

2003/05/07 BXL Dorint: From Legal Wordplay to Granted Software Patents

<http://swpat.ffii.org/events/2003/europarl/05/07/index.en.html>

Workgroup

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During this first day of a two-day conference in Brussels, in and near the European Parliament, we bring software professionals, patent practitioners, economists and politicians from EU and US together for a symposium in the Dorint Hotel to explore the chain of causality from a proposed EU software patent directive to resulting patenting practises. The day begins with speeches by FTC.gov commissioner Mozelle W. Thompson and Prof. Lawrence Lessig on “The US as a Test Case”, and ends with a panel of software leaders from small and large enterprises, social scientists and MEPs on “E-Patents and E-Commerce”.

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1 Time and Place

time: Wednesday 2003/05/07 09.00-18.00

place: Brussels Boulevard Charlemagne 11-19 (near European Commission, 5-10 minutes walk from European Parliament) Dorint Hotel
 See AEL conference wiki for map.

Simultaneous interpreting at least for DE-EN, FR-EN and ES-EN is available
 We have all kinds of projectors, including lcd projector (beamer), available.

2 Conference Program

time	about what?	who?
09.00	<p>Software Patents – The U.S. as a Test Case</p> <p>Keynote Speech: Learning from American Mistakes</p> <p>The hearings held by the U.S. competition agencies paint a darker picture of U.S. practice than the report than the report on which the Commission relies, and the Undersecretary for Intellectual Property has described the Patent Office as an agency in crisis. What can Europe learn from the U.S. experience?</p>	<p>Prof. Lawrence Lessig</p> <p>Co-Panelists: Mozelle W. Thompson (Commissioner, US Federal Trade Commission) Brian Kahin (Professor for Information Policy Studies, Univ. of Michigan)</p>

time	about what?	who?
10.00	<p style="text-align: center;">Civil Liberties under Overlapping Property Regimes</p> <p>Some companies have used patents to obtain broad exclusion scopes which copyright denied them. Some are using patents to make their competitors, copyright property useless. Proponents of the directive say that “patents and copyright are complementary and may overlap”, whereas earlier doctrines called for a clear separation of spheres of property. How has such overlapping worked in semiconductor topography and areas? Will the broadest property right always win out? Are civil liberties crushed under a broadness competition? How can an integrated system of intellectual/industrial be (re)created?</p>	<ul style="list-style-type: none"> • Dr. Swen Kiesewetter-Köbinger (patent examiner at German Patent office¹) • Lessig • Ville Oksanen (EFFI.org, Helsinki) • Jörg Wittenberger (aske-mos.org) • MEP Pii-Noora Kauppi

¹speaking only for himself, not for his employer

time	about what?	who?
11.00	<p>Software Patents and Europe's Legal Structure</p> <ul style="list-style-type: none"> • With the challenges facing the European and global patent system(s), how should decisions on software and business methods be made? And by whom? • What can a EU directive achieve in the context of concurrence between inter-governmental treaties and EU Law? 	<ul style="list-style-type: none"> • Reinier Bakels (Amsterdam University, author of a EU-sponsored study on software patents) • RA Roman Sedlmaier (German attorney and writer of much-cited articles, coiner of the term "confusion by clarification") • Jozéf Halberszadt (Examiner at the Polish Patent Office²) • Dr. Luuk Van Dijk (vosn.nl, Netherlands) • Mikko Välimäki (effi.org, Finland) • MEP Toine Manders (IP expert of ELDR, Netherlands, author of JURI amendment 72, which <i>calls on the commission to withdraw the directive because the fact that the European Patent Convention and Community legislation exist alongside each other makes the current legal rules concerning the granting of patents unnecessarily confusing.</i>) • Kahin
12.00	Buffet	

