

Business as Usual for Software Patents at the EPO

On 12 May 2010 the EPO's Enlarged Board of Appeal confirmed the EPO's current practice in relation to patent applications relating to computer implemented inventions (CIIIs).

Current CII Practice at the EPO

The EPO has for a number of years routinely granted patents for computer implemented inventions (CIIIs) that have a technical character. In particular, the EPO considers whether, in the case of a computer program, the program causes a "further technical effect" that goes beyond the 'normal' physical interactions between a computer program (software) and the computer (hardware) on which it is run. The EPO has also granted patents that include claims to computer programs *per se*.

Referral to the Enlarged Board

In October 2008 the then President of the EPO, Alison Brimelow, referred four questions concerning the patentability of CIIIs to the Enlarged Board of Appeal (EBA). The European Patent Convention allows the EPO president to refer points of law to the EBA where two Boards of Appeal have given different decisions on that point.

In determining whether the referral was admissible, the EBA found it necessary to consider the meaning of "different decisions". The EBA determined that in order for such a referral to be admissible the decisions had to be "conflicting decisions".

The EBA then proceeded to review the EPO's case law relating to CIIIs to determine if any Board of Appeal decisions conflicted. The only inconsistencies found by the EBA in the earlier case law of the EPO relating CIIIs centred upon the patentability of claims to programs stored on a computer readable medium.

An EPO Board of Appeal determined in IBM (T1173/97) that a claim to a computer program *per se* was patentable if when running on a computer or loaded into a computer, it brings about, or is capable of bringing about, a technical effect that goes beyond the 'normal' physical interactions between the program and the computer. Furthermore, the Board decided that it made no difference whether the program is claimed by itself or stored on a carrier. However, another EPO Board of Appeal later decided in Microsoft (T424/03) that a claim to a program stored on a medium has a technical character since it relates to a computer readable medium.

The EBA decided that the difference of opinion in these cases is a legitimate development of the case law. Thus the decisions do not conflict; a prerequisite for an admissible referral.

Going Forward

It is believed that this decision is good news for Applicants of patents relating to CIIIs. The EPO's current practice with regard to these applications should not change. Furthermore, it is hoped that certain comments in the EPO's decision may assist in swaying the practice of the UK IPO to be more favourable to applications for CIIIs.

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