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Sent: jeudi 14 décembre 2000 13:49  
To: consultation@eurolinux.org; MARKT SOFTPAT  
Subject: "The Economic Impact of Patentability of Computer Programs"

LS,

The Vereniging Open Source Nederland (The Dutch Open Source Society, <http://www.vosn.nl>) welcomes the initiative of the European Commission to conduct a consultation to the possible effects of patents on the software industry.

The VOSN is a society promoting the professional use of Open Source Software in the Netherlands, currently counting some 30 members and candidate members ranging in size from 1 to 6000 employees. Not only because our members have an interest in open source software, but also because they are active in the software industry as a whole, the VOSN takes a deep interest in -- and wishes to express great concern about -- the plans to allow the granting software patent monopoly "protection" in Europe.

Many comments have been made, and the VOSN finds it her duty to contribute to the discussion in a constructive way. We hope that the presented comments serve the discussion.

The European Commission is free to publish excerpts from this document in any way it sees fit. A copy will be made available to the public on [www.vosn.nl](http://www.vosn.nl) and [petition.eurolinux.org](http://petition.eurolinux.org).

On behalf of the board of the VOSN,

Joost Helberg, chairman,  
Henk Klopping, secretary

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Comments on  
"The Economic Impact of Patentability of Computer Programs".  
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The independent study conducted by mr. Hart, mr. Holmes and mr. Reid ([http://europa.eu.int/comm/internal\\_market/en/intprop/indprop/softpaten.htm](http://europa.eu.int/comm/internal_market/en/intprop/indprop/softpaten.htm) here after referred to as "the study"), that serves as a basis for the discussion, touches upon most important points, but manages to draw surprising conclusions. The VOSN would like to analyze the arguments presented and comment on their validity, in the order in which they are presented in its section I, the summary and conclusions.

meaning of art 52(2)c (p.1)

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In the conclusion presented in section I, page 1, we can read that the exclusion of software by article 52(2)c was never meant to be significant according to the authors. However, presented with the evidence in section II of the study, this is a very misleading conclusion.

One Mr. Gunter Grall is quoted extensively on page 10, motivating the exclusion at the time of draft, on the grounds of computer programs not being of a technical nature, just like mathematical methods. He is also quoted as saying that article 52(2)c was just meant to reinforce explicitly the non-patentability, even though it could already be deduced from article 52(1), itself, because that only allows technical inventions to be patented.

It must be remarked here that the distinction 'technical' vs. 'non-technical' in this context is meant to distinguish between the realm of engineering and the realm of mathematics.

Clearly, according to the letter and the spirit of the treaty, computer programs are not technical in this sense, and should not be patentable.

On the next pages we read how the EPO and its board of appeal \*themselves\* have seized article 53 -- which clarifies that in turn, the use of software in an invention itself does not \*exclude\* it from patentability either -- to grant patents on pure software nevertheless. The EPO and its board of appeal has specifically tried very hard not to see the difference between a computer program and a machine, where the authors of the treaty could see this difference very well.

The fact that the EPO has granted patents outside its legal domain now constitutes 'the status quo', which is in turn used to justify the plans to make these illegal patents legal.

In fact, the 'status quo' is not only that 30.000 patents have been granted illegally, but also that these cannot be used to do much harm, because fortunately, article 52(2)c prevents them from being used in courts.

But if the law and the practice differ, this in itself cannot be a reason to change the law. It is in our civilization a fortunate custom to adapt the practice to the law, not the other way around, unless very substantial evidence is put forward that the law in its current form does not suffice. The only evidence put forward in this

case is that the EPO has already broken it.

#### The situation in the US and Japan (p.2)

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The first two paragraphs on page 2 correctly state that in the USA anything is patentable, but also suggest that to US standards "use of computer/software" makes an invention "of the technological arts". As can be concluded \*from the same paragraph\* this is \*not\* the reason software is patentable in the USA. An invention in the USA must satisfy some criteria of usefulness and new-ness, but is explicitly not required to be technical. Whatever example the USA may set, the current situation there cannot be used as an argument that computer programs are technical, merely that they are patentable.

