

# EU Software Patent Directive: Parliament's vs Council's Version

<http://localhost/swpat/papers/euoparl0309/cons0401/tab/index.en.html>

Workgroup

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In September 2003 the European Parliament amended a proposal from the European Commission for patentability of software in such a way that it became a proposal that clearly disallows software patents. The EU Council of Ministers and the European Commission subsequently disregarded the European Parliament's Amendments and reached "political agreement" in May 2004 in favor of a text that goes even further than the previous text of the Commission in imposing US-style unlimited patentability, but shrouds this in a veil of convoluted wording, characterised by multiple negations and other misleading syntactic devices. Below you can find out yourself by carefully reading the core provisions of the proposed EU directive "on the patentability of computer-implemented inventions" which we have collected in a table, together with short explanations of the implications. At the end we add pointers to the originals from the Parliament and Council websites as well as to related analyses and news reports.

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

## 1 table

Council 2004-05-18	Implications	Parliament 2003-09-24	Implications
<p><b>Recital 17</b> The provisions of this Directive are without prejudice to the application of Articles 81 and 82 of the Treaty, in particular where a dominant supplier refuses to allow the use of a patented technique which is needed for the sole purpose of ensuring conversion of the conventions used in two different computer systems or networks so as to allow communication and exchange of data content between them.</p>	<p>A patent holder is entitled to block interoperability as much as he wants, as long as he doesn't violate antitrust law. Patent law itself imposes no limits. Moreover, even if anti-trust law is violated, it is very unlikely that there will be any effective legal remedy, given the complexity of the concerned procedures, as shown in the EU vs Microsoft case, where the Samba project's freedom to use Microsoft's standards was not assured. This recital is a new repressive measure against software developers and users taken by the Council in 2004. The Commission had at least left room for interpretation here. See also Article 6 and 6a.</p>	<p><b>Recital 17</b> This Directive should be without prejudice to the application of the competition rules, in particular Articles 81 and 82 of the Treaty.</p>	
<p><b>Article 1</b> Scope This Directive lays down rules for the patentability of computer-implemented inventions.</p>	<p>2</p>		
<p><b>Article 2a</b></p>	<p>A "computer-</p>	<p><b>Article 2a</b></p>	<p>A "computer-</p>

## 2 Annotated Links

- **latest public version on Council website**<sup>6</sup>
- **The amendments approved, from the EP.**<sup>7</sup>

consolidated version by EP, changes were still being applied by the secretariat during the days after the vote. E.g. “contribute” in “technical features that any invention must contribute” was changed to “posess”.

- **EU Council 2004 Proposal on Software Patents**<sup>8</sup>

The Council of Ministers has reached political agreement on a paper which contains alternative suggestions to the amendments on the directive “on the patentability of computer-implemented inventions” passed by the European Parliament (EP). In contrast to the EP version, the council version permits unlimited patentability and patent enforceability. Following the current version, “computer-implemented” algorithms and business methods would be inventions in the sense of patent law, and the publication of a functional description of a patented idea would constitute a patent infringement. Protocols and data formats could be patented and would then not be freely usable even for interoperability purposes. These implications might not be apparent to the casual reader. Here we try to decipher the misleading language of the proposal and explain its implications.

- **Fake Limits on Patentability in the Council Proposal**<sup>9</sup>

We try to produce a short overview of the deceptive tricks in the Council’s software patent proposal of 2004-05-18.

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<sup>6</sup><http://register.consilium.eu.int/pdf/en/04/st09/st09713.en04.pdf>

<sup>7</sup>[http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=DOCPV&APP=PV2&LANGUE=EN&SDOCTA=2&TXTLST=1&POS=1&Type\\_Doc=RESOL&TPV=PROV&DATE=240903&PrgPrev=PRG@TITRE|APP@PV2|TYPEF@TITRE|YEAR@03|Find@%2a%69%6e%76%65%6e%74%69%6f%6e%73|FILE@BIBLIO03|PLAGE@1&TYPEF=TITRE&NUMB=1&DATEF=030924](http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=DOCPV&APP=PV2&LANGUE=EN&SDOCTA=2&TXTLST=1&POS=1&Type_Doc=RESOL&TPV=PROV&DATE=240903&PrgPrev=PRG@TITRE|APP@PV2|TYPEF@TITRE|YEAR@03|Find@%2a%69%6e%76%65%6e%74%69%6f%6e%73|FILE@BIBLIO03|PLAGE@1&TYPEF=TITRE&NUMB=1&DATEF=030924)

<sup>8</sup><http://localhost/swpat/papers/europarl0309/cons0401/index.en.html>

<sup>9</sup><http://localhost/swpat/letters/cons0406/text/index.en.html>

- **Urgent Call to National Governments and Parliaments<sup>10</sup>**

Europe's governments are about to put their stamps under a directive proposal for unlimited patentability and unfettered patent enforcement of "computer-implemented" algorithms and business methods. The agreement by the Council of Ministers of 2004-05-18 discards well-deliberated decisions of the European Parliament and the EU's consultative organs without any justification and without democratic legitimation. The majority was secured by deceptive packaging and by questionable diplomatic maneuvering at the decisive session. The undersigned, who represent the leaders of software innovation and informed discussion on software innovation policy in Europe, ask the responsible politicians to pull the emergency brake and to reorganise the process of competitiveness legislation in the Council.

