



## ISVs and intellectual property protection in Europe: Freedom to choose the best IP protection

### Introduction:

**The European Software Association would like to point out what it sees as the major issues for European ISVs in the area of IPR. The Association's foremost concern is that ISVs should be given the freedom to choose the IPR protection which best suits their needs. This is essential as every business model requires a different IPR protection, depending on the product that is being produced, the frequency of updates to the products, as well as other factors.**

Over the last decade, technological developments have made piracy easier and IT has increasingly become a part of the critical infrastructure of companies, governmental institutions and society at large. In this new environment, companies are using various Intellectual Property Rights (IPR) protection, to ensure that the rights of the creator are protected from illegal and illegitimate copying.

The European Software Association believes that those who innovate and invest deserve the right to protect their creation, in the way they choose to, if they choose to.

The method chosen to develop, protect and release innovations vary on the type of software, the investment made in developing it, its usage and the business model adopted. Various intellectual property protection models are beneficial to ISVs as they protect different elements of software:

- § patents: the technical solution implemented in the program, if it is novel and inventive
- § copyright: the program as a form of expression - used as a tool against piracy or in combination with open licensing models
- § trade secrets: the valuable and confidential information contained in the program.
- § trademarks: used to protect various distinctive signs used for the marketing of products.

### ISVs need the freedom to choose the IPR protection which best suits their needs

The European Software Association has conducted a study amongst its membership to analyse what ISVs use to protect their innovations. The results clearly show that different ways of combining and using the various IPR protections are adopted by the members. Therefore the Association members consider that the freedom to choose the IPR protection, which best suits their needs, is an overriding principle that promotes innovation and a vibrant software industry in Europe.

The survey also indicates that members have encountered various problems: piracy, other copyright and trademark infringements, 'reverse engineering' beyond what is permitted to achieve interoperability under existing EU legislation, leading to the unfair cloning of products by competitors.

In Europe low quality patents as well as 'patent trolling' should be avoided. Therefore, we plead for further improvements in the processes for granting patents so as to allow for continued high patent quality. This can be done within the existing legal framework through more efficient and better administrative processes (better case allocation, easier access to opposition, reduced delays in decisions on oppositions, etc.).

Furthermore, the case studies show that various factors explain why companies adopt different IPR protection systems. Some do not opt for patents due to the fact that a Europe-wide patent does not exist. Others use patents to a limited extent, others use just copyright protection and last but not least various companies choose a combination of IPR protection (patents, trade marks, copyright and trade secrets).

Some concerns are voiced about the complexity of IPR protection in Europe. There is no single patent system in Europe. The complexity and cost aspect, due to the fact that patents need to be filed on a national level and that there are costs such as translation and legal fees, is often a disincentive for companies to apply for patents, especially for the smaller ISVs. Therefore some companies have decided not to patent their products in Europe. Either they choose to patent their product elsewhere (e.g. the US) where the cost of patent protection is many times less than in Europe, or they choose not to patent their products at all.



Copyright is sometimes the preferred IPR protection. Some companies rely solely on copyright and do not avail themselves of the possibility of patent protection.

The overall outcome of the case studies is that all the companies agree that IPR protection is a key factor to innovation in the software area. Yet due to the nature of their products and business models different options are chosen.

IPR is essential for ISVs as a push for innovation. Investing resources in innovation can only be supported if an investment can be protected. As innovation is a driving force for the creation of jobs and growth, a more efficient and consistent European IPR framework, especially regarding patents, would contribute to a growing European software industry. Solutions to the afore-mentioned concerns should be found. IPR protection, including patents, is in our industry's best interest. The Association is therefore, naturally, interested in participating in any effort to find such solutions

A European IPR framework should take the following concerns into account:

- § Freedom should be left for the ISVs to choose the IPR protection systems most appropriate to their business model.
- § Patentability should continue to be limited to technical solutions and should not be reduced or expanded, to include business methods.
- § The costs of patents, and in particular the translations costs, should be reduced substantially.
- § Other tools should facilitate the access to and enforcement of patent protection for SMEs.
- § Incentives should be available to encourage SMEs to apply for a Community Patent.
- § The adoption of a Community Patent granted by one central authority and subject to the same rules throughout the EC is to be encouraged so long as the costs of obtaining, maintaining and translating such patents is affordable to all patent holders including SMEs.
- § There is a need for a new, specialised European Court system for patent validity and patent infringement cases which would develop a uniform interpretation of patent issues and replace the diverging national case laws.
- § Regardless of the type of IPR protection used, all IPR systems should be up-to-date.

## **Conclusion**

The European Software Association is looking forward to the Public Hearing on Patents, scheduled to take place in June. The Association is furthermore looking forward to taking part in upcoming discussions on Intellectual Property Rights as a whole.

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