

The logo for End Software Patents features a red, stylized, swirling shape that resembles a lowercase 'e' or a circular arrow, positioned to the left of the text.

# End Software Patents

Online copy: <http://endsoftpatents.org/esp-epo-2009>

End Software Patents,  
(c/o Free Software Foundation)  
51 Franklin Street, Fifth Floor,  
Boston, MA 02110, USA

May 29<sup>th</sup> 2009

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

Fax: +49 89 2399-3014  
With copy to: [Dg3registry\\_eba@epo.org](mailto:Dg3registry_eba@epo.org)

**Subject: G 3/08 Amicus curiae brief**

Dear Sirs,

End Software Patents (“ESP”), is a worldwide campaign to abolish software patents. Its Executive Director is Ciaran O’Riordan (Europe based), and its primary funder is Free Software Foundation (USA based). Drawing on years of work on

- the EU Directive on the patentability of computer-implemented inventions,
- the ‘in re Bilski’ court case in the USA,
- analysis of the market costs of software patents in the USA,
- compiling existing documentation on the case against software patents

ESP respectfully offers the below comments.

Yours sincerely,

---

Ciaran O’Riordan  
Executive Director, End Software Patents

(Contents: 7 pages, including this page.)

## **Considerations**

Having read the G 3/08 amicus curiae briefs available on the EPO website as of the morning of April 29th, we will try to avoid repetition. Before answering the questions in the referral, we offer three notes to highlight why we feel our policy of abolishing software patents would lead to a positive, sensible outcome for Europe.

### **1. General cost to businesses**

A report compiled by Ben Klemens, commissioned by ESP, estimated the cost of software patent litigation in the USA to be \$11.2 billion as of February 2008. This sum is what Europe is risking by the continued granting software patents. For matters this serious, the EPO should adopt a minimalist approach. In the medium to long term, clearer legislation should be sought.

This report also highlighted that most targets of software patent litigation are not companies that would consider themselves software companies. Rather, every company that has an IT department and a website can have software patent liability. They are thus not just a burden to innovation in the IT sector, but a burden to the economy as a whole.

<http://endsoftpatents.org/2008-state-of-softpatents>

### **2. Europe's SME-based economy**

The 2004 report from PriceWaterhouseCoopers, “Rethinking the European ICT Agenda,” noted that “*A software patent, which serves to protect inventions of a non-technical nature, could kill the high innovation rate. [...] most small enterprises are strongly opposed.*”

The 2004 report from Deutsche Bank Research, “Innovation in Germany, Windows of opportunity,” recommended: “*The German government is among the tentative*

*critics of the EU software patent bill. This position should be bolstered, by (1) putting forward academic evidence and (2) making SMEs' concerns heard. SMEs are crucial providers of pathbreaking innovations, but would be most adversely affected by patentability."*

[http://www.dbresearch.com/PROD/DBR\\_INTERNET\\_EN-PROD/PROD000000000175949.pdf](http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD000000000175949.pdf)

### **3. Infringement is expensive and unavoidable**

Looking for an example of a software company who should have the best chances to avoid software patents, Microsoft is a good candidate. They have some of the largest financial and legal resources in the world with which to perform patent searches. Additionally, they are a supporter of software patents – so we can assume they make a good faith effort to work respectfully within the patent system. If Microsoft can't abide by the patent system, no one can.

Last month (March 2009) they were ordered to pay \$388 million to Uniloc for infringement of software patents. Later that same month, Microsoft was part of a group of fourteen companies forced to pay an undisclosed amount, estimated at a total of \$1 billion, to CSIRO, again for infringement of software patents.

Uniloc: <http://www.businessweek.com/ap/financialnews/D97EI6981.htm>

CSIRO: <http://www.thetechherald.com/article.php/200917/3520/Australia-s-CSIRO-wins-big-Wi-Fi-patent-battle>

Microsoft continues to support software patenting because they can handle fines of these sizes. Most companies can't.

## **Answers**

### **Question 1**

*“1. Can a computer program only be excluded as a computer program as such if it is explicitly claimed as a computer program?”*

No. The EPC's exclusion of computer programs does not make any mention about being limited to any category or form of application.

### **Question 2a**

*“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. Use with a computer, and thus storage on a computer-readable data medium, is part of the essential existence and inherent purpose of all computer programs. It would thus be absurd to let such elements change the nature of a claim.

### **Question 2b**

*“(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?”*

2(a) talks of claims in the area of computer programs. Computer programs are, rightly, excluded from patentability by EPC Art.52. There is therefore no scope to talk about how claims in the area of computer programs can avoid the fact that computer programs are excluded, via “further technical effects” or any other means.

More generally, to avoid exclusion from patentability, a claim must contain an innovation in an area that is patentable subject matter.

In particular, the inputs and outputs of a computer program – without which it would serve no purpose – must not be allowed justify.

### **Question 3a**

*“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?”*

This requirement is insufficient because it would rely too heavily on the nature of how a feature can “cause” an effect. Also, it is the domain of the innovation, rather than the domain of the result or effect, which decides whether a feature contributes to technical character.

If a product developer invents a new way to cure rubber, he should be able to apply for a patent on curing rubber. His invention might contain many non-patentable things, including computer programs, but these wouldn't have any positive or negative influence on the patentability of his rubber curing innovation. If a patent is granted for rubber curing, it should be of concern to others who are involved in curing rubber. It should not be of concern to people engaged in development of non-patentable products similar to the non-patentable elements of the rubber curing patent.

### **Question 3b**

*“(b) If question 3(a) is answered in the positive, is it sufficient that the physical entity be an unspecified computer?”*

No. That would make it trivial to circumvent the exclusions of EPC Art.52.

### **Question 3c**

*“(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?”*

No. That would make it trivial to circumvent the exclusions of EPC Art.52.

### **Question 4a**

*“4.(a) Does the activity of programming a computer necessarily involve technical considerations?”*

No.

The EPC, in compliance with TRIPS, allows patents in all fields of technology. The EPC excludes “discoveries, scientific theories and mathematical methods” from patentability, as well as “aesthetic creations”. Development of software requires considerations which are sometimes similar to development of mathematical methods, sometimes similar to development of symphonies, and at other times similar to writing a novel. That none of those three domains fall within the EPC's definition of “technical” is confirmation that development of software does not require technical considerations.

### **Question 4b**

*“(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?”*

No.

## Question 4c

*“(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?”*

No features resulting from programming can contribute to there being a technical character in a claim.

**Page 7 of 7. END.**