

Europäische Konsultation über die Patentierbarkeit von Computer-Implementierbaren Organisations- und Rechenregeln (= Programmen für Datenverarbeitungsanlagen)

<http://swpat.ffii.org/papiere/eukonsult00/index.de.html>

Arbeitsgruppe

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Am 19. Okt 2000 veröffentlichte die Dienststelle für Gewerblichen Rechtsschutz der Europäischen Kommission (EuDGR) ein Sondierungspapier, welches eine rechtliche Argumentation darlegt, wie das Europäische Patentamt (EPA) sie in den letzten Jahren verwendet hat, um ihre Praxis der Patentierung von Programmen für Datenverarbeitungsanlagen und anderen Organisations- und Rechenregeln gegen den Buchstaben und Geist der geltenden Gesetze zu rechtfertigen. Die Konsultation richtete sich offenbar an die Patentabteilungen diverser Unternehmen und Verbände und war als ein Manöver zu ihrer Mobilisierung konzipiert. Das Papier selber warb einseitig für den Standpunkt des Europäischen Patentamtes und stellte Fragen, die nur Patentjuristen verstehen und beantworten können. Ferner wurde es von einer "unabhängigen Studie" bestätigt, welche eine bekannte Denkfabrik der Patentbewegung im Auftrag der EuDGR durchgeführt hatte. Patentjuristen verschiedener Organisationen sandten applaudierende Antworten ein und erklärten dabei das bekannte Credo der Patentbewegung, wonach Patente grundsätzlich in allen Gebieten die Innovation fördern und vor allem dem Wohle der kleinen und mittleren Unternehmen dienen. Allerdings antworteten auch einige Verbände und Firmen sowie über 1000 Einzelpersonen,

vor allem Programmierer, mit kritischen Stellungnahmen. Die EuDGR hat die Stellungnahmen bisher nur schleppend und unvollständig und in schwer konsultierbarer Form veröffentlicht. Dem wollen wir abhelfen, und Sie können mitmachen.

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1 Wie es zustande kam

In summer 2000 the scene was set for legalising software patents in Europe. For several years, the EU Commission’s Industrial Property Unit¹ had planned to rubberstamp the European Patent Office’s policy of granting patents on rules or organisation and calculation. The last necessary step was the official removal of all restrictions on patentability from the law or at least a deletion of the “programs for computers” in art 52 of the European Patent Convention (EPC). Moreover, the European Commission was scheduled to become a major player in a future European patent system, which was to be based on Community law rather than on an intergovernmental negotiation process. As a part of this transition, the European Commission was to issue a software patentability directive. Under the name of “clarification” and “harmonisation” the existing legal framework was to be discarded and instead the practise of the European Patent Office was to be legalised and made binding for national courts, many of which had so far refused to follow the EPO on its adventurous course, either by sticking to the letter and spirit of the existing law or by developping their own halfway solutions. In 1997 the European Commission outlined the contents of a software directive in a “Greenpaper on the Community Patent” and inserted it into the rear part of a long resolution text

¹http://europa.eu.int/comm/internal_market/de/indprop/index.htm

which was rubberstamped by the European Parliament. Yet, this met with unexpected resistance. By summer 2000 a Petition for a Software Patent Free Europe had gained the support of 50000 signatures, 200 software companies and numerous politicians of all camps. Under the impression of these developments, the governments of FR+DE+UK decided not to delete the computer program exclusion for the time being and instead hand over the issue to the European Commission. The patent law experts at the CEC Patent Unit then opened² a public consultation on 2001-10-15 which was to last until 2001-12-15 and thus cover exactly those weeks, during which the EPC had been scheduled to be changed. Art 52(2) EPC was as a result left untouched, and instead the patent movement³ was mobilised by means of a specifically focussed consultation call:

The basic question of whether computer programs (computer-implementable rules of organisation and calculation) are inventions in the sense of patent law (art 52 EPC) was not asked. Instead, the CEC Patent Unit implied that the answer must be yes. They talked about “computer-implementable inventions” and used this term as a synonym for “computer-implementable rules of calculation and organisation” rather than for true technical inventions which can be implemented under program control and whose patentability is beyond doubt. Thus the EU Industrial Property Unit not only implied an answer where it should have asked a question, but also falsely attributed silly positions to the software patent critics, before even opening the consultation.

