Software patents in Europe: What can happen next ?

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Historical facts (1)

- 20-02-2002 : First version of the directive released by the Commission
  - Allowed patents on running software
  - Silent on patents on programs stored on media
- 24-09-2003 : Parliament strongly amends directive
  - Forbids patents on intellectual processes
  - Yet mixed software/hardware inventions are patentable, even if the software part is not

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Historical facts (2)

- 28-10-2003 : Commission disregards most of Parliament's amendments
- 07-05-2005 : Council endorses (un)common position
  - Allows patents on running software
  - Allows patents on software stored on any medium
- 06-07-2005 : Parliament rejects Council's (un)common position
  - Overwhelming majority : 648 out of 680 MEPs present
- So, what's next ?

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Analysis of second reading's vote (1)

- For the second time, the European Parliament was about to amend the directive to ban software patents
  - Qualified majority for the “Rocard-Buzek” amendments
  - GNL + Greens + most of PSE + most of ALDE + part of PPE + IND + NI
- The pro-patent lobby asked the other part of PPE for rejection to avoid an anti-software patent directive
- The anti-software patent coalition feared the Council would disregard its amendments again and that conciliation would result in having “some” software patents, which would mean full software patentability according to EPO's current practice

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Analysis of second reading's vote (2)

- Therefore, all groups voted against the directive to gain time
  - The majority did it to reject EPO's current practice
- After having said in first reading what it wanted, the European Parliament said in second reading what it did not want

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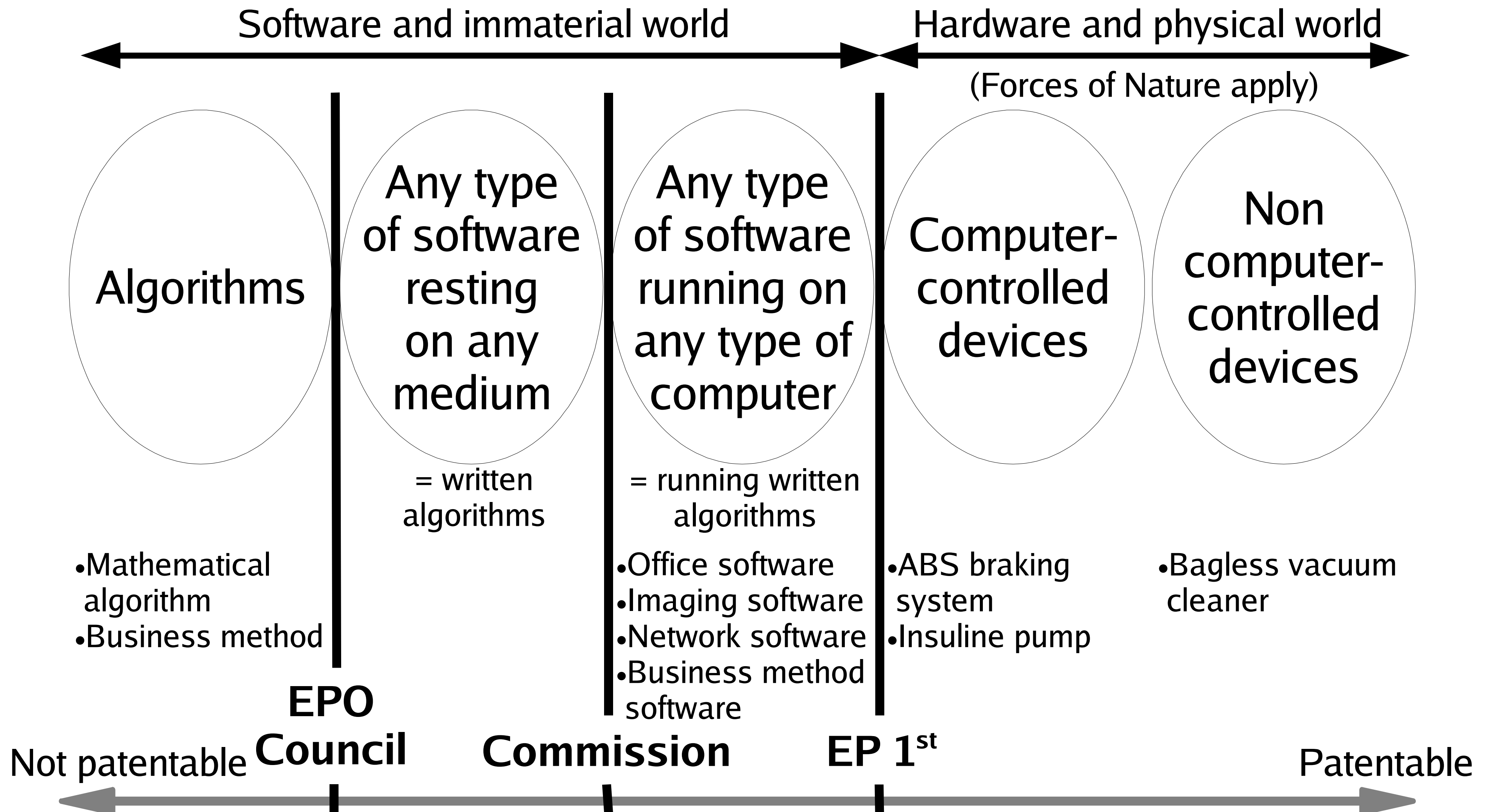
Where to set the limit for patentability



