Auctioning knowledge ?

by Philippe Aigrain*

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On June 20th, the Legal Affairs committee of the European Parliament has adopted -against the opinion of the rapporteur Michel Rocard- a set of amendments that open all doors to the patentability of software. For now close to 10 years, the European Patent Office has been trying to obtain a legal blessing for the general auctioning of this modern form of knowledge.

Already in 2003, during the Parliament's first reading, the Legal Affairs committee had adopted a report in favour of patentability. Some members are traditionnally sensitive to large interest groups and to the ways of thinking of what has become the « patent system » (patent offices, consultants and lawyers). However, in 2003, the Parliament succeded in plenary to raise the level of the debate. Considering scientific, innovation, social and economic stakes, it adopted a text that made software and software-based information processing clearly unpatentable. Will it do the same this time? To assist it in its decision, it is useful to come back to substance, and to explain what is at stake in terms that are accessible to all, leaving aside legalese jargon.

What is software? It is the expression, encoded as information, of a process to be applied on information. So what? might the reader say. Examples might be more informative: software is what one uses to write, create, communicate, compute, model, memorize; software gives structure to all digital media from text to moving image; software is the instrument of any science; software is the invisible grammar that shapes one's expression and weaves exchanges between all. But software is also an instrument of medical diagnosis or therapeutical advances. Who controls software innovation, who can channel it in some direction or restrict it to one's profit has a power reaching further that we imagine.

The narrow vision of a limited number of companies and of a patent system that works to its own extension is being met with a solidly argued rebuttal. It comes from scientists and innovators, from the immense majority of affected economic players, from those economists who see beyond simple dogmas on the benefits of property, and from the thinkers who have tried to see where software patentability would bring us.

Scientists and practiioners of software are close to unanimous in refusing the legalization of patentability. The most renowned European scientists, including Britain's Robin Milner, single EU recipient of the Turing award, addressed a petition to the European Parliament that states software patentability is « scandalous from the view point of ethics, economically unjustified and harmful » and claims it « would impact adversely scientific and technical innovation, and put democracy at danger[1] ». Tens of thousand of software engineers and developers, including a great number of staff members of the pro-patent multinational companies (Nokia, Siemens, Ericsson and a few other members of the EICTA lobby) equally oppose software patents[2]. However, according to pro-patents lobbyists, only some financial investors and lawyers understand what is at stake in software.

Survey after survey, even those institutes most favourable to software patents had to recognize that European SMEs find them harmful to their activity. European SME organizations such as CEA-PME have taken a clear position against software patents. The companies that have chosen the path of cooperative free / open source software based innovation are confident that the future will be theirs ... if only it is not stolen from them using patent monopolies.

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1 http://www.upgrade-cepis.org/issues/2003/3/up4-3Petition.pdf

2 http://petition.eurolinux.org/index_html

All that still concerns only specialized stakeholders. What about the economy at large, and society? Economy as a discipline is not the kingdom of consensus. Two schools can be found on this subject. Doctrinarians of property stress the need for patents as an incentive for software innovation, without explaining how either the innovative software we presently have or the large software empires came to exist without patents. Other leading economists, who have faced up to the reality of things, have written an open letter to the Parliament, defending positions similar to those of the scientists[3].

Did anyone try to understand where patenting software would lead us? From the seventies to this day, via the TRIPS agreement of 1994, a group of multinational companies, originally led by IBM, Monsanto and Pfizer, then joined by a few European companies and newcomers such as Microsoft, AOL-Time Warner and Vivendi-Universal, convinced governments to extend systematically the domain of patents and the execution mechanisms for copyright. Their aims were simple: to be able to separate design from production, to be able to delocalize production and use the threat of delocalizing it further, and to realize the dream of investors: free oneself from the burden of staff by creating value magically, through the zero-cost reproduction of information. Now many want to imitate them and achieve near magical margins of operation. But someone is paying the cost: us and our children. In the field of software, Europe and India still resist this madness. Because they do so, we still underestimate the consequences of acceptance of patents. The decision of 6 July 2005 will put to test the ability of democracy to draw limits on how much a very special kind of companies can enclose the public domain, to confirm that it is still possible for the economy to develop in forms that are compatible with a decent, human and innovative society. A large share of economic players will welcome a confirmation of this ability. Therefore , it is time for MEPs to confirm the trust they have deserved since the 2003 vote, and reject clearly any legalisation of patents on software and software-based information processing.

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3 http://www.researchineurope.org/policy/patentdirltr.htm