#### The survey of economic literature (p.2)

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The VOSN is very happy that the EC would base its decision on economic arguments. We can only conclude, with the authors on page 2, that the evidence of any benefits is thin, and that considerable evidence of the harm of patent monopolies has been published. (eg. <http://www.nwo.nl/iter/ovc.pdf>) We cannot however, understand how that conclusion fails to play any role in the recommendations subsequently offered by the study.

The European Union operates on the firm basis of the treaty of Rome, defining deregulation and liberalization of the internal market as one of its goals.

An article in the Dutch newspaper 'Het Financieele Dagblad' of dec. 4, 2000, p.4 stated that after all deregulation and liberalization, patents were "the only way left to keep competitors at a distance." Clearly, if this is the generally recognized use of patents, it is directly against all the EU's intentions for the internal market.

#### benefits of IP "protection" for software vendors (p.2)

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By choosing the phrase "patent protection" the study chooses a biased view towards the more visible benefits for the patent owner, at the end of page 3. The phrasing "patent monopoly" more adequately describes the harm done to all the non-owners of a patent. No matter how many monopolies I have, all my neighbors together are going to have more monopolies against me. When this broader perspective is chosen, it is evident that the harm done by patents is not an abstract macro economic one, but one that hurts any individual software maker

in the industry. The cross licensing fees will form a serious friction on the market, as indeed the USA example already shows. (<http://www.researchoninnovation.org/online.htm#ip2>)

The study states that independent software vendors play a major and rapidly increasing role in innovation in the field. The study correctly assesses that the interests of these developers must be served by whatever Directive the EU issues. Sadly, the study incorrectly asserts that these interests are served (paraphrasing:)

a) by patents, because they are more powerful than copyright  
b) by patents, because they are very similar in Europe (already) and the US  
c) by patents, because software should not be treated differently from the 'proper standards'

ad a)

the broader 'protection' offered by the patent is also the greater harm caused by it. ie: a shotgun offers more protection to me than a pointed stick, but (from the European perspective), we like to live in a neighborhood where most people are not armed with anything heavier than the latter.

To illustrate the broadness of the patents, a view in the patent horror gallery, assembled on <http://www.freepatents.org/examples>, suffices. The difference between a non-technical patent and a technical one, is the difference between a monopoly on a specific way to cast a key from a certain kind of metal, and a monopoly on using doors with locks. In an industry that tries to deal with security of data for example, such patents mean the end of any innovation.

ad b)

first: whether or not one situation is similar to another is hardly a reason by itself to change one of them.

second: the situation is only 'similar' if one accepts the illegal 30.000 patents as granted, a status quo that one has to live with. The proposed Directive may well provide a clear re-enforcement of the intention of the original treaty: to consider software as mathematical formulae.

ad c)

as clearly indicated in section II of the study, software is considered 'not technical' in the letter and spirit of the treaty, and hence is not patentable 'in a special way' but simply 'not patentable'. Further simplification of the law on this point is not in the interest of the public.

Actually, b) and c) invite us to come back to the gun analogy: European weapon manufacturers would really like to see European handgun laws simplified and harmonized to the great USA example, in

order to get a safer marketplace. Also the harmonization between USA taxes and European ones is desired by many European firms. It would leave so much more money to pay lawyers with.

By focusing on the evident benefits for the few, the study steps by its own findings of section III that the cost are there for the many.

#### Developers of open source software (p.3)

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On page 3 the study seems to suggest that Open Source developers may want to get their own patents, to get the same "benefits" as other software developers. This suggestion sidesteps two important points:  
a) open source developers have no interest in a monopoly, and certainly not in financing the administrative apparatus that supports it  
b) any marginal benefit does not undo the harms caused by other patent monopolies.

