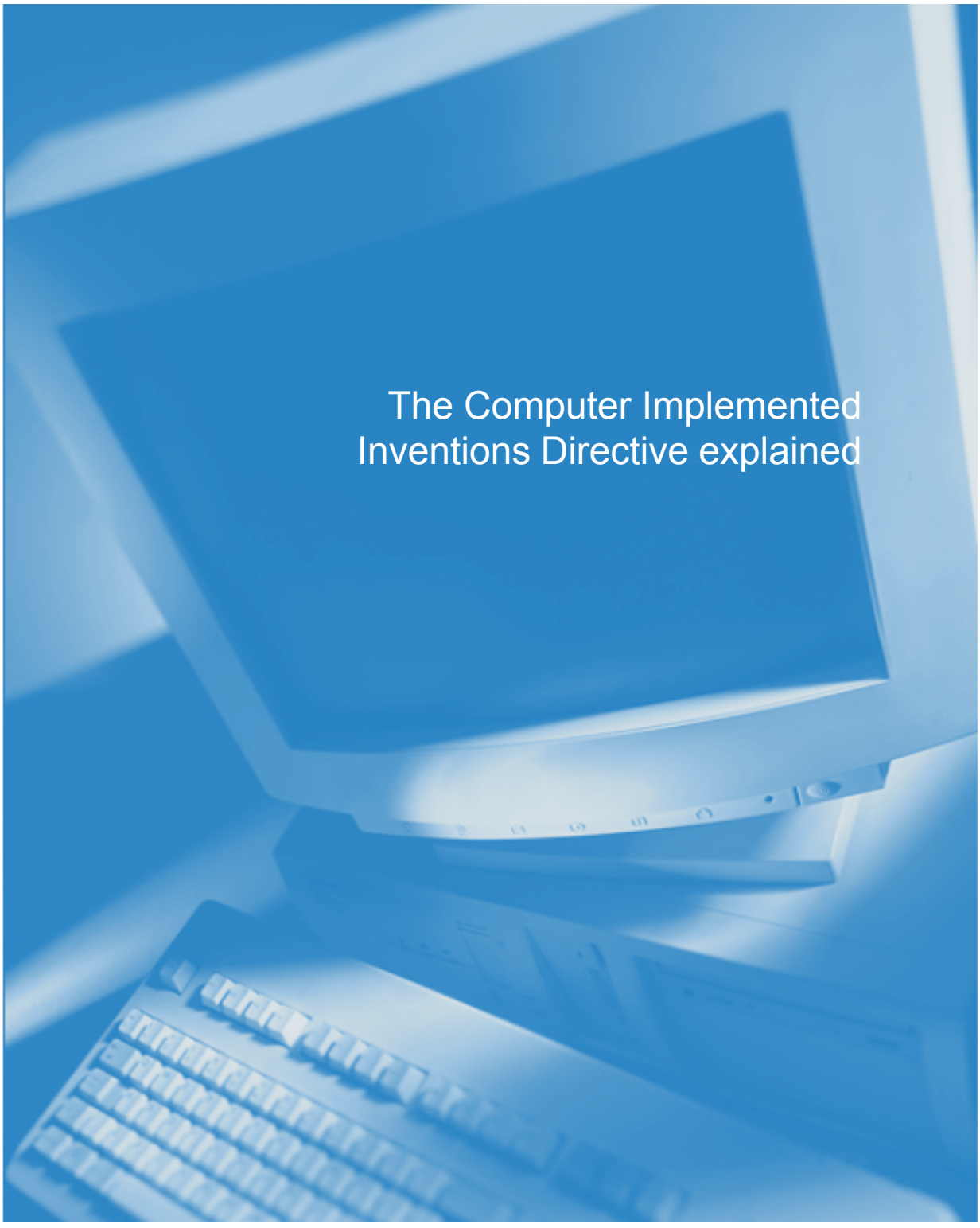
PATENTS & SOFTWARE: FACT & FICTION



The Computer Implemented Inventions Directive explained

A DTI SERVICE

Introduction

The patent system exists to encourage innovation in technology. Innovation in business generally, e.g. in the financial world, is equally important but seemingly prospers without the stimulus of patent protection. Software straddles the technological and business worlds: computers drive modern business processes. This is why the extent to which computer implemented inventions (CII) should be patentable has become an issue.

Why do we need a Directive?

We need a Directive to clarify the situation and prevent a drift towards the more liberal patenting regime of the United States. The EU Council has agreed a text which reflects the current position in the UK and other member states. That text will now be debated by the European Parliament.

What will the Directive change?

The Directive aims to clarify the current situation, but retain the *status quo*: it is not about making all software patentable. Inventions involving the use of computers will be patentable **only if** they make a 'technical contribution'. This includes inventions directed at solving a technical problem – e.g. software which improves control of a robot arm – but excludes inventions directed at solving a business problem - e.g. software to run a new financial system. Of course, to be patentable the invention must also be new and inventive.

