

The TRIPS treaty and Software Patents

<http://swpat.ffi.org/vreji/prina/trips27.pdf>

2000-08-01

Contents

1 Does TRIPS require software patents?	1
2 TRIPS Article 10: Computer Programs and Compilations of Data	2
3 TRIPS Article 27: Patentable Subject Matter	2

1 Does TRIPS require software patents?

The Treaty on Trade Related Aspects of Intellectual Property Rights (TRIPS), signed in 1993 as a constituting document of the World Trade Organisation (WTO), sets minimal rules for national intellectual property law in order to prevent member nations from using intellectual property as a hidden trade barrier against other nations.

Article 27 has often been construed by patent lawyers to imply that patent claims must be allowed to extend to computer programs.

Paul Hartnack, Comptroller General of the British Patent Office, commented this question at the London hearing in 1997 (<http://www.patent.gov.uk/softpat/en/1000.html>):

Some have argued that the TRIPS agreement requires us to grant patents for software because it says “patents shall be available for any inventions in all field of technology, provided they are capable of industrial application”.

However, it depends on how you interpret these words.

Is a piece of pure software an invention? European law says it isn't. Is pure software technology? Many would say no. Is it capable of “industrial” application? Again, for much software many would say no. TRIPS is an argument for wider protection for software. But the decision to do so should be based on sound economic reasons. Would it be in the interests of European industry, and European consumers, to take this step?

It may also be asked whether laying claim to immaterial objects such computing logic, programming interfaces and organisational methods does not constitute a form of

trade monopoly, which is contrary to the spirit of TRIPS and to the letter of earlier GATT agreements.

2 TRIPS Article 10: Computer Programs and Compilations of Data

1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).
2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

3 TRIPS Article 27: Patentable Subject Matter

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.¹ Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.
2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.
3. Members may also exclude from patentability:
 - a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
 - b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

¹For the purposes of this Article, the terms “inventive step” and “capable of industrial application” may be deemed by a Member to be synonymous with the terms “non-obvious” and “useful” respectively.