PROFESSIONAL CONTRACTORS GROUP

CIIs: FACT & FICTION

The Professional Contractors Group recognises that the prolonged controversy over the directive on computer-implemented inventions has led MEPs to be wary of representations from both sides. It is a reflection of the deep concern felt by our members over this issue that we nonetheless feel obliged to contribute further to the debate even at this late stage. This paper is intended to clarify some of the highly confusing arguments that have frequently been put to MEPs.

FICTION: The Common Position forbids the patenting of "software as such" so there's no problem

- "Software as such" is a legal fiction: no computer program in use anywhere in the world can actually be classed as "software as such" – it is a purely theoretical construct.
- Article 5.2, rendered more simply, reads: "A claim to a computer program… [shall] be allowed [when] that program would… put into force a product or process… in accordance with [art. 5.1]." 5.1 itself refers only to "a process carried out by a computer… through the execution of software." Every computer program in use in the world can be said to meet this criterion and is therefore rendered patentable.

FICTION: Rocard's approach will remove essential patent protection that is currently available

- Software patents granted by the EPO are not currently enforceable because most case law in member states respects the TRIPs agreement and the EPC by recognising that software is not patentable. These patents therefore currently offer no protection at all. Under Rocard's amendments, all patents that are currently valid will remain valid.

FICTION: SMEs need patents to protect their software-related inventions

- SMEs cannot afford to mount legal actions against companies infringing their patents, particularly not against vastly wealthier companies like Microsoft. Software patents would therefore be of no use to them whatsoever.
- Furthermore, SMEs cannot afford to check their innovations against existing patents. IBM no longer checks its new software products for patent infringements in America as it's not cost-effective; so how can it possibly be cost-effective for a small company?

FICTION: Copyright is a "weak" form of protection and developers need patents as well

- Under copyright, a program's code remains secret unless the author chooses to make it public; a competitor who wants to create a program to do the same task will have to create it from scratch, giving the originator a competitive advantage.
- Copying a mere 1.7% of a program's code has proved enough to make a copyright action viable in the past; this is excellent protection!

FICTION: Software can make a technical contribution

- Some have argued that making a piece of software run faster should count as a technical contribution; given that software is just a set of instructions to a computer, any new efficiency results only from a more efficient set of instructions. This is no more technical than giving someone instructions on how to win a game of chess in fewer moves.

FICTION: Software development is capital-intensive and this investment ought to be rewarded

- Software can be, and regularly is, developed by one person working on their own with nothing more than a standard computer, yet some parties have stated to MEPs that it is somehow capital-intensive.

FICTION: The Common Position will assist the EU in meeting the goals of the Lisbon Agenda

- Two thirds of EPO's software patents have been granted to American and Japanese companies. Suddenly allowing these companies to enforce their patents against their European competitors will not assist the EU's competitiveness.