

IPAN issue brief - no. 7

issue: Patents and software in Europe

background

Patents provide much stronger protection than copyright. This is because the scope is wider and copying is not a requirement for infringement of a patent but is for infringement of copyright. However, patents are not available to protect all types of subject-matter and in the UK and Europe protecting computer software and related subject-matter with patents is not clear-cut. In 2002 the European Commission proposed a Directive aimed at clarifying practice on the patentability of computer-implemented inventions within the EU. Unfortunately, this proposed Directive was comprehensively rejected by the European Parliament in 2005.

Patents protect novel and inventive (i.e. non-obvious) developments of a technical nature. Increasingly, products and processes themselves long recognised to be patentable - from washing machines to telecommunications systems - owe their novel characteristics to a controlling program in a microprocessor or computer. The European Patent Office (the EPO) has established the firm position that when an invention has the necessary technical character it is patentable even if it involves a computer program in its implementation. The EPO and national courts have recognised that such patents are not for "programs for computers as such", which are specifically excluded from patentability under Art 52 of the European Patent Convention.

In the USA the patent statute can and has been interpreted to allow patenting in fields excluded by European law. For instance patents can be obtained for software even when there is no technical contribution. This has led to patents for pure business methods, with no technical attributes, for example where computer systems control the flow of investments between different funds and all the novelty lies in the business steps.

A number of concerns have been raised about patents and, in particular, about patents on software: a) that patents are often granted on trivialities and b) that in any event patents tend to favour big business.

comment

The collapse of the European Directive does not alter the legal position on patenting of computer-implemented inventions. The EPO cannot treat such inventions any differently from other inventions. Similarly it is highly unlikely that the EPO will change its position on business methods. A Directive would have

harmonised the law across the EU. The current position is unsatisfactory in that national courts can come to conflicting decisions. But differences of approach by national courts are far less important than the concerns expressed widely by MEPs and the public.

Everyone agrees that the quality of patent examination has to remain high and that the issue of patents on seemingly trivial features has now become a significant issue. Opposition of the grant of such patents may not be possible or indeed successful. It is clear that patent examiners need better access to what is publicly known in the software community and there are current initiatives to help achieve this.

Patents do not in general favour big business. Enforcing patents can certainly be expensive but without a patent (or at least an application for one) any business has far less commercial security and bargaining power. European patents continue to be granted for computer-implemented inventions (the EC has stated¹ that at least 30,000 such patents have been granted since 1978), but how such patents can be obtained and the limitations involved need to be better publicised. Small businesses in particular need to be made better aware of the opportunities which appropriate use of patents may provide them.

^[1]

<http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/02/32&format=HTML&aged=1&language=EN&guiLanguage=en>

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suggested links for further reading: