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Enlarged Board of Appeal
European Patent Office
Erhardtstrasse 27
80331 Munich, Germany

To whom it may concern in the Enlarged Board of Appeal,

I hereby submit my answers to the questions about case G3/08. As a computer scientist in Europe, the subject matters to me personally; in particular, the effect of this matter reaches Free/Open Source software. It is increasingly used and developed in Europe, whose legislation in the area affects progress.

The questions are phrased in such a way that they almost entrap the answerer, so replies address entire blocks of questions. I shall address the questions raised by the EPO, in turn.

QUESTION 1: CAN A COMPUTER PROGRAM ONLY BE EXCLUDED AS A COMPUTER PROGRAM AS SUCH IF IT IS EXPLICITLY CLAIMED AS A COMPUTER PROGRAM?

I fear that permitting such loopholes to exist leads to the actual permission of software patents. To quote Marshall Phelps from Microsoft, "[The EPO] can't distinguish between hardware and software so the patents get issued anyway." By allowing ambiguity, the EPO essentially leaves the door open to software patents, in which case the policy becomes moot.

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?

This suggests that a separation between hardware and software is possible despite the fact that one requires another in order to operate. There is no program which is separable from hardware because without execution it exists only in the minds of people, much like poetry. Any software patent is able to characterise itself with the combination of hardware that it interacts with, so it is irrelevant whether or not hardware is mentioned in a patent application. If the inventor was to construct a novel physical entity, its physical attributes – not mere zeroes and ones that pass through it – may merit a patent.

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

Hardware responds to signals that it is capable of interpreting and reacts in a predefined physical fashion. For example, a hard drive uses a physical process to produce output upon receiving a known signal. As such, any process described in algorithms may effect a physical device in one form or another, but its role in the process is as abstract as one's thoughts. To suggest that software changes the form of something physical is to suggest that one's mere thoughts can lead to muscular motion and thus be considered an invention. Once the ownership of one's ideas – as expressed in broad terms – becomes possible, copyrights can be rendered moot and instead block *any* expression of ideas – be it an algorithm, a musical note, or the assembly of pertinent facts/parts – which is what every invention really is about. There needs to be a physical device which is new and unique. Without innovation in physical terms, patentability becomes not only absurd but dangerous too. In *Re Bilski* is an example of broadening the scope of patents too far.

QUESTION 4: (A) DOES THE ACTIVITY OF PROGRAMMING A COMPUTER NECESSARILY INVOLVE TECHNICAL CONSID-

ERATIONS? (B) IF QUESTION 4 (A) IS ANSWERED IN THE POSITIVE, DO ALL FEATURES RESULTING FROM PROGRAMMING THUS CONTRIBUTE TO THE TECHNICAL CHARACTER OF A CLAIM? (C) IF QUESTION 4 (A) IS ANSWERED IN THE NEGATIVE, 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?

If specialised knowledge is required to write a particular program, i.e. series of commands, then it is likely to involve computer-independent knowledge such as mathematics or physics. To acquire a monopoly on areas of science where nature's rules cannot be refuted should require the inventor to seek a patent in his/her particular field, not the field of software engineering. The question begs to insinuate that scientists deserve protection for their hard work, but rarely does this work have anything to do with computers; software is just where these ideas happen to be applied, although they could equally well be applied using pen and paper.

On a separate note, in order for Europe to preserve and promote autonomy, the rejection of software patents is encouraged. This gives tremendous advantage to those who are able to program without the burden of lawsuits, filing of papers, and studying of too many papers. It gives European programmers the upper hand. The field of software is highly complex and there are many intersections in implementations of different ideas. It is not practically possible to ensure that one program does not 'collide' with another at a binary level and since composers of software are able to program without anything but a computer (and distribution likewise, thanks to the Internet), to impose unnecessary limits is virtually to forbid many the art of programming, turning it into a scarcely-explored field possessed and controlled by a small number of privileged classes with portfolios that represent monopolies on mathematics. This imperils both the economy and the value of innovation; history teaches that most brilliant software technologies are conceived by a small group of enthusiasts, and not with a patent application.

Yours sincerely,
Roy Schestowitz
Manchester, England

A handwritten signature in black ink, appearing to read 'Roy Schestowitz', with a long horizontal line extending to the right.