"Clarity but status quo"

Why isn't Copyright enough?

Copyright automatically protects source and object code from being copied. But code which is developed independently, even if it achieves the same effect, would not be a breach of your copyright. A patent, on the other hand, would protect the innovative solution or effect delivered by the software, providing it makes a technical contribution.

"We have listened to the concerns expressed by the UK software sector, both large firms and SMEs, about the boom in software patents in the US. Some seem to think that the proposed Directive is going to mirror the situation there and allow the patenting of all software. This is simply not true. The text of the Directive agreed by the Council in May 2004 will prevent Europe following US practice, and will provide clear guidance and legal certainty on what is and what isn't patentable in the EU. That's good for our members, and just as importantly they won't be prevented from protecting important innovations merely because they happen to use computers or digital technology to implement them. We believe that any changes to the current text of the Directive will seriously undermine and possibly damage the prospects for many of our members."

John Higgins, DG, Intellect

Intellect is the trade body for the UK based information technology, telecommunications and electronics industry. Our 1,000 members employ more than 1.1 million people and make a huge contribution to the UK economy accounting for around 10% of GDP.

The Proposed CII Directive – Fact & Fiction

- **It would harmonise the law throughout Europe** - *Yes. It would end any divergence of practice between national courts and the European Patent Office Boards of Appeal and make the European Court of Justice the highest authority.*
- **It will make clear what is patentable** - *Yes. The text incorporates strict tests as to what can and cannot be patented. This clarity will benefit all business.*
- **It would ban 'business method' patents in Europe**- *Yes. The Directive would maintain the existing ban on patents for 'pure' business methods – there must be some technical innovation.*
- **Open Source Software will survive**- *Yes. Open source software has thrived under the current patent system and the Directive won't change this.*
- **It would allow software patents in Europe for the first time**- *No. It won't make things patentable which are currently unpatentable. Patents for certain types of computer implemented inventions have been granted for over 30 years in the UK & Europe.*
- **It would be harmful to SMEs** - *No. The patent system can be very helpful to SMEs because it allows them to hold their own against big business – see the Factfile.*
- **Europe would follow US practice**- *No. It would curb any drift towards the liberal US position and maintain the existing bars against non-technical software and business methods.*
- **It would allow a Haydn Symphony or Pythagoras' Theorem to be patented**- *No. The Directive would maintain the current ban on patenting such things.*

FACTFILE

Company:	RadioScape
Activity:	Digital radio software
Location:	London, UK
Established:	1996
Staff:	70
Man. Director:	John Hall

We work at the cutting edge of digital audio broadcasting and reception, providing amongst other things, software-based receivers to some of the biggest names in the business. Patents have been crucial to our success as we use a license and royalty business model.

Starting as a very small company of just 5 employees, we wouldn't have been able to attract venture capital if we hadn't protected the ideas we'd developed with patents. RadioScape's technology is based on the Eureka 147 published standard, elements of which are covered by a patent pool. Having patented our own developments we now licence our technology to multinational semiconductor and consumer electronics companies.

The strength of our patent portfolio has enabled us to become a global leader in digital radio technology and do business with major international companies with the security that patents provide both parties.

The UK Patent Office has a strong tradition of rejecting patent applications for software which do not meet the legal requirements. This tough approach has ensured that only patents with a 'high presumption of validity' are granted.

Examples of patents refused by the UK Patent Office during 2004

- A pre-determined route through a virtual on-line shop, which permits users to 'see' one another
- A method of limiting exposure to financial risk by imposing a monetary limit on the accumulated value of trades (e.g. bonds, futures, etc.) that a trader can make in one day
- A computer system for optimising an investment portfolio to reflect the investor's wishes on risk, investment spread and investment limits
- An internet-based system for allowing individuals to club together to benefit from bulk purchase discounts: those who commit themselves early get a better price
- A reminder system which sends a single consolidated reminder for all the actions necessary in the next week or month, rather than sending lots of separate reminders
- A system for automatically optimising the scheduling of airline crew

Other examples of CII patent applications on which the Patent Office has ruled (either to allow or refuse) can be seen amongst the '*ex parte*' cases provided here: http://www.patent.gov.uk/patent/legal/decisions/index.htm

How is patent practice in the US different from the UK and Europe?

Patents have always been granted for products and processes in chemistry, medicine, engineering, electronics and the like. This includes inventions implemented using computers and software, such as automated manufacturing processes. However, over the last ten years, the US has broadened its practice and granted patents for any application that makes a "useful, concrete and tangible contribution". This means the mere use of a computer renders all manner of software, including non-technical applications like accountancy software, patentable in the US. In Europe, in contrast, it is the technical contribution of the invention which determines patentability. As such, general business software is not patentable as it is not considered technical. The use of a computer alone does not confer patentability on an application.

Further Information

For more information about the CII Directive, visit: http://www.patent.gov.uk/about/ippd/issues/cii.htm

or contact enquiries@patent.gov.uk

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