



STOWARZYSZENIE POLSKI RYNEK OPROGRAMOWANIA  
POLISH SOFTWARE MARKET ASSOCIATION  
NIP: 526-17-33-342 KRS: 0000121020 REGON: 010012308

Brussels, 1 June 2005.

**The opinion of Polish Software Market Association on  
The Impact of Software Patenting on Polish Enterprises**

The Polish Software Market Association acting on behalf of Polish software creators and market players does not support the idea of introducing software patents. Instead, we are strongly in favour of sustaining the binding regulations of the European Patent Convention prohibiting such measures, and we also postulate that the Polish party in the discussion should vote in favour of maintaining the hitherto legislation which does not allow for granting patents on software solutions. In our view, introducing software patent law can be detrimental especially to medium and small-sized IT enterprises across Europe, leading to an unjustifiable increase in operating costs in all economic sectors, which may, in turn, decrease our competitiveness as compared to non-European markets. The draft document proposed by the European Commission, which is highly modelled upon the US legislation (i.e. the idea of software patentability), has been strongly supported by major IT corporations, especially by the US-based enterprises. Due to the general availability of IT resources, Polish enterprises have been perfectly capable of developing new technologies and upgrading their products, at the same time, making their own contribution to better computerisation of markets and businesses, not only in Poland but also all over Europe.

In view of the Polish Software Market Association, IT developments free from excessive legal constraints can substantially facilitate both economic and scientific processes. Thus, the unjustifiable limitation of the freedom of thought in the information society as a result of introducing software patents may considerably hinder such processes. It should be also emphasised that in the coming future IT solutions will be applied in virtually all kinds of businesses or sciences. As a consequence, development of software solutions should be historically perceived as a value indispensable for the further shaping of the European creative thought. Hence, imposing patent charges on software



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solutions and computerised business management will substantially hinder businesses and economic development in many countries.

If the regulations regarding software patents came into force, it would be necessary for software developers to ensure that they don't infringe any of thousands of patents, so each company will have to employ a patent watchdog. It's hardly surprising, that law firms which could potentially act as such watchdogs are the main advocates of broadening the scope of patents without defining clear rules.

Big corporations can reduce the costs of patents by entering into agreements of sharing patent portfolios however, European SMEs who haven't got at their disposal patent portfolios will run a risk of facing requests for high license fees.

The cost of own patent research, the insurance against claims and legal costs of potential lawsuits make it impossible for SMEs to protect against even overtly groundless claims. After all, the final decision would be taken in the court of law, which in Polish circumstances means even several years of legal battle.

In the case of manufacturing technical devices it is far easier to check whether their components are patented or not. It is also usually possible to produce the same device fulfilling the same task but in another way. On the other hand, software patents are of such general nature that finding alternative solutions to serve the same functionality is basically impossible.

Under the TRIPS agreement the patent protection should last for a period of 20 years (mind you Poland accessed world wide internet merely 12 year ago). 20 years in IT business means ages.

Since it is legally impossible to set a protection period adjusted to a typical lifecycle of the novelty in this area, (for example Jeff Bezos from Amazon.com suggested 3-5 years), it could be better not to create mechanisms extending that protection for the period several times longer than the life cycle of a typical solution

In our opinion, software patents would excessively interfere with computer markets and slow down development processes in a number of economic sectors in



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Poland. Moreover, it is also worth remembering that patents do not protect the interest of inventors (i.e. creators of a given solution) but, as a matter of fact, they only secure the rights of an organisation which has actually acquired a given patent at an expensive price.

At the same time, the Polish Software Market Association is not in favour of the total liberalisation of software copyright regulations. Software, just like works of literature, is already under legal protection. Moreover, the scope of protection in the case of software seems to be much broader, since unlike other works, computer applications do not have to conform to any laws on private or public usage.

Computer software is a creation of human brain manifested via words and digits, and, therefore, it should be protected by copyright, rather than approach the domain closely connected with technical matters. Presumably, adopting the software patent law is not really intended as protection, since protection has already been provided by the copyright regulations. Moreover, introducing software patents seems to be rather inconsistent with the very idea of patentability. Could software be treated as an invention? Generally, an invention should be understood as a technical novelty intelligible from the point of view the contemporary technical knowledge. As a matter of fact, software is an algorithm translated into the programming language. It is an unambiguous formal development, rather than a technical solution. Hence, imposing patents on algorithms would be commensurate with imposing patents on mathematical theorems. Software patents are not intended to protect the rights of entrepreneurs (i.e. via providing them with due remuneration for their input and risk) but rather work as an intellectual property pension. It can be also regarded as a dangerous violation of the general principle of non-patentability of creative performances (let us imagine, for e.g. granting patent rights on art painting or music techniques, modes of literary narration, camerawork etc.)

Adopting the draft directive as proposed by the European Commission may result in bankruptcy of a great number of Polish IT companies. The majority of software patents are now owned by US and Japanese-based enterprises. Introducing software patents in Europe may eventually paralyse the European IT industry, since all the existing foreign



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patents would have to be recognised within the EU territory as well. Introducing software patent regulations will lead to monopolisation of the domestic IT market by non-European companies, at the same time strongly suppressing the creative potential of domestic enterprises, especially small-sized businesses and new market players. It should be also emphasised that the costs of obtaining patents from the European Patent Office are now calculated in thousands of euros and the very application process is rather time-consuming and painstaking, which puts additional financial strain on small and medium-sized businesses. Software patents would be highly detrimental to innovative thought; they would encourage monopolist practices and, hence, limit the consumers' freedom of choice, increase the costs of new IT developments and deprive citizens of an opportunity to participate in the information society governed by sound principles.

It is worth noticing that according to USPTO data only Microsoft had 6130 patents in January 2005, most of them were software patents. This year Microsoft intends to submit 3000 new patent applications. In 2003 IBM acquired 3415 patents, out of which over half was related to software.

Most big companies sign agreements on sharing patent portfolios which protect them against claims of patent violation.

As you see even these big multinational giants are afraid of expensive patent lawsuits.

Medium sized companies will never have the chance to withstand such a "patent war" with the biggest players on the market.

PRO also calls for further in-depth research in view of the far-reaching economic consequences for the SMEs in Europe.

Slawomir Kosz  
President  
PRO Association



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I would also like to add a few words from the perspective of the President of a Polish Medium Size Software Developer – MacroSoft S.A.

MacroSoft (spelled with A not I) is a company with almost 20 years of experience on IT market, employing 300 people with the turnover of 9 mln EURO.

We have managed to create our own tools for managing relation database an a complete programming environment.

This long experience as well as active participation in drafting Polish bill on copyright gives us the right to voice our opinion also on the issue related to the directive.

MacroSoft fears that the patentability of computer-implemented inventions will reinforce monopolisation in IT sector.

We strongly believe that the directive should at least contain some safeguards.

It should be limited exclusively to technical software solutions, and economic customs and trade methods should be explicitly excluded.

These are the minimal conditions to allow this fast growing sector to continue to grow and develop further for the benefit of the users.

In my opinion software is not a unique product but builds on from previous ideas, so the judgement what could be patented would be very difficult and expensive.

Currently we allocate about 1 mln eur on R&D. If the new directive in its current form became a reality, at least 200 thousand EURO would have to go into software patenting, and the benefits from this investment? None whatsoever.

We, our know how, products are sufficiently protected by copyright.

Slawomir Kosz  
President  
MacroSoft SA