The example on page 3 of how open source software helps to create platforms we do not understand. There is ample anecdotal evidence that monopolies and open standards are two opposite forces.  
(eg. the WAP patents, or the P3P standard:  
<http://www.w3.org/1999/05/P3P-PatentPressRelease>)

Some of the already granted monopolies, when enforceable, will cause large numbers of individual developers to become vulnerable to threats by lawyers. The cost of even the remotest possibility of defense against this are well beyond the means of the vast majority of the developers involved.

The Open Source movement has been able to make good use of the copyright laws because it applies, for free, to concrete pieces of code. Patents on software are expensive monopolies of broad and general ideas, which take every business opportunity out of innovating, contrary to their intention.

#### The effect of the law in Japan (p.4)

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In all honesty we cannot claim any expertise here, and trust the study to accurately represent the situation.

#### The effect of the law in the USA (p.4-6)

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The USA has allowed patenting of software and business methods for quite some years, and the devastating effects are now beginning to surface, to the extent that proposals are brought to the senate to do something about them  
(<http://www.wired.com/news/politics/0,1283,39238,00.html>).

The study asserts that the success of the software industry has been significantly dependent on the possession of IP rights. This is of course difficult to assess, given the absence of a second USA where the patent system was not in force. Nevertheless, on page 5 the study itself states that "there was relatively little use of patents". Clearly, most software vendors did not need 'protection' that much.

Similarly, we cannot assess exactly how Europe would have benefitted had the law been changed five years ago, although we certainly don't see that the e-hype missed Europe, despite its restrictive patent system.

The concerns stated in the study on page four are very much shared by the VOSN, but sadly the reassuring comments are not. In brief the concerns on the current USA situation are:

- 2.1) the granting of large numbers of trivial patents, burdening SME's with legal defense
- 2.2) oligopolisation of the market
- 2.3) obstruction of incremental innovation

ad 2.1)

the study discusses three alleged causes, possible solutions and lessons to be learnt from them:

- a) the prior-art databases are not large enough,
- b) the new and inventive criteria are not applied
- c) it is difficult to present counterarguments to patents

a) The VOSN is of the opinion that it is not the size of the database that matters, although it would help. The problem of patenting general ideas is that it becomes impossible to link them to keywords: the patent on hyperlinks by British Telecom could never have been found by the inventors of the world wide web (who were \*NOT\* the first to use hyperlinks. Nor was BT.) searching for relevant art. (<http://www.theregister.co.uk/content/1/11450.html>, <http://lists.essential.org/pipermail/random-bits/2000-June/000165.html>)

Furthermore, we strongly feel that because of the general nature of software, belonging to the realm of abstract thought as opposed to concrete technical applications, it is impossible to define a distinction between a trivial and a non trivial application.

b) The EPO makes its revenues, just like the USPTO, from \*granting\* patents, not from researching them. Any organization would become intellectually corrupt under such circumstances. Unlike the study asserts, the trivial patents are a considerable burden to the USA software industry, as has been widely recognized ([www.bustpatents.com](http://www.bustpatents.com)).

The only way the triviality problem could be circumvented is by applying some obviousness criterion in the law, as the whole problem originates from the fact that Patent Officials cannot be expected to uphold such a standard . But it is not the European tradition to build economic tresholds into laws: either everything of a certain kind is patentable or nothing, there cannot in the law be defined some cutoff on the expense or the expected revenue of the invention.

c) No matter how easy it would be to challenge patents, the fact remains that there is a serious risk added to the core process of a software developer, when he can be brought to court without prior warning for any basic construct he uses in his daily work.

That problem is not solved by having a central court to which to appeal, that problem is only solved by not allowing monopolies on abstract ideas.

ad 2.2)

The study proposes that in the unlikely case of the abuse of monopoly power by a large player, anti-trust measures are taken. However, the history of IBM at the end of the eighties and Microsoft at the end of the last decade has shown that abuse of such power is far from imaginary. It is not efficient to first grant monopolies and then to take them away when they are used as intended: as monopolies. In fact it may prove very hard to do so, once the law is stretched to that limit.

ad 2.3)

The situation is presented that startups with a valuable patent have something to bargain when they are sold to larger parties. But that is exactly where the problem starts, because when the larger party has a broad monopoly portfolio, the incentive to innovate further is gone, when it is cheaper to just keep the competition at a distance by asserting the monopoly. Again the study puts the benefit for the small in the picture, not the burden for society.

