U.S. Patent Court to Rehear Software Issue
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U.S. Patent Court to Rehear Software Issue

Special to The New York Times

WASHINGTON, Feb. 28—The Court of Customs and Patent Appeals will hold a rehearing Monday on its decision last November to make software-computer programs patentable. The controversy has split the computer industry.

The computer industry consists of the manufacturers of the machines, or hardware, and the concerns that deal in everything else, or the software. The two sides disagree on the patent issue.

Computer programs are sets of instructions telling a computer how to perform a particular job, whether making out a payroll or performing scientific calculations. So far, the Patent Office has granted patents only on programs embodied in equipment, including gears, cams and electric circuits, and not on the software that may be on punched cards or magnetic tapes.

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Apart from the intricate legal arguments, which involve such things as "thought control," are two practical considerations.

Without patents, the fast-growing software industry believes it has no adequate protection for its programs, which it values at billions of dollars.

The Patent Office lacks the skilled examiners and background information (called "prior art") to cope with the thousands of applications that software patents would bring.

The rehearing Monday was granted at the request of the Patent Office, which suggested that the November decision was making mental processes patenable and that such a patent could be easily infringed.

Replies to several questions raised by the court on these and other points were included in voluminous briefs filed last week by the Patent Office the Mobil Oil Corporation, whose appeal resulted in

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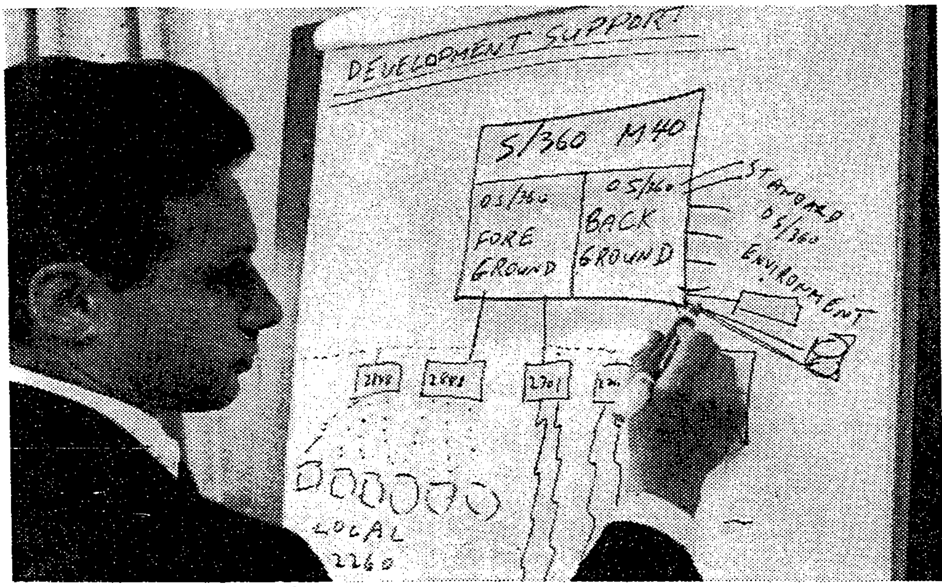

A computer programer at work. In industry terminology, the machines are the "hardware," and everything else—punched cards, magnetic tapes, etc.—constitute "software."

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software decision, and several friends of the court.

Among these friends, the International Business Machines Corporation, and Honeywell, Inc., sided with the Patent Office. Against it were Applied Data Research, Inc., the Association of Independent Software Companies and Bell Telephone Laboratories, Inc., which has several pending cases in the area.

I.B.M., the giant of the industry, and other hardware makers have usually made software programs available to buyers of the machine, without special charges.

The matter will not be settled at the hearing Monday but presumably by the end of the term June 30, the court will formally uphold its November decision, written by the late Judge Arthur M. Smith, or will modify it.

Review Possible

If the decision stands in favor of software patents, the Patent Office will have to decide whether to ask the Solicitor General to seek review by the United States Supreme Court.

The patenting of instructions affects more than the computer business. The chemical and oil industries, for example, may develop programs for their own processes and machines.

If software programs are not patentable, other forms of protection will be needed. Both copyrighting and trying to guard them as trade secrets present disadvantages.

In response to a published invitation from the Patent Office, I.B.M. has filed a proposal for registration. A description of the concepts of each program would be published, but the program itself would be kept secret and protected for 10 years. The system would require legislation.

The general question has already been before Congress. The President's commission on the patent system recommended in 1966 that all computer programs be excluded from the patent system and protected otherwise. This exclusion clause was incorporated in a "patent reform" bill, but was dropped when opposition developed at hearings. No bill was passed.

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