

EPO Supreme Tribunal refuses to arbitrate on Software Patents "It is Time for the Legislator to Take Over"

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<http://eupat.ffii.org/10/05/eba>

May 14, 2010

For many years patent lawyers have been urging that the Technical Boards of Appeal of the European Patent Office should, when they decide on important legal questions, allow the parties to appeal to the Enlarged Board of Appeal. According to Art 112 EPC they are in fact obliged to do so, but they have a very peculiar understanding of what constitutes an "important legal question". E.g. in 1998, when they made computer programs as such patentable, they did not allow an appeal to the EBA.

Even if the TBA does not allow parties recourse to the EBA, the president of the European Patent Office can ask the EBO to take a decision on important legal questions or questions where divergence has occurred.

The FFII has, among others, repeatedly called on the EPO to do this with regard to the caselaw on software patentability which the TBA have accumulated since 1986.

In 2007 Alison Brimelow took over the presidency of the EPO and, encouraged by a EPO-internal movement for reform of the patent system, indeed asked the EBA to take a stance on some perceived incoherence within the TBA caselaw regarding software patents.

But unfortunately the EPO failed to ask questions of legal importance.

They didn't even question the IBM I+II decisions of 1998 that established program claims.

Thus the EBA correctly denied the alleged incoherence and explained that it sees no reason to take charge of this hot potato.

They explicitly reject the idea that a lack of legitimacy of the TBA decisions could be a reason to intervene:

"... a presidential referral is not admissible merely because the European Parliament and Council have failed to adopt a directive on CII patenting

... When judiciary-driven legal development meets its limits, it is time for the legislator to take over.”

It is clearer than ever that the responsibility now lies with the national parliaments who are, at least in theory, the masters of the European Patent Convention and its national implementations.

1 Resources

- Opinion of the Enlarged Board of Appeals and Press release by the EPO:
- Amicus Curiae Briefs
- FFII page on Referral G3/08