# Remember July 6th, 2005

[ The day European Parliament said NO to software patents ]



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The Battleship. Photo Alberto Barrionuevo

On July 6th, 2005, the Software Patents Directive was rejected by the European Parliament with an overwhelming majority of 648 votes vs 14. It was the first time in European Union history that civil society spread its voice so massively, was heard and won over big industries lobbyists. The unforgettable day when the European Parliament reminded the Commission and the Council of the signification of the word Democracy. According to Josep Borell, former EP President : the "most decisive majority vote in the history of the chamber".

## I – SOFTWARE PATENTS DIRECTIVE STORY

Whereas the development of the digital industry raised the issue of software legal protection, it did not take much time for most of national lawmakers to agree on the fact that due to software original nature, ie. a set of instructions presented just as a musical partition, copyright was the most appropriate.

In that regard, the 1995 agreement on Trade related aspects of Intellectual property rights (TRiPS) contains an article 10.1 specifying that computer programs shall be protected as literary works in the sense of the 1886 Berne Convention. To avoid any confusion, the 1973 Munich Convention on European Patent meanwhile expressly excludes software from patentability in its article 52.

For quite obscure reasons though, the European Patent Office (EPO) started from its very launching to bypass the law and deliver software patents under various category names. Not that obscure actually, once you know that the EPO revenues depends on the number of patents delivered.

The proposed Directive on the Patentability of Computer-Implemented Inventions (CII), also called Software Patents Directive, was an attempt to legalize the EPO Board of Appeal case law. Issued by the European Commission on February 20th 2002, the proposal was supposed to "harmonise national patent laws and practices" on the issue.

With not much surprise, the proposed directive was supported by well established IT corporations benefiting from the delivered patents, but also patent lawyers and "patent trolls", ie. non practicing entities holding patents portfolios.

Due to the threat on innovation and competition, the opponents as for themselves were mostly open source and free software SMEs - software patents causing disproportionate costs of licensing and unavoidable law suits.

Main citizen lobby active on the issue, the Foundation for a Free Information Infrastructure (FFII) played a major coordination role in warning Members of European Parliament about the dangers of the proposal, hardly understandable in itself without explanation.

106 amendments were adopted by the European Parliament in first reading on September 24th 2003. The main idea was to confirm the patentability of machines running the software but exclude what was related to data processing and therefore, software patents. In other words, the amended version was in total contradiction with the purpose of the initial one,

condemning EPO practices instead of approving them.

On May 18th 2004, the Council agreed on what they called a "compromise version".. Quite a surprise for MEPs : with massive lobbying from pro-patents, the Commission had actually simply suppressed all amendments before sending the proposal to the Council, so that the later had to vote on more or less the same proposal as initially. Thanks to the Polish Government though, who announces that it would not support the text issued, the second reading was postponed.

A democratic concern had raised. The balance of power between the Commission and the Council on one side, representing respectively E.U.'s head and member states governments, and the European Parliament on the other side, elected by and standing for the people, was threaten.

Whereas the FFII started claiming "Power to the Parliament, no Software Patent", MEPs slowly split into two camps that overtook on the political groups : those in favor and those against. Several months battle followed with growing indignation about the way the EP first reading amendments had been considered. On March 7th 2005 though, the compromise version was confirmed by the Council and sent to the Parliament for second reading.

Michel Rocard, rapporteur on the directive, issued a very clear report, warning his colleagues against the dangerous wording of the text and tabled amendments. As the European Parliament Committee on Legal Affairs (JURI) did not react positively, a new set of amendments were jointly presented by Michel Rocard, for Socialist Parti, together with Jerzy Buzek and Zuzana Roithova, from EPP-ED (Christian Democrats).

While the plenary vote in Strasbourg was approaching, and proponents multiplying pathetic attempts to obtain MEPs votes, the citizen mobilization reached its paroxysm to gain support for the "Jerzy / Buzek" amendments.

On July 6th, 2005, the proposal was finally rejected by an overwhelming majority of 648 votes vs 14 and Michel Rocard commented :

"There is a collective and unanimous anger on the part of the entire Parliament at the unacceptable way it has been treated by the Commission and the Council. A total and cynical contempt for the choices made by Parliament at first reading. A total absence of any consultation by the Commission in drafting the text for the second reading. Repeated attempts even to stop discussions between Governments within the Council itself. As a matter of principle, this is scandalous enough. The crisis in Europe today has a lot to do with the deficit of democracy, an area where the Council has an overwhelming responsibility, as it has proved amply on this issue. Let us hope that this rejection is a lesson to it ! "

## II – UNDERSTANDING THE DEBATE

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Why are software patents so bad ? To understand the debate, a short reminder about Intellectual Property (IP) might be appropriate. An explanation about software nature and its implication inside our modern society would also be needed.

