

Christian Bayer
Salvador-Allende-Platz 9
07747 Jena

GBK · EBA · GCR

24. April 2009

Christian Bayer, Salvador-Allende-Platz 9, 07747 Jena

Enlarged Board of Appeal
European Patent Office
Erhardstraße 27
80331 München

Jena, 21. April 2009

Case G3/08: Referral under Art. 1 12(1)b) EPC by the President of the EPO (Patentability of programs for computers) to the Enlarged Board of Appeal.

Dear Sirs,

I want hereby state my opinion about the questions asked by the President of the EPO by this amicus curiae brief in accordance with Art. 10 of the Rules of Procedure of the Enlarged Board of Appeal. In this letter I speak for myself as a private citizen and a student of computer science in Jena, Germany. As a self-employed programmer now and especially in future my chances on the market depend on the rejection of Software Patents. In order to understand what computer programs are in relation to patentability I think it is important for you to understand my view on computer programs.

Question 1

CAN A COMPUTER PROGRAM ONLY BE EXCLUDED AS A COMPUTER PROGRAM AS SUCH IF IT IS EXPLICITLY CLAIMED AS A COMPUTER PROGRAM?

The answer is no. A computer is a technical device which might be subject to patents but a computer program is not a technical device in no matter. It is nothing more and nothing less than a structured 'text'. This 'text' can control a computer but in the physical aspect it can only make the computer do things the computer was able to do already. A computer cannot produce other physical effects after being programmed than it was able to produce before. To state a rather drastic example: A computer program cannot make a computer fly. So the technical aspect is subject to the computer itself, not to the software.

Question 2

(A) CAN A CLAIM IN THE AREA OF COMPUTER PROGRAMS AVOID EXCLUSION UNDER ART. 52(2)(C) AND (3) MERELY BY EXPLICITLY MENTIONING THE USE OF A COMPUTER OR A COMPUTER-READABLE DATA STORAGE MEDIUM?

(B) IF QUESTION 2 (A) IS ANSWERED IN THE NEGATIVE, IS A FURTHER TECHNICAL EFFECT NECESSARY TO AVOID EXCLUSION, SAID EFFECT GOING BEYOND

THOSE EFFECTS INHERENT IN THE USE OF A COMPUTER OR DATA STORAGE MEDIUM TO RESPECTIVELY EXECUTE OR STORE A COMPUTER PROGRAM?

Article 52(2) EPC relates to what I said above. A computer program is no technical device and no technical invention, so it simply cannot be patented. By the way a invention needs to be new and innovative to be patent-eligible, so it is irrelevant if a claim 'aviod[s] exclusion under Art. 53(2)(C) and (3)'. A computer program can also be seen as mathematics. In reference to the concept of Hoare-Logic, a theory by the Microsoft Research employed computer scientist Antony Hoare, a computer program can be fully transformed to a mathematic formula (see http://en.wikipedia.org/wiki/Hoare_logic). Because an abstract formula does not need a physical medium like a 'computer-readable storage' to be understood or even to be applied or used. So it cannot be compared to something like the ABS in a car, an invention which clearly is a technical innovation which can be patented. ABS is also based on a mathematic formula but I cannot reduce the breaking distance if I think of the formula when I kick my brake pedal. But I am able to understand what a program does when I read its source code. And I can imagine what a mathematic formula describes. And I could imagine the tunes of a symphony if I read the score if I had the ability to. The latter three statements refer to the same concept. To abstract ideas of how to possibly solve a problem, not the actual technical and physical implementation of it which can be patented. As you can see abstract ideas are not bound to the physical matter of a medium like a computer storage, simply because they can exist in my mind as well as on this data storage.

To use again rather drastic words: If I would think of a patented computer program, did I have to pay patent fees?

So the answer to Q2 (a) is no and Q2 (b) does not make sense in here.

Question 3

(A) MUST A CLAIMED FEATURE CAUSE A TECHNICAL EFFECT ON A PHYSICAL ENTITY IN THE REAL WORLD IN ORDER TO CONTRIBUTE TO THE TECHNICAL CHARACTER OF THE CLAIM?

Definitely. This is exactly the point of Art. 52(2) EPC. Any 'innovation' that does not cause any physical effect is not patentable.

(B) IF QUESTION 3 (A) IS ANSWERED IN THE POSITIVE, IS IT SUFFICIENT THAT THE PHYSICAL ENTITY BE AN UNSPECIFIED COMPUTER?

No. This question aims at the following: If we cannot bind an abstract idea like a computer program to a concrete thing like a real computer, lets bind the abstract idea to an abstract computer so that it can be compared to a patentable invention. This is egalitarism of fundamental different things. An unspecified computer is a concept that exists in computer science in different forms. The most 'popular' one is the so called 'Turing Machine' by Alan Turing [http://en.wikipedia.org/wiki/Turing_machine]. This construct is also an abstract idea, pure mathematics. As you might agree, an abstract idea cannot evolve any physical effect. So computer programs that can be run on an 'unspecified computer' do not cause physical effects just like computer programs running on a real computer and cannot be patented.


(C) IF QUESTION 3(A) IS ANSWERED IN THE NEGATIVE, CAN FEATURES CONTRIBUTE TO THE TECHNICAL CHARACTER OF THE CLAIM IF THE ONLY EFFECTS TO WHICH THEY CONTRIBUTE ARE INDEPENDENT OF ANY PARTICU-

LAR HARDWARE THAT MAY BE USED?

Just the same again, the answer is no. If physical effects are independent of any particular hardware, programs causing these effects are not patent-eligible by means of Art. 52 (3).

To state my point: Computer programs are protected by the copyright. Patents on computer programs are simply redundant: They try to cover already protected work of programmers. In opposite to patents, copyright is inherent in the work of the author. Patents have to be claimed which is very expensive and that's why it is often impossible for small-business companies or even self-employed programmers to pay for them. So Software Patents give large companies unjust advantages in competition. In today's time of economic crisis the EU cannot afford patent claims against small or middle sized companies. Legalizing Software Patents would wipe out one of the most innovative and most productive industries we have in the EU and so endanger a lot of jobs.

Yours faithfully,

A handwritten signature in cursive script, appearing to read 'Ch. Bayer', written in dark ink.

Christian Bayer