

European battle over software patents

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The long-running battle over patents for computer software has reached a new stage in Europe. An amendment [1] submitted on a Directive proposal [2], already approved by the European Parliament (EP) about three months ago, includes significant limits on software patentability. It makes software explicitly unpatentable and regulates safeguards such as freedom of publication and interoperation. The EP's Directives can become law only with the approval of the European Union (EU) Council. The approved Directive is then relayed to the Member States for local approval.

Since the EP's action, an intense campaign has been launched to kill this decision in the EU Council. Defenders of software patents, amongst which Ericsson, Nokia, Philips, Alcatel and Siemens are prominent, use the confusion created by the current practice of the European Patent Office (EPO). They base themselves largely on the owners of some more than 20,000 software patents already issued by the EPO, which diverged from the European Patent Convention (EPC) laws and began granting software patents openly in 1998. The EPO was established by the EPC [3], but in a clear violation of the EPC laws [4] it continues its practice to this day.

The granting of software patents by the EPO, however, has not created a clear mechanism for the patent owners because the issued patents could be challenged in a court of law. The campaign to kill the amendment is an attempt by the big corporations to rectify this situation.

Traditionally granted by governments, a patent is a means of protecting ownership of inventions or designs that can be clearly and concretely defined. Although they originated to protect an individual invention from being stolen, today patent laws have emerged largely as a means of protecting revenue streams for the big corporations. Nowadays, a patent ensures that, for a prolonged period, the owner is entitled to a share of any tangible income incurred via the use of his or her invention at the expense of the cost introduced to the end user.

This model has run into complications since the 1980s with the revolutionary growth of the computer industry. As computer software—the set of instructions that tell computers what to do—became a major source of revenue for the industry, copyrights were introduced in Europe for computer software [5]. The copyright, however, protects only the computer programme and not the ideas behind it. For example, if a programme that prints text is produced and marketed, the marketed software can be copyrighted. However, the idea to print text cannot be copyrighted. Anyone, with sufficient knowledge to develop such software, can develop a new computer programme that prints text and market it

without the fear of being sued.

The computer industry has now grown to such dimensions that copyrighting a software product does not satisfy the appetite of powerful sections of the industry. Their aspiration goes beyond owning the product. They want to own the way the product works, looks, performs, etc. For this, they must present the software as though it were an invention and try to cover it with patents.

In reality, however, software cannot even be defined for patent purposes. Developing software requires detailed analysis based on its specific requirements—that is, its tangible need—much more than any other technology. In this complex process, the product never gets finalised and evolves forever, even after it has been released for use. This makes software akin to social art, as the ideas of many continuously pour into it. This is best demonstrated by the rise of Open Software, in which the human-readable code is distributed, encouraging an open development platform to which anyone with the necessary skills can contribute.

The controversial nature of software patents, however, did not stop the lawmakers from proceeding with full force. They coined a term, “computer-implemented inventions,” that supposedly clarifies which software constitutes an invention and which does not, by claiming that its “technology” part can be separated from the “art” part. The original directive states that the “invention” must make a technical contribution to the state of the art in a technical field in order to qualify for a patent [6].

The directive also allows so-called “programme claims,” which could permit patenting the description of a technology rather than the technology itself, sometimes referred to as “information patents.” According to this, software authors and Internet service providers (ISPs) can be sued for direct patent infringement everywhere in the EU, as soon as they make a programme with the claimed features available somewhere on the Internet.

Another area in which software patents are becoming critical for the market is the patenting of a “business method.” Normally, this kind of patent is widespread in the industry [7]. But when software is involved in the business method, things get further complicated. If software is not patentable, the business method itself cannot be examined for patent. This has now changed in the US after the courts and the US Patent Office allowed patents on business method inventions [8].

The implications of patenting software are immense. In the 21st century, computers influence every aspect of social life. If patents were allowed for software, human creativity, in one of its most advanced forms, would be subject to jurisdiction. Faced with the potential of being sued, this would discourage and alienate creative individuals from attempting to build useful software or add value

to existing products. Even companies, small or large, would hesitate to develop new software due to fear of violating patents.

