PROFESSIONAL CONTRACTORS GROUP

POLICY BRIEFING - DIRECTIVE ON THE PATENTABILITY OF COMPUTER-IMPLEMENTED INVENTIONS: an opportunity to update technological patenting without introducing harmful software patents

Software has never been, and should not be, patentable.

- Software is not a field of technology – rather, it is a set of instructions for a computer: it should be no more patentable than a business method or the rules of chess.
- The European Patent Convention of 1972 explicitly states that software is unpatentable; it should be respected by the new Directive.
- The WTO's TRIPs agreement states that software should be protected by copyright; this already provides adequate protection for developers.
- To patent software would be to patent an idea: even if a completely new way of implementing the idea is devised, it would breach the patent, despite being innovative.

It is far from clear that software patents would increase innovation.

- The experience of the USA suggests that software patents lead to reduced spending on R&D; companies spend money on defending their patents rather than on innovating.
- The case for any change to established practice must be proved before it is implemented; without any clear proof of economic benefits, the case for software patents fails instantly.

Software patents would harm small business.

- Large companies have clearly signalled their desire to enforce patents through the courts and oblige small companies to buy licences to their patent portfolios; both of these actions would cripple most small software businesses.
- Any independent software developer could infringe a patent in any and every line of code he or she writes, but there is no way of knowing about the infringement until it is too late – it is not realistically possible to look through every patent filed.
- It is impossible to insure against accidental patent infringement; the developer will not know they have stepped on a patent landmine until it is too late and their business is ruined by a legal action.
- The elimination of independent software houses will force all small businesses to pay large companies' higher charges for bespoke software; this would be harmful for all types of small business, not just software developers.
- Small software firms do not want to patent their inventions: copyright offers enough protection already and they could never create a portfolio comparable with those held by the largest companies.

The Directive currently makes software patentable: it should be amended to allow for genuine technical inventions to be patented.

- The Council's common position of March 2005 leaves crucial terms such as "technical character" undefined, which allows software to be mis-categorised as being technical and therefore patentable; these terms should be defined to take account of the fact that software is not technical.
- When a genuine technical innovation has been achieved, a resulting invention, even one containing a software element, should be patentable, so long as the innovation lies not in the software but in the physical application of the invention.
- The Directive currently contains some misleading clauses stating that software will not be patentable unless it meets a certain condition, for instance being loaded in a computer: these conditions are so general that they are effectively always true. These clauses making "pure" software patentable should be removed or negated.