



Enlarged Board of Appeal
European Patent Office
Erhardtstrasse 27
80331 München

Paris, April 29th, 2009

**Subject : April Referral G 03 / 08 – Case G03/08 - Referral under Article 112(1)b) EPC
("Patentability of programs for computers")**

Dear Sir or Madam,

We would like to raise your attention to our accompanied written statement which may be deemed useful for your answering of the points of law in the Case G 03 / 08.

April is a French association which promotes and defends Free Software. Our position is that, in compliance with several international treaties –TRIPS, WIPO Treaty on Copyright, etc.– software is covered by copyright law. Copyright allows software authors to decide how to use and distribute their work. Thanks to copyright law, some free licenses like the GNU General Public Licence (GPL) and the Berkeley Software Distribution (BSD) allow anyone to run, study, copy, improve and release Free Software.

However, in the last decades, a handful of players would like software to be also covered by patent law. This would give to the patent holder the right to prevent from writing or using any other software that uses the same features, formats or algorithms.

But the benefits of patents applied to software have never been proven economically. Worse, in a field like software where innovation is cumulative and incremental, i.e. where each innovation is base on previous ones, it can be shown that investments in R&D are hampered by patents.

By considering that a software idea is the sole property of the patent holder, an artificial scarcity is created. Whereas a basic principle of free software is conversely to enrich the pool of knowledge, allowing everyone to access it freely.

Therefore, software patent and Free Software are irreconcilable. Patent law is a model shaped from an industrial past, attempting, when applied to the field of software, to consider in terms of property some mechanisms that are no more and no less than mathematical formulas, abstractions, that could equally be implemented in the human brain rather than on a computer. While Free Software, by recognizing the added value of each and everyone's contribution, offers a model of collective intelligence in line with the potential offered by the digital revolution.

Yours sincerely,

Benoît SIBAUD, President

The current practice at the European Patent Office:

Programs for computers are a form of "computer-implemented **invention**", an expression intended to cover claims which involve computers, computer networks or other programmable apparatus whereby prima facie one or more of the features of the claimed invention are realised by means of a program or programs. Such claims may e.g. take the form of a method of operating said apparatus, the apparatus set up to execute the method, or, following T 1173/97 (OJ 10/1999, 609), the program itself. Insofar as the scheme for examination is concerned, no distinctions are made on the basis of the overall purpose of the invention, i.e. whether it is intended to fill a business niche, to provide some new entertainment, etc.

Source: Guidelines for examination in the EPO, chapter 2.3.6 Programs for Computers

The legal base provided by the European Patent Convention

Article 52 Patentable inventions

(1) European patents shall be granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application.

(2) The following in particular **shall not be regarded as inventions** within the meaning of paragraph 1:

(a) discoveries, scientific theories and mathematical methods;

(b) aesthetic creations;

(c) schemes, rules and methods for performing mental acts, playing games or doing business, and **programs for computers**;

(d) presentations of information.

(3) Paragraph 2 shall exclude the patentability of the subject-matter or activities referred to therein only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such.

ad 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.

Question 1 is an expression of the "strict literal" approach made possible by the reasoning of T 1173/97 ("as such"). With cases like T 424/03 a statutory exclusion of pure software methods is rendered meaningless, contrary to the law and the systematic context of EPC Article 52.

Any reasonable interpretation ought to be put in systematic consistence with the other subject-matter or activities listed in Article 52(2).

The mentioned case T 424/03 is about pure data processing. Claim 1 reads:

"A method in a computer system (10) having a clipboard for performing data transfer of data in a clipboard format, said method comprising the steps of:..." "

The "clipboard" or "storage area" here are symbolic denominators for the memory in which data is temporarily stored and the method is always embodied as software. The general public speaks here of a software patent.

ad 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.

(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?

The reasoning of the Board is out of line with the provisions of the EU Software directive and other international software protection provisions which do not make a difference between imaginary software without a carrier medium, software on a carrier and software run on a computer. It is no coincidence that the imaginary form of software is found to be the "software as such" which is excluded from patentability. The reasoning serves the sole purpose to permit software patenting.

In T 0425/03 the Board emphasized that "a method implemented in a computer system represents a sequence of steps actually performed and achieving an effect, and not a sequence of computer-executable instructions (i.e. a computer program) which just have the potential of achieving such an effect when loaded into, and run on, a computer. Thus, the Board holds that the claim category of a computer-implemented method is distinguished from that of a computer program. Even though a method, in particular a method of operating a computer, may be put into practice with the help of a computer program, a claim relating to such a method does not claim a computer program in the category of a computer program."