The accompanying “independent study”, written by some well-known EU software patent lobby activists⁴, again reiterated the usual patent lawyer credo in the guise of a somewhat more objective wording. This led the study to draw conclusions such as “any proposition to extend the patent system beyond the status quo cannot be claimed to rely on scientific evidence”. In this context “status quo” refers to the practise of the European Patent Office’s Technical Boards of Appeal. The study does not even consider the possibility of criticising that practise and returning to the European Patent Convention. Nor does it explain the concept of “technical invention”, which is the underlying spirit of the European Patent Convention. Moreover the study predicts that software patents will gradually be accepted and used by the open source software community for its own benefit.

In spite of all this care taken to mobilise a network of patent professionals and create the impression of a pro-patent mainstream opinion, the results of the mobilisation campaign did not really look very convincing as a basis for arguing the case of software patentability.

While at the beginning, the CEC Indprop Unit (Industrial Property Unit in the General Directorate for the Internal Market of the Commission of the European Community) still wanted to quickly issue a directive and rallied national governments for this purpose, it gradually turned out that these governments were not very eager to go along. Also, the CEC Patent Unit itself apparently found that this consultation was not a good basis for their plans. They reported to the governments that the consultation result showed

²http://europa.eu.int/comm/internal_market/en/indprop/comp/softpatde.htm

³<http://swpat.ffii.org/analyse/bewegung/index.de.html>

⁴<http://swpat.ffii.org/papiere/clsr-rhart97/index.en.html>

an “overwhelming vote of the concerned industries in favor of software patents” and only a minority, mainly from the “opensource movement”, was clamoring against software patents. But they did were not eager to display the results of the consultation on their website, and it was very hard to press them to publish at least a small part of the submissions. Most submissions have not yet been published, often in spite of repeated requests by the authors to have them published, and those that have been published have been transformed to a PDF format that makes them hard to use in any hypertext-based dialogue.

Thus the work of evaluating the consultation has largely been left to private initiatives like ours. The CEC Patent Unit has however ordered a summary analysis⁵ from an “independent contractor”, which has been available internally since April and was released to the public at the beginning of August, together with the installation of a web-based online discussion forum⁶.

The CEC online discussion forum is only web based, without an archive, incompatible with normal posting and referencing and automatisisation mechanisms, depending on Javascript, in general poorly accessible, unacceptable for the people who have developed high standards of public communication in newsgroups and mailing lists⁷. Since the Internet became popular, our representatives and their PR agencies have been trying hard to reinvent the wheel of civil culture, apparently hoping to change its shape from a circle to a square that matches their tv-based communication habits. Even though the Indprop Unit’s attempt to at least engage in some form of dialogue seems commendable, citizens are not to blame for ignoring this type of government-designed “e-democracy”. The forum attracted only 50 comments – none from pro swpat people – that were later hard to find and died very soon.

2 Some examples of the “Independent Contractor”’s bias

2.1 Pg. 8:

Here and elsewhere the report claims that the software patentability critics are unaware of 20000+ software patents granted. May be they just consider them invalid because the law does not allow them and are probably not enforceable. In fact the report recognizes that almost everybody thinks the situation is ambiguous and uncertain. Little wonder that many people, specially not especialistas in law, tend to disregard 20000 patents of uncertain practical value.

The report says that the anti software patent position is “radical” and would require “extensive negotiation”. It is the first time we hear the majority of people in a debate called “radical” for defending the enforcement of current law. We wonder what negotiation would be necessary, but I doubt the purpose of the report was to assess the necessary means to obey the majority. I thought it was intended to summarize the opinions, proposals and demands of the participants.

⁵http://europa.eu.int/comm/internal_market/en/indprop/comp/softpatanalyse.htm

⁶http://europa.eu.int/comm/internal_market/en/indprop/comp/softforum.htm

⁷<http://swpat.ffii.org/archiv/foren/index.de.html>

2.2 Pg. 12:

The table that summarizes opinion on the desired patentability subject matter does not give numbers, only vague qualitative descriptions.

