

**STATEMENT BY THE
FREE SOFTWARE FOUNDATION EUROPE (FSFE)
TO THE 13th SESSION OF THE
STANDING COMMITTEE ON THE LAW OF PATENTS (SCP)
(Geneva, 23-27 March 2009)**

Mr Chairman,

FSFE joins other speakers in congratulating you on the honour of chairing this most important session of the SCP. We would also like to extend our congratulations to the secretariat, which has provided us with several very informative studies on four essential areas for the effectiveness of WIPO's work. We believe these studies provide an excellent starting point for the discussion and should be maintained as living documents that can accompany our debates and act as backdrop for the future action discussion.

Referring to document [SCP/12/3](#), the report on the international patent system, FSFE believes that its systematic considerations should be taken into account for and put in perspective to the reports. In particular the economic rationale for the patent system should be taken into account and reflected for the considerations of document [SCP/13/3](#), the report on exclusions from patentable subject matter and exceptions and limitations to the rights.

In our view, the rationale for exceptions and limitations should loosely be based on the ancient wisdom of "[primum non nocere](#)", the knowledge that action can be more harmful than inaction, that inclusion of an area in the patent system can result in less innovation than its exclusion. It should be the overarching principle for this SCP to maximise innovation, and the economic rationale for patenting provides us with the background to understand when we would be well advised to follow this principle and avoid regulation through patents.

As highlighted in document SCP/12/3, the economic rationale for patents is based on providing incentives in cases of market failure, disclosure of knowledge in the public domain, as well as technology transfer, commercialisation, and diffusion of knowledge. The "three step test for inclusion in the patent system" should therefore be based on demonstrated market failure to provide innovation, demonstrated positive disclosure from patenting, and effectiveness of the patent system in the area to disseminate knowledge. Software fails all three tests, for instance, as innovation in the IT industry has been dramatic before the introduction of patents, there is no disclosure value in software patents, and patents play no role in the diffusion of knowledge about software development.

FSFE understands that the secretariat worked hard to provide a conclusive report on the issues according to its mandate to provide a report on exceptions and limitations. Unfortunately the result is a report in which some exceptions from the patent system have been excepted, specifically cases where the exception from the patent system is based on a different view of patentable subject matter, such as software under article 52 of the European Patent Convention.

In order to provide an overview of the area covered by patents and the exceptions to that coverage, we submit that member states could mandate the secretariat to also provide an overview over the differences in patentable subject matter and reasons therefore, and combine it with the existing SCP/13/3 to provide a comprehensive overview.

--- Statement by [Georg C.F. Greve](#), Free Software Foundation Europe, President