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AN OPEN-AND-SHUT CASE

THE DIPLOMATIC CONFERENCE TO REVISE THE ARTICLES OF THE EUROPEAN PATENT OFFICE VOTES TO MAINTAIN THE STATUS QUO REGARDING SOFTWARE PATENTS IN EUROPE PENDING ISSUANCE OF A NEW SOFTWARE PATENT DIRECTIVE BY THE EUROPEAN UNION

by

Erwin J. Basinski, Esq. *

A. Introduction

The majority of EPC States decided that the issue of changes to delete the prohibition against computer programs as such should be deferred pending the review being carried out by the European Commission in preparation for the proposed EU Directive on Software Patents. There would then be the possibility of including a subsequent amendment to Article 52 after the EU Software Patent Directive is issued.

As to the pending Software Patent Directive, on 19 October 2000, the European Commission launched consultations (i.e. requests for comments) via the Internet on the patentability of computer-implemented inventions, requesting that interested parties submit comments to the EC prior to December 15, 2000. It was reported that over 60,000 comments were received from independent software developers and small to medium business enterprises (SME) in Europe as a result of a concerted lobbying campaign against software patents by the Open Source Software community in Europe. Some comments, both pro and con are now available for viewing on the EU web site.

It is understood that the EU is soliciting additional economic studies and will begin the draft of the Software Patent Directive shortly.

B. Background

Software patents have been granted in Europe for many years. The European Patent Office (EPO) estimates that they have issued over 20,000 patents on computer programs.[1] This is

* Erwin Basinski is Of Counsel in the Electronic & Software Patent group of Morrison & Foerster LLP, San Francisco. The comments in this article are strictly those of the author and are not to be attributed to Morrison & Foerster LLP. This article was first published in the "World eCommerce & IP Report", February 2001, BNA International, Inc.

in spite of the language of Article 52 of the European Patent Convention (EPC) which indicates that computer programs "as such" are not patentable. Moreover, in recent years, rulings of the Boards of Appeal of the EPO have liberalized the interpretation of just what is a "computer program as such" [2] so that any program which produces and claims a technical effect in a system or process that is patentable, is not considered a "computer program per se" and is itself patentable.

A Diplomatic Conference to Revise the European Patent Convention began at the EPO in Munich on November 20 and ran through November 29, 2000. This meeting considered recommended changes to the Articles and Rules of the EPC. The Basic proposal for the revision of the European Patent Convention (CA/100/00e) recommended many changes including:

> *Bringing Article 52(1) into line with Article 27(1), first sentence, of the TRIPS Agreement with a view to enshrining "technology" in the basic provision of substantive European patent law, clearly defining the scope of the EPC, and making it plain that patent protection is available to technical inventions of all kinds;*
>
> *Deleting "Computer Program Products" from Article 52(2)(c) EPC in view of the fact that the Boards of Appeal have confirmed that computer programs producing a technical effect, as a rule, are patentable subject matter under the EPC*[3]*; and*
>
> *Possibly deleting Article 52(2) and (3) in their entirety.*

It was thought that these Boards of Appeal cases on computer programs and the recommended changes would result, at least, in the deletion of computer programs from Article 52(2) EPC. However, in a surprising development in September 2000, at a meeting of the Administrative Council of the EPC, Germany, France, Italy, and others voted against deleting computer programs from Article 52(2) EPC.

At the time it was not clear what prompted this apparent reversal in position on the part of these countries. However, earlier in late 1999, the LINUX proponents, which had now become known as the "open source" software foundation, had begun a lobbying campaign, promoting LINUX as a "low or no-cost " answer to Microsoft NT™ and to Sun Microsystems Inc.'s Solaris™ operating systems. Moreover, the Open Source proponents, fearing retaliation from operating system vendors, by way of patent infringement lawsuits, began a concerted lobbying campaign in Europe against software patents in general. These efforts led to a concerted movement to prevent the EPO from "weakening" the statutory prohibition against patenting computer programs per se. It is believed to be this development that influenced the "apparent" change of position of these and other countries at the September 7, 2000 meeting of the EPC Administrative Council.

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1 "Software Patents - An essential element of the European Patent System" by Ingo Kober, President of the EPO, paper presented in London on 23 March 1998.

2 See T 1173/97 - Computer Program Product/IBM, OJ EPO 1999, 609.

3 Id.

Moreover, discussions have apparently been going on at the highest Ministry levels in several European countries during the summer of 1999 to consider "Business Method' patents and whether these should be allowed in Europe. Some members at the highest levels in some governments appear to prefer a sui generis approach to business method protection instead of using the patent system. The apparent inseparability of business method patents, Internet related patents, and computer program patents, along with the lobbying campaign against software patents in general, by the open source proponents, and Greenpeace representatives (who were protesting against gene technology and cloning patents) appears to have encouraged the representatives at the Diplomatic Conference to retain the status quo regarding computer software in Articles 52(2) and (3).

Meanwhile, the European Commission published the results of a Green Paper on the Community Patent and the patent system in November 1997[4] which led to considerable debate on software patents in Europe. This was followed by a Round Table discussion on the "Patenting of Computer Software" held at the EPO headquaerters in Munich on 9-10 December 1997, sponsored by the EPO and the UNION of European Practitioners in Industrial Property. These discussions and debates led the Commission to conclude that

> *"the current legal situation regarding patent protection for computer-implemented inventions is unsatisfactory by virtue of lacking clarity and legal certainty.... This situation has adversely affected investment and innovation in the software sector and has had a negative impact on the functioning of the Internal Market."*[5]

These debates led to the preparation of a legislative initiative by the European Commission (the Directive on Computer Software Patents) beginning with the commissioning of an economic study to try to determine whether the existence of software related patents have indeed affected "investment and innovation in the software sector" both in the US as well as in Europe.[6] This study was an attempt to determine whether software patents have led/contributed to the rise in the eCommerce market (with its related growth in the US economy) in the US, and whether the lack of similar less-liberal software patent policies in Europe had contributed to the lagging economy in these areas in Europe.

