

September 15, 2015

To

Shri Narendra Modi

Hon'ble Prime Minister of India

7 Race Course Road, Teen Murti Marg Area,

New Delhi - 110011

Sub: Concerns over the “Guidelines for Examination of Computer Related Inventions (CRIs)” issued on August 21, 2015

Sir,

This concerns the “Guidelines for Examination of Computer Related Inventions (CRIs)” issued on August 21, 2015 by the Office of the Controller General of Patents, Designs and Trademarks. We, the undersigned, wish to share with you some of our concerns over this document, particularly in context of its potential repercussions on Indian industry and innovation. The Guidelines in their current form, by providing for patenting of software, could place the Indian software industry, especially software product companies and startups, at the mercy of Multinational Corporations and patent holding entities who have amassed many patents in the area and continue to do so. The Guidelines by allowing for software patents will make writing code and innovating in the area of software a dangerous proposition due to the chance of infringing on the patents held by big corporations.

The stated intent of the document is to provide guidelines for the examination of patent applications relating to CRIs by the Patent Office so as to further foster uniformity and consistency in their examination. However, we submit that the Guidelines in their current form run counter to the object of Section 3(k) of the Patents Act, 1970, which is to unconditionally exclude mathematical and business methods, computer programs *per se*, and algorithms from patentable subject matter.

Section 3(k) was inserted into the Patents Act, 1970 by the Patents (Amendment) Act, 2002 [No. 38 of 2002] and reads:

“3. What are not inventions – The following are not inventions within the meaning of this Act,-

...

(k) a mathematical or business method or a computer program per se or algorithms;”

The “Manual of Patent Office Practice and Procedure” published by the Patent Office in 2011 as a practical guide for the effective prosecution of patent applications, as well as the “Draft Guidelines

for Examination of Computer Related Inventions (CRIs)” issued in 2013 by the Patent Office had reiterated the unconditional exclusion as per Section 3(k) of mathematical methods, business methods (even with the help of technology), computer programs *per se*, and algorithms from patentable subject matter. Specially with reference to the non-patentability of computer programs *per se*, the Draft Guidelines noted that a computer program that may work on any general purpose known computer or related device does not meet the requirements of law. It was said that for considering the patentability of computer programs in combination with hardware, the hardware had to be more than general purpose machines.

However, examination procedures detailed under the 2015 Guidelines differ from the above position in the following key respects:

- Under the 2015 Guidelines, mere use of a mathematical formula in a claim to clearly specify the scope of protection being sought would not necessarily render the claim a mathematical method. Methods of encoding/decoding, encryption/decryption, and simulation through mathematical formulae are cited as patentable examples. This effectively negates the intent of Section 3(k), as it enables the patenting of mathematical methods that are claimed citing a technical application. The exclusion under Section 3(k) being unconditional, this examination procedure contravenes the spirit of law.
- Though the 2015 Guidelines purport to treat claims that relate to business methods in substance as non-patentable, it states that if the claimed subject matter of a patent application specifies an apparatus and/or a technical process for carrying out the invention even in part, the claims shall then be examined as a whole. The Guidelines further clarify that mere usage of words such as “enterprise”, “business”, “supply-chain”, “sales”, and “commerce” in a claim does not make a CRI just a business method. To examine a patent application as a whole, irrespective of whether or not the claims largely constitute business methods renders the provisions of Section 3(k) illusory. It makes way for business methods to be granted patent protection, thereby reversing their blanket exclusion from patentable subject matter as envisaged under Section 3(k).
- With respect to computer programs *per se*, the 2015 Guidelines state that so long as a computer program is not claimed “in itself”, but is claimed in such a manner as to establish industrial applicability while fulfilling all other patentability criteria, the patent should not be denied. This stands in contradiction to the Patent Office's earlier stance, which as mentioned above was that only those computer programs combined with novel, non-general purpose machines would even be considered for patenting. In arriving at its broader interpretation of patentability, the 2015 Guidelines point to the report of the Joint

Parliamentary Committee on the Patents (Second Amendment) Bill, 1999 to demonstrate that the legislative intent behind the words “*per se*” was to allow patenting of things essential to give effect to a computer program, as well as any improvement or technical advancement achieved by a computer program. However, the 2015 Guidelines overlook one crucial development viz. the unsuccessful attempt made by the Patents (Amendment) Bill, 2005 [drawing from the Patents (Amendment) Ordinance, 2004] to amend Section 3(k) and extend patentability to computer programs with “technical application to industry”. When laid before the Parliament, the proposed amendment faced objection on the ground that it would result in the creation of monopolies by multi-nationals (as stated in a press release dated 23/3/05), and was subsequently deleted. This demonstrates a clear legislative intent against broadening the patentability of computer programs. Any guidelines adopted by the Patent Office on CRIs must therefore also adhere to this legislative intent of Section 3(k), which the 2015 Guidelines fail to do.

Further, the Guidelines set out three broad premises under which subject matter relating to CRIs may be considered patentable:

- novel hardware;
- novel hardware with a novel computer program;
- novel computer program with known hardware, which goes beyond the normal interaction with such hardware and effects a change in the functionality and/or performance of existing hardware.

The Guidelines add that a computer program, which when running or loaded into a computer, goes beyond the “normal” physical interactions between software and hardware and is capable of bringing further technical effect, may be patentable.

The Indian Patent Office was established under the provisions of the Patents Act, 1970. By permitting patents in mathematical and business methods and computer programs, we now have a situation where the creature of the Act is attempting to usurp the provisions of the Act. Section 3(k) instituted a blanket exclusion of the above from patentable subject matter to prevent monopolies and foster innovation. The 2015 Guidelines defeat this necessary purpose, and open a Pandora's box of potential harm to Indian industry. Such a step will invariably stifle innovation and weaken the Government's “Make in India” initiative.

We therefore request you to initiate urgent steps to recall the “Guidelines for Examination of Computer Related Inventions (CRIs)” issued on August 21, 2015, and to ensure that any future

guidelines issued by the Patent Office on this subject are in tune with the legislative intent.

Sincerely,

CONCERNED CITIZENS/ ORGANISATIONS:

Alternative Law Forum
Centre for Internet & Society, Bangalore
Democratic Association for Knowledge Freedom
Digital Empowerment Foundation
Dr.Arul George Scaria
Free Software Foundation India
Free Software Movement Karnataka
Free Software Movement of India
Indian Software Product Industry Round Table (iSPIRT)
Indic Project
Internet Society, Trivandrum Chapter
IT For Change
Mimir Technologies Private Limited, New Delhi
National Working Group on Patent Laws
Prof. Jayesh Bellare, Department of Chemical Engineering, IIT Bombay
Prof. Kannan Moudgalya, IIT Bombay
Prof. Madhu N. Belur, Department of Electrical Engg, IIT Bombay
Shri Prabhu Ramachandran, Associate Professor, Department of Aerospace Engineering, IIT Bombay
Prof. Supratik Chakraborty, Professor, Dept. of Computer Sc. and Engg, IIT Bombay.
Prof. Rahul De, Indian Institute of Management, Bangalore
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Shri. S.P.Shukla
Shri.Srinivasan Ramakrishnan, Consultant and Former DG, C-DAC
Society for Knowledge Commons
Swathanthra Malayalam Computing
Third World Network

Cc:

Hon'ble Minister of Commerce and Industry
Hon'ble Minister of Communications and Information Technology
Hon'ble Minister of Science and Technology
Principal Secretary, PMO
Secretary, Department of Commerce

Secretary, Department of Electronics and Information Technology
Secretary, Department of Science and Technology,
Secretary, Department of Industrial Policy and Promotion

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