The majority of responses fall into two distinct groups who hold substantially different views

fails to note that one of these two groups is majoritary and the other isn't. I could also say that "the majority of opinions of people fall into two distinct groups, those who think that murder is wrong and those that don't". It's true, but it doesn't clarify anything. Most people think that murder is wrong. And I hope we're not looking for a compromise in that.

In 2.1.2 they say it's interesting to see that opponents to software patents use the term "software patent" and proponents use "computer implemented invention patent". It is not interesting once you realise that the few proponents are patent professionals and patent holders and the opponents are software developers, users or researchers. Little wonder that patent professionals are more used to the term invention and software engineers are more used to the word software rather than to euphemistic EPO slang.

The size of the "petition" does not necessarily reflect the relative balance of views of the population as a whole

. Certainly a call for comments is not a statistically planned survey, but obviously the minority in favor of software patents does not represent the majority of the population. I don't think the majority of the population has any position in the issue. If the purpose of the patents is to promote innovation in some given field, certainly you want to listen to the developers, teachers, students and researchers in the field and not to the lawyers and managers, except when the field is law or management. I don't think lawyers will innovate in software. So probably the population as a whole would vote against software patents if told who advocates for one or the other option. But this is as much speculation as is the report statement. The only thing we know for sure is that more than 90% of the people that cared to speak to the EC about software patents do not want them.

2.3 Pg.13

I fail to understand the table by country, and would very much welcome an explanantion. It says:

The "open source proportion" is the proportion of responses that was overtly from "open source" lobbies, the vast majority was from the "petition" organised by the Eurolinux Alliance.

"Patent Support" is the proportion of responses sent directly to the European Comission that supported patents for computer implemented inventions and were not explicitly from "open source" groups.

This classification is quite irrelevant to the point of whether respondents supported or not extending the patentability to software, and apparently confuses the notions “open source” and “against software patents” in an attempt to associate opposition with a phenomenon regarded as minority. On the other hand, the report fails to probe into the political background of the pro-swpat group. This group apparently belongs to the same small stratum of people to which the organisers of the consultation themselves belong and which they mobilised by the very way in which they put the questions.

3 Wie Sie helfen können

Wir können uns die verbleibende Arbeit teilen.

...

4 Auswertung

Most of the submissions fall into one of the following categories:

1. Small-scale studies from individual researchers/academics, carefully crafted, with original reasoning and references to relevant literature, e.g.
 - ...
2. Position papers from patent lawyers of large enterprises and industry associations that state the standard articles of faith from the credo of the patent movement and professionally play the mobilisation game of the CEC Industrial Property Unit, usually without more than schematic reference to the special situation of the body which they represent, written by a patent law expert of that body without review or even knowledge of other members of the organisation. These articles generally show a lack of basic knowledge on the European concept of technical invention and the debate on computer-programs that has been raging since the 60s⁸. Instead they dwell much on the TRIPS fallacy⁹ and other well-known patent movement propaganda myths. It sounds as if these lawyers draw all their knowledge from a limited repertoire, comprising not much more than the “independent study” on which this consultation was based.
 - ...
3. Position papers from patent practitioners and their associations. Very similar to the above, reflecting the credo of patent circles, without knowledge of the concept of technical invention, without consideration for the risks of unlimited patentability, with naive claims about the economics of software, like the above group, but often a little bit less schematic, sometimes more aggressive.

⁸<http://swpat.ffii.org/analyse/erfindung/index.de.html>

⁹<http://swpat.ffii.org/analyse/trips/index.de.html>

- ...
- 4. Position papers from other representatives of organisations with varying, less schematic viewpoints, not playing the game of the consultation paper¹⁰ but rather citing parts of it as appropriate for the (independently structured) argumentation.
- ...
- 5. Statements of personal experience and opinion on software patentability, not closely oriented toward the paper
- ...
- 6. Short political statements by individuals, most of whom fear negative effects of software patents.
- ...

There are still more than 1300 unpublished statements, most of which probably belong to the last two categories and can be found on the Eurolinux consultation site¹¹.

5 Weitere Lektüre

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¹⁰http://europa.eu.int/comm/internal_market/en/indprop/comp/softde.pdf

¹¹<http://petition.eurolinux.org/consultation>