This economic study of software patents in the US and in Europe has been completed.[7] Those in DGInternal Market considered the economic study as inconclusive and could be read either way.[8]

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4 Green Paper: COM (1997) 314 final of 24.6.1997; follow-up Communication: COM(1999) 42 final of 5.2.1999.

5 "The Patentability of Computer-Implemented Inventions" - "Consultation Paper by the Services of the Directorate General for the Internal Market", Brussels, 19 October 2000, Bernhard Mueller, Administrator, Internal Market DG.

6 Id.

7 See the report at www.europa.eu.int/comm/internal_market/en/intprop/indprop/softpaten.htm and a summary of the report at www.europa.eu.int/comm/internal_market/en/intprop/indprop/studyintro.htm.

On 19 October 2000, the European Commission launched consultations (i.e. requests for comments) via the Internet on the patentability of computer-implemented inventions.[9] Since that date, hundreds and hundreds of comments opposing software patents in general have been received (generally from the open source supporters via email), with very few comments received from businesses in favor of software patents. Some of those comments which authorized their publication on the Internet can be viewed at the EU web page.[10]

The primary arguments in the early comments against software patents in Europe, according to Mr. Mueller[11], are the following:

Patent protection is not needed to foster innovation in the software field;

Software patents inhibit interoperability of software systems;

Software production is inexpensive and therefore there is little need to protect the investment in its creation;

Software patents threaten the growth of the open source software community, which if left unencumbered, will benefit society.

Comments by pro-software patent groups can be seen at the EU web page.[12]

The members of the EPC in the Diplomatic Conference meeting, on Thursday 23 November 2000, decided to make no changes at this time to Article 52(2) regarding computer programs, on the basis that they did not wish to preempt whatever new rules might be promulgated in the EU Software Patent Directive now under study. It is generally believed by practitioners in Europe that this decision was prompted, in large measure, by the intense lobbying of the open source proponents[13].

During that time, the open source community and Greenpeace stepped-up their lobbying efforts against software patents. At the conference "Is software patentable?" sponsored by the IT Section of the German Bar Association in Munich, on 17-18 November 2000, there was a panel discussion on the politics of software patents. Those speaking for software patents included Tim Crean, Patent Counsel of Sun Microsystems, and Vic Siber of Clifford Chance et al (and formerly with IBM). Those speaking against software patents included Richard Stallman,

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8 Comments made by Mr. Mueller at a conference on "Is software Patentable?" sponsored by the IT Section of the German Bar Association in Munich, on 17-18 November 2000, (at which I also was a speaker).

9 See http://www.europa.eu.int/comm/internal_market/en/intprop/indprop/softpaten.htm

10 See http://www.europa.eu.int/comm/internal_market/en/intprop/indprop/softreplies.htm

11 Comments made by Mr. Mueller at supra note 9.

12 See footnote 9 supra. Responses included those by groups such as The EU Committee of the American Chamber of Commerce in Belgium ; Trade Marks Patents & Designs Federation ; European Affairs Office, GE International; Philips.

13 For more background on the Open Source efforts see the article at http://www.wired.com/news/politics/0,1283,40299,00.html.

noted developer of the GNU systems and avid anti-software patent proponent with the Free Software Foundation, Mr. Sebastian Kuntze, CEO of Linux Informationssysteme AG, a seller of Linux Operating Systems, and a Mr. Pilch, Representative of the Open Source Association. These latter gentlemen are articulate opponents of software patents, emphasizing a perceived threat to software developers of "trivial" software patents as well as legitimate software patents being issued by the US Patent Office especially, but also by the EPO, and in general the "immorality" of software patents. Because of intense lobbying activity of the delegates to the EPC meeting in November 2000 (many of these delegates also representing member states of the European Union), the anti-software patent proponents appear to have influenced the refusal of the delegates to the Diplomatic Conference to delete the restriction against computer programs as such in Articles 52(2) and (3) EPC.[14] It remains to be seen what impact their lobbying efforts will have on the EU Software Patent Directive currently under study.

As a side note, Mr. Mueller has been recently transferred from DG Market to return to the Alicante Trademark Office. Mr. Anthony Howard will take over the software patent file at DG Market as of March 1, 2001.

C. Conclusion

At the present time, it is our understanding that the German Ministry of Economics and Technology is seeking expert opinions on the subject of software patents from various experts such as the Fraunhofer Institut and the Max-Planck-Institut. European software patent experts, such as Jurgen Betten, of Betten & Resch, Munich, are attempting to provide the DG Internal Market with some recommendations that might accommodate the concerns of the OpenSource community. In the meantime Mr. Howard and his associates at DG Internal Market are attempting to draft the Software Patent Directive. It is understood however, that DG Information Society may be anti-software patent and would like to see some compulsory license arrangement built into the Directive. We shall continue to follow the developments toward this EU Software Patent Directive with great interest.

[14] A very good report on the Diplomatic Conference can be found at http://www.aippi.org/reports/report-EPO-Dipl.Conf.htm. See also the press release of Dr. Grossenbacher of November 29, 2000 at http://www.european-patent-office.org/news/pressrel/2000_11_29_e.htm.