

Software Patents in the European Union

European Patent Convention (1977)

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 - (a) discoveries, scientific theories and mathematical methods;
 - (b) aesthetic creations;
 - (c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;
 - (d) presentations of information.
- Art. 52(3): The provisions of paragraph (2) shall exclude patentability of the subject-matter or activities in question “only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such.”

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1978 EPO Examination Guidelines

- “A computer program may take various forms, e.g. an algorithm, a flow-chart or a series of coded instructions which can be recorded on a tape or other machine-readable record-medium, and can be regarded as a particular case of either a mathematical method ... or a presentation or information If the contribution to the known art resides solely in a computer program then the subject matter is not patentable in whatever manner it may be presented in the claims. For example, a claim to a computer characterised by having the particular program stored in its memory or to a process for operating a computer under control of the program would be as objectionable as a claim to the program per se or the program when recorded on magnetic tape.”

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The EPO Barriers Come Down

- 1978-1985: EPO highly resistant to patenting software
- 1985 onward: EPO increasingly receptive to patent applications, so long as the software has a “technical aspect”
 - 1985 Revised Guidelines
 - IBM (EPO Technical Board of Appeal, T0935/97)
 - IBM (EPO Technical Board of Appeal, T1173/97)

Divergence Among National Courts

- UK: software unpatentable even if technical aspect has been shown
- DE: very soft “technical aspect” requirement

Commission of the European Communities Seeks Harmonization

- **1997 Green Paper** (http://europa.eu.int/comm/internal_market/en/indprop/patent/paten.pdf)
- **1999 Follow-up proposes Draft Directive, establishing patentability of software** (http://europa.eu.int/comm/internal_market/en/indprop/patent/8682en.pdf)
- **2000 Study of Economic Impact** (http://europa.eu.int/comm/internal_market/en/indprop/comp/studyintro.htm)
- **2000 “Final Round” of Consultations** (http://europa.eu.int/comm/internal_market/en/indprop/comp/soften.pdf)
- **2002 Proposal for a Directive** (http://europa.eu.int/comm/internal_market/en/indprop/comp/com02-92en.pdf)

Proposed Directive, Art. 4

- Member States shall ensure that a computer-implemented invention is patentable on the condition that it is susceptible of industrial application, is new, and involves an inventive step.
- Member States shall ensure that it is a condition of involving an inventive step that a computer-implemented invention must make a technical contribution.
- The technical contribution shall be assessed by consideration of the difference between the scope of the patent claim considered as a whole, elements of which may comprise both technical and non-technical features, and the state of the art.

Debate

Expand:

- Union of Industrial and Employers' Confederations of Europe (UNICE)
- European Information, Communications and Consumer Electronics Technology Industry Association (EICTA)

Shrink:

- EuroLinux
- Foundation for a Free Information Infrastructure
- Committee of the Regions
- Academics
- Start-up companies

Continued Struggle within EU

- Sept. 2003: European Parliament in first reading proposes amendments to Draft Directive
 - Patents on “programmed devices” permitted
 - But no patents on “data processing”
 - All patented technology must be “susceptible of industrial application”
 - Safe harbor for copying for interoperability
 - (http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=20030924&LANGUE=EN&TPV=PROV&LASTCHAP=7&SDOCTA=2&TXTLST=1&Type_Doc=FIRST&POS=1)

Continued Struggle within EU

- May 18, 2004: Council of Ministers, by a bare qualified majority, removes amendments and tentatively adopts pro-patent version
 - Change in vote-weighting system in EU
Competitiveness Council, the defection of Poland, and rumblings in the Netherlands and Germany destabilize the agreement
 - Dec. 7, 2004: Competitiveness Council vote delayed
- Summer 2006: Parliament rejects final draft