Software Patents
in the European Union
European Patent Convention (1977)

• Art. 52(2): The following in particular shall not be regarded as inventions within the meaning of paragraph 1:
  – (a) discoveries, scientific theories and mathematical methods;
  – (b) aesthetic creations;
  – (c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;
  – (d) presentations of information.

• Art. 52(3): The provisions of paragraph (2) shall exclude patentability of the subject-matter or activities in question “only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such.”
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1978 EPO Examination Guidelines

• “A computer program may take various forms, e.g. an algorithm, a flow-chart or a series of coded instructions which can be recorded on a tape or other machine-readable record-medium, and can be regarded as a particular case of either a mathematical method … or a presentation or information … . If the contribution to the known art resides solely in a computer program then the subject matter is not patentable in whatever manner it may be presented in the claims. For example, a claim to a computer characterised by having the particular program stored in its memory or to a process for operating a computer under control of the program would be as objectionable as a claim to the program per se or the program when recorded on magnetic tape.”
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The EPO Barriers Come Down

• 1978-1985: EPO highly resistant to patenting software

• 1985 onward: EPO increasingly receptive to patent applications, so long as the software has a “technical aspect”
  – 1985 Revised Guidelines
  – IBM (EPO Technical Board of Appeal, T0935/97)
  – IBM (EPO Technical Board of Appeal, T1173/97)
Divergence Among National Courts

• UK: software unpatentable even if technical aspect has been shown
• DE: very soft “technical aspect” requirement
Commission of the European Communities Seeks Harmonization


Proposed Directive, Art. 4

- Member States shall ensure that a computer-implemented invention is patentable on the condition that it is susceptible of industrial application, is new, and involves an inventive step.
- Member States shall ensure that it is a condition of involving an inventive step that a computer-implemented invention must make a technical contribution.
- The technical contribution shall be assessed by consideration of the difference between the scope of the patent claim considered as a whole, elements of which may comprise both technical and non-technical features, and the state of the art.
Debate

Expand:
- Union of Industrial and Employers’ Confederations of Europe (UNICE)
- European Information, Communications and Consumer Electronics Technology Industry Association (EICTA)

Shrink:
- EuroLinux
- Foundation for a Free Information Infrastructure
- Committee of the Regions
- Academics
- Start-up companies
Continued Struggle within EU

  - Patents on “programmed devices” permitted
  - But no patents on “data processing”
  - All patented technology must be “susceptible of industrial application”
  - Safe harbor for copying for interoperability
    - (http://www3.europarl.eu.int/omk/omnsapir.so/pv2?
      PRG=CALDOC&FILE=20030924&LANGUE=EN&TPV=PROV&LASTCHA
      P=7&SDOCTA=2&TXTLST=1&Type_Doc=FIRST&POS=1)
Continued Struggle within EU

• May 18, 2004: Council of Ministers, by a bare qualified majority, removes amendments and tentatively adopts pro-patent version
  – Change in vote-weighting system in EU Competitiveness Council, the defection of Poland, and rumblings in the Netherlands and Germany destabilize the agreement
  – Dec. 7, 2004: Competitiveness Council vote delayed

• Summer 2006: Parliament rejects final draft