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Contribution to the Referral G03/08

Dear members of the Enlarged Board of Appeals,

together with a majority of software experts and parliaments in Europe we see no role for patents for software and business methods. So we are surprised to find out that some die-hards in the European Patent Organization (EPO) still do. We apologize in advance for the unbalanced tone of this Amicus Curiae Brief, however we intend to transmit our opinion through content and form. We hope with this to help the members of the board, among other issues, to understand how outrageous the question of software patents is seen by many and what answers are considered correct.

Where is the law on which legal base you grant for us in Munich patents on software, eCommerce and business methods? In our country we believe that laws have some importance for a referral on points of law, so let us remind you of the relevant legal base:

European Patent Convention Article 52 Patentable inventions

(1) European patents shall be granted for any **inventions** which are susceptible of industrial application, which are new and which involve an inventive step.
(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) The provisions of paragraph 2 shall **exclude patentability** of the subject-matter or activities referred to in that provision only **to the extent** to which a European patent application or European patent **relates to such subject-matter or activities** as such. ...

Your institution still seems to rely on certain different interpretations of the European Patent Convention Article 52 while our democratic decision makers found no reason to support them. For instance there was the attempt of a Software Patent Directive which was actually written by the BSA.

> "..., the author of this document [published by the EU-Commission], according to the Microsoft Word [for Mac] file, is Francisco Mingorance (franciscom@bsa.org), patent expert and director of public policy at BSA ..., an association which represents the interests of large US software publishers in Europe."[1]

but the European Parliament dumped it. Officials and politicians were meditating over newspeak from patent institutions like "computer-implemented inventions" and technology tautology and failed to explain software experts that this legislative project was not about software patents. No one understood what SAP's and other BSA members' interest was in washing machine patents. It took some time for politicians to find out that the institutional stories patent departments told us were unsubstantiated, to understand why and communicate it expressed a bias due to the profit maximizing strategy of patent offices and the desire of the US software establishment to get market protection. European citizens jointly fought the intervention in the internal matter of the European Union. The rest is history.

Apparently the European Patent Office did not follow the debate and examiners were too busy to grant their software and web patents under an inflated scope. It is a problem for us and we hope you find the time now to reconsider this.

Two cases are quoted in the referral which are very insightful to this end:

> **T1173/97** also know as IBM/Computer program product: A master play of word twisting which turned the interpretation of the EPC 52 into something else, invented terms like software as such and not-as-such, and "further technical effects".

> **T242/03** also known as Microsoft/Clipboard: where T1173/97 is applied in a way that the board of appeal pretends it does not understand that the clipboard is not about pure software and invents some "further technical effects". Who would believe that this is not a case about unlawful software patent granting?

We wonder why these American companies, both BSA members, were able to set precedents which are detrimental to the interests of European citizens. How does a decision under the appeal procedure change the European Patent Convention or Swedish patent law? Who invited the EPO to change its own interpretation? Can an institution interpret and expand its own legal base? Again, you in Munich grant patents for us in our country and other European nations. A European patent becomes in our country a patent under Swedish patent laws. In our country we do not even have an "as such" clause in our laws. We find it all a bit odd.

So you should better pay attention. It is very important for you to abide to the law. Look at the mess patent risks generate in the digital society:

> "..., increasingly, patents fail to provide clear notice of the scope of patent rights. Thus, innovators find it increasingly difficult to determine whether a technology will infringe upon anyone's patents, giving rise to inadvertent infringement. Similarly, they find it increasingly costly to find and negotiate the necessary patent licenses in advance of their technology development and adoption decisions. Thus, clearance procedures that work well for tangible property are undercut by a profusion of fuzzy patent rights. An ideal patent system features rights that are defined as clearly as the fence around a piece of land. Realistically, no patent system could achieve such precision, but our current system appears to be critically deficient in this regard."[2]

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1 http://www.interesting-people.org/archives/interesting-people/200202/msg00212.html

2 Bessen/Meurer: Patent failure - how judges, bureaucrats, and lawyers put innovators at risk, Princeton, 2008, p. 46

Do we have to re-nationalize our patent granting so that BSA members cannot play word twists with us? Software is not patentable under the European Patent Convention.[3] Why is it so difficult to abide to the letter and spirit of the law? We hope you will help your colleagues understand that this is a political matter, no administrative affairs which can be left to employees of the EPO which are not even judges but aspire to act like them.

