IN THE SUPREME COURT OF JUDICATURE
HER MAJESTY'S COURT OF APPEAL

Case №: CH 2007 APP 0549

ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION (Patten J)

BL O/209/07

ON APPEAL FROM THE COMPTROLLER-GENERAL OF PATENTS,
DESIGNS AND TRADE MARKS (Mrs S.E. Chalmers)

IN THE MATTER OF THE PATENTS ACT 1977

AND

**IN THE MATTER OF UK PATENT APPLICATION № GB 0325145.1 IN
THE NAME OF SYMBIAN LIMITED**

AND

**IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE
COMPTROLLER-GENERAL OF PATENTS DATED 30 JULY 2007**

B E T W E E N:-

THE COMPTROLLER GENERAL OF PATENTS

Appellant

- and -

SYMBIAN LIMITED

Respondent

**WRITTEN SUBMISSIONS OF THE COMPUTER AND
COMMUNICATIONS INDUSTRY ASSOCIATION
AND OTHERS**

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1.   These are the written submissions of the Computer & Communications Industry Association, a United States Organisation[1] - CCIA, Red Hat, Inc - Red Hat and Canonical Limited - Canonical. CCIA is a trade association that has supported open source software through its Open Source and Industry Alliance. Red Hat and Canonical are private companies which have interests in open source software. CCIA, Red Hat and Canonical have common interests in these submissions. Hereinafter however, for the sake of brevity, only CCIA will be referred to but these are the submissions of all three entities.

2.   CCIA supports the Comptroller.

3.   CCIA has a few, simple, submissions. CCIA does not wish to engage in argument and estimates that its submissions will occupy very little of the court's time. CCIA asks to be allowed to answer any submissions which may arise in the hearing and which might call for an answer. CCIA will avail itself of this privilege, if granted, as sparingly as possible.

4.   CCIA appears because of its concerns that one sided policy and economic arguments are being used without evidence to substantiate greater protection for computer programmes.

5.   CCIA makes two core submissions, being

      a.   that the restriction on patents and computer programmes does not seem to have inhibited investment and incentives to development (the incentives point) and

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[1]CCIA describes itself as a non profit membership organization for a wide range of companies in the computer, internet, information technology and telecommunications industries, represented by their senior executives. CCIA was created over three decades ago and it promotes open markets, open systems, open networks, and full, fair, and open competition. See www.ccianet.org.

b. that the lines between what is properly patentable as a computer programme should be more clearly defined (the bright lines of the law point).

The incentives point

6. Gowers said: "The economic evidence suggests that ... [computer programme] patents have done little to raise incentives to innovate, and other evidence suggests that the introduction of such patents will have a chilling effect on innovation." Whatever this evidence may be (and it is accepted that this court has had no or no real opportunity to consider this) it is undoubtedly the case that the computer software industry has grown substantially despite the "as such" proviso. The proviso was put in as a limitation on what is already a limitation on the scope of the "invention". Therefore, it is submitted that the phrase "as such" should neither be construed out of existence nor should it be construed narrowly as it is not a limitation in itself.

7. Indeed, given that the economic cost of obtaining protection for inventions combined with the cost of avoiding infringement is already so great, expanding protection further may stifle investment, creativity and innovation. Conversely, if the limitation on the definition of invention is construed broadly it may actually stimulate, rather than stifle, these things. In addition, there is a danger that overly broad protection will encourage patenting itself (and with it thickets and incumbent portfolios), rather than encourage research and development and with it innovation[2].

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[2]See Bessen, James and Meurer, Michael J., "Patent Failure: How Judges, Bureaucrats and Lawyers Put Innovators at Risk" Princeton University Press, 2008; see: www.researchinnovation.org/dopatentswork/dopat9.pdf - this paper provides the first comprehensive empirically grounded, industry specific assessment of benefits and costs of patents (in the USA) which includes a (pessimistic) analysis of the net effects on the software industry.

8.   The evidence in support of the policy arguments or that refuting them is not before this court. It is submitted therefore that this court should venture cautiously when considering wide ranging policy arguments.

The Bright Lines Point

9.   Poorly defined boundaries are a bad thing. If patents are to be provided to industry then inventors and applicants should not be expected (or forced) to spend time and money investigating where the edges of protection lie unless such investigations cannot be avoided.

10.   CCIA does not take issue with steps (1) - (3) of *Aerotel* (construe the claim, identify the contribution and then see if it is solely excluded), even if the Comptroller does have an issue with the order in which the steps or further steps such as assessing novelty or inventiveness are carried out. It is step 4 which is the issue. In *(T 0154/04) Duns Licensing LP* [2007] E.P.O.R. 349, TBA, it was said that (¶ 4):-

> " ... [Patent protection is reserved for creations in the technical field. ... [The subject-matter claimed must therefore have a "technical character" or to be more precise - involve a "technical teaching", *i.e.* an instruction addressed to a skilled person as to how to solve a particular technical problem using particular technical means. ..."

11.   In *(T 22/85) IBM/Document Abstracting and Retrieving* [1990] E.P.O.R 98, the TBA said, or at least implied, that establishing a set of rules for operating a computer was essentially the same as establishing a set of instructions. It continued by stating that such a set of instructions is a computer programme and so falls to be excluded from the definition of invention. The claim in the present case is no more than rules and so it should not be patented as it is merely a computer program as such.

12.   In *IBM* the TBA looked at the end result and said that nothing tangible was

done on a physical object (¶ 13) but that if it had been then that would have qualified as technical.

13.   In this case the tangible thing is, presumably, the fact that the computer is operating more efficiently[3] or quickly and, it is submitted, that if this court could say that such an invention is not to be patented than that would go some way to painting the bright line. The question really is "how tangible is tangible?" Whilst, perhaps, the court might not be able or might not want to answer that question, it can at least say that it is not about doing something more quickly by the mere operation of code.

Increase in speed

14.   Patten J below held that this was the essential point. The applicant could make its operating system operate more quickly and as previous authority had decided that a quicker computer programme was patentable he was bound to allow the appeal (see ¶63) as *Aerotel* (¶91) directed him to do so, where Jacob L.J. (in an appendix to the judgment) said:-

> "So what *Gale* decided is that the computer program exclusion extends not merely to the code constituting a program, but that code as embodied on a physical medium which causes a computer to operate in accordance with that code. More is needed before one is outside the exclusion – as for instance a change in the speed with which the computer works. A technical effect which is no more than the running of the program is not a relevant technical effect. And *Gale* clearly decides that merely putting a new program on a known memory device is not enough to escape art 52(2)."

However one needs to be careful here as Mr Gale's programme did run more quickly (see [1991] R.P.C. 305, 317_{40}, C.A. *per* Nicholls L.J.) and so the processing speed of the computer is changed because it is taking less time to compute the square root of a number. Patten J pounced on this as being

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[3]Computers can operate more efficiently without necessarily operating more quickly by, say, executing tasks with a low priority (such as virus detection and sweeping) at times of low CP usage - *i.e.* in the early hours of the morning for many PCs.

determinative. However it is submitted that such words must be qualified by what follows 'A technical effect which is no more than the running of the program is not a relevant technical effect.' this is precisely what is claimed here. It is submitted that an effect brought about by a quickly or efficiently operating programme by (1) better written code or (2) using less processing resources is not a relevant technical effect and does not make the invention patentable.

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