Enlarged Board of Appeal
European Patent Office
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2009-04-24
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Re: Case G3/08: Referral under Art.112(1)b) EPC by the President of the EPO on the patentability of programs for computers to the Enlarged Board of Appeal.

Dear Sirs,

This matter is important to our software business. The large number of computer program patents recently granted by the EPO demand sound limits. This task is not simple given the questions asked in the referral.

It is important that clarifications are made where patents pose real risks, and many software developers wonder:

When do we acknowledge computer aided inventions as patentable?
Is merely choosing optimization in information space vs calculation steps an invention?
Is even publishing source code or instructions a possible infringement?
Why should file formats, as organization of information, be patentable?
Why should mere data communication protocols be patentable?
How large is the risk that I do not own what I write?

The World Wide Web Consortium tries to keep software patent out of web standards, the European car navigation developer Tom Tom's president recently said that they "spent more on patents than R&D" and patent trolls thrive on software developers and users.

Our concern is that EPO is overstepping its authority by neglecting EPC-restrictions on software.

Opinion on Referral Questions

Question 1

Can a computer program only be excluded as a computer program as such if it is explicitly claimed as a computer program?

No. Excluded subject-matters should not be patentable under the EPC irrespective of how it is claimed. As software developers our definition of mere computer programs as such is data processing. It is a process of calculation and organization of information.

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?

No. Should a film producer get patents on his movie plot by merely mentioning the camera?

(b) ... 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?

No. "Further technical effects" seems to be a way to make old stuff reappear as new inventions by adding a computer program. The real invention must lie in what happens outside the program, such that it makes the programming irrelevant to what is new in the invention.

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?

Yes, that must be one conclusion from the exclusions. They seem to cover all abstract matters as excluded from patentable inventions. Another way would be to visit the recent US - Bilski case where the "*Applicants' claims are not directed to patent-eligible subject matter, and in doing so, we clarify the standards applicable in determining whether a claimed method constitutes a statutory "process" under § 101.*" and later that "*All of the steps are data manipulation steps*".

(b) ... is it sufficient that the physical entity be an unspecified computer?

No. For instance, making use of red, green and blue diodes in a computer display to sharpen the image can be an invention regardless of any computer program even if it can be implemented using one. Disregarding this boundary would flood the EPO with patents on how to use the very same invention in relation to any kind of presentation of information.

Question 4

(a) does the activity of programming a computer necessarily involve technical considerations?

No. No more than writing a user manual.

(c) ... can features resulting from programming contribute to the technical character of a claim only when they contribute to a further technical effect when the program is executed?

The term "further technical effect" is misleading. Programming should be irrelevant to the contribution of technical features. A better voice compression contributes in the sense of knowledge in how to alter sound signals in relation to listeners, not merely in using another method of data processing.

Summary

EPO needs a very clear mandate to grant patents on computer program. The TRIPS "fields of technology" does not exclude limits on what is a patentable invention. It is very questionable if patents make a good incentive for software that contain many thousands of new ideas and easily combines into millions of new ideas on how to organize and calculate information over the Internet.

We believe software patents puts the whole patent system at risk.

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Updates and comments can be found at: http://bosson.blogspot.com/