



**International Chamber of Commerce**

*The world business organization*

## **Policy statement**

### **Software and business method patents**

Commission on Intellectual and Industrial Property, 23 July 2001

[French version](#)

The International Chamber of Commerce (ICC) is the world business organization. It is the only representative body that speaks with authority on behalf of both large and small enterprises from all sectors in every part of the world. Founded in 1919 to promote international trade, investment and the market economy system, ICC today represents thousands of member companies and associations from over 130 countries. ICC firmly believes that the protection of intellectual property stimulates international trade and investment, and encourages innovation and transfer of technology, which are essential for economic growth.

## **Background**

Software is an essential element of information and communications technologies which are now used in many sectors of commercial activity to implement methods of conducting business. The current debates on the patenting of software and business methods are therefore of singular importance to the business community.

In Europe, the question has been raised as to whether it is economically justified to grant patents on software and other inventions implemented by computer. Some circles are proposing to ban software from patentability, or at least to subject it to special restrictive rules (such as a shorter duration or compulsory licensing).

In the United States, the granting in earlier times of patents of questionable validity has contributed to a debate around the patenting of business methods. Although the US Patent and Trademark Office has taken substantial steps to improve the situation, some proposals have appeared to enact legislation which would introduce special requirements for the patentability of such methods.

## **ICC position**

ICC firmly believes that patents provide an incentive for innovation by encouraging investment in R&D and promoting the dissemination of technology through the publication of patents.

Technologically innovative companies should be able to obtain patents to protect their inventions without discrimination as to the technological field. On the other hand, it has long been established that creations of a purely abstract nature cannot be patented.

ICC therefore believes that inventions relating to software and business methods should not be treated differently from any other inventions, and should be patentable as long as they meet all of the usual requirements of patentability applied to other fields of technology, including technical content. At the same time, however, it is critical to ensure that the standard rules and requirements for patentability are appropriately applied in examining applications in these fields.

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## Detailed analysis

The traditional way of approaching the question of whether any invention is patentable consists first in determining if the invention falls in the general domain of what is appropriate subject matter for a patent. If it does, the invention must pass the three classical tests of novelty, non-obviousness and utility or industrial applicability. This is basically what Article 27(1) of the TRIPS agreement mandates as a standard.

It is generally agreed that in order to meet the first requirement an invention claimed in a patent must present one or more characteristics of a technical nature. Because technology evolves over time, thus making the meaning of "technical" a time-dependent notion, it would be unwise to try and define further the concept of technical characteristics.

Once the invention as claimed has been determined to present a technical character, the other tests must be applied. The novelty and industrial applicability tests are generally based on factual determinations and the standards applied do not require further developments, except maybe to stress the need for improved access to existing prior art by the various Patent Offices throughout the world. It is the test of non-obviousness, or inventive step, that requires a more careful analysis. The test consists in verifying that the invention as claimed would not have been obvious to a person skilled in the relevant field at the time the patent application was filed, given what was publicly known at that time. One useful approach to the question of obviousness, although not the only one, is the so-called problem-solution approach, favoured in particular by the European Patent Office. Under that approach, one first determines the problem with the known devices or processes that the invention purports to solve. Then, one determines if the problem was obvious to a person skilled in the field in which the problem arises. If not, then the claimed invention cannot be held obvious. If yes, then one must determine if there is a technical contribution, i.e. the solution to the problem defined in the claimed invention calls for technical features or, at least, technical considerations, such that the claimed invention taken as a whole would not have been obvious to a person skilled in the technical field where a solution would normally be sought.

When applying the above mechanism to the assessment of inventive step or non-obviousness of inventions using software, computers or other features of the information and communications technology to implement business methods or indeed any other kind of methods, some further remarks must be kept in mind. A technical contribution can arise either from an innovative technical implementation of a known method or from an innovative change in the method leading to a more efficient technical implementation. In the former case, where the method is well known, the technical implementation must go beyond merely using a known computer in a straightforward manner to implement the method. In the latter case, the technical contribution results from the technical considerations that are at the root of the claimed invention. This is widely accepted where mathematical concepts are involved and it appears appropriate to apply the same reasoning to other kinds of methods, including business methods.

Where the claimed invention is found to present a technically innovative solution, it should make no difference whether the invention is claimed as an apparatus, a method or a computer program for implementing the method.

## Conclusion

ICC therefore urges that governments should continue to apply traditional rules regarding patentability for business methods and for software and other aspects of information and communication technology, and not devise any specialised scheme for inventions in those particular fields.

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