



Software patents at the EPO: The current practice

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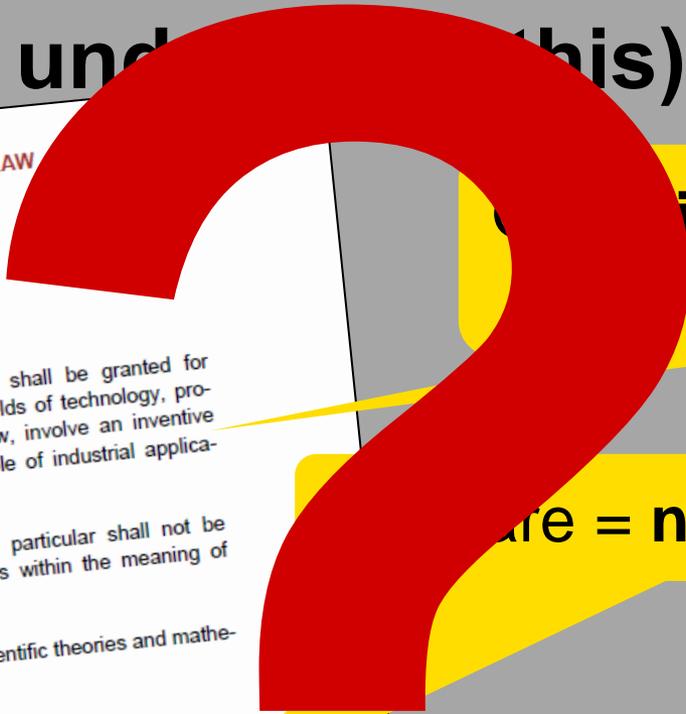
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THE LEGAL BASIS (don't try to understand this)



“inventions“ that
„technical“

are = non-invention ...

only excluded “as such“

THE FRAMEWORK DEVELOPED BY THE EPO BOARDS OF APPEAL

1. **Coherent methodology**

for assessing the patentability of computer-implemented inventions

2. **Case law**

concerning individual aspects to stake out the grey area of technicality

1. METHODOLOGY

Two hurdles for patentability:

#1 Is there an invention?

„patent-eligibility“

#2 Does it have the required qualities?

novelty, inventive step („non-obviousness“)

Independent hurdles! (somewhat different to some recent US decisions)

1. METHODOLOGY

HURDLE #1: PATENT-ELIGIBILITY

YES, if the claimed subject-matter uses technical means (e.g. a computer)

- The technical means can be trivial
- No weighing up of technical and non-technical features (i.e. no „core theory“)
- Very low hurdle
- Landmark decision: T 0258/03 (Auction method/HITACHI) of 21 April 2004

1. METHODOLOGY

HURDLE #2: INVENTIVE STEP

YES, if the technical features are non-obvious

- Only technical aspects count!
- The non-technical features are ignored in the assessment of inventive step
- This is the real challenging test
- Landmark decision: T 0641/00 (Two identities/COMVIK) of 26 September 2002

1. METHODOLOGY

SUMMARY:

- Patent-eligibility is no issue at all
- The challenging test is inventive step, where only the technical features count

→ **European patents only for non-obvious *technical* contributions!**

2. CASE LAW

Example: Industry 4.0 and IoT inventions

- (Software) features relating to the control of a technical process / device are regularly considered technical
- More critical: New business models based on big data analytics
 - May yield interesting insights, but does not necessarily control the machine...

2. CASE LAW

Example: Artificial intelligence

A computer-implemented method, comprising:

using a novel and non-obvious neural network to process generic data.

→ **Patent-eligible** („computer-implemented“)

→ **But not patentable, since this is pure math / data processing** (does not count towards inventive step)

2. CASE LAW

Example: Artificial intelligence

A computer-implemented method, comprising:

using a novel and non-obvious neural network to optimize the shape of a wing in terms of its drag.

→ **Patentable, since the math is limited to a technical purpose**

→ **Breakthrough mathematical (AI) concepts are not patentable, but the technical applications are!**

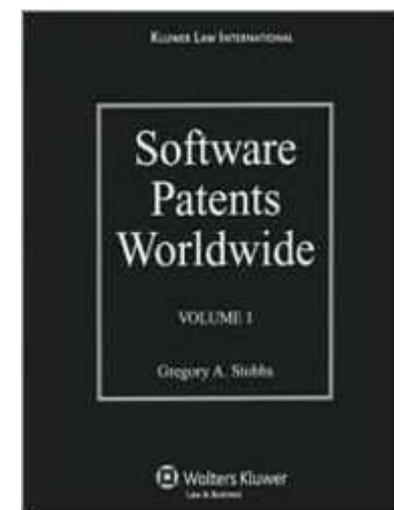
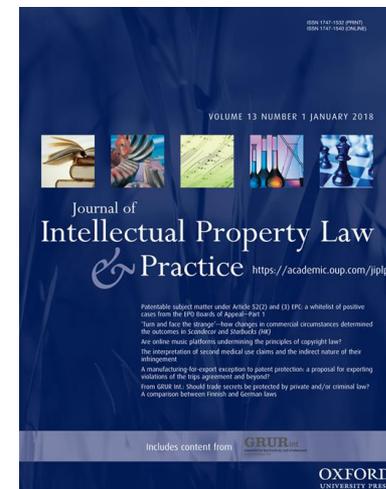
RECOMMENDED READING

“Patentable subject matter under Article 52(2) and (3) EPC: a **whitelist of positive cases** from the EPO Boards of Appeal”
(Stefan V. Steinbrener)

“**Software Patents Worldwide**”

EPC chapter
(Stefan V. Steinbrener)

Germany chapter
(Hans Wegner, Bastian Best)



BONUS TIP #1: ALLOWABLE CLAIM CATEGORIES

1. „Device/apparatus, comprising ...“
2. „Computer-implemented method, comprising ...“
3. „Computer program comprising instructions for implementing the method of claim 2.“
 - Only if it has a „further technical effect“
 - No need to claim a „non-transitory computer-readable medium“!

BONUS TIP #2: CLAIMS FOR NETWORKED SYSTEMS

- Contributory infringement is no fun in Europe
- Draft a separate independent claim for each entity: transmitter → intermediary → receiver

Thank you for your attention.