

Motion

Proposed by the Parliamentary Groups of the CDU/CSU, SPD, FDP and BÜNDNIS 90/DIE GRÜNEN

Securing Competition and Innovation Dynamics in the Software Sector — Effectively Limiting the Granting of Patents on Computer Programs

The parliamentary groups hereby submit the following motion to the Bundestag for adoption:

I. The German Bundestag ascertains:

Innovative, powerful and secure information systems are an indispensable and fundamental requirement for a society based on knowledge and information. Major contributors to the development of these systems in Germany and Europe are small and midsize software development enterprises as well as larger corporations which are globally active. The competitiveness of all enterprises is decisively dependent on the copyright laws as regulated in the European Directive 1991/250/EEC (2009/24/EC) and in Sections 69 a et seqq. of the German Copyright Act (UrhG). The exploitation rights under copyright law pursuant to Section 69 c UrhG ensure that the commercial income from computer programs goes to the software developers who created them. Simultaneously, software copyright law is intended to ensure interoperability among the programs.

The German Patent Act (PatG) and the European Patent Convention (EPC) acknowledge the precedence of copyright law for regulating the protection of computer software by excluding computer programs “as such” from patent protection. Nevertheless, in actual practice — especially that of the European Patent Office (EPO) — patents have been granted which impact computer programs in that teachings related to pure data processing clothed as a mere formality in the guise of “technical procedure” or “technical equipment” have been patented and claims have been explicitly directed to computer programs realising these procedures or equipment. The number of software-related patents granted by the EPO alone has been estimated in the high five-digit range.

Even the Federal Court of Justice (BGH) recognised a broad scope of patentability of software-related teachings in precedent decisions in 2009 and 2010 (control unit for testing modalities, X ZB 22/07 of 20 January 2009; Windows file management, X ZR 27/07 of 20 April 2010; dynamic document generation, Xa ZB 20/08 of 22 April 2010). In these decisions, the BGH interpreted the technicity requirement as criterion for patentability very broadly and rejected a strict interpretation of Section 1 PatG as a reason for excluding computer programs. In doing so, the BGH moved closer to the more liberal approach for the granting of patents as practised by the EPO.

This situation leads to substantial legal uncertainty for software developers: the abstract nature of the patent claims means that a software-related patent encompasses all of the separate embodiments of the protected problem solution in concrete computer programs. Computer programs which contain protected problem solutions may not be utilised commercially without the consent of the patent holder.

The software developers affected by this situation lose de facto the exploitation rights intended under copyright laws to the computer programs they have themselves created and are exposed to unpredictable cost and liability risks in the event of commercial utilisation. In addition, patent-protected components of software solutions are fundamentally irreconcilable with the terms and

conditions of licences for largely open source software. There are justified fears that the general economic consequences of this situation will be a tendency to monopolisation in the software sector and the correspondingly negative consequences for innovation dynamics and the labour market.

The Bundestag has recognised this situation and advocated the restoration of legal security for software developers in the form of a motion submitted by all of the parliamentary groups back in 2005 (Drs. 15/4403). The Bundestag reasserted its conviction “that adequate protection of intellectual property is indispensable for the maintenance and development of creative social potential in the interest of the creative actors and consumers as well as of our culture, economy and society as a whole.”

The granting of software-related patents as practised in Europe is in contradiction to the “copyright approach” taken in 1991 by Directive 1991/250/EEC. It is consequently irreconcilable with the intent of the European law-givers as expressed in the directive.

The Bundestag addresses this aspect as well in its cross-parliamentary group motion 15/4403 and remarks: “According to Article 10 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organisation (WTO), computer programs should be protected in accordance with the rules of copyright law. The copyright protection of computer programs is assured by Directive 91/250/EEC of the Council of 14 May 1991 on the legal protection of computer programs, which was implemented in Germany in the form of Sections 69 a et seqq. of the German Copyright Act. Accordingly, computer programs ‘as such’ (as well as business models) are excluded from patentability pursuant to the applicable provisions of the European Patent Convention. Adherence to this principle must be maintained.”

As a consequence of the failure to adopt the proposal for a directive of the European Parliament and the Council on the patentability of computer-implemented inventions (COM(2002) 92), the blocking of independent program claims, the securing of the practical applicability of the interoperability privilege set forth in copyright law, the protection of software developments based on licence models for free and open source software and the blocking of patents for software-based business methods as called for by the Bundestag as well have been disregarded down to the present day.

We are still faced with the task of securing the proper acceptance of the “copyright approach” set forth in the software directive at the European level and realising the corresponding statutory concretisation in German law as well because Article 14 (1) of the Basic Law [*Grundgesetz*] demands the guarantee of genuine effectiveness of copyright law within the legal jurisdiction of Germany.

II. The German Bundestag calls upon the German government

1. to ensure that the commercial exploitation rights of a software program remain protected under copyright law and are not rendered ineffective by third-party software patents;
2. to ensure that software solutions in the area of pure data processing, software-based reproduction of information and of computer-aided control functions are protected exclusively by copyright laws and that, moreover, no patent protection is granted to abstract solutions in this area;
3. to continue to regulate utilisation and prohibition rights for software-based solutions through copyright law;
4. to restrict patent law protection to software-supportable teachings in which the computer program serves merely as a replaceable equivalent for a mechanical or electro-mechanical component, as is the case, for instance, when software-based washing machine controls can replace an electro-mechanical program control unit consisting of revolving cylinders which activate the control circuits for the specific steps of the wash cycle;
5. to preserve the precedence of copyright law so that software developers can also publish their work under open source licence terms and conditions with legal security.

III. Concerning a possible new initiative for a reform of copyright or patent law at the European level, the German Bundestag calls upon the German government

1. to seek the most concrete definition possible of the technical contribution and the inclusion of a definition of the term “technology”. The definition must ensure that computer programs as such, business methods and algorithms cannot be patented; this should restrict patent law protection to software-supportable teachings in which the computer program serves merely as a substitutable equivalent for a mechanical or electro-mechanical component;
2. to seek standardisation in all of Europe of a patent law interoperability privilege of the broadest possible scope;
3. to advocate the position that alternative development concepts, in particular open source projects, should be hindered as little as possible by patent law provisions;
4. to seek actively at the European level an independent, scientific evaluation of the practice of the patent offices, especially of the EPO, in making decisions to grant patents;
5. to seek the elimination of deviations in the granting of patents as practised by the EPO and the national patent offices and the prevention of grants of patents on software-supportable teachings.

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