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Opposing forces (1)

- The (naval) battle at the Parliament allowed to evidence two opposing blocks
- Anti-software patent camp :
  - Many individual software SMEs
  - SME organisations (CEAPME+UEAPME: 11 million SMEs)
  - Consumer associations (BEUC)
  - Libre software creators and users
  - Free access activists (FFII)

http://www.economic-majority.com/

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Opposing forces (2)

- The pro-software patent camp :
  - Some large companies
    - Their legal services and general management, in fact
    - In some cases, the technical management is known against
  - A few software SMEs
    - Some of them owned by large companies (“astroturfing”)
  - Patent attorneys
  - Some European governments
    - Through their “patent experts”, from national patent offices
    - Other ministries can be against
  - The US government
    - Invited itself in the debate (US Trade Representative)

What does the pro-swpat camp want ? (1)

- Fostering innovation is clearly not the issue
  - There is economical evidence that software patents hinder innovation in the US
- Large companies (plan to) use swpats to deter competition
  - Higher costs and negotiation delays for SME market entry
    - SMEs cannot afford such costs
  - Cross-license patent portfolios between oligopoly players which then live in a world without software patents
  - Call for reforms on “patent quality” not to be sued in turn by “patent trolls”

http://www.researchoninnovation.org/swpat.pdf
http://www.ftc.gov/opp/intellect/020227trans.pdf

What does the pro-swpat camp want ? (2)

« If people had understood how patents would be granted when most of today's ideas were invented, and had taken out patents, the industry would be at a complete standstill today. I feel certain that some large company will patent some obvious thing related to interface, object orientation, algorithm, application extension or other crucial technique. If we assume this company has no need of any of our patents then they have a 17-year right to take as much of our profits as they want. The solution to this is patent exchanges with large companies and patenting as much as we can. »

William Gates III,

Memorandum « Challenges and Strategy », 1991

http://pauillac.inria.fr/~lang/libre/reperes/local/Challenges.and.Strategy

http://www.forbes.com/asap/2002/0624/044.html

http://www.redherring.com/mag/issue66/news-sue.html

http://swpat.ffii.org/pikta/xrani/cifs/index.en.html

http://l2.espacenet.com/espacenet/viewer?PN=EP0394160&CY=ep&LG=en&DB=EPD

What does the pro-swpat camp want ? (3)

- Some European governments pushed for swpats
  - Dossier handled by members of national patent offices
  - Strong pressure on cabinet members by legal departments of large “national” companies
- European governments do not realise that swpats :
  - Do not prevent outsourcing at all
  - Threaten their local software SME job market
  - Ease tax evasion
  - Put national information independence at risk
- Swpats used by the US administration as a strategic weapon

http://www.researchoninnovation.org/swpat.pdf
http://www.ftc.gov/opp/intellect/020227trans.pdf
http://www.heise.de/tp/r4/artikel/2/2898/1.html
http://www.heise.de/tp/r4/artikel/5/5263/1.html

Patents used as a strategic weapon

- Offensive use of the patent system by the USA to control new fields considered strategic :
  1. Implicit extension of the American patent system (by *laisser-faire*) to the new promising field
  2. Governmental and international pressures (WTO, TRIPS, WIPO) to extend the system to other nations
  3. Global control of innovation and its applications by extension of the prior Usonian patents
- The US delegation is pushing for unlimited patentability in current WIPO negociations
  - Threats to walk out if its demands are not accepted

http://www.firstmonday.dk/issues/issue8_3/kahin/index.html
http://www.wipo.org/scp/en/documents/session_7/index.htm

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What next ?

- Considering the enormous potential sources of profit for some companies, and because of the lack of understanding of these issues by policy makers, the fight is still going on :
  - Actions towards standardisation bodies
  - International treaties that dilute national Rights
  - Bilateral agreements
  - Potentially harmful European directives

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Attack on the W3C

- The W3C (« *World Wide Web Consortium* »), under the pressure of big members (comprising Microsoft), has been pressured to endorse patented standards
  - RAND (« *Reasonable And Non Discriminatory* ») licenses
  - Hold-up of the market by large companies
  - Putting aside of libre software
- Following the outraged reactions of the Internet community, rules excluding patents in W3C standards have been set up

http://www.w3.org/TR/2001/WD-patent-policy-20010816/
http://www.w3.org/2002/02/pp-update-pressrelease
http://www.w3.org/TR/2002/WD-patent-policy-20020226/

