February 13, 2004

To: Minister Rocco Buttiglione, Competitiveness Counsil
Commissioners Frederik Bolkesten and Erkki Liikanen
European Commission

Re: Comments on Proposed Directive on the Patentability of Computer-Implemented Invention (CIIIs)*

Dear Minister and Commissioners:

The Japan Intellectual Property Association (JIPA) is one of the world largest associations of intellectual property users, with the membership of 1,000 Japanese companies. As its members file a number of European patent applications, JIPA pays much attention to the contents of the Proposed EU Directive on the Patentability of Compute-Implemented Inventions.

JIPA's views on inventions of computer software are as follows.

1. Computer software relates to a technical matter and therefore should be deemed patentable.
2. While a pure business method that does not relate to a technical matter should not be deemed patentable, computer software relating to a business method should be deemed patentable if it relates to a technical matter.
3. In order to properly protect inventions of computer software, program claims should be accepted.

The draft EU Directive proposed by the European Commission in February 2002 stated that the protection level for inventions of computer software should be harmonized within the EU at the same level as the EPO's current practices. The results of the "Comparative Study on Business Method-Related Inventions" presented at the trilateral conference between the EPO, the JPO, and the USPTO also go along with the concept that inventions of computer software, which have technical aspects, should be protected. The JIPA has recognized and evaluated the trilateral offices as going in the direction to accept the patentability of inventions of computer software.

However, the draft EU Directive was revised by the European Parliament on September 24, 2003, to:

- Exclude data processing-related inventions from the scope of patentability (Article 2(c) regarded data processing as not belonging to a field of technology and Article 2(d) defined "industry" under the patent law as "automated production of material goods");
- Regard a data processing-related invention as not constituting infringement of a patent as long as it is used for the purpose of data processing.

JIPA considers this revised draft to be questionable, as it would hinder the development of the information processing industry, rather than protecting inventions in the industry. More specifically, as the current industry is based on the combination of hardware and software, if patents are granted to inventions of hardware while they are not granted to inventions of software, incentives to carry out software-related research and development will be decreased within the EU.

Software is created based on certain ideas, such as a method to display a terminal screen and a processing method to improve information security, which will enable differentiation of products.

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* "*CHIZAI KANRI*" (Intellectual Property Management), Vol. 54, No. 2, pp. 325-326 (2004)

The copyright law only protects expressions and therefore it cannot prevent misappropriation of ideas, because it is easily possible to avoid infringing another's copyright by using different expressions for the same idea. For this reason, it is necessary to also grant patent protection to inventions of software based on technical ideas. JIPA therefore requests the deletion of Article 2(c) and (d).

The problem of infringing third parties' patents with respect to open-source software will increase in importance in the future. However, the problem occurs on the occasion of exercising patent rights with respect to software-related inventions, and there seems no need to deny the establishment of software patents. If any problem occurs that would seriously affect the society, it should be resolved by reinforcing compulsory licenses and restricting the exercise of patent rights.

Furthermore, the revised draft EU Directive is contrary to the outcome of the trilateral conference and therefore would cause problems in the harmonization in examination procedures between Japan, the United States, and Europe. From the perspective of achieving harmonization, it is necessary to make the scope of protection uniform. Recital 6 of the draft EU Directive proposed by the European Commission in February 2002 stated that the provision in the TRIPS Agreement ("all inventions in any field of technology have to be patentable if they are new, non-obvious and have industrial applicable") shall be applied to computer-implemented inventions. However, in the draft EU Directive revised by the European Parliament, Recital 6 was deleted while Article 2(c), which regarded data processing as not belonging to a field of technology, and Article 2(d), which restrictively defined "industry" is "automated production of material goods," were added. Thus, the revised draft is also questionable for the reason that it is against the TRIPS Agreement.

If you have any question on our comment, please feel free to contact Mr. H. Doi, Director of Policy & Strategic Division of JIPA (doi@jipa.or.jp).

Yours very truly,

Yasuo Sakuta, President
Japan Intellectual Property Association