time	about what?	who?
13.00	<p data-bbox="437 304 821 389" style="text-align: center;">Invention Concepts in Europe and the Resulting Patents</p> <ul style="list-style-type: none"> <li data-bbox="459 416 847 591">• Did the European Patent Office really grant software patents “from its earliest days”, as MEP Arlene McCarthy says in her report? What were the original standards of the EPC and how did the EPO change them from 1973 to 2003? <li data-bbox="459 618 847 792">• Were the changes motivated by evolution of technology or by internal political evolutions of the patent system? How many patents of which types were granted as a result? Were the changes gradual or were there major leaps and revolutions? <li data-bbox="459 819 847 994">• Was the EPO an innovator or a follower? How do national practises in Europe differ? Is the EPO violating Art 52 EPC? Is there a way back, or would that lead to “irreconcilable conflicts with the EPO”, as MEP McCarthy says? <li data-bbox="459 1021 847 1115">• What options does the European Parliament have today for defining what is a patentable invention and what not? 	<ul style="list-style-type: none"> <li data-bbox="922 367 1316 465">• Jürgen Siepmann (legal delegate of Linux-Verband, Germany) <li data-bbox="922 501 1114 528">• Halbersztadt <li data-bbox="922 564 1316 698">• Daniel Retureau (drafter of Opinion of the Economic and Social Council of the EU on the Directive Proposal) <li data-bbox="922 734 1316 797">• Xavier Drudis Ferran (caliu.info) <li data-bbox="922 833 1252 860">• MEP Neil MacCormick

time	about what?	who?
14.00	<p>Emerging Phenomena in Patent Practice</p> <ul style="list-style-type: none"> • Thickets, Holdup, Ambush, Broadcast Litigation, Contract Clauses. Who benefits and who loses? • Subsidizing Failure? – Patents after the Bust 	<ul style="list-style-type: none"> • Richard Clark (MD, Elysium Ltd, UK, JPEG – Editor and WebMaster) • Robert Dewar (CEO, gnat.com, USA) • DEIM Ágoston (CEO, lsc.hu, Hungary) • Sylvain Perchaud (MD, europe-shareware.org) • Sven Biedermann (software entrepreneur, Germany) • Kahin • MEP Luis Berenguer Fusta • MEP Mercedes Echerer
15.00	Coffee	

time	about what?	who?
15.30	<p data-bbox="421 304 837 365">IT Infrastructure Patents and the Information Society</p> <ul data-bbox="456 387 847 1061" style="list-style-type: none"> <li data-bbox="456 387 847 539">• The path of operating system kernel development is cluttered with patents. What kind of services and applications have been affected so far? <li data-bbox="456 562 847 808">• Yesterday's Innovators Locking In Tomorrow's Innovation? Alcatel's proclaimed strategy of patenting the "Next Generation Internet" and the consequences of a possible domination of software by patent-oriented hardware industries. <li data-bbox="456 831 847 891">• Microsoft's Patenting Strategies <li data-bbox="456 913 847 1061">• As patent numbers increase and patent quality decreases, is the noose around Free OS Development becoming tighter or looser? 	<ul data-bbox="922 365 1318 994" style="list-style-type: none"> <li data-bbox="922 365 1318 398">• Richard Stallman (gnu.org) <li data-bbox="922 421 1318 481">• Franco Gasperoni (CEO, ACT Europe) <li data-bbox="922 504 1318 564">• David Hughes (CEO, hcc-embedded.com)Hungary <li data-bbox="922 586 1318 620">• Alan Cox (redhat.com) <li data-bbox="922 642 1318 703">• Santeri Kannisto (CEO, sot.com, Finland) <li data-bbox="922 725 1318 786">• Felix Gaehtgens (felix@symlabs.com, http://www.symlabs.com) <li data-bbox="922 808 1318 842">• N.N. (Microsoft) <li data-bbox="922 864 1318 898">• MEP Marco Cappato

time	about what?	who?
17.00	<p>E-Patents and E-Commerce</p> <ul style="list-style-type: none"> • The directive proponents seem to consider advancements in database, groupware, enterprise resource planning etc to be patentable inventions but distance themselves from “pure business method patents”. Can such a distinction prevent the worst in Europe? • Recently various E-Commerce companies, not all of which develop software, have been attacked with E-Patents in the US. In many cases, equivalent patents have been granted in Europe and would become enforceable under the proposed directive. How would E-Commerce be affected? 	<ul style="list-style-type: none"> • David Axmark (CTO, MySQL, Sweden) • Jacob Hallen (CTO, AB Strakt, Sweden; president, Python Business Forum) • Bernhard Runge (software developer, SAP) • Lars Soltau (CEO, slab.de) • J.P. Smets (CEO, nexedi.com) • Kahin • MEP Anders Wijkman³
20.00	Dinner	Taihon, rue du march au fromage 35, tel 02-514 50 58

The scientific conference continues on the following day’s afternoon at 15.00. In between you can attend a Parliamentary Hearing and a Street Performance. See the Event Overview.