Although the first privileges similar to Intellectual Property Rights (IPR) appeared at the 15th century, the expression "Intellectual Property" itself is quite recent as it was first used with the creation of the United International Bureaux for the Protection of Intellectual Property (BIRDI) in 1893. The BIRDI was in charge of the application of the two conventions that set the basis at International level of the two IP branches :

- 1886 Berne Convention on the protection of literary and artistic works - copyright
- 1883 Paris Convention on industrial property for patents and trademarks

Whereas those two conventions are still relevant, the BIRDI were replaced in 1967 by the World Intellectual Property Organisation (WIPO), an extension of United Nations.

IP offers exclusive rights on creations depending on what we are talking about. While literary and artistic works are protected by Copyright, inventions, which provides "technical solutions to technical problems", are protected by Patent Law.

To benefit from Copyright protection, the creation should be original and fixed on a material support. Its sole publication is then enough for the creation to be protected - no registration, no fee.

Patentability criterias as for themselves are the following :

- novelty regarding the state of the art
- non obvious for a specialist of the sector
- subject to industrial application

On the contrary to literacy and artistic works, inventions shall be officially registered to benefit from patent protection. This implies a bunch of fees, multiplied by the various territories where the invention will be used.

A software is a set of instructions and data aimed at being executed by a machine so that the later can perform either one or several special tasks. By definition, software and hardware are two different things. Just like a music and a musical instrument ; a novel and a printer.

Written as source code by a human in a specific language, the software is translated through a compiler into a machine code - with zero and one - that then gives rise to electric signals. Exactly like what is happening when a dvd player linked to a screen displays a movie.

Having not a single technical aspect in itself - one cannot "touch" it - software is far away from an invention, and can therefore only be subject to Copyright protection as literary work.

Beyond its non technical nature, it is important to note that software does not meet with patentability criterias anyway : thousands being developed every day, the "state of the art" cannot be defined ; the distinction between obvious and non obvious is also impossible to make, and the concept of software patenting is just as odd as mathematics patenting.

Now, let's take a higher view on the issue.

Whereas Patent Law spirit should encourage innovation by giving inventors the privilege to commercialize their creation without worrying about competition during a certain period, software patents have quite the opposite effect.

Patent costs, which include deposit, licensing and law suits, are indeed totally disproportionate in comparison with software development, production and distribution budget ; in fact, it is simply hundred times more expensive to get a software patented than to commercialize it.

The consequences are terrible in terms of innovation.

Because today, software are everywhere. In everything we use in our everyday life. In all sectors of industry. They are in the heart of our information society but also far beyond.

Innovation in the field of software has consequences on innovation in the field of environment, communication, health, agriculture, transportation, .. and many, many other sectors which implies the use of computer systems.

This is why software patents are so dangerous. They do threaten our future.

## III – THE DEMOCRATIC CHALLENGE

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A few weeks before the vote, Members of European Parliament (MEPs) received the following email : "Dear Members and Assistants. Yes its true ! If you go down to Place du Luxembourg from now until 3pm, you can collect your free ice cream and support the Computer Implemented Inventions Common Position ! Hope to see you soon." A perfect illustration of what the campaign in favor of the directive was about.. And of what European democracy should more generally endure, ie. a succession of doubtful practices to grab votes.

While software patents do not make sense, the main reason why the directive was rejected was actually not so much about the content, but about the manner the European Parliament was treated. Whereas a wonderful work had been done by MEPs to amend the directive in first reading, the Commission surreptitiously suppressed all amendments before passing the text to the Council. Unimaginable for anyone who has notion of what separation of powers is about.

To understand why the Commission acted so, it is important to remind its initial role, ie. guaranteeing the respect of E.U. legislation and initiating it. How are the texts written ? In fact, the Commission needs to consult experts and stakeholders before all.. Reason why the lobbying is so well established in its premises.

The Software Patents Directive was push by the European Patent Office (EPO) but also the most powerful companies in the place, gathered inside the "European Information and Communications Technology Industry Association" (EICTA), leaded by Microsoft - henceforth, "Digital Europe". Those ones are everywhere and we can say it, do influence our governments in their everyday work. Not surprising, as they control information systems, which is by the way one of the reason why it is vital to keep competition safe in this particular field - to safeguard the independence of governments.

