UNICE
THE VOICE OF BUSINESS IN EUROPE

20 April 2005

UNICE COMMENTS ON THE ROCARD WORKING DOCUMENT ON THE PATENTABILITY OF COMPUTER-IMPLEMENTED INVENTION

1. GENERAL

UNICE has been following closely the progress of discussions between the European Parliament and the Council of Ministers regarding the proposed directive on the patentability of computer-implemented inventions.

UNICE has supported the common position adopted by Member States with a view of ensuring a legal framework providing appropriate patent protection in this area, in order to enable European companies, including SMEs, to be competitive in a high-tech global environment. Europe's innovation in new technologies is a pillar for growth in the European economy. This is key to improve Europe's competitiveness and therefore contribute to the Lisbon strategy.

In order to contribute to the upcoming discussions in the EP Legal Affairs Committee, UNICE would like to make the following remarks on some of the issues raised by Mr Michel Rocard in his recently issued working document.

2. SPECIFIC COMMENTS TO THE WORKING DOCUMENT

a. « *d'autre part, il faudra spécifier que le traitement de l'information ne soit pas considéré comme un domaine technique au sens du droit des brevets et à ce que les innovations en matière de traitement de l'information ne constituent pas des inventions au sens du droit des brevets* »

This proposal would eliminate all existing patents in the field of information and communication technologies. Examples include: car navigation systems, electronic controls in modern airplanes, computer-controlled motor management necessary to render cars compliant with current environmental regulations, image processing in medical diagnostic equipment, data processing in chemical process technology, compression of audio / video / data signals to make them suitable for recording on a CD / DVD, image enhancement techniques in TVs and monitors, teletext processing in a TV, anything relating to user control of e.g. a TV, speech and data signal processing in GSM phones, ICs (e.g. Intel Pentium) that process signals faster than previous generation ICs, telecom systems of any kind using computer- and information-processing-related technologies, technical improvements to data processing systems, computer-aided design and computer-aided manufacturing.

Furthermore, this proposal goes directly against what has been prescribed in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), namely that all inventions in any field of technology have to be patentable if they are new, non-obvious and industrially applicable.

b. *"description de la forme des revendications de façon tant positive que négative, afin que d'une part les revendications sur les inventions contrôlées par ordinateur ne puissent porter*

que sur des produits ou des procédés techniques, et d'autre part que les revendications de logiciels, en eux-mêmes ou sur tout support, soient interdites"

This proposal would introduce a significant change to the current legal framework in Europe since the European Patent Office and national courts (e.g. the German Bundesgerichthof decision of 17 October 2001 in the case X ZB 16/00, GRUR Int., 2002, p. 323) already allow program product claims having a new and non-obvious technical contribution.

UNICE is of the opinion that an exclusion of claims directed to program products, even when they relate to a perfectly patentable invention having a technical character, takes away a significant part of the economic value of the patent.

The reason for this is that computer programs are often used as a component of an implementation of an invention. If that component cannot be the subject of a patent claim, the patent holder will not be able to stop unauthorised persons from distributing this patented invention. Not allowing for program product claims mean in practice that only private users will directly infringe the patent as they implement the invention, while the manufacturers and distributors will escape direct infringement by manufacturing or distributing a disk containing the computer-implemented invention. This outcome is not desirable. The Council has identified the problems created by the Commission's proposal and addressed them appropriately in the common position.

c. *"pour assurer l'interopérabilité, renforcement de la confirmation des droits découlant des articles 5 et 6 de la directive 91/250, par le fait que lorsque le recours à une technique brevetée est nécessaire à la seule fin d'assurer l'interopérabilité entre deux systèmes, ce recours ne soit pas considéré comme une contrefaçon de brevet"*

If this proposal were to be adopted, it would render patents unenforceable over a wide area of interest to European industry that depend on data interchange. This includes innovations in, among other sectors, telecommunications, information technology and consumer electronics. The proposal would significantly reduce incentives for R&D investment in these areas, since it would make it difficult for innovators to obtain effective patent protection and deny their entitlement to compensation. Therefore, UNICE urges the European Parliament to reject this proposal.

It is claimed that this proposal would meet the need to ensure interoperability, especially regarding dominant suppliers. However, the need to ensure interoperability has been satisfactorily addressed in article 6 of the proposed directive. Additionally, no actual cases are known of patent holders who have abused their patent rights to prevent interoperability. To the extent that there is a problem beyond the safeguards provided for in article 6, e.g. in a case of an alleged abuse of a dominant position, the redress should be found in competition law. For this reason, recital 21 makes clear that articles 81 and 82 of the EC Treaty remain available to deal with any abuse by reason of a dominant supplier's refusal to allow the use of a patented technique necessary for data interchange.

Restricting the enjoyment of patent rights in a specific field of technology, is also contrary to the TRIPs agreement, as this is a compulsory licence without fair compensation for the patentee and without an individual evaluation on the merits.

* * *