

# The National Public Meeting on Software Patents

*Centre for Internet and Society* | 2008-10-04

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*On Saturday, October 4, 2008, the Centre for Internet and Society, with the support of eighteen other organization, held a meeting on the National Public Meeting on Software Patents in the United Theological College campus. The aim of the event was to explore various issues surrounding software patents, especially from the perspective of the draft Patent Manual.*

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After introductions by Sunil Abraham of CIS, the discussions were kicked off by Sudhir Krishnaswamy (an Assistant Professor at National Law School), who spoke about typology of laws; principle-based arguments for excluding software from patenting; policy-based arguments for the same; and lastly, strategies for combating the patent manual. About the rationale behind excepting software ("computer programmes *per se*") from patentability, he theorised that given the location of "computer programmes *per se*" in section 3(k) of the Act, surrounded as it is by "mathematical or business method" and "algorithms", the exception seems to be a principle-based one and not a policy-based one. He also talked about what he saw as the practical realities of the Patent Office, and questioned the role the Draft Manual would actually play in the decisions of Patent Examiners. He listed out economic arguments as:

1. Inapplicability of the incentive arguments. The software industry does not need patents since copyright covers software, and even if incentives are required, that is incentive enough;
2. Return on investment. Short shelf-life, and hence 17-year patent terms are irrelevant when the shelf-life is so small;
3. New intermediaries are created, who are neither producers nor consumers of software. These intermediaries who help in price-discovery. They discover value in patents which were previously thought neglected by the process known as patent trolling.

Apart from these, he also briefly talked of the legal arguments around software patents, and argued that the question is not only about copyright vs. patent, but also about property vs. contract. He asked questions such as: "What role does copyright play in the software industry, or is contract more important?", and pointed out that while this might have been addressed around a decade ago, those questions need to be revisited given the current scenario. Further,

he proposed that the strategies should not revolve solely around the Patent Act and Draft Manual, but around pre- and post-grant oppositions as well.

Prabir Purkayastha of the Delhi Science Forum and Knowledge Commons spoke next, giving a quick run-through of the history, both legal and philosophical, surrounding software patents in India and in the U.S. and Europe (pointing out that most of the wordings of Draft Manual on this point are borrowed from a similar document in the U.K.). He asked the question of why people are opposing software patents. Is it because it is damaging to 'public interest', because it bad for Indian domestic software industry, or because it is an abstract idea which is sought to be patented in the guise of something else? He concluded that ultimately it is not the manual that groups are opposing, but the notion of software patents themselves. Thus, he focussed on how the phrase "*per se*" used in the Act ought to be interpreted by the Patent Office so as to give credence to the Indian Parliament's rejection (in 2005) of the 2004 patent ordinance (in which section 3(k) read: "a computer programme *per se* other than its technical application to industry or a combination with hardware"). Lastly, he talked about the various strategies to be employed in the fight against software patents, including pre- and post-grant oppositions.

Dr. Nagarjuna G. of the Free Software Foundation of India focussed on what he termed "the absurdity of software patents". He emphasised how software requires an interpreter or hardware, and hence talk of "software *per se*" often becomes meaningless. Further, he underlined how embedding software in hardware was not innovation in itself, and stressed on the changing notions of software and hardware as we evolve technologically. His equation of software with abstract ideas gives us a glimpse into the foundation of his objection to software patents.

First up in the second session (which was more focussed on the manual, and the law in India) was Prashant Iyengar of the Bangalore-based Alternative Law Forum. He first listed out the different kinds of objections to software patents, including the point that there are only limited ways of thinking about programming, as Donald Knuth's *The Art of Computer Programming* shows. Then he went on to go through the history of software patents in India, from the first software patent, granted in 1996, through the 2002 Amendment, the 2004 Ordinance, the 2005 Amendment, and the 2005 and 2008 Draft Manuals. He looked at the vocabulary surrounding software patents, including the words "*per se*" and "as such", and the cases and legislations from which the language used in the Draft Manual might have been borrowed. He also started a fruitful debate on the different ways to attack the implicit inclusion of that which is not "computer programmes *per se*" within the scope of patentable subject matter.

After Prashant was Venkatesh Hariharan of Red Hat. He spoke on the practical benefits and harms of software patents, and spoke at length about the difference between legal protection of software in the form of patents and via copyright. He pointed to data showing that lawyers are the ones who benefit most from

software patents, and that software developers were the ones who suffered most. Pointing to such practical issues such as how does one go about coding a simple e-commerce transaction when more than 4000 patents have already been granted in that area, he brought down the level of discussion from abstract notions of laws and legalities to practical experiences of software programmers.

Next, Pranesh Prakash of the Centre for Internet and Society made a presentation on a small sample of software patents that have been applied for in India, and pointed out the infirmities in both the patents that have been applied for, as well as the problems in uncovering these patents because of various errors on the Indian Patent Office website. Going through a few of the patent applications, he showed how a great number applications have very badly worded abstracts, filled with weasel words, whose sole purpose is obfuscating the fact that what is being applied for is a software patent. This, he pointed out, made it difficult to both determine the scope of the applications (subject matter) as well as the innovations contained in the invention (novelty and non-obviousness), and thus difficult to examine from the perspective of pre-grant oppositions.

After these presentations, the meeting continued with the Open House session which had many people making presentations, including Abhas Abhinav of DeepRoot Linux, Arun M. of FSF India, and Joseph C. Matthew, who is the IT Adviser to the Chief Minister, Kerala. With the wrapping up of this session, the proceedings for the day came to a close.

### **Coverage in the press**

- The Hindu (September 25, 2008) - World Day Against Software Patents
- Time Out Bengaluru (October 3, 2008) - Software Patenting
- The Hindu (October 5, 2008) - Software patenting will harm industry, consumer

### **Audio Recordings and Slides**

- The Principles of Patent Law and Introduction to Software Patents
  - Sudhir Krishnaswamy (National Law School) | mp3 | ogg
  - Prabir Purkayastha(Delhi Sience Forum) (Knowledge Commons) |mp3 | ogg
  - Nagarjuna G.(Free Software Foundation of India) | mp3 | ogg
- Software Patents in India: The Indian Patent Act and the Draft Patent Manual
  - Prashant Iyengar(Alternative Law Forum) | mp3 | ogg
  - Venkatesh Hariharan(Red Hat) | mp3 | ogg
- Software Patent Applications in India
  - Pranesh Prakash (Centre for Internet and Society) | mp3 | ogg | ppt
- Open House
  - Abhas Abhinav (DeepRoot Linux) | mp3 | ogg
  - Arun M.(Free Software Foundation of India)| mp3 | ogg

- ▶ Joseph Mathew (IT Adviser to the Chief Minister, Kerala)| mp3 | ogg