

# Patentability Legislation Benchmarking Test Suite

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

Workgroup

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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.

## Contents

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\*<http://www.ffii.org/~phm>

## 1 Some sample patents

- **Software Patents of the European Patent Office<sup>1</sup>**
- **New Patent Database<sup>2</sup>**
- **European Software Patents: Assorted Examples<sup>3</sup>**

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<sup>1</sup><http://localhost/swpat/patents/txt/ep/index.en.html>

<sup>2</sup><http://gauss.ffii.org/>

<sup>3</sup><http://localhost/swpat/patents/samples/index.en.html>



## 2 Sample Claims

Patent	Claim 1	Comment
<p>Runlength Coding<sup>4</sup> (JPEG<sup>5</sup>)</p>	<p>An ordered redundancy method for coding digital signals, the digital signals taking a plurality of different values, using two types of runlength code (R, R'), the method comprising the steps of.</p> <ol style="list-style-type: none"> <li>1. utilising the first type of runlength code (R) for coding a runlength of the most frequently occurring value followed by the next most frequently occurring value;</li> <li>2. utilising the second type of runlength code (R') for coding a runlength of the most frequently occurring value followed by any value other than the next most frequently occurring value; and</li> <li>3. when the second type of runlength code is used, following the runlength code value by a code value indicative of the amplitude of said other value.</li> </ol>	<p>This patent was granted by the EPO in 1994 after 7 years of examination, with priority date 1986.</p> <p>In 2002 it prompted Sony and other companies to pay many million USD for using the JPEG standard and made JPEG cease to be an international standard.</p>
<p>NetworkSalesSystem (OpenMarket)</p>	<p>A network-based sales system, comprising</p> <ul style="list-style-type: none"> <li>• at least one buyer computer for operation by a user desiring to buy a product;</li> <li>• at least one merchant computer;</li> </ul> <p>and</p>	<p>This patent, granted to OpenMarket Inc by the European Patent Office in 2002 after 6 years of examination, is identical to a system which is currently being used in the USA to squeeze money out of various e-commerce companies.</p>

## 3 Questions to be answered for each

### 3.1 Clarity

Assuming that the prior art and the contribution are correctly disclosed, how would the following questions be answered, if the proposed law was in force:

Would this kind of innovation be patentable under the proposed rules? Why (not)?

Would any judge reach the same conclusions? Where are areas of uncertainty?

### 3.2 Adequacy

- Are these conclusions adequate?
- To what extent would they promote/stifle innovation? What effects would they have on competition? on the interests of consumers?
- To what extent would they conform to public policy goals, such as those spelled out in the Rome Treaty, in eEurope etc?
- What effort is needed to arrive at the claimed innovation? What effort is needed to imitate the claimed innovation without violating copyright? How does this compare to the innovation effort (innovation vs imitation cost ratio)? What effort is needed to develop and distribute an average system (e.g. software application, embedded system) of which the claimed innovation would typically be a part? How does this compare to the innovation effort (innovation vs development cost ratio)?
- What special right might be adequate in case patents are deemed too heavy and copyright too light? Utility certificate? Specially tailored innovator's privilege / reward<sup>12</sup>?

## 4 Comparison Table

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<sup>12</sup><http://localhost/swpat/analysis/basti/index.en.html>

test sample	innovation vs imitation cost ratio	innovation vs development cost ratio	other indicators	should be patentable?	invention by standard A (CEC/BSA)	invention by standard B (EPC/FFII)	candidate for sui generis property
Tabbed Palettes <sup>13</sup>	1	0.00001	...	-	+	-	-
Network Sales System <sup>14</sup>	0.5	0.005	...	-	+	-	-
Audio Coding <sup>15</sup>	1	0.05	...	-	+	-	o
Fe-B-R Magnet <sup>16</sup>	10	0.5	...	+?	+	+	o
...							

## 5 Legislation candidates to be tested

**CEC:** CEC & BSA 2002-02-20: proposal to make all useful ideas patentable<sup>17</sup>

**CULT:** Rocard/CULT 2002-12-09: Data Processing is Not a Field of Technology<sup>18</sup>

**ITRE:** Plooiij/ITRE Counter-Proposal: Publication and Interoperation do not Infringe<sup>19</sup>

**JURI:** JURI 2003/04-6 Amendments: Real and Fake Limits on Patentability<sup>20</sup>

**PARL:** Europarl 2003-09-24: Amended Software Patent Directive<sup>21</sup>

**CONS:** EU Council 2004 Proposal on Software Patents<sup>22</sup>

**FFII:** EU Software Patent Directive Amendment Proposals<sup>23</sup>

<sup>17</sup><http://localhost/swpat/papers/eubsa-swpat0202/index.en.html>

<sup>18</sup><http://localhost/swpat/papers/eubsa-swpat0202/cult0212/index.en.html>

<sup>19</sup><http://localhost/swpat/papers/eubsa-swpat0202/itre0212/index.en.html>

<sup>20</sup><http://localhost/swpat/papers/eubsa-swpat0202/juri0304/index.en.html>

<sup>21</sup><http://localhost/swpat/papers/europarl0309/index.en.html>

<sup>22</sup><http://localhost/swpat/papers/europarl0309/cons0401/index.en.html>

<sup>23</sup><http://localhost/swpat/papers/eubsa-swpat0202/prop/index.en.html>

check item	CEC		CULT	ITRE	PARL	FFII
Tabbed Palettes <sup>24</sup> not a technical invention	-	-	?+	?	+	+
Network Sales System <sup>25</sup> not a technical invention	-	-	?+	?	+	+
Audio Coding <sup>26</sup> not a technical invention	-	-	?+	?	+	+
disposition program 1976 <sup>27</sup> not a technical invention	-	-	+?	?	+	+
Rod Splitting 1980 <sup>28</sup> not a technical invention	-	-	+?	?	+	+
Flight Costs 1986 <sup>29</sup> not a technical invention	-	-	??	?	+	+
ABS	-	-	?	?	+?	+?

## 6 Annotated Links

- <http://aful.org/wws/arc/patents/2003-06/msg00047.html>

see also [amccarthy<sup>32</sup>](#) and <http://aful.org/wws/arc/patents/2003-06/msg00040.html>

- **Pamphlets on Software Patents<sup>33</sup>**

One of the pamphlets is a one-page version of the test suite. Two example claims are presented to politicians with a simplified set of questions. So far the proponents of software patents, such as Arlene McCarthy, have failed to answer.

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<sup>32</sup><http://localhost/swpat/events/2003/euoparl/05/remna/amccarthy/index.en.html>

<sup>33</sup><http://localhost/ffii/proj/kunst/swpat/pamflet/index.en.html>