QUESTION 1

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

Look at the European Patent Convention. Computer programs are excluded, are not inventions and cannot be claimed. If it is claimed it relates to a computer program as such. Sure it can also relate to a computer program as such if its not claimed as a computer program. Consider actual cases and see how your examiners grant illegal software patents. Would you argue that T1173/97 and T424/03 are not cases about software patents? You might want to think so. We don't.

So how could you rename it? A word processing apparatus, an network based sales process, a device with a computer loaded on it. No need to be creative, the applicants tried that for you before.

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?

Of course not, that would be too blunt as a circumvention. Not that it wasn't tried in the patent granting practice.

(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?

Congratulations. That is more creative for circumventing the law.

> "T1173/97 introduced a rather ugly idea that a method of operating a computer or a program in order to be have a technical character, requires a so-called "further technical effect". They said that whenever you run a program on a computer, you have a technical effect. But that is not sufficient. They wanted something beyond what happens whenever you run any old program. So they said for methods or programs you have to have a further technical effect, but the apparatus is always within the realms of patentability"[4]

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?

We admit that we have not made up our mind about technical effects in the virtual world. There are some things in nature which have certain hidden powers, the reason for which man does not

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3 Dworkin: The Nature of Computer Programs, in: Information Technology: The Challenge to Copyright, Sweet & Maxwell , 1984, p. 89

4 Rees (EPO): Software patents? EPO Practice: history and state of play, url: http://www.ps.uni-sb.de/~tmueller/reestran.pdf

know; such, for example, is the lodestone, which attracts steel and many other such things, which S. Augustine mentions in the 20th book Of the City of God. And so women in order to bring about changes in the bodies of others sometimes make use of certain things, which exceed our knowledge, but this is without any aid from the patent practitioner. And because these remedies are mysterious we must not therefore ascribe them to the power of the patent practitioner as we should ascribe evil spells wrought by witches. We are wondering if it in order to bring about some technical effect, the patent practitioner must intimately co-operate with the witch, or whether one without the other, that is to say, the patent practitioner without the witch, or conversely, could produce such a technical effect.

Where do we find the requirement for a technical effect written in the law? Please show.

> Decision T 163/85 (10) was concerned with a claim directed at a television signal which inherently comprised the technical features of the TV system. The Board considered that the non-exhaustive list of exclusions under Art 52(2) and (3) EPC could be generalized to subject-matter which is essentially abstract in nature, which is non-physical and therefore not characterized by technical terms.

Great, this explains a lot. The list of non-patentable item is non-technical therefore technical effects are required.

> Decision T 424/03, which was concerned with the transfer of data on a computer via a clipboard, considered **the method itself to have technical character** (i.e. not only because it was claimed as a computer-implemented method). This was because functional data structures were used independently of any cognitive content in order to enhance the internal operation of a computer system with a view to facilitating the exchange of data among various application programs (Reasons, 5.2). According to claim 1 (Facts and submissions, IV), these data structures (clipboard formats) are defined by their purpose ('text', 'file contents' and 'file group descriptor'). It is further specified that the selected data is converted into the file contents clipboard format and stored as a data object, and that the 'file group descriptor clipboard format' is used to hold a file group descriptor holding descriptive information about the data object.

Why not simply abide to the law? Granting software patents is illegal.

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

Well, you mean when the performance of the code heats the processor? Brilliant idea. But we are afraid, no legal base for your smart circumvention proposal.

QUESTION 4

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

No.

(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?

From the referral:

> "The effects caused by a computer program (which may or may not contribute to its technical character) may occur when the program is executed (for instance how much memory it occupies, how quickly it carries out the tasks for which it was programmed, ' etc.). On the other hand, there may be effects relating to software development which affect the programmer in his work (ease of maintenance of the program, flexibility, portability, reusability etc.)."

What is "technical" about that? Again we have to consider the certain hidden powers, the reason for which man does not know. It would seem that most extraordinary and miraculous events

come to pass by the working of the power of nature. For wonderful and terrible and amazing things happen owing to natural forces. And this S. Gregory points out in his Second Dialogue. The Saints perform miracles, sometimes by a prayer, sometimes by their power alone. There are examples of each; S. Peter by praying raised to life Tabitha, who was dead. By rebuking Ananias and Sapphira, who were telling a lie, he slew the without any prayer. Therefore a man by his mental influence can change a material body into another, or he can change such a body from health to sickness and conversely. For these reasons the lack of a legal base can also be healed.

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