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European Patent Office
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Duitsland

VIA FACSIMILE
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DATE	YOUR REFERENCE	OUR REFERENCE
29 April 2009	G3/08	H/G3/08

RE

Amicus curiae brief concerning G3/08
Due date: 30 April 2009

In the above case I wish to comment as follows

General

I have a Master of Science degree in applied physic from the University of Technology Delft (1984). I graduated in a group called Computational Physics where I worked on building hardware and software for simulating phase transitions, such as programming (special purpose) computers at the assembly language level and at higher levels and building specialized hardware when necessary.
I have been with this patent attorney's firm since 1984 (EQE 1988). I requested a referral in this matter from the President of the EPO (in case T1044/07).

Although this letter is under the letter head of my firm it reflects my personal opinion which is not necessarily the opinion of our firm and/or our clients.

I disagree in general with the Board of Appeal 3.5.01 which issued a number of decisions unfavorable for computer software protection.

Opinion

I enclose an old decision from the Appeal Division of the Dutch Patent Office, published in OJ EPO 1988 71-74, which reflects the only sound reasoning in this field. A carrier with information, whether it is software, audio-, video information or readable material is not patentable if it is only the information content that characterizes the carrier.

A computer on which a set of instructions is loaded is however considered to be a novel apparatus according to this Appeal Division. There is a strong equivalence to an apparatus built in hardware which is patentable (if inventive) and a computer on which instructions are loaded. If the instructions are in firmware, i.e. can not be changed by the buyer of the apparatus, the situation with respect to patent protection, should not be different than if the instructions are in software.

The questions

1. As in the field of (second) medical use and playing games, the restrictions of the EPC should be interpreted narrowly. So yes, a computer program can only be excluded as a computer program as such, if it is explicitly claimed as a computer program.

2a. An apparatus provided with means for executing the steps of a computer program should avoid exclusion under Art 52(2)(c) and 3(b). There should be no further technical effect necessary.

3a. I enclose a further decision from the Appeal Division from the Dutch Patent Office published in OJ-EPO 1998, 74-78, in which the processing of information is also considered to be of technical nature.

3b. The physical entity should be a specified computer, viz. the means for executing the program steps should be positively mentioned.

3c. In view of b: Yes, the apparatus features contribute to the technical character of the claim.

4a. I did agree with the Decision from above Appeal Division that computer programming is usually non technical. Computer programming has been mainly developed in universities of technology, especially by mathematicians, physicians and electrical engineers. The world of computer science such as artificial intelligence, computer languages, and assembling languages is still mainly dominated by scientists featuring Nobelprice winners in physics. So yes, in most instances the activity of programming a computer involves technical considerations.

4b. There should be made no distinction between the features in the claim. The claim should be considered as a whole in line with the approach used in other fields such as the (second) medical use.

4c. In view of the above, it is inconsistent with other fields of technology that in the field of computer programming a further technical effect would be necessary.

Concluding

I am of the opinion that the patent system is first of all meant to give inventors and small businesses a chance in the market place. If a good product can be copied easily, large companies with an established market share and established marketing channels can easily reach a large customer base and create a de facto standard resulting in domination of the market. In the technical field of software few large companies dominate the market.

Granting patents to innovating software, small companies would benefit in the long run which should be beneficial to consumers as well. This general statement is even more important in the software industry as production costs and copying costs are extremely low.

I strongly believe that the patent system should provide protection against copying in the same way as in other technical fields. The domination of the large industries can be diminished by granting patent for inventive software as indicated above.

Yours sincerely,

LAND, Addick Adrianus Gosling

Enclosure(s): 2