This is concisely explained by Bill Gates, the founder of the giant Microsoft Corp., in an internal memo of 1991: "If people had understood how patents would be granted when most of today's ideas were invented and had taken out patents, the industry would be at a complete standstill today." After sharing his opinion on the consequences of patents with his staff, he then makes his predatory but revealing conclusion: "The solution [for us] is patenting as much as we can. A future startup with no patents of its own will be forced to pay whatever price the giants choose to impose. That price might be high. Established companies have an interest in excluding future competitors."

In practical terms, software patents would also literally render any software copyright meaningless, as a copy of software could contain hundreds, if not thousands, of patents, most of which would be difficult to identify.

Even though the patents, like copyrights, expire after an extended period, this helps little. The history of ideas demonstrates that they are fueled by a particular environment and, not infrequently, flourish more or less at the same time. Thomas Edison would never be in a situation to finish off the works of others for a practical incandescent light bulb, had he lived in the Stone Age. An idea may then turn into science and technology due to the popular support given to it in the form of joining ideas and other technologies upon which it rests. If this process is killed at its initial stages, due to one individual or company holding a patent for the idea, the momentum will rarely reach levels that push the idea to take off. Thus patents, originally intended to fuel innovation, today act in an opposite manner, suppressing it.

Defenders of software patents argue that they will fuel research and development (R&D), but a report commissioned for the UN Conference on Trade and Development Secretariat in 1990 argued the opposite: "Patents as an instrument to stimulate innovative activities appear to be of little relevance for small firms. It was found that no significant changes in R&D behavior would take place if the patent protection time were reduced or extended. Also, for large firms, the R&D behavior seems to be rather independent of the availability of patent protection. The survey showed that increased patent protection time is likely to provide, at most, a modest stimulus for R&D activities. Chemical, and particularly pharmaceutical, firms appear to be more sensitive to such changes."

Under the capitalist system, ideas, and all forms of artistic, scientific and technological endeavours are treated as forms of private property. Patents, together with copyright and trademarks, are classified as intellectual property, with complex rules relating to the use, reproduction and licencing of inventions and creations.

As with all forms of bourgeois property, the producers of intellectual property are alienated from the products of their labour. Employees, for example, enjoy no rights, or control, over the discoveries or artistic creations they make in the course of their employment. Either by contract or by common law, these become the property of the company for which they work.

Vast progress in computerisation and other scientific, medical and technological developments create both the necessity and

possibility for the social collaboration of humanity on a world scale. Social needs have become increasingly complex and the technologies that support them have become ever more socialised. Where Marx spoke of the socialisation of machinery and labour, we now witness the socialisation of science and technology. It is impossible in today's world to achieve results in science or technology without collaborating with others around the globe.

The demand for software patents highlights the basic conflict of interest between the giant corporations, which see patents as simply another weapon in the accumulation of private profit, and the interests of the broad mass of ordinary working people throughout the world. The defence of intellectual progress requires not only an opposition to any extension of patent laws, but a struggle against the social system that gives rise to these.

The example of the EPO, which, under the pressure from the market, violates the very law under which it was created, demonstrates that such a defence cannot be left to institutions set up within the confines of the profit system, on a national, European or world scale.

Notes:

1. Amendment number A5-0238/84, submitted by Joachim Wuermeling, on behalf of the Group of the European People's Party (Christian-Democrats) and European Democrats (PPE-DE).
2. Directive for "Patentability of Computer-Implemented Inventions," COM(2002) 92 - C5-0082/2002 —2002/0047(COD)
3. See EPC Article 4.
4. EPC Article 52, 2c explicitly declares that "schemes, rules and methods for performing mental acts, playing games or doing business, and *programmes for computers*" are not regarded as inventions.
5. Under Directive 91/250/EEC of May 14, 1991
6. Article 2 of original Directive [2] defines a "computer-implemented invention" as "any invention implemented on a computer or similar apparatus which is realised by a computer programme." It then continues: "It is a consequence of this definition that the 'novelty' of any invention within the scope of Directive does not necessarily need to reside in a technical feature." It also states, in the same Article, that the "technical contribution" is a "contribution to the state of the art in a technical field which is not obvious to a person skilled in the art."
7. This is so despite EPC Article 52, which clearly excludes "methods for...doing business" as invention.
8. One famous example is Amazon.com's 1-click patent, which it obtained on September 28, 1999, against its competitor Barnesandnoble.com. It is a method of placing an order when purchasing an item via the Internet. By patenting this "method," Amazon.com ensured that no others could implement this idea.



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