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« Considerations through Europe on software protection: patents? copyright?»

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Introduction

- Computer programs are generally protected as literary works by copyright law.
- As a consequence, computer programs are not considered as patentable inventions, see article 52(2)c of EPC
- However, computer programs are excluded from patentability only if the patent relates to a computer program <u>as such</u> (Art. 52(3) EPC)
- Therefore, devices or methods involving use of computer programs have <u>always</u> been considered as patentable, as far as they involve a technical effect.
- See VICOM Case T208/84 of July 15, 1986 where it was considered illogical to grant EP patents on a process controlled by a programmed computer and to refuse protection to the computer programmed to execute such control (image processing).

Introduction

✤ From IBM case in T1173/97 of July 1, 1998, EPO started to grant patents with <u>claims directed to a program considered as a product,</u> provided that the program brings about a technical effect which goes beyond the normal physical interactions between the software and the hardware on which the program runs

✤ In other words, the EPO considers that if an invention using a computer program involves a technical effect, it is possible to grant a patent, irrespective of the category of the claim (device, method or computer program)

✤ For example, an operating system for a computer is patentable, or a software reducing the track of the mouse cursor on the screen, or enhancing the data storage capacity of the computer, etc…

Introduction

✣ To prevent different interpretations by national Courts on validity of EP patents on computer program related inventions, a proposal of Directive has been examined by the European Parliament and seriously contested and amended

✣ According to the current wording of the new proposal of Directive n° 9713/04 of May 24, 2004, a computer program related invention can be claimed as a computer program, alone or on a carrier, as a programmed device or a method implementing this device.

✣ This proposal of Directive is in line with the current case law of the Boards of Appeal of the European Patent Office.

✣ This proposal has been adopted at the qualified majority by the Council of the EU on March 7, 2005 (Spain voted against, Italy, Austria and Belgium abstained) and is currently re-examined by European Parliament

Protection by copyright

- The protection of computer programs by copyright law has been harmonized through out the European Union, by application of European Directive n° 91/150 of May 14, 1991.

- In all the 25 Member States of the EU, computer programs are specifically or implicitly protected by copyright law.

- By copyright, the source code and the object code are protected as literary works. Modifications and translations are also protected.

- In most countries, the duration is 70 years after death of the author, in application of European Directive n° 93/98 of October 29, 1993. Few countries seem not to have yet modified their national law on the duration of copyright law (Cyprus, Greece and Portugal).

Protection by copyright

⌘ © notice <u>recommended</u> for obtaining full damages, in Ireland, Italy, Lithuania and Luxembourg

⌘ Registration is never compulsory, but in Italy it is possible to register a program before SIAE on a special public Register, and in France it is possible to register a security on a software before the French Patent Office

⌘ The advantages of copyright protection are in particular :
- ⌂ the length of protection, namely 70 years after death (even though such a protection seems not reasonable for computer programs)
- ⌂ low cost (no formalities nor registration are compulsory)
- ⌂ automatic protection over 150 countries, by application of Berne Convention

Protection by copyright

- The drawbacks of the protection by copyright are :
  - a protection limited to identical copy, in whole or in part
  - no protection against computer programs using the same functions, when the programming is different
  - the source code of computer programs is generally kept secret, since there is no incentive for disclosure to the public

- Indeed, according to article 9.2 of Trips Agreement, copyright protection shall not extend to expressions, ideas, procedures, methods of operation or mathematical concepts as such.

- The European Parliament itself added to the proposal of Directive n°9713/04 in the Statement 16 «*With the current trend for traditional manufacturing industry to shift their operations to low-cost economies outside the European Union, the importance of intellectual property protection and in particular patent protection is self-evident* » .

Protection by copyright

⌘ As a consequence, there is little protection against "intelligent" copying which consists in accessing to the source code of a program, by reverse engineering, in order to understand how the functions are implemented by the program. It is then easy to create a new "similar" program, using the same functions, but with a different programming

⌘ *As a conclusion*, copyright protection is useful and efficient, but insufficient to protect the EU software industry against intelligent imitations made in low cost *economies*,

Protection by patent law

- 23 countries out of 25 EU States are also member of the EPC

- Programming logic systems may be protected in Austria by Utility Models up to 10 years: this renders claim formulation much easier

- Latvia is an associated country to EPC, but according to patent Attorneys in Latvia, EP patents on computer programs should be revoked in Court on the basis of their national law

- Only Malta is completely out of the EPC. However, according to patent Agents in Malta, the national case law should follow the EPO case law

- According to patent Attorneys through out European Union, the national Patent Offices are expected to follow the EPO case law

Protection by patent law

⌘ The advantages of protecting software by patent are :

⬑ a protection on the functions of the computer program, independently from the programming itself

⬑ a public disclosure on the functions of the computer program, through the patent application publication

⬑ a definition of the scope of the protection claimed on the computer program, in the patent claims

⌘ The drawbacks are in particular :

⬑ the risk of patenting purely theorical computer programs, without specific programming

⬑ the poor readability of a claim directed to a computer program

⬑ the difficulty to determine whether the source code of a computer program infringes or not a functional claim protecting a computer program.

Protection by patent law

⌘ According to the latest EPO case law (T258/03 of April 21, 2004), the Board of Appeal concluded that, in general, a software, an apparatus or a method for performing an economic activity and involving technical means as usual as a computer, is an invention within the meaning of article 52(1) EPC

⌘ But, only the features which contribute to a technical character will be taken into account for assessing novelty or inventive step, the economic steps being let aside

Protection by patent law

✽ Most national Courts are also expected to follow the EPO case law, even though there is little or no case law at present

✽ However, the Courts in France, Poland, United Kingdom and Ireland are expected to be more restrictive than EPO

✽ In SAGEM case (Paris CA Jan. 10, 2003) a method has been rejected by the FPO as being <u>manifestly</u> not an invention, but just an economic activity (it must be noted that no technical means were claimed, even usual means)

Conclusion

❆ Both protections by copyright and patent law are used and seem to be complementary

❆ The proposal of European Directive, in its actual wording, is in line with the latest EPO case law, since art. 4 of the Proposal states that the technical contribution has to be considered when assessing inventive step

❆ This proposal of Directive would not change much the situation of patentability of computer programs through out the European Union, since most countries follow the EPO case law.

Source

- Manual of Industrial Property, 2005

- EPO and French Case Law

- Information collected from Patent Attorneys in all the 25 Member States of the EU