Piano keys and dinosaurs

EUPACO

24 January 2007[1]

Cristian Miceli

Progress

"Usually, terrible things that are done with the excuse that progress requires them are not really progress at all, but just terrible things"

- Russel Baker

“MONOPOLY

IS AN EVIL...

“For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good”

Thomas Babbington Macaulay,
speech in the House of Commons, 1841
(http://www.kuro5hin.org/story/2002/4/25/1345/03329)

“A patent system is always a burden on trade, commerce and industry: if only because of the “red tape” effect. The only question is whether the benefits outweigh the burdens”

Peter Prescott QC, Deputy High Court Judge

(paragraph 35, IN THE MATTER OF Patent Applications GB 0226884.3 and 0419317.3 by CFPH L.L.C.)

Purpose of Intellectual Property

"To promote the interests of Authors and Inventors by rewarding the same through the grant of monopolies without regard to the economic and moral consequences for society as a whole."

Purpose of Intellectual Property

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”

Article I, Section 8, US Constitution on the powers given to Congress

The Patent System – 'the public interest'

"There can be but one justification for having a patent system, and that is that it is good for the people of the country. If the patenting of certain things does more harm than good, it matters."

Peter Prescott QC, Deputy High Court Judge (paragraph 11, IN THE MATTER OF Patent Applications GB 0226884.3 and 0419317.3 by CFPH L.L.C., emphasis added)

The Patent System – 'the public interest'

"property is the creature of the law, and that the law which creates property can be defended **only on this ground**, that it is a law beneficial to mankind"

- Thomas Macaulay (emphasis added)

The Patent System – 'the public interest'

"for the people"

"beneficial to mankind"

Progress

- Encouraging the progression of the arts and sciences through granting exclusive rights but being mindful of the effects on the public interest:
  - consumer choice
  - competition (as this helps choice)
  - innovation / best of breed

Key requirements for a patent system grounded on the public interest

- public engagement
- ideas remain free
- 'outcomes' based approach
- inventive step
- separation of granting and reviewing bodies - both accountable to the public
- independent and skilled judiciary

Public engagement – the problem

STAKEHOLDERS

INVENTORS

COMPANIES

PATENT ATTORNEYS

LAWYERS

ACADEMICS

THE PUBLIC....

Driven in the wrong direction

RIGHTSHOLDERS

"Do the pharmaceutical and biotech industries want the European Parliament to have the final say over what should and should not be patentable? Is the auto industry happy for that to happen? Does the chemical industry believe that politicians should be able to second guess judges? If not, they had better start doing something about it."

Joff Wild, Intellectual Asset Management Magazine, 'The EPLA battle heats up', 15 November 2006
http://www.iam-magazine.com/blog/Detail.aspx?g=6ea24195-7a04-4ce1-9e02-70b8cea5cb6f

'maximising IP value for business'

Driven in the wrong direction..continued

PATENT PROFESSIONALS

“Marks & Clerk will coordinate the team representing Macrossan...the team is not requiring him to pay their professional fees.

"This is an area of great public interest, especially given the failure of the EU directive on computer-implemented inventions to restore a pan-European consensus," said Dr John Collins of Marks & Clerk.

(Source: Out-law.com, 10/11/2006 http://www.out-law.com/page-7464)

in who's interest.....the public interest?

“Only we understand the system”

“Practically the only MEP who had any degree of understanding on the [CII Directive] was Sharon Bowles, the only MEP who is also a qualified patent attorney”

David Pearce, trainee patent attorney, writer for the IPKat (www.ipkat.com), IP law blog, 14 January 2007

