European Parliament Hearing on Software Patentability

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7 November 2002

Software and Business Method patents are first and foremost a policy issue, rather than a legal issue.

This issue has been examined in several European jurisdictions over the past few years, most notably at the Community level, in France, Germany, the Netherlands, and the United Kingdom. Some of these jurisdictions have even conducted multiple studies. Most studies were based on extensive consultations. Since these studies were completed before we started our investigations, our policy analysis could benefit from their analysis and conclusions.

Despite the widely varying approach of the studies, all invariably conclude that it is very hard to decide in favour or against software patents. Also, it appears to be difficult to discriminate between the software inventions that should, and those that should not be patentable. Currently, "technical" software inventions are considered to be patentable. Case law shows that this distinction often leads to rather arbitrary results. There are "bad" technical patents and "good" non-technical patents. Good patents stimulate innovation. Bad patents create undue monopolies.

Will the proposed European Directive for "computer-implemented inventions" be helpful to discriminate between "good" and "bad" patents?

In essence, the proposed directive has a threefold objective:

1. confirming and maintaining the status quo of a limited software patentability,
2. improving legal certainty, and
3. improving unity of law.

Let us review these objectives one by one.

Starting with the last objective, indeed a European Directive may improve the unity of law, as member states' courts are required to interpret the law in conformity with the directive, eventually under the supervision of the European Court Of Justice. It should be emphasised though, that the grant itself of European patents by the European Patent Office would not be harmonised

by the directive. So, at best, the proposed directive would reach this objective only in due course as case law is created.

Concerning the second objective, we have serious doubts as to whether the proposed directive will improve legal certainty. The "technical contribution" concept introduced by the proposed directive is *not* an improvement. At first sight, it seems logical not to allow patents for inventions lacking such a contribution. But in practice, a "technical contribution" requirement is likely to increase rather than decrease confusion. The directive does not define the concept of "technology". The associated *Frequently Asked Questions* document explains that "technology" *cannot* be defined because patent law naturally deals with leading edge technology, which is in constant change. If however the courts have to decide what "technology" means on a case by case basis, as is proposed in the FAQ document, the proposed directive fails to meet one of its prime objectives.

In our view however, the difficulties in defining and handling the concept of "technology" are symptomatic for the fact that it is hard to draw the dividing line between "desirable" and "undesirable" patents. The distinction may not be related to the technology "content" of inventions at all.

Concerning the first objective – maintaining the status quo of a limited software patentability – the proposed "technical contribution" requirement is apparently intended to prevent "business method" patents. While there is little agreement about software patentability, most consulted Europeans are opposed to business method patents. If business method patents are to be categorically excluded, in our view it would be more appropriate to prohibit such patents as a category by an explicit legal provision, rather than indirectly by means of a "technical contribution" requirement.

The complaint has been raised that patents are granted for "trivial" software inventions. It has been argued that such inventions do not need patent protection. Moreover, "trivial patents" may hinder the competition process. Have indeed patents been granted for trivial inventions? The answer is not straightforward. Actually there is a long-standing practice to refuse patents only for very obvious inventions. In other words, the statutory "inventive step" requirement in practice represents a relatively low threshold for all types of inventions, not just for software. Changing this standard would imply a major change in patent law. But there are reasons to consider such a change.

Let us take a slightly wider perspective. Patents have been controversial for a very long time (over a century). Patents are meant to stimulate innovation by protecting R&D investments. But in practice, patents are widely used for "strategic purposes", in other words, to fight competitors with legal means rather than with product superiority. There is an old American saying: "if you can't beat them, sue them". Edison, the inventor of the electric light bulb, already fought his competitors in court, rather than on the marketplace by delivering better products.

Given the controversiality of patents, there is an astonishing lack of factual empirical data about the actual functioning of the patent system. Consultations mainly reveal opinions, instead of hard facts. There are many economic theories about patents, but hardly any theory can be calibrated, due to the lack of empirical data.

Given these uncertainties, the priority should in our view not be on yet another European Directive, but rather on concerted efforts aimed at obtaining more insight in the way the patent system actually works. We do not advocate yet another consultation or study. Instead, we feel that there is a need for an agency that collects data about the operation of the patent system in a systematic fashion. Article 7 of the proposed directive deals with "monitoring". We would advocate the creation of a Patent Observatory that should collect patent system "management information" on a routine basis. Only such an Observatory could answer even such basic questions as whether patents are needed in specific industries – and for what type of inventions.

Another unknown factor is the licensing practice. Since the legal provisions on compulsory licences are very limited, licences are typically granted on a voluntary exchange basis. This "cross-licensing" practice may create a barrier for small and medium-sized enterprises, as SMEs typically do not own a patent portfolio of sufficient size to participate in this game. This is contrary to the popular belief that patents are good for SMEs. While barriers can indeed exist, we have no way of knowing the extent of this problem. The Patent Observatory could provide such hard facts as well.

In sum, given the above, we feel that there is no reason for a European Directive. For a start, given the invariably ambiguous results of all the studies and consultations conducted in the recent past, it is hard to decide what policy is best. In addition, the wording of the proposed directive is likely to increase rather than decrease the confusion about patentability criteria.

Apparently the objective of the proposed directive was to provide watertight provisions for the specific case of "computer-implemented inventions". No statute can be watertight however. Law is made both by legislators and courts. It would be a mistake to make very detailed provisions for "computer-implemented inventions" in isolation of other patent laws, in an attempt to prevent undesired interpretations.

Adopting the proposed directive may give the false feeling that the software patent problem at last has been "addressed". As we have seen, the problem is much more complex than just confirming a dividing line by some rules in a directive. The recent crisis in the American patent system shows that patent policy requires continuous attention. The forthcoming introduction of the European Community Patent may represent a good opportunity to revisit the European patent system as a whole.