EU revises position on software patents

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Is software patentable in Europe? Following questioning from a member of the European parliament, the European Commission recently released a statement containing strong implications that computer programs aren't patentable, and that existing patents on them may be struck down by the courts.

The Polish MEP Adam Gierek formally questioned the EC about whether the practices of the European Patent Office (EPO) were undermining the social acceptability of the patent system, with patents being granted for solutions that aren't patentable under the current law. In response, the Commission responded with a statement saying that the European Courts of Justice (ECJ) were not bound by the case law developed by the EPO, but were in fact free to interpret the provisions of the EPC. Although the EPO will continue to grant patents, with these new interpretations any existing patents for software programs could then potentially be invalidated by the Courts.

There is a strong anti-software patenting activist movement in Europe where these debates are closely followed. When the EU tried to pass an earlier directive that would have liberalized the scope of what could be patented, aligning with the practices of the EPO, the campaigners made their concerns widely known. Top of the list were fears that loosening up standards to create an "American-style" approach to patenting. Citing the controversial "One click" patent filed by online retail giant Amazon.com, concerns focused on the possibility that patents would be granted to a much wider range of software and business practices than previously. In the event, that particular directive was thrown out.

Now focus has turned to the so-called Community Patent (also known as the EC patent), a patent law currently being debated by the Commission. If passed, it would allow European individuals and companies to obtain a consistent unitary patent which would be valid across the entire EU, rather than having to go through the expense of enforcing it through national courts in each and every country. Activists fear that this community patent would be also be governed by the EPO.

In general, patents on software are prohibited by EU legislature, but much of the current confusions have arisen from the wording of Article 52 of the European Patent Conversion. The article cites a number of processes which are exempt from patentability, including presentations of information, mathematical methods, aesthetic creations, "mental acts" and computer programs. The ambiguous wording of Article 52 has, however, led to a loophole effect. In practice the EPO has applied the loophole in a manner which has so far permitted software patents, infuriating the anti-software patent lobby.

This new move has been met with cautious optimism by the Free Information Infrastructure (FFII) who saw the statement as a positive step. "It is good to see that the Commission no longer presents EPO case law as 'the status quo which must be codified'," said FFII president Pieter Hintjens, in a statement. But the reasoning behind the decision is still flawed, as it still relies on the courts themselves to strike down any software patents that the EPO might grant.

Litigation is often too expensive for small firms, forcing them to pay for a license, and this in itself is a particularly European issues. Whilst the larger players in the United States have been hit by an increasing number of patent infringement lawsuits, the European sector has a greater number of small firms than its American counterpart. And it's these smaller companies would be hit hardest by any patent suits. "Software patents not yet taken to court will impose an enormous burden on the

industry," said Hintjens.

Others are even less hopeful that this is a move towards striking down software patents in Europe. In their blog, IPKat, London-based intellectual-property enthusiasts Jeremy Phillips and Ilanah Simon describe the move as little more than a complex description of who gets to interpret the rules on patentability between the EPO and the ECJ. This doesn't mean that it will be more or less difficult to gain software patents as ultimately both bodies will be interpreting exactly the same wording of the clause. Anti-software patent activist Florian Mueller went further, writing in a recent post on his Web site "It isn't going to happen anytime soon. There is too much resistance against it."