting the Council's (Un)Common Position**



The case for rejection is a case against adopting a bad directive. Legal uncertainty over whether or not software patents are enforceable is better than the certainty that they are, especially since there are still other open avenues to structurally attack their validity outside this directive project. A bad directive would be very harmful to such initiatives.

### **Long term European legislative goals**

Integration of the European Patent Office into the EU industrial policy legal framework via EU membership of the European Patent Organisation and via the "Community Patent" and a European Patent Court does not require this directive.

However, the integration project will be put at risk if the principles of this directive contradict the fundamental principles of the European Patent Convention, since the EPC would become an EU law. Codified contradictions would make application and interpretation of European patent law unpredictable forever.

For example, the invention concept, which lies at the heart of patent law, would be severely compromised if the Council text were adopted and the European Patent Convention remains unchanged. After all, the latter says a computer program is not an invention, while the former can only be interpreted consistently as meaning an explicit introduction of the patentability of computer programs.

### **The European Patent Office**

A bad directive would also make other initiatives to clarify the situation meaningless. As pointed out by many MEPs in 2002 already, the EPO has not yet exhausted its own possibilities to clarify the interpretation of the EPC when it comes to software patents. Article 112 of the EPC gives any EPO Board of Appeal the opportunity to refer basic questions to the Enlarged Board of Appeal. Lawyers have interpreted unclarities in recent software patent case law as attempts to get the Enlarged Board of Appeal involved in order to open up a window for settling this matter properly.

Furthermore, the debate over the last two years has not left EPO unaffected. Public pressure from the European SMEs and the programmers they are supposed to serve has initiated work inside the institution. There are signs of change and windows of dialogue might open. The "EPO information day" in the EP is one example of the increased need felt by EPO to communicate in public. A bad directive would close those windows.

### **The Commission**

Even if Commissioner McCreevy has misunderstood the EP restart request as a plea for killing the directive, the Commission cannot keep running away from its responsibilities. DGs other than DG MARKT are very unhappy with the uncontrolled developments and may take action. For example, in August last year DG INFSO launched a three year study on the effects of software patents.

The development of the Commission's knowledge base and policy framework must transparently engage the full intellectual resources of the Commission -- it cannot be handled within DG Markt as a merely political decision. The Commission needs to take a look at this because it needs to develop competence in patent policy, and not just for software but more generally.

The Parliament is not capable of monitoring the impact of the patent system on a continuing basis and calls on the Commission to develop the capacity to do so. The Commission "appears to have misinterpreted" the Parliament's request for restart, so it now may have to be made stronger and more explicit.

## **Conclusion**

Finally, don't think for one minute that European software developers and SMEs will stand by passively while being robbed of their assets by holders of US-style software patents and software patent parasites. Just like IBM and other non-European interest groups pushed the Council text's interpretation of the EPC for many years at the EPO, a countermovement built upon the awareness raised during this directive process could turn the tide.

If no bad directive is adopted now, both the public and the European Parliament will still get several opportunities to stop the current EPO practice from becoming codified law. A bad directive would however make such initiatives very difficult, and some even impossible.

## **Appendix C: Third party juridical and economic analyses of the Council text**



In summary, the Council's position can be described as the most extreme position seen until now for unlimited software patentability. It takes on board the original Commission proposal, but additionally introduces patent claims directed to computer programs on their own, and redefines "computer program as such" to mean something which no one would ever even want a patent on.

Since the Council and Commission texts are so similar, virtually all criticisms voiced about the former hold for the latter as well.

### **1. Maria Alessandra Rossi: Software Patents: a closer look at the European Commission's proposal**

This paper is part of the proceedings of the European Policy on Intellectual Property conference on 10 March 2005 in Copenhagen, Denmark. It was written by a researcher at the Doctoral School of Law and Economics, University of Siena, Italy. The full paper can be downloaded from [http://www.epip.ruc.dk/Papers/ROSSI\\_Paper.pdf](http://www.epip.ruc.dk/Papers/ROSSI_Paper.pdf)

The author's conclusions can be summarised in five important points:

1. The Commission's proposal would not decrease legal uncertainty in any way. The reason is that it is built upon the jurisprudence of the European Patent Office. This practice relies on undefined terms such as "technical character", "technical contribution" and "technical effect".
2. On the contrary, the European Parliament in its first reading "undoubtedly made some steps in the direction of improving clarity in the definition of patentable subject matter in the field of computer-implemented inventions".
3. The only consistent interpretation of the Commission proposal corresponds to an express insertion of the patentability of computer programs, i.e., it goes even further than simply deleting the exclusion of patentability of computer programs from the law.
4. The Commission is significantly changing the status quo by extending the patent system to cover computer programs.
5. The Commission does not provide any economic evidence to justify its changes to the status quo. On the other hand, many empirical economic studies provide reasons for concerns about this move.

## **2. Sandra R. Paulsson: Patenting Software vs Free Software**

This study was ordered by the European Parliament's DG on Economic and Social Policy. The author is a jurist who graduated at Lund University of Law, Sweden, who also holds a Master of Law of Suffolk University Law School, Boston, USA. The full paper can be downloaded from <http://www.ffii.org/~jmaebe/paulsson.pdf>

This author's conclusions are as follows:

1. The Council and Commission texts are semantically very similar.
2. The Commission proposal would codify the European Patent Office's practice, which is quite similar to the US Patent Office practice.
3. There is no problem with patenting business methods at the European Patent Office or under the Commission proposal.
4. SMEs will not be magically helped by the patent system by merely informing them better. The objections they have to the patent system are very well founded, and not based on imaginary fears.

## **3. Other studies**

An overview of many more economic and juridical studies can be found at <http://wiki.ffii.org/ConsParlo406En>