

The Directive-Implemented Invention of Software Patents



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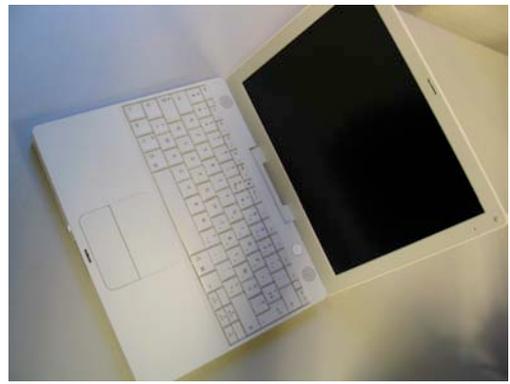
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*All is not as technical
as it seems*

Introduction

“[I]t's very difficult to persuade programmers that just because an invention is "easy", does not make it any less patentable.”

- *Steve Probert, Deputy Director UK Patent Office*



Why do we need a directive?

Since 1985, there has been a steady drift at the European (and some national) Patent Offices towards granting software patents. In most European countries software patents have either not yet been tested in courts, or have been generally unenforceable until now (the UK being a notable exception). To stop the drift towards a US-style situation, we need a directive that clearly codifies the legal status quo: software patents are not enforceable in Europe. This intention was clearly embodied in many of the European Parliament's core amendments to the “Directive on the patentability of computer-implemented inventions”.

Technical contribution

The Commission and Council proposals rely on requiring a “technical contribution” in order to prevent software patents. Such a technical contribution is already required today by the European Patent Office. Examples of such “technical contributions” in software patents which have already been granted are making a graphical user interface that takes up less space on your screen, and a retailer sending manufacturers' offers from a database to their customers by email. As a result, many US patents already have virtually identical European variants.

Copyright

Copyright protects original endeavours without preventing independent creations, and as such cannot be used to hamper fair competition in a free market. Intellectual property law always has to strike a fine balance between protecting innovators whilst not encumbering competition and follow-up innovation too much. Copyright has over time proven to get this balance just right so far as software development is concerned. Software patents, on the other hand, have already raised serious concerns in the USA.

HERE BE DRAGONS

I work for a small UK software company specialising in software for fixed and mobile telecoms operators that employs less than 100 people. My company has become exceptionally successful in our field and are market leaders for service providing in Europe and have significant share in Asian markets. Indeed we are doing very well across the globe.

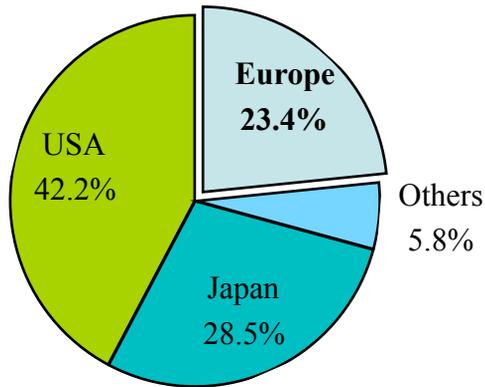
In our recent Company Day, our CEO proudly pointed out our successes on an atlas of the world. To Egypt, to Bulgaria, to Japan, to Switzerland to China etc. But in his presentation, North America was simply labelled “Here be dragons”! That's how our company views the US. A nation which we daren't touch. Where we've seen our competitors burn themselves in mitigating legal cases.

The reason is that most of us are actually involved in providing solutions – we don't employ a huge legal department. We can not afford to. Patents make it far more difficult and far more expensive and far far slower to develop software.

Jeffrey Lake — Tertio Telecoms Ltd — <http://www.telco-tertio.com>

Myths about the directive

by Reinier Bakels, computer scientist, lawyer and law scholar, author of the "JURI 107" report on software patents for the European Parliament



European software patent
"inventors" by country

"The directive enhances the competition potential of Europe"

In reality European software patents are mainly applied for by American companies. Patent law is governed by the "assimilation principle", which forces governments to provide the same protection possibilities to foreigners as it does to its own citizens. Based on that same principle, European companies can already obtain US patents as well. Therefore it isn't surprising that the Americans strongly objected to the amendments of the European Parliament.