The practice of your technical boards of appeal is as far away from the legal base, the European Patent Convention Article 52 which exclude software patent applications from patentability, that ordinary people describe the administrative practice as illegal granting of software patents, and sure this is what T 425/03 was about.

Let us further quote from T0425/03: "Claim 5 is directed to a computer-readable medium having computer-executable instructions (i.e. a computer program) on it to cause the computer system to perform the claimed method. The subject-matter of claim 5 has technical character since it relates to a computer-readable medium, i.e. a technical product involving a carrier (see decision T 258/03 - Auction method/Hitachi cited above). Moreover, the computer executable instructions have the potential of achieving the above-mentioned further technical effect of enhancing the internal operation of the computer, which goes beyond the elementary interaction of any hardware and software of data processing (see T 1173/97 - Computer program product/IBM; OJ EPO 1999, 609)."

In T 0953/94 we find "Since the list of excluded matters as enumerated in Article 52(2) EPC is apparently ("in particular") not exhaustive, and since all those excluded matters enumerated can, cum grano salis, be subsumed under the term "abstract", the requirement for a contribution in the aforementioned sense is normally equated with a requirement for a "technical" contribution to the art."

This grain of salt was later used in the notorious T 1173/97 decision.

"Referring, in particular, to T 208/84 (OJ EPO 1987, 14), cited in the first instance proceedings, in that case, the "data" to be processed represented "images in the form of a two-dimensional data array having elements arranged in rows and columns", and those images were considered as a "physical entity"."

Richard Stallman, founder and President of the Free Software Foundation, depicted the EPO recently as a "corrupt and malicious organization" which was an extreme expression to phrase the loss of trust in the present institutional practice. Our democratic institutions highlighted again and again that they do not want software patents and did not give the EPO permission to grant them.

The above example exposed the rule and terminology bending of the technical boards of appeal. When we consider interpretations like these it is doubtful if it makes sense to take reasoning of the Technical Boards of Appeal seriously at all and better endorse the "malicious" formula proposed by Mr. Stallman. It does not make much sense to speak about "physical entities" when even data is considered to be physical.

ad 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 (A) IS ANSWERED IN THE POSITIVE, IS IT SUFFICIENT THAT THE PHYSICAL ENTITY BE AN UNSPECIFIED COMPUTER?

(C) IF (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?

A mastery of physical or chemical properties is essential while modal properties are beyond consideration. The properties concept is well established in natural science. As a result the transformation of data or other modal properties would not be considered technical. The crucial element is the mastery. Of course the conventional use of computer hardware would lead to effects concerning the physical properties as our thoughts may inflict bioelectrical or biochemical effects in our body. In the computer context e.g. the output on a display but these conventional effects are irrelevant because software is about the mastery of modal properties.

ad Question 4

(A) DOES THE ACTIVITY OF PROGRAMMING A COMPUTER NECESSARILY INVOLVE TECHNICAL CONSIDERATIONS?

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

(C) IF (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?

The referral document says it was not specified in the EPC "whether, or under which circumstances, the activity associated with creating programs for computers, i.e. programming a computer, is a technical activity which is in principle patentable, or a non-technical activity which is as such excluded from patentability."

We fail to understand the relevance of the activity of programming. The term "subject matter or activities" is a placeholder for the excluded items under Art 52(2) EPC.

We find it a bit odd that "human activity" is implied to be patentable. The example clearly shows that the EPO practice requires a reality check and it demonstrates the limits of the "as such" spirit 1173/97 put into reality.

According to T 0931/95 "The assessment of inventive step has thus to be carried out from the point of view of a software developer or application programmer, as the appropriate person skilled in the art, having the knowledge of the concept and structure of the improved pension benefits system and of the underlying schemes of information processing as set out for example in the present method claims."

It would be advisable to take the point of view of a software developer or application programmer into account also for the matter of scope. But we are afraid, even in the context of T0931/95 it is just legal fiction.

ANNEX: Software

We found the following legal definition recommended by the World Intellectual Property Organisations which meets our own understanding:

(i) "computer program" means a set of instructions capable, when incorporated in a machine-readable medium, of causing a machine having information-processing capabilities to indicate, perform or achieve a particular function, task or result;

(ii) "program description" means a complete procedural presentation in verbal, schematic or other form, in sufficient detail to determine a set of instructions constituting a corresponding computer program;

(iii) "supporting material" means any material, other than a computer program or a program description, created for aiding the understanding or application of a computer program, for example problem descriptions and user instructions;

(iv) "computer software" means any or several of the items referred to in (i) to (iii)

Source: Model Provisions on the protection of computer software. 1978 Copyright 6; WIPO Publication No. 814. Weinheim: VCH Verlagsgesellschaft, 1987, 9