

## Can software be protected?

There is no single answer to this question internationally. It is well known that in the United States, which is a large software supplier, patent protection has been available for software for a long time. As early as 1981, the Supreme Court decided to protect « anything under the sun made by man ».

In Europe however, the system explicitly excludes software from protection (art. 52c EPC). This difference has profoundly affected habits on either side of the Atlantic. The number of filings has increased rapidly in the USA, many of them being fortunately of no interest. In particular, there is the Amazon “One click” patent (see below) or the British Telecom Hypertext patent, whose functionality forms the basis of the Internet.

American companies are not limited solely to their national territory and have quickly invested in Europe. This is how, under the pressure of case law, the European Office has accepted protection of inventions expressed only by executing a computer code.

It should be recalled that previously, the only means available to software publishers was copyright. Copyright protects software against copying, but does not protect the underlying concept. Could we really allow a whole slice of European industry, particularly the part reputed to be decisive in the great game of information literacy, to escape from patent law?

The European response is half-baked. It is the principle of a glass that is half empty or half full depending on the observer. A special Parliamentary session adopted a directive (24 September 2003) pronouncing a clear exclusion from patent protection of software per se and more generally of business methods, while leaving an opening for current practice.

According to software patent detractors (Linux, Open Source ...), Europe has not followed the American trend and refuses patent protection. A subject has rarely been so heated and it was reported that physical threats were made against Members of Parliament.

However, the current practice of the European Office was, in a way, confirmed. Paradoxically, while the anti-patent victory is being celebrated, there is talk of 30,000 European patents being granted in this category.

What, then, is the current situation?

The answer lies in the magic formula of “technical effect”. What lies behind this incantation? The inventor has to demonstrate that his software is in fact a machine which provides a new technical solution to a technical problem. It is preferable to speak of a processing method with the computer as a mere instrument.

How can we determine whether this technical condition is fulfilled?

The first question to be asked is: Has this method already been achieved by other means? We often meet people who propose a computerized and thus quicker, more efficient approach, to methods previously carried out manually. This is the case for example of Internet sites that offer centralization of previously disparate data (health insurance premiums, journey distance calculations, dates or vintages...). Even if this is the first time that such a compilation has been proposed, the overall solution is not new and a patent cannot be obtained in such cases.

Another example that can be cited is the use of a mobile telephone to pay for a drink in a vending machine. These vending machines, which accept payment via a telephone bill, are found in shops. Sending an SMS message authorizes the vending machine to dispense a bottle. The cost appears on your next



mobile telephone bill. It is possible to protect this idea since there is a surprising data path (from the mobile phone network to the drink vending machine) which has no analogy with the state of the art prior to the arrival of wireless telephone communication.

Although this idea is expressed only via software, the concept aims to overcome a technical problem, which is to dispense with the need to have the small change necessary for such a vending machine. It is

an alternative to payment by card, token or electronic key.

Finally, to give a picture of software patent protection, a more revealing indicator than any theory on the subject, is the number of European Patents in this category, which is estimated at 30,000. Although, as mentioned above, not everything can be protected, sufficient latitude nonetheless remains for programmers to create a portfolio of assets.

#### Amazon ONE CLICK

In June 1997, Amazon filed its famous patent on the "One Click" technology, an idea that consists in pre-storing a client's settings in a server and storing a cookie referring to those settings in that client's computer. This enables an item to be purchased with a single click, by associating the item with the cookie. This idea was classed as an improvement to the shopping basket which still required validation.

As soon as the US Office granted the patent, Amazon took out an injunction against Barnes and Noble, a competitor in Internet sales. Barnes succeeded in overturning the injunction on appeal on the basis of numerous documents demonstrating that the idea was not new in 1997.

The parties reached an out of court settlement, which makes any interpretation difficult. Nonetheless, Amazon has not taken any further action against other companies.

While some countries, like New Zealand, have accepted the patent, in Japan (one of the three main countries which carry out an in-depth examination), the patent was rejected for lack of novelty.

In Europe, the Application was withdrawn by the Applicant, which would suggest that here too, novelty could not be demonstrated. It should be noted that the European Office did not exclude such a method simply because it concerned software. If it had been filed a few years earlier, Amazon would have had its European patent!