3 Annotated Links

- **Research on the Macroeconomic Effects of Patents⁴**

Since Fritz Machlups report to the US congress of 1958, a considerable number of studies about the economic effects of the patent system has accumulated. Some studies deal with certain types of innovation (sequential, complex systems) or with special areas such as semiconductors, genetics or computing rules (algorithms, mathematics). None seems to claim that the patent system has a positive effect on innovation in these fields. Most find strong indications for negative effects. Some governmental studies (e.g. by intellectual property institutes and the

³subject to confirmation

⁴<http://swpat.ffii.org/archive/mirror/impact/index.en.html>

like) combine such negative findings with a recommendation to legalise software patents.

- **Quotations on the question of the patentability of rules of organisation and calculation**⁵

Salient quotations from law texts, economic analyses, political documents as well as statements by programmers, politicians and other parties interested in the debate about software patents.

- **Patentability Legislation Benchmarking Test Suite**⁶

In order to test a law proposal, we try it out on a set of sample innovations. Each innovation is described in terms of prior art, a technical contribution (invention) and a small set of claims. Assuming that the descriptions are correct, we then test our proposed legislation on them. The focus is on clarity and adequacy: does the proposed rule lead to a predictable verdict? Which of the claims, if any, will be accepted? Is this result what we want? We try out different law proposals for the same test series and see which scores best. Software professionals believe that you should “first fix the bugs, then release the code”. Test suites are a common way of achieving this. Pursuant to Art 27 TRIPS, legislation belongs to a “field of technology” called “social engineering”, doesn’t it? Technology or not, it is time to approach legislation with the same methodological rigor that is applicable wherever bad design decisions can significantly affect people’s lives.

⁵<http://swpat.ffii.org/archive/quotes/index.en.html>

⁶<http://swpat.ffii.org/analysis/testsuite/index.en.html>

- **McCarthy 2003-02-19: Amended Software Patent Directive Proposal**⁷

Arlene McCarthy, British Labor MEP appointed by the European Parliament's Committee for Legal Affairs and the Internal Market (JURI) to report on the European Commission's Software Patentability Directive Proposal (CEC/BSA Proposal), suggests that the European Parliament should enact the CEC/BSA version with additional safeguards to align Europe on the US practise and make sure that there can be no limit on patentability. McCarthy reiterates the CEC/BSA software patent advocacy and misrepresents the wide-spread criticism without citing any of it. Even economic and legal expertises ordered by the European Parliament and other critical opinions of EU institutions are not taken into account. McCarthy's economic argumentation consists of tautologies and unfounded assertions, such as that companies like Ericsson and Alcatel need software patents to finance their R&D, that SMEs need european software patents in order to compete in the USA, that patents are needed to keep developping countries at bay. McCarthy uses the term "computer-implemented inventions" as a synonym for "software innovations". These "by their very nature belong to a field of technology". McCarthy insists that "irreconcilable conflicts" with the EPO must be avoided. McCarthy says she wants to "set clear limits as to what is patentable" – and that she wants to avoid the "sterile discussions" about "technical effects" and "exclusions from patentability". Yet her proposal stays confined to such discussions. McCarthy demands that all useful ideas, including algorithms and business methods, must be patentable as "computer-implemented inventions". McCarthy proposes to recognise the EPO as Europe's supreme patent legislator and to make decisions of a few influential people at the EPO irreversible and binding for all of Europe.

- **Swpat Conference Amsterdam 2002-08-30..1 (Columbanus Symposium)**⁸

Hartmut Pilch is attending a conference hosted by Prof. Bernt Hugenholtz and Reinier Bakels from University of Amsterdam about the typology of innovations in the software and business method area and the implications of various rules for defining what is patentable, including the European Commission's recent proposal for a directive and hopefully also our widely supported counter-proposal.

⁷<http://swpat.ffii.org/papers/eubsa-swpat0202/amccarthy0302/index.en.html>

⁸<http://swpat.ffii.org/events/2002/ivir08/index.en.html>

- **Information Economy and Swpat Conference Paris 20020610-1⁹**

Institut Français des Relations Internationales (IFRI.org) and Center of Information Policy Research at Mariland University (CIP.umd.org) are organising a transatlantic conference on information economy and in particular on the limits of patentability as well as the problems in neighboring areas such as database exclusion rights and copyright. Hartmut Pilch is participating on behalf of FFII and Eurolinux on two of the panels.

⁹<http://swpat.ffii.org/events/2002/ifri06/index.en.html>