- **EU Council Plans to Scrap Parliamentary Vote without Discussion<sup>11</sup>**

The EU Council of Ministers is demonstrating that the concept of democracy is alien to the EU. This Wednesday, the Irish Presidency and the European Commission managed to secure support for a counter-proposal on the software patents directive, with only a few delegations - including Belgium and Germany - showing resistance. The new text proposes to discard all the amendments from the European Parliament which limit patentability. Instead the lax language of the original Commission proposal is to be reinstated in its entirety, with direct patentability of computer programs, data structures and process descriptions added as icing on the cake. The proposal is now scheduled to be confirmed without discussion at a meeting of ministers on 17-18 May, unless one of the Member States changes its vote. In a remarkable sign of unity in times of imminent elections, members of the European Parliament from all groups across the political spectrum are condemning this blatant disrespect for democracy in Europe.

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<sup>10</sup><http://localhost/swpat/letters/cons0406/index.en.html>

<sup>11</sup><http://localhost/swpat/log/04/cons0507/index.en.html>

- **Why Amazon One Click Shopping is Patentable under the Proposed EU Directive<sup>12</sup>**

According to the European Commission (CEC)'s Directive Proposal COM(2002)92 for "Patentability of Computer-Implemented Inventions" and the revised version approved by the European Parliament's Committee for Legal Affairs and the Internal Market (JURI), algorithms and business methods such as Amazon One Click Shopping are without doubt patentable subject matter. This is because

1. Any "computer-implemented" innovation is in principle considered to be a patentable "invention".
2. The additional requirement of "technical contribution in the inventive step" does not mean what most people think it means.
3. The directive proposal explicitly aims to codify the practise of the European Patent Office (EPO). The EPO has already granted thousands of patents on algorithms and business methods similar to Amazon One Click Shopping.
4. CEC and JURI have built in further loopholes so that, even if some provisions are amended by the European Parliament, unlimited patentability remains assured.

- **What is a Computer-Implemented Invention?<sup>13</sup>**

A washing machine with an embedded computer? Or a general-purpose data processing program? In their public discourse, the promoters of the EU software patent directive proposal say they do not want patents on "pure software" but only on "computer-implemented inventions", by which they say they mean "washing machines and mobile phones". Art 2 of the proposal itself however says otherwise, as does the history and practise of granting patents for "computer-implemented inventions" at the EPO.

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<sup>12</sup><http://localhost/swpat/papers/eubsa-swpat0202/tech/index.en.html>

<sup>13</sup><http://localhost/swpat/papers/eubsa-swpat0202/kinv/index.en.html>

- **Interoperability and the Software Patents Directive: What Degree of Exemption is Needed<sup>14</sup>**

Art 6 of the proposed software patent directive pretends to impose a limit on patent enforcement to safeguard interoperability. Art 6a, which was inserted by the European Parliament and approved by all three concerned committees, actually does impose a gentle but real limit. It says that filters for conversion from one format to another may always be used, regardless of patents. Unfortunately even this limit has provoked a furious backlash from corporate patent lawyers, seconded by large IT associations and governments (whose patent policy is usually formulated by corporate patent lawyers). After the summer pause of 2003, Arlene McCarthy MEP proposed an amendment to Art 6a which would render Art 6a meaningless. The movement against Art 6a was joined by Wuermeling (EPP), Manders (ELDR) as well as the governments of UK and US. Yet explanations as to what is wrong with the Interoperability Privilege remain very vague. We explain the meaning of Art 6a and the different amendments under discussion.

- **Program Claims: Bans on Publication of Patent Descriptions<sup>15</sup>**

Patent Claims to “computer program, characterised by that upon loading it into memory [ some process ] is executed”, are called “program claims”, “Beauregard claims”, “In-re-Lowry-Claims”, “program product claims”, “text claims” or “information claims”. Patents which contain these claims are sometimes called “text patents” or “information patents”. Such patents no longer monopolise a physical object but a description of such an object. Whether this should be allowed is one of the controversial questions in the struggle about the proposed EU Software Patent Directive. We try to explain how this debate emerged and what is really at stake.

- **Europarl 2003-09-24: Amended Software Patent Directive<sup>16</sup>**

Consolidated version of the amended directive “on the patentability of computer-implemented inventions” for which the European Parliament voted on 2003-09-24.

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<sup>14</sup><http://localhost/swpat/papers/eubsa-swpat0202/itop/index.en.html>

<sup>15</sup><http://localhost/swpat/papers/eubsa-swpat0202/prog/index.en.html>

<sup>16</sup><http://localhost/swpat/papers/europarl0309/index.en.html>