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Hague Conference (1)

- Proposed « Convention on jurisdiction and foreign judgments in civil and commercial matters »
  - Would apply to all « *business to business* » contracts, excluding private usage
  - Would apply to patents and to all *sui generis* rights such as copyright, comparative advertising, …
- Being drafted
- Any abiding State accepts decisions and injunctions pronounced in any other abiding State
  - Without being allowed to re-judge them
  - Even if national Laws are not harmonized

http://www.cptech.org/ecom/jurisdiction/hague.html

http://www.hcch.net/e/conventions/draft36e.html

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Hague Conference (2)

- Article 4

Article 4 Choice of court

1. If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

2. An agreement within the meaning of paragraph 1 shall be valid as to form, if it was entered into or confirmed -
a) in writing;
b) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
c) in accordance with a usage which is regularly observed by the parties;
d) in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.

  - Allows a company to select the least demanding national Law regarding its obligations of result
  - Increases the difficulty of suing for plaintiffs
  - Also concerns « clickable contracts »

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Hague Conference (3)

- Article 12

Article 12 Exclusive jurisdiction

…

4. In proceedings which have as their object the registration, validity, [or] nullity[, or revocation or infringement,] of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction. This shall not apply to copyright or any neighbouring rights, even though registration or deposit of such rights is possible.

[5. In relation to proceedings which have as their object the infringement of patents, the preceding paragraph does not exclude the jurisdiction of any other court under the Convention or under the national law of a Contracting State.]

- Allows one to legalize in all abiding States the patents granted in the United States or in Japan :
  - Patents on software
  - Patents on business methods
  - Patents on genes

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Bilateral agreements

- USA/Jordan Convention of October 24th, 2000 on intellectual property

MEMORANDUM OF UNDERSTANDING ON ISSUES RELATED TO THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS UNDER THE AGREEMENT BETWEEN THE UNITED STATES AND JORDAN ON THE ESTABLISHMENT OF A FREE TRADE AREA

The Government of the United States of America ("United States") and the Government of the Hashemite Kingdom of Jordan ("Jordan"), recognizing the need to promote adequate and effective protection of intellectual property rights, to provide enhanced intellectual property protection to account for the latest technological developments, and to promote greater efficiency and transparency in the administration of intellectual property systems in order to strengthen the international trading system; Agree,

…

5. Jordan shall take all steps necessary to clarify that the exclusion from patent protection of "mathematical methods" in Article 4(B) of Jordan's Patent Law does not include such "methods" as business methods or computer-related inventions

…

Agreement, with the exception of paragraph 3, which shall be implemented within two years from the date of entry into force of the Agreement. Done at Washington, in duplicate, this twenty-fourth day of October, 2000, which corresponds to this twenty-sixty day of Rajab, 1421, in the English language. An Arabic language text shall be prepared, which shall be considered equally authentic upon an exchange of diplomatic notes confirming its conformity with the English language text. In the event of a discrepancy, the English language text shall prevail.

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Offending European directives (1)

- “On the community patent”
  - Risk to have amendments enlarging the scope of patentability
  - Creation of specialised patent courts
    - In the US, the CAFC, specialised in patent cases, is much more in favor of patent holders than other federal courts

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Offending European directives (2)

- “On measures and procedures to ensure the enforcement of intellectual property rights” [CE (2004)/48]
  - Articles 8 and 13 allow to seize competitor's tools or products prior to any real infringement or judgment

Article 8 Measures for protecting evidence

1. Member States shall lay down that, where there is a demonstrable risk that evidence may be destroyed even before the commencement of proceedings on the merits of the case, the judicial authorities may, in the event of an actual or imminent infringement of an intellectual property right, authorise in any place either the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the documents relating thereto. These measures shall be taken by order issued on application, if necessary without the other party having been heard. [...]

Article 13 Disposal outside the channels of commerce

Member States shall lay down that the judicial authorities may order that the goods which have been found to infringe an intellectual property right, as well as the materials and implements used primarily for the creation or the manufacture of the goods in question, be disposed of outside the channels of commerce, without any compensation being due.

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Offending European directives (3)

- “on criminal measures aimed at ensuring the enforcement of intellectual property rights” [COM (2005)276]
  - Article 4 allows alleged plaintiffs to have access to their competitor's confidential data

Article 4 Joint investigation teams

…

The Member States must ensure that the holders of intellectual property rights concerned, or their representatives, and experts, are allowed to assist the investigations carried out by joint investigation teams into the offences referred to in Article 3 of Directive ..../…/EC.

  - Article 6 gives the possibility to spread tripbombs on the path of potential competitors

Article 6 Initiation of criminal proceedings

…

Member States shall ensure that the possibility of initiating investigations into, or prosecution of, offences covered by Article 3 of Directive ..../…/EC are not dependent on a report or accusation made by a person subjected to the offence, at least if the acts were committed in the territory of the Member State.