



Business Software Alliance

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BSA COMMENTS ON THE EUROPEAN COMMISSION'S PROPOSED DIRECTIVE ON THE PATENTABILITY OF COMPUTER- IMPLEMENTED INVENTIONS

July 2002

Over the past 25 years, the software industry has been a major contributor to technological innovation and economic growth worldwide. Clear, effective and predictable intellectual property protections are at the heart of this contribution, providing the incentives and resources software developers need to invest in creating new products and new technologies. A sound and harmonised legal framework in each of the areas of copyrights, trademarks and patents is essential if the software industry is to remain a key driver of economic growth and enabler of the Information Society. The Business Software Alliance[□] thus welcomes a European Union directive on Patentability of Computer-Implemented Inventions and supports harmonisation in this area. BSA believes that a directive will ensure the continued innovation, investment and competition that have long been the hallmarks of software development and will benefit software companies of all sizes by creating a more predictable legal regime.

1. BSA welcomes European Union action to harmonise patent law affecting computer-implemented inventions.

In recent years, patent protection has grown in importance as advances in technology have allowed many kinds of inventions to be implemented either in software or in hardware. However, there currently is a lack of harmonisation within the European Union regarding the patentability of computer-implemented inventions. The European Patent Office ("EPO") and some national patent offices in the Member States are applying different standards, and the criteria for patent protection of software-related and computer-implemented inventions are frequently misunderstood. These rules must be harmonised.

BSA supports the European Commission's efforts to achieve a clarification and harmonisation of the law on patents for computer-related inventions. Such efforts can further the important goals of predictability and consistency in the internal market. The BSA encourages the Commission, the European Parliament and the European Council to work quickly to adopt the Proposed Directive in order to achieve a clear and predictable legal regime for software-related inventions as soon as possible.

[□] The Business Software Alliance is the voice of the world's software and Internet industry before governments and with consumers in the international marketplace. Its members represent the fastest growing industry in the world. BSA educates computer users on software copyrights; advocates public policy that fosters innovation and expands trade opportunities; and fights software piracy. BSA members include Adobe, Apple, Autodesk, Bentley Systems, CNC Software/Mastercam, Compaq, Dell Computers, Entrust, IBM, Intel, Intuit, Macromedia, Microsoft, Network Associates, Novell, Sybase, Symantec and UGS. BSA websites: www.bsa.org; www.nopiracy.com.

2. BSA calls for stringent application of the prerequisites for patentability for computer-implemented inventions

The standards under any harmonised legal regime adopted for software patents should be stringently applied by the national patent offices of the Member States in considering patent applications for software-related inventions. In particular, the national patent offices should ensure that their examiners are properly trained for evaluating patent applications. Further, comprehensive prior art databases for software-related inventions should be developed and maintained to ensure that invalid patents are not granted due to the inadequacy of search databases for inventions already made public.

The Directive should maintain the current EPO practice regarding the technical contribution requirement for patentability. The Proposed Directive sets forth a standard for patentability of computer-implemented inventions that follows the current practice of the Technical Board of Appeals of the EPO. This requires that computer-implemented inventions make a non-obvious technical contribution to be patentable. This criterion is useful and appropriate in distinguishing patentable from non-patentable inventions. The requirement of a non-obvious technical contribution is also in compliance with the TRIPs Agreement and the European Patent Convention. The Proposed Directive effectively does not extend patent protection to many computer-implemented business methods, because of the continuing requirement that the invention make a technical contribution. The commendable effect of the Proposed Directive is to maintain an approach to patentability that ensures a more selective treatment of inventions in non-technical areas such as business methods than is currently the case in other geographies such as the United States.

BSA notes that the Proposed Directive does not allow computer program-product claims. Article 5 of the Proposed Directive differs from the current practice of the EPO Board with respect to claim language used in software patents. Namely, although the Board currently allows claims to computer-program products, either on their own or embedded within a storage medium, the Proposed Directive limits product claims to programmed computers, programmed computer networks, or other programmed "apparatus". By disallowing computer program-product claims, the Proposed Directive makes it more difficult to enforce patent rights related to computer programs. . In this context, it should be noted that product claims covering computer programs by themselves or media containing computer programs that were in patents granted until now could be rendered invalid once the Proposed Directive is adopted.

3. BSA welcomes the Commission's explanation of the complementary nature of copyright and patent protection and supports the statement in the Proposed Directive that acts permitted under Directive 91/250/EEC ("Software Directive") will continue to be permitted and cannot be prevented under the patent laws of the Member States

The Software Directive contains an exhaustive list of the exceptions that apply to software. These acts are permitted under the Software Directive so long as they are performed by an authorized user of the computer program, and include making a back-up copy of the software and decompiling the software in limited circumstances. These narrow exceptions are an important part of the EU's software copyright regime and reflect a careful compromise among many interested parties.

Under Article 6 of the Proposed Directive, patentees may not require that patent licensees or purchasers of patented software relinquish their right to make a back-up copy of the software, or their right to decompile the patented software for the purpose of ensuring interoperability with other software. BSA believes that Article 6 strikes the proper balance. Article 6 is narrowly tailored to ensure that acts permitted under the Software Directive will continue to be permitted under the new patents regime. At the same time, Article 6 in no way broadens the limited circumstances under which back-up copies may be made or software may be decompiled.

4. Innovation and competition in the software industry is the goal.

Innovation and competition are the motors that have driven rapid advances in computer program development, and BSA shares the European Commission's goal of fostering innovation, investment and competition, BSA appreciates the opportunity to comment on this important initiative.

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