

AIPLA 03-10-06: EU Parliament making software technology unpatentable

<http://swpat.ffii.org//papers/europarl0309/aipla0310/index.en.html>

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US Patent Attorney Erwin Basinski, chairman of the International Affairs Subcommittee of the Electronic & Computer Law Committee of the American Industria Property Lawyers Association (AIPLA) calls on his colleagues to rise in arms against the European Parliament's amended directive, which would render granted patents invalid and, by excluding what Basinski calls "software technology" from patentability, violate Art 27 TRIPs. Basinski attributes the amendments to the enormous power of the "opensource lobby". Basinski, a specialist in the art of patenting business methods at the European Patent Office and a diplomat with excellent relations to the European Commission, seems pessimistic about the possibility of amending the directive back to what it was. He predicts that his colleagues will instead work toward having the directive killed by the Council.

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1 The Text

The EU Parliament recently voted on the Proposed Software Directive. The text as amended (a copy is attached) appears to completely eliminate any

software patent and make unenforceable most existing patents.

The amended directive implies no breach of TRIPs. On the contrary, it bases the exclusion of software patents on the doctrine that technical inventing is closely related to the use of forces of nature and that *data processing is not a field of technology in the sense of Art 27 TRIPs*. This doctrine pervades the directive as amended by the Parliament. It is stated explicitly in several of its articles and recitals. Thus the original recital 6 has been rendered redundant.

The apparent influence of the open source community on the members of Parliament and the Parliament's general apparent lack of understanding of the technological and business advances resulting from the current and predicted use of computer related inventions, are truly remarkable and illustrate the political nature of the problems. As one of my European friends remarked recently: "the question of the patentability of software related inventions and software implemented business methods does not have to be decided as a function of the existing laws, but as a function of social needs. This is a social - or political - problem before being a legal problem."

2 Annotated Links

- **Interoperability and the Software Patents Directive: What Degree of Exemption is Needed¹**

Discusses an earlier report from E. Basinski in which he tries to mobilise the TRIPs FUD argument against Art 6a (interoperability amendment).

- **The TRIPs Treaty and Software Patents²**

European patent authorities often cite the TRIPs treaty as a reason for making computer programs and business methods patentable and for making such patents enforceable in the most indecent ways. This reasoning is fallacious and easy to refute.

¹<http://swpat.ffii.org/papers/eubsa-swpat0202/itop/index.en.html>

²<http://swpat.ffii.org/analysis/trips/index.en.html>

- **Erwin J. Basinski: Business Method Patents in Europe - A Saussurean Explanation³**

A US patent attorney explains how claims to business methods must be crafted if they are to pass at the EPO in the light of the “Pension Benefit System” decision. Basinski concludes that

If you have any intent to file a Business Method type application in Europe/Japan/etc. and even for purposes of the US you will have to approach the invention a little differently. The EPO rules should generally be followed because if you do it their way it should work in the US and Japan.

Basinski explains that, by following the EPO’s rules, the applicant will have to add some redundant specifications to his patent description which do not make the patent less broad but rather more cryptic:

In the background section, one should describe the “technical problem” addressed by the invention, in terms of how the system/method makes the computer function “more efficiently” “faster” “in a less costly way” “more of something” in doing what the invention is doing (such that you have a “further technical effect” rather than just the interaction of computer and its instructions). The description of the technical solution then becomes a cryptic statement of what the invention does and should specify the novelty and inventive step.

³<http://www.mofo.com/news/general.cfm?MCatID=&concentrationID=&ID=141&Type=5>