European Council approves software patents

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Patentability of computer software in Europe has been accepted by the Council of Ministers of the European Union. In a meeting in May, the Irish presidency, which helped draft a new directive in favour of software patents, reportedly secured a narrow majority for the draft. The new draft did not include the amendments pushed by the European Parliament last September, which declared software patents explicitly illegal.

The Council will pass the draft back to the European Parliament for a second reading after it presents it to the Council of Ministers for adoption, which is regarded as formality. The Parliament can only reinstate the removed amendment with an absolute majority.

If the new draft becomes law and is then adopted by member states, the patenting of software in all European countries will be possible. This would mean that the computer-implemented algorithms, the communication protocols and possibly the programme descriptions enter the area of litigation, and a patent lawyer would be required in order to develop software in Europe.

The council has redrafted the original directive to give it a more complete form towards the granting of patents for so-called "computer-implemented inventions," a term invented to present software with a more technical face than it actually has. This new draft, prepared by the administrators in the European Council, stands in stark contrast to the earlier decision of the elected European Parliament.

The redrafting has been carried out by the Patent Working Party of the Council, a group of patent administrators close to the European Patent Office (EPO). The EPO has been granting software patents since 1998 in a violation of patent laws under which the EPO itself was established. European Patent Convention Article 52, 2c declares that "schemes, rules and methods for performing mental acts, playing games or doing business, and *programmes for computers* [emphasis added]" are not regarded as inventions. Patents are only allowed on genuine inventions.

There are claims that behind the council's decision lies pressure from the Commission of European Communities (CEC), an executive body of appointed representatives from the member states. A leaked paper from the CEC in November 2003 argued that the European Parliament's amendment is unacceptable.

The CEC had launched a formal consultation on the original directive in October 2000. It received 1,447 responses, 91 percent of which opposed software patents. Seventy-four percent of the objections were from individuals, with only 10 percent coming from the large corporations and associations. Only 17 percent of individuals supported software patents. These findings are now ignored along with the decision of an elected parliament. The details are not known, as the negotiations of the council are not accessible to the public, or even to the members of the European Parliament.

In reaching their decision, the ministers have ignored widespread opposition to the move, expressed in demonstrations and other forms of protest involving small and large companies.

Among the arguments against software patents has been a fear that European corporations will be unable to compete with their US counterparts, which own 75 percent of the patents already granted by the EPO. Others, including Alcatel, Ericsson, Nokia and Siemens, argue that unless software patents are allowed, the value of most of their patents will be wiped out and this will harm their competitiveness. The CEOs of the above companies sent a letter to EU commissioners, arguing precisely this.

The policymakers claim their support for the software patents will promote innovation, increasing competitiveness and employment, creation of a level playing field, etc., but such arguments have already long since been proven false. In today's world, a patent is no longer a weapon for an individual inventor to protect his invention, thereby providing him an incentive for his work, but rather a weapon in the arsenal of large companies to stifle competition and independent innovation.

Research conducted by Bessen and Hunt in 2003, titled "An Empirical Look at Software Patents," shows that currently in the US, 15 percent of total patents granted each year are software patents. They found evidence "that software patents substitute for R&D [research and development] at the firm level; they are associated with

lower R&D intensity." That is, the more software patents are appropriated, the less the R&D activity. They reveal that this occurs "primarily in industries known for strategic patenting and is difficult to reconcile with the traditional incentive theory of patents." Another finding is that the propensity to patent has increased remarkably, in particular within the industries known for strategic patenting. The researchers conclude that "firms may be engaged in a patent 'arms race.' " In other words, it is about control, not about fuelling innovation.

In the US, the patent-litigation industry is a fast-growing one, and most of the volume is attributed to software patents. In a period of 12 months ending September 2003, a 13 percent increase was registered in patent-infringement lawsuits compared to five years earlier. "The nation's overburdened patent system," in the words of co-founder and chairman of giant Intel Corp., Andrew S. Grove, "is causing an abundance of innovation-slowing litigation."

The director general of internal market and financial services in the CEC, John Mogg, states that introducing software patents will create a level playing field because it will bring relevant European laws in line with the US and Japan. He adds that the "patent system should not be looked at in isolation. [It] constitutes part of the general legal framework necessary to ensure a full-fledged market economy."

Modern innovations can only come to life as a concerted effort to collect ideas, glue them together and improve them in the process. Any obstacle on this path will easily jeopardise the fragile nature of innovations. A rule can be laid down here: The bigger the obstacles, the fewer the innovations. The obstacle of patent application would be added to the obstacles of patent litigations, creating a sizable one approaching unacceptable limits, even in the market place.

The right of patenting software will alienate the most timid and the young amongst the software community by severely limiting their freedom, by creating enormous obstacles and by causing a false sense of ownership.

Even when approached only on technical grounds, patenting software will create a considerable setback for humanity at an age when computer software is used in every sphere of life.

The mere fact of owning an idea as a property puts it under scrutiny and pushes it into the field of litigation. Ideas are something the human brain is capable of producing en masse but not in an identical or an isolated manner. In the field of software, this creates controversy because computer software is a collection of ideas moulded together that are hard to separate. The fact that the software can be presented in a product form does not make it any more patentable than an artwork.

It would be quite a task to locate a software patent even if one assumes it can be patented. For this, one would have to find out which ideas are actually patented for the software at hand. Some patents can be kept secret for months, which is long enough to develop a software product without noticing the underlying patents. Even if they are not secret, they are to be searched for and found in the thousands, if not millions, of patents, most of which are written in an unfriendly language. It is not uncommon for someone not to recognise his or her own patent.

On the flip side, for the requestor of the software patent there is essentially no reliable way to present the work of software so that the patent will survive litigation, unless the laws are watered down as happened in the US during the 1990s. If the work is presented in the printed text of a computer language, or on a computer disk, it is still out of the context in which it was developed. It would require that the whole operating environment be attached to the software in order to "prove" that it does exactly what was claimed in patent application. Even if this is done and all components of software are available, analysing patented software in detail during litigation would be a very expensive process in itself, playing into the hands of the more powerful of the litigators. Statistics in the US support this view: 90 percent of software patent litigations are lost if the smaller of the litigators can survive the legal process.

The undemocratic nature of adopting the new draft reveals how far the interests of the major companies are protected at the heights of European politics against the interests of the ordinary software writers. The obstacles created for the software community are completely ignored. This reflects only a microcosm of policies against the working population at large.

Software technology sits in the heart of modern industries and must be fostered, not stifled. The fact that the European Council overlooks the empirical evidence building against the software patents and ignores the opposition from the elected European Parliament testifies to the size of investments to be protected by the darlings of the CEOs. As the law is strengthened, this process will accelerate at the expense of the freedom enjoyed by today's software writers in Europe.