"Software patents are required because copyright does not protect ideas"

Patent law does not exist to protect ideas either, *unless* they have the character of an invention. In practice, it turns out that software patents are abused to protect pure ideas. This is commercially very attractive for some, but disastrous for others and society.

"Consultations argue in favour of software patents"

On the contrary, many consultations in several countries consistently show that there is no consensus. The Commission thinks the opinion of (a few) large companies to be much more important than that of (many) small companies and as such ends up with a predictable, but utmost unjustified, conclusion.

"It would be naive for any company (or for that matter, any country) to assume that amassing patents for patents' sake is a meaningful measure of success."

- Nicholas Donofrio, Senior VP, IBM

"Patents are good for SMEs"

This persistent myth is fed by some rare success stories that actually are exceptions to the rule that patents typically serve the interests of large enterprises. Thus, unsurprisingly, the latter are the strongest lobbyists for the directive (in its original form).

THE LAWYER PERSPECTIVE

As a lawyer, it might seem strange that I am against software patents (after all, everyone agrees that software patents will benefit at least one sector of the economy – the legal sector). At Moorcrofts, our clients are predominantly knowledge-based industries, particularly software and media companies, and creativity is the single most important activity these companies undertake.

I have never had a client who has said to me "I would have created X [item of software] if I could have patented it, but I won't bother now". (Incidentally, in the interests of balance I have to say this not the case across all fields of endeavour outside software).

The introduction of software patents would benefit only big corporations with large patent portfolios for whom the system has the effect of raising a huge barrier to entry for SMEs and individuals.

Some examples of granted European Software Patents

The European E-Commerce Emergency

 <http://webshop.ffii.org/>

Your webshop is PATENTED!

4 CD **15** Films **2** Books **15** *NEW: ORDER BY CELL PHONE!* **2** Get help straight from our internal support databases!

17  **7** Ladybugs are very useful insects. They dispose of parasites. However, software patent litigators are far too large for them in general. **15** View film in Browser **15** Liked this search result? You may also like these:

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2 2. Bugging ladies
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5 5. Bugging me, bugging you

16  **20** Go to one of our stores and mix/burn your own DVD à la carte! **10** Add to shopping cart **3** Send as gift **10** **11** Request loan **18** **9** Pay using credit card **12**  **12** Yes, I want to receive special offers! **14**

14 If we don't have your order in stock, it will immediately be sent to an affiliated vendor!

Selection of patents from the above webshop (for more, see <http://webshop.ffii.org/>):

1. Webshop: Selling things over a network using a server, client and payment processor (EP0803105).

Technical contribution: the client sends the payment order directly to the payment processor, instead of first to the shop which then has to contact the payment server itself.

3. Electronic Shopping Cart: allow the user to mark several items he wants to buy and then pay for all of them together (EP784279).

Technical contribution: the browser of the user keeps track of the marked items (e.g., using a so-called "cookie"), instead of the server.

5. Preview window: show a window with a larger version of the picture (EP537100)

Technical contribution: a new instead of the old window is used to display extra information.

10. Gift: order a gift for someone by entering their email address, so the webshop can mail that person to ask him for his shipping address (EP927945).

Technical contribution: order a gift for someone without knowing their shipping address.

20. Burn CD/DVD: write bought data on a removable disc (such as a CD) (EP195098)

Technical contribution: no need to ship CD's/DVD's, just burn them on demand (this also applies to online music stores that allow customers to burn bought music to CD's).

Q: How is this different from the US?

A: It isn't. The US variants of these patents are virtually identical in scope. Only the wordings are sometimes slightly different, because they don't have to emphasise a "technical contribution".

Further information

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An introduction to the issue:

<http://www.nosoftwarepatents.com>