

Intellectual Property - Austria

Program logic as intellectual property? Decision brings clarity

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In one of its last decisions, the Supreme Patent and Trademark Board (SPTB) (1) clarified the status of program logic under the Utility Model Act(2) – a question that has remained unanswered since 1994. The SPTB concluded that program logic – a category of invention pursuant to Section 1(2) of the Utility Model Act – can be protected only if it contains a technical aspect.(3)

Facts

In 2011 the claimant tried to register program logic for solving ordinary differential equations as a utility model pursuant to the Utility Model Act. The Patent Office Technical Department denied registration.

Decision

The claimant filed a complaint against this decision with the Patent Office Complaint Department. The Complaint Department upheld the Technical Department's decision, arguing that the program logic in question lacked a technical aspect and thus could not be registered as a utility model. The SPTB followed that reasoning and denied registration as well. It stated that although program logic on which programs for data processing devices are based constitutes a registerable invention pursuant to Section 1(2) of the Utility Model Act, programs for data processing devices as such are not considered inventions (see Section 1(3)(3) Utility Model Act). This is because they are merely rules or instructions for performing mental acts that contain no technical information or solutions to technical problems (ie, technical aspect). The SPTB therefore concluded that not every program logic that is inherent to such programs can be registered *per se* – only those that contain a technical aspect. The fact that the usage of a computer is required to run a program is not sufficient to fulfil this requirement. Since the program logic in question solved no technical problem, but merely solved numerical mathematic equations, it was simply a device for mathematical performance, and could not be protected as a utility model. Therefore, registration was denied.

Comment

This decision finally eliminates the legal uncertainty regarding the protectability of program logic, which began when this category of invention was incorporated into the Utility Model Act in 1994. Although a new class of IP rights was created within Austria (as far as can be seen, no other legislation protects mere program logic – not even the Patent Act, the high-level act that protects IP rights for technical inventions), its scope of protection remained uncertain. For years it was unclear whether the Utility Model Act was intended to protect new program logic as such (irrespective of further requirements) or whether program logic had to contain a technical aspect (ie, the solution to a technical problem) in order to be registered. This decision finally declared that although program logic is explicitly mentioned as a protectable invention in Section 1(2) of the Utility Models Act, this qualification must be seen with regard to Section 1(1) of the Utility Models Act, which abstractly defines the subjects under protection as inventions in all fields of technology that are:

- new (ie, do not form part of the state of the art);
- based on an 'inventive step'; and
- industrially applicable.

This means that only new, inventive and industrially applicable technical software can constitute an invention pursuant to Section 1(2) of the Utility Models Act.

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Endnotes

(1) The last major amendment to IP-related statutes involved the dissolution of the SPTB as of January 1 2014. The Austrian Supreme Court has now taken over the functions of the SPTB (for further details please see ["Amendment of IP-related statutes will come into force shortly"](#)).

(2) The Utility Models Act was adopted in order to legally protect so-called 'utility models'. Utility models are inventions that are based on an inventive step "that is not big enough for acquiring patent protection pursuant to the Austrian Patent Act, which is why they are often referred to as little patent".

(3) OPM 11.12.2013, OBG 1/13.

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