From: Robert Tiller[e-mail address redacted]
Sent: Monday, September 27, 2010 3:53 PM
To: Bilski_Guidance
Subject: Comment from Red Hat Regarding Interim Guidance on Bilski

Red Hat appreciates the opportunity to submit comments regarding the Interim Guidance for Determining Subject Matter Eligibility for Process Claims in View of *Bilski v. Kappos* ("Interim Guidance"). As the world's leading provider of open source software and related services to enterprise customers, Red Hat has a keen interest in this issue, particularly as it relates to applications for software patents.

Today there are hundreds of thousands of patents relating to software, and tens of thousands continue to be granted each year. In many cases, these patents have vague and uncertain boundaries. Thus it is virtually impossible to determine whether a new software product could be deemed to infringe an existing patent. This means that introducing any innovative software product entails a risk of a lawsuit based on a vague patent. Such lawsuits often cost millions of dollars to defend, along with the risk of actual damages, treble damages, and injunctions. Far from encouraging innovation, vague software patents discourage it. The problem of vagueness is so endemic in software patents that it warrants action at the threshold level of subject matter eligibility.

In view of this serious problem, Red Hat submits that the Interim Guidance should be revised to recognize that software patents will ordinarily fail to satisfy the requirements of 35 U.S.C. Section 101 as interpreted in *Bilski* and prior Supreme Court cases. Software is essentially nothing more than a set of mathematical algorithms expressed in a particular programming or machine language. As the *Bilski* Court recognized, mathematical algorithms, by themselves, are abstract ideas that are not patentable.

As the Supreme Court found in *Diehr* and reiterated in *Bilski*, an application of a mathematical formula (as opposed to the formula by itself) may be entitled to patent protection. This does not mean, however, that merely storing or running software on a general purpose computer justifies granting a patent on an otherwise unpatentable algorithm. This is clear from the Supreme Court's *Benson* decision, which rejected as an unpatentable abstract idea a mathematical algorithm capable of being used in programming a general purpose computer. Thus the statement in the Interim Guidance that "recitation of some structure, such as a machine . . . will in most cases limit the claim to such an application" is overly broad and subject to misinterpretation.

The *Bilski* Court strongly reaffirmed that abstract ideas, including mathematical algorithms, are not patentable. In applying *Bilski*, the Patent and Trademark Office should recognize the applicability of this principle to software patents. This course is consistent both with the Supreme Court's teachings and the core patent objective of encouraging innovation.

Sincerely,
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