PROFESSIONAL CONTRACTORS GROUP

# PCG POLICY BRIEFING ON THE PROPOSED EU DIRECTIVE ON THE PATENTABILITY OF COMPUTER-IMPLEMENTED INVENTIONS

## INTRODUCTION

The Professional Contractors Group is extremely concerned about the likely effects of this Directive if it is implemented in the form adopted as the European Council's common position in March 2005. PCG hopes that the extremely sensible approach suggested by Michel Rocard on April 13th and so far pursued by JURI, which will prevent the patenting of software in its own right, will be implemented in full.

## THE DIRECTIVE DOES ALLOW PATENTING

There is some confusion over exactly what the Directive's effects will be. It has been suggested that it is nothing more than an exercise in tidying-up and clarification of existing law and will actually make software patents impossible. PCG is worried, however, that in fact a Directive has emerged which, in the form agreed in March, will enact a measure counter to these stated aims.

The wording of the Directive is deeply confusing in this regard. The wording frequently uses formulae such as "software will not be patentable unless [condition x] is met", where on reflection it is clear that condition x is, in reality, always met. Definitions of such terms as "technical contribution" inserted by the European Parliament during its first reading have all been removed by the Council, whose text thus rests on ambiguous and undefined terms. Any software deemed to have a "technical character" can be patentable, and what constitutes a "technical character" is wholly at the discretion of the patenting authorities. The Council's common position, therefore, clearly allows for software to be patented, in contrast to the EP's first reading, which explicitly forbade this.

## SOFTWARE PATENTS WOULD BE BAD FOR SMALL BUSINESS

Software patents have been routinely granted in the United States for over a decade now. Some alarming trends have arisen in this time. The Paulsson report, a briefing written for MEPs by the Scientific Technology Options Assessment (STOA) team in the Internal Policies Directorate General of the European Parliament, has confirmed that small companies' fears about many of these being repeated in the EU are realistic.

- Large companies set up cross-licensing agreements with each other, but small companies, by definition, cannot have large patent portfolios with which to bargain and therefore have to pay to buy a licence to a portfolio of patents. For a small company making, say, a 10% profit, a licensing agreement under which it pays 2% of the value of its sales to the patent-holder will rob it of a whole fifth of its profit.
- Numerous large independent companies have established large patent portfolios despite not developing software themselves; these companies exist to enforce these patents aggressively. The cost to small businesses of defending or settling such actions is often crippling.
- Even if programmers are not sued for an infringement, they would still be put at a disadvantage as their insurance costs would increase; every line of code they write would risk infringing a patent.
- Many small companies who need custom software are not able to afford the fees charged by large corporations. If they do not have access to independent software houses (including freelance developers) this will stifle innovation across the whole SME sector.
- Small businesses do not want to be able to patent: to establish the patent would cost money that could be better spent on R&D, while to defend it could be even more costly.

## THE IDEA THAT SOFTWARE SHOULD BE PATENTABLE IS INCORRECT

Article 52 (2)(c) of the European Patent Convention, in line with standard practice since World War Two, states that: "schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers," should not be patentable. A computer program is no more than a series of instructions or steps given to a computer to execute, just like a business method or

the rules of a game. Software should therefore be no more patentable than the rules of hopscotch. Any new Directive should uphold Article 52 (2)(c), as no party has ever stated a desire to re-draft the European Patent Convention.

Patents are intended to offer a monopoly on a technical, physical invention. To patent software would be, by contrast, to patent an idea. To patent abstract ideas, mathematical truths, chemicals or scientific facts would run entirely contrary to the rationale of the patent system as it has been established. Those who argue that software should be patentable in just the same way as any other technical invention assume that software is "technical" in the same way as orthodox patentable inventions. In reality, it is not.

## THE ECONOMIC RATIONALE FOR PATENTING SOFTWARE IS FLAWED

The standard rationale for patents is that inventions require investment which should be rewarded and protected. From this stems the conventional wisdom that patents encourage investment in R & D and therefore cause greater levels of innovation. If this cannot clearly be shown to be true in the case of software, the case for software patents evaporates instantly. A pattern has emerged in America of companies with large patent portfolios cutting their R&D spending in favour of vigorous assertion of their patents. Far from fostering innovation, software patents have been used as a substitute for it.

## SOFTWARE IS ALREADY PROTECTED BY COPYRIGHT

The World Trade Organisation's agreement on Trade-Related aspects of International Property rights (TRIPs) does not, as proponents of software patents have suggested, require software to be patentable; it merely says that patents, in general, should be enforced. It explicitly states that software should be protected by copyright, not patents. Copyright prevents the code in a computer program from being copied directly and so provides sufficient protection for software already.

## RECENT PRACTICE HAS SURREPTITIOUSLY OPENED THE DOOR FOR SOFTWARE PATENTING

Many at government and parliamentary level in the UK are adamant that the Directive will reinforce the status quo. It is perhaps the case that they do not appreciate what the status quo entails as far as the European Patent Organisation is concerned. The EPO said in 1978 that, "if the contribution to the known art resides solely in a computer program then the subject matter is not patentable." More recently, however, the EPO has granted roughly 50 000 patents in a way that runs directly counter to this principle and which generally seem to assume that anything running on a computer can constitute a technical invention. This violates Article 27 of TRIPs.

## SUMMARY

PCG believes that:

- Software is not patentable and should not be made patentable
- The Council's common position would allow the broad patentability of software
- Software patents would harm small businesses
- Software patents would not bring any clear economic benefit in terms of encouraging innovation

PCG calls for the European Parliament to amend the Directive in line with its first reading and with the suggestions of M. Rocard. Key to these are definitions of what can and cannot be patented and what constitutes a "technical contribution." Protection for interoperability is also vitally important. Such provisions would establish a highly sensible framework for technological patenting without making software patentable.