

UK Court of Appeal considers the patentability of touchscreen-related inventions

A recent judgment of the UK Court of Appeal in *HTC v Apple* considered whether computer implemented methods utilised in touchscreen devices were excluded from patentability. The judgment offers insight on excluded subject matter issues which continue to plague European and UK patents and patent applications.

Apple sought to overturn a High Court judgment from July 2012, in which HTC prevailed in claims made against it of infringement of four of Apple's European (UK) patents.

In the High Court judgment, all four of Apple's patents were found to be invalid. The appeal considered only two of the patents.

The first patent had been found to be invalid by the High Court judge since it was said to be a computer program "as such", and also obvious. The patent was concerned with how the underlying operating system on which an application runs deals with single or multiple concurrent touchscreen touches within the application. This facilitates the design of the application by allowing a developer to configure a view as either a single-touch or a multi-touch application so that subsequent touches can accordingly be dealt with at the operating system level.

Judgment

The appeal judges held that the claimed method **was not excluded from patentability** stating that dealing with multiple simultaneous touches is "essentially technical". It was stressed that an invention which is patentable in accordance with conventional patentable criteria does not become unpatentable because a computer program is used to implement it. Finally, it was held that a device using the claimed method was a better device since it was easier for programmers to use.

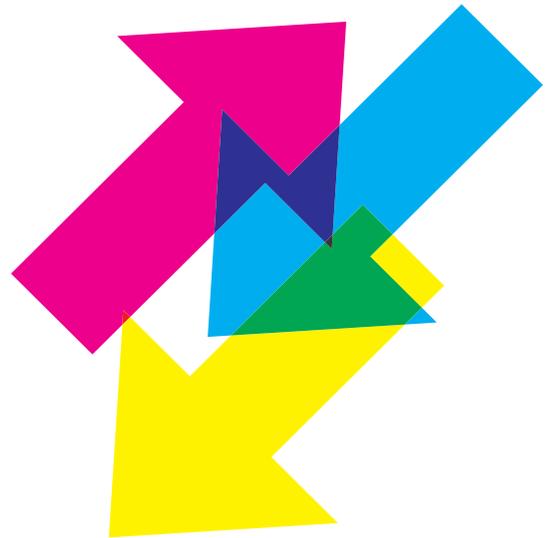
The appeal judges also added some insight concerning the "minefield" of excluded subject matter. It was stated that both the UK courts and the Technical Boards of Appeal at the EPO have tended to avoid arguing what the underlying legislation means. It was said that, in the past, the argument has generally been whether there is a "technical contribution" or "technical

effect", without addressing whether this actually means the same as the underlying legislation.

It is interesting to note that, in this case, the claim was tied to the "real world" through the receiving of a touch. It is unclear whether absence of this real world tethering would have resulted in a different conclusion concerning excluded subject matter.

Apple sought to overturn the finding of obviousness for claim 1 of this patent, but the judges upheld the initial finding that a skilled team tasked with designing an operating system for a multi-touch device would arrive at the invention, and therefore claim 1 was deemed to be obvious.

However, dependent claim 2, now having escaped the excluded subject matter exclusion, was found to be valid since a case of non-obviousness could not be established.



The second patent under appeal concerned the “slide to unlock” feature familiar to many users of Apple iOS products. This patent had been found to be obvious in High Court proceedings.

The appeal considered whether a further enhancement of this feature used to unlock different applications by swiping respective images in predefined directions was obvious. The most relevant state of the art used in assessing obviousness was a touchscreen device produced by Neonode. Neonode’s device implemented application unlocking functionality by swiping in a predefined direction. Different applications were launched depending where the swipe occurred on the screen. The key difference claimed in Apple’s patent was that the user moved an unlock image along a predefined path. This difference was described as “swipe with feedback”. This was ultimately deemed by the appeal judges to be an obvious modification of Neonode’s device.

Summary

This case dealt with some interesting issues concerning touchscreen patents, computer programs and excluded subject matter. Although each case is of course judged on its merits, it now seems that a claim tethered to a “touch” might well avoid the exclusions to patentability set out under Section 1(2) of the UK Patents Act (corresponding to Article 52(2) EPC). Whether a claim which is inherently, but not expressly, tethered to a “touch” would escape the exclusions remains unclear.

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Need advice

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