Written statements in accordance with Article 10 of the Rules of Procedure of the Enlarged Board of Appeal

Enlarged Board of Appeal
European Patent Office
Erhardtstrasse 27
80331 MUNCHEN
Germany

Concerning case G 3/08

This written statement is submitted by me in my role as a private citizen and inventor in Sweden, one of the EPC member states. The decision of the EBoA strongly affects my ability as a programmer and inventor in the field of software to create and market new products.

To fully understand the issues at hand, one needs to understand the nature of programming and software, the nature of inventions and the contents of the EPC. While I am certain that the EBoA has a superior knowledge of the latter, I believe I can bring some more understanding of the former into the decision.

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, if it is reasonable to assume that the implementation of the invention requires the use of a *general* computer, the computer program may be excluded regardless of the explicit wording of the patent application.

It is a reasonable test for a patent examiner to make, when evaluating the patent application. It should result in very few cases of ambiguity and would be easy to apply.

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, this would render art. 52(2) and (3) totally ineffective. The authors of the articles put them there for a well defined purpose. They did not intend for the articles to be easily circumvented by clever wording of patent applications.

(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?

Yes. Again, we must look at the intentions of the authors of the articles. All the exceptions to patentability that are mentioned in article 52 of the EPC are the results of mental endeavours which lack a specific tie to the manufacture of physical goods or the efficiency of a physical product.

It is my impression that the authors of the EPC viewed all the exclusions as having similar properties from a patent perspective, and that they should all be treated in the same way. Discoveries, scientific theories and mathematical methods are abstract ideas that can have a real world manifestation. Aesthetic creations, methods for playing games and doing business are likewise abstract ideas that can be applied to real world scenarios. The similarity between the act of creating computer programs and these other activities is striking. The difference between the exclusions and a process for synthesising a

molecule, reducing the materials needed in a mechanical component or reducing the braking distance of a vehicle is similarly striking. The latter group is meaningless without a physical entity, while the former is not. An aesthetic creation is a manifestation of an idea that exists independent of the physical object of art. A mathematical method or formula is meaningful even if it isn't applied to a physical problem. The rules of a game are the same regardless of whether the game is played with wooden pieces, on a computer or in the minds of people. The sequence of execution of a program is the same regardless of whether the program runs on a physical machine, a virtual machine or in the minds of people.

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. As explained under Question 2, the group of exclusions under article 52(2) explicitly exclude human endeavours that contain an element of innovation, but lack a physical manifestation. We think that this is a clear message from the authors of the EPC that new ideas that lack a technical effect on a physical entity in the real world should not be the subject of patents.

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

No, an unspecified computer is the physical representation of an abstract idea. This was firmly established by Alan M. Turing in the 1930's. However, if a patent application requires a specific physical manifestation of the abstract idea of a computer, then patentability can not be excluded by this criterion alone.

(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?

If the Enlarged Board of Appeal reaches the conclusion that question 3 (A) should be answered in the negative, I would like to argue that that **this question also should be answered in the negative**. If a technical effect is not tied to any particular hardware, it is an abstract idea. It is therefore clearly a "program, as such" and explicitly exuded from patentability by article 52 (3).

The EBoA has to make a decision which adheres to the letter and intent of the EPC. At the same time, it needs to consider the practical consequences of its decision. The set of answers to the questions in this written statement will result in clear and easy to follow guidelines for the patent examiners. This will improve working conditions and reduce the number of dubious and inadmissible patent applications. It should also reduce the total burden of work for the EPO.

The set of answers to the questions in this written statement would not have significant adverse consequences. Programs are covered by copyright, making even small fragments of truly original works the subject of legal protection. If this protection is insufficient, one needs to ask exactly what a patent would protect. The only answer I can come up with is a mathematical method, which is explicitly excluded in article 52(2)a, in the EPC.

Göteborg 17 March 2009
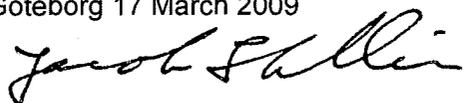
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