Another issue sidestepped, is that the publication of a patent application sets it wide open for claims from trivial 'enabling' patents, thus effectively making it risky for SME's to publish their invention, adding to concern 2.2.

Effect of the inventive step requirement

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Since both in the USA and in Europe, an invention has to be new, the effect of this criterion cannot be established. Both in Europe and in

the USA, this criterion has been applied with regrettable looseness. Software patents and sloppy application of the inventive criterion have led to the trivial business patent burden, as the study correctly asserts.

#### Effect of software related patents on e-commerce (p.6)

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The study asserts oncemore falsely that because software patents already exist, we might as well have them, and simplify the law. As stated earlier, the VOSN is of the opinion that it is much simpler and of clear economic wisdom that the dangerous and illegal software patents be recognized as such.

#### Aims of the study (p.7)

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The study claims to have satisfied its general aims to provide information and guidance on wether the European Commission should issue a Directive to sanctionize the 'status quo' or to extend the possibilities of patenting even to non technical areas.

On page 7, ad I, the authors conclude that they did a good job, given the short time and low budget. We can only join them in the satisfaction about the well researched sections II and III.

However, given that unlike the authors, we are only volunteers, writing this comment unpaid and in our scarce spare time, next to our efforts to run our businesses in the turbulent and (still) highly innovative software industry, the conclusions presented in section I are remarkably shallow and easily rejected.

The study proposes three possibilities for the content of the Directive to be issued, in brief:

- option 1: allow patents on software by removing article 52(2)c and 53
- option 2: allow patents on software by asserting that the mere use of a computer/program makes an invention technical.
- option 3: allow patents on software by removing the technicality requirement in Europe altogether.

Unlike suggested by the study, option 1 goes much further than sanctioning the 'status quo': it effectively takes away the last legal barrier that keeps 30.000 patents from wreaking havoc on the market.

Unlike suggested by the study, option 2 does not bring European practice in line with USA practice, because there technicality is simply \*not required\*, and not \*automatically implied\* for inventions

concerning software.

Unlike suggested by the study, not a single argument in favor of option 3 has been presented in it, other than that the law would be simpler. In particular, a reference is made to the economic arguments \*against\* that possibility. Hence the authors propose something to which they can only name counterarguments!

The concluding remarks on p.8 make it clear that there is plenty of opportunity to bring all these options in line with legal theory, by stretching the definitions, or plainly doing away with them.

We find it incomprehensible that no option is put forward in line with the economic evidence, as even quoted by the authors in the study, namely to sanctionize the letter and spirit of the current treaty, which clearly and unambiguously forbids granting patent monopolies in the realm of pure thought.

On top of that the current law is sufficiently broad to allow inventions to be patented that do contain pure thought, when at least also satisfy other, explicitly stated and unambiguous criteria of technicality. This should take away any remaining concern about the possibility that the current situation inhibits innovation.

conclusion

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The study manages to draw strongly biased conclusions from evidence of the opposite facts. As explained in detail the preceding sections of these comments, reading the study carefully for oneself clearly reveals

- a) the economic harm caused by granting patent monopolies on software,
- b) the unlawful workings of the EPO,
- c) the unwillingness by the Intellectual Property community to recognize even the possibility that software patent monopolies are harmful and should remain forbidden.

Given the discrepancy between the presented facts in section II and III and the conclusions of section I we can only conclude that this study was not meant to be read in detail.

We urge the European Commission to carefully balance its information by taking notice of other commentaries issued (<http://petition.eurolinux.org/consultation>), and wish them strength, courage and wisdom.

On behalf of the Dutch Open Source Society (VOSN),  
workgroup Public Relations and Awareness,

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