

## **BILETA Response to:**

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### **The Patentability of Computer-implemented Inventions (Consultation Paper by the Services of the Directorate General for the Internal Market)**

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#### **1. BILETA**

The British and Irish Law, Education and Technology Association (BILETA) was formed in 1986 and represents law schools – some 100 institutions in total – and their interests in law, technology and education. BILETA interest in intellectual property matters has been increasing for some years and the annual conference now demonstrates that law teachers have substantial expertise and understanding of IPRs in the new technological environment. It is in this light that we wish to contribute to the debate on software patenting.

#### **2. General Position**

We are supportive of the idea of patents, and while we understand that the argument from economics for the value of the patent system is not totally persuasive, the general argument that some kinds of inventive activity deserve special support and reward is one with which we agree.

We accept that digitisation changed the nature of technology and that protection should be awarded for technical inventions whether comprising a computer-related aspect or not.

We are aware of the general tenor of the debate in the US over software protection and do not believe that importing the US position to Europe will provide a stable and consensual European patent system.

#### **3. The Nature of IPRs**

While we are supportive of reward for inventive activity, we are also aware that monopoly rights are problematic. It is very difficult to remove an intellectual property right once it has been awarded – as the history of copyright demonstrates – and, further, there is always a tendency for those rights to be developed and to become stronger monopoly rights. For example, the development of ownership rights over domain names which been developed within a context of trademark rights has significantly extended the nature of a trademark right.

These developments and extensions can occur both within the legislative context and within the judicial (i.e. national courts) and/or administrative (EPO Boards of Appeal) contexts, and having been so developed are difficult to undo.

It is in this light that we believe any developments of IPRs should be carefully considered and only created or extended after proper study and debate. **We do not believe that such careful consideration has been undertaken with regard to software patenting, and thus do not believe that the time has yet come to further extend those rights which presently exist.**

#### **4. The Lack of Legally-oriented Research**

It is clear that most of the research which has been undertaken into IPRs has been within the context of economics. Little funding has been made available either for substantive law study (i.e. in developing discussion between academic lawyers in a European context) or in socio-legal study of the patent system in practice (e.g. litigation). We believe that this lack of support for legal study is one of the main reasons for the current lack of insight as to how to proceed in this area. There is simply an insufficiently developed body of theoretical legal knowledge upon which to base action.

Such knowledge collection should revisit – for example - the question of whether software is a special object which requires rethinking of the nature of protection. This is especially important since removing the ‘technical requirement’ in patenting will reduce the barrier between software protection and copyright protection, and it is not clear to us what the result of this may be. It may well become a monopoly right which provides ‘look and feel’ protection for software – which does not appear to be a currently desired outcome.

There are many aspects which require study. For example, we can suggest:

- those related to litigation – particularly with the debate on the future of the Community Patent;
- collection of evidence of patent infringement in a situation where reverse engineering has become a contentious form of investigation;
- the proposal to provide lower level protection in the form of utility models and how this interacts with patent protection for software;
- the proper format of claim expression in a situation where code can be described in a multitude of ways and at a multitude of detailed or abstract levels;
- the nature of protection awarded to products produced by differing claim types;
- the proper length of protection for software invention.

And there are, of course, other areas which we feel to be extremely important which need investigation but which – though not properly ‘legal’ – relate to examination practice and procedure such as the difficulty of prior art searching

## **5. The Role of Patent Offices**

While we understand that Patent Offices have been taking a substantial part in the debate over software patenting (and that this is correctly a part of their role) we believe that this role should be viewed in a slightly critical light: that is, that their desire to expand their 'business' should not affect the debate. Instead, we believe that the national patent offices should be increasing their support for independently produced research.

## **6. Conclusion**

We are concerned that there is a desire to significantly develop patent rights without proper study and without a clear consensus on where any development should end. We suspect that there is a willingness to jump after the US, rather than paying attention to the current problems in the US over software, and ensuring that – should Europe extend software rights – it is done with a full understanding of where Europe wants to go and how best to get there.

We therefore urge that a significant programme of legally-based research study is put in place urgently. This programme should investigate as fully as possible all relevant aspects of software protection in a European context.

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Further information on BILETA can be got from <http://www.bileta.ac.uk>