Rejection of the directive would thus not have been possible without the unprecedented mobilisation of citizen around MEPs, mostly coordinated by the Foundation for a Free Information Infrastructure (FFII) and supported by 1948 SMEs under the "Economic Majority" label. This made this vote the "most decisive majority vote in the history of the chamber" (Josep Borell, former EP President). In other words : the victory of citizen advocacy, transparent, spontaneous, on corporate lobbying, obscure and outdated.

It is important to note that whereas the EICTA campaign was heavily financed, the FFII had to count mainly on volunteers. "We weren't professional lobby workers", commented Alberto Barrionuevo, OPENTIA SL, in response to interview by FFII stagiair Pierre-Antoine Rousseau. "We were a lot of professionals in the subject matter, coming mainly from SMEs and

Universities, concerned about our future and defending our rights and families. Almost no one of us got paid a salary for doing lobbying. We were 'small ones against big ones' - this sentence is what said an EPP MEP to a group of FFII members in one of our meetings".

The best image of the two camps was given on the eve of the d-day, while MEPs coming back from their lunch break looked down the river and saw a yacht hired by the pro-patents lobbyists, urging to "vote for the CII directive" ; in front of it, two canoes were placarding "software patents kill innovation".

What were the victory's ingredients then ? "Internet is the key", Alberto continued. "This is the first time that a lobbying campaign has taken the whole advantage of Internet to join a lot of small and dispersed actors all around Europe/world. Collaboration made possible thanks to Internet was a main key issue". For Florian Mueller, from No software Patent Initiative, "honesty and authenticity" also made the difference. "Politicians understand that the FFII consists of people who genuinely care about the issues they represent, as opposed to the mercenaries hired by the pro-software patent forces."

Andre Rebentish, from now General Secretary of FFII compares the later advocacy with what he calls the "Artus principle : you leave the court to kill the dragon, you meet other for just another adventure or quest, and all heroes meet again at the Artus court. Many knights, improvised action, and there is always a little princess to liberate or a dragon to slaughter. That way you gain experience, team up with interesting people and are able to act very productively. FFII lobbyists are like hero knights in an Artus novel."

The whole campaign was then summarized by a simple message : refusing software patents would be for European Parliament affirming their democratic power towards the Commission and Council inelegant attempts to make them go through despite a clear positioning against in first reading. The yellow T-shirts branding "Power to Parliament - No software patents" became then a non equivocal symbol of resistance. Whereas they had been forbidden within the premises of the institution, several MEPs removed their shirt to wear them on once inside the hemicycle.

Then came the vote. A resounding victory for European Democracy.

## IV – TOWARDS UNITARY PATENT

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The day the Software Patents Directive was rejected, Michel Rocard, rapporteur on the Directive, warned the European Patent Office (EPO) :

"Rejection is a message directed at the European Patent Office. The European Parliament has refused to ratify the recent judicial errors (...) If these errors were to continue, it now seems clear that a parliamentary majority would emerge to put a stop to them."

Since then, the EPO however continued both to deliver software patents and to push for formal approval of its nasty practices, starting with the European Patent Litigation Agreement (EPLA), that was supposed to create among signatory states an integrated judicial patent system with uniform rules of procedure within the EPO structure. Smart idea, as it would have de facto legitimated the old case law on software patents.

The EPLA was abandoned in favor of another big project : the Unitary Patent, which simply gives an unitary effect in all members states to all patents delivered by the EPO, and is currently under examination process at European Parliament.

Whereas arguments in favor are mainly about simplifying the system and reducing overall costs - which is fine - the Unitary Patent regulation proposal does not mention any kind of patent quality requirements nor substantive law.

In other words, even the most trivial patents, such as software patents, but not only, will be enforceable all over Europe, just as any national patent.

While a proper regulation on European patent system is needed, patentability criterias should be the first to be defined. The present regulation does not contain any reference to what is needed for an invention to be patentable.

If the EPO was a democratic institution, one could say, let's trust its forty years case law.. But it is not the case. The EPO stands out of European institutions and is financed depending on the patents delivered. This means that the more patents there are, the more money they make. This leads to an unavoidable decreasing of patents quality and an increasing flow of trivial patents.

As foreboded by Michel Rocard in 2005, will a parliamentary majority emerge to "put a stop" ?