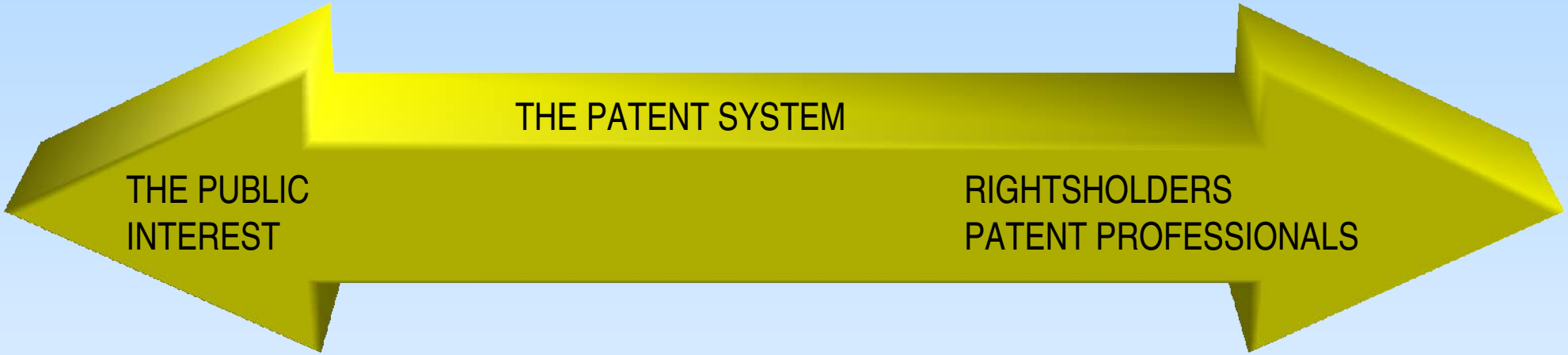
“Only we understand the system”

“After all, *a return on investment* is what the IP game is all about, is it not?”

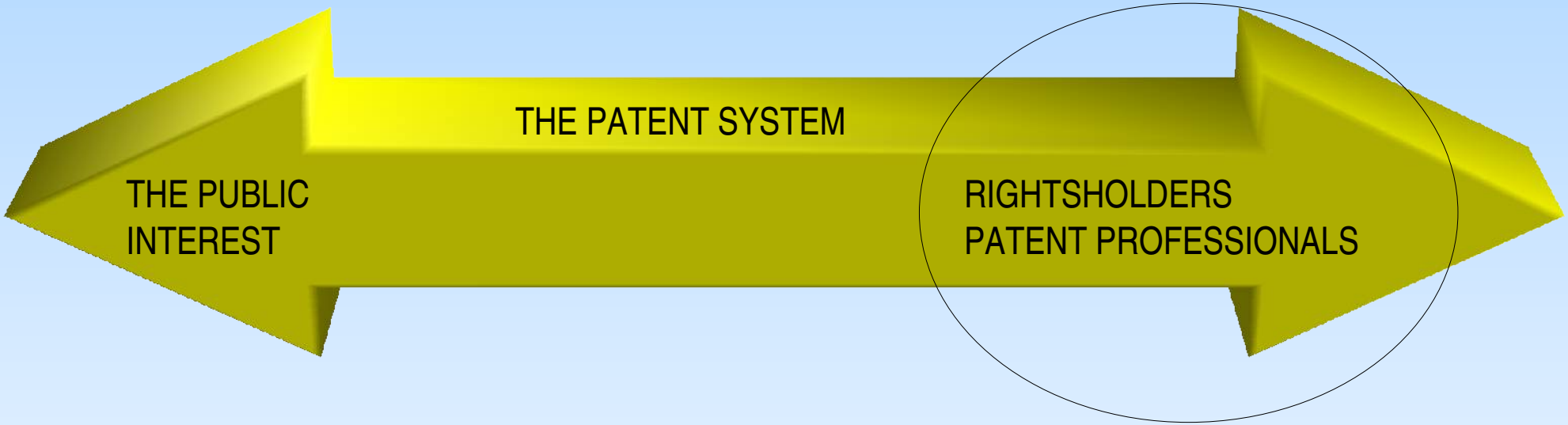
David Pearce, trainee patent attorney, writer for the IPKat (www.ipkat.com), IP law blog, 14 January 2007 (emphasis added)

No, it is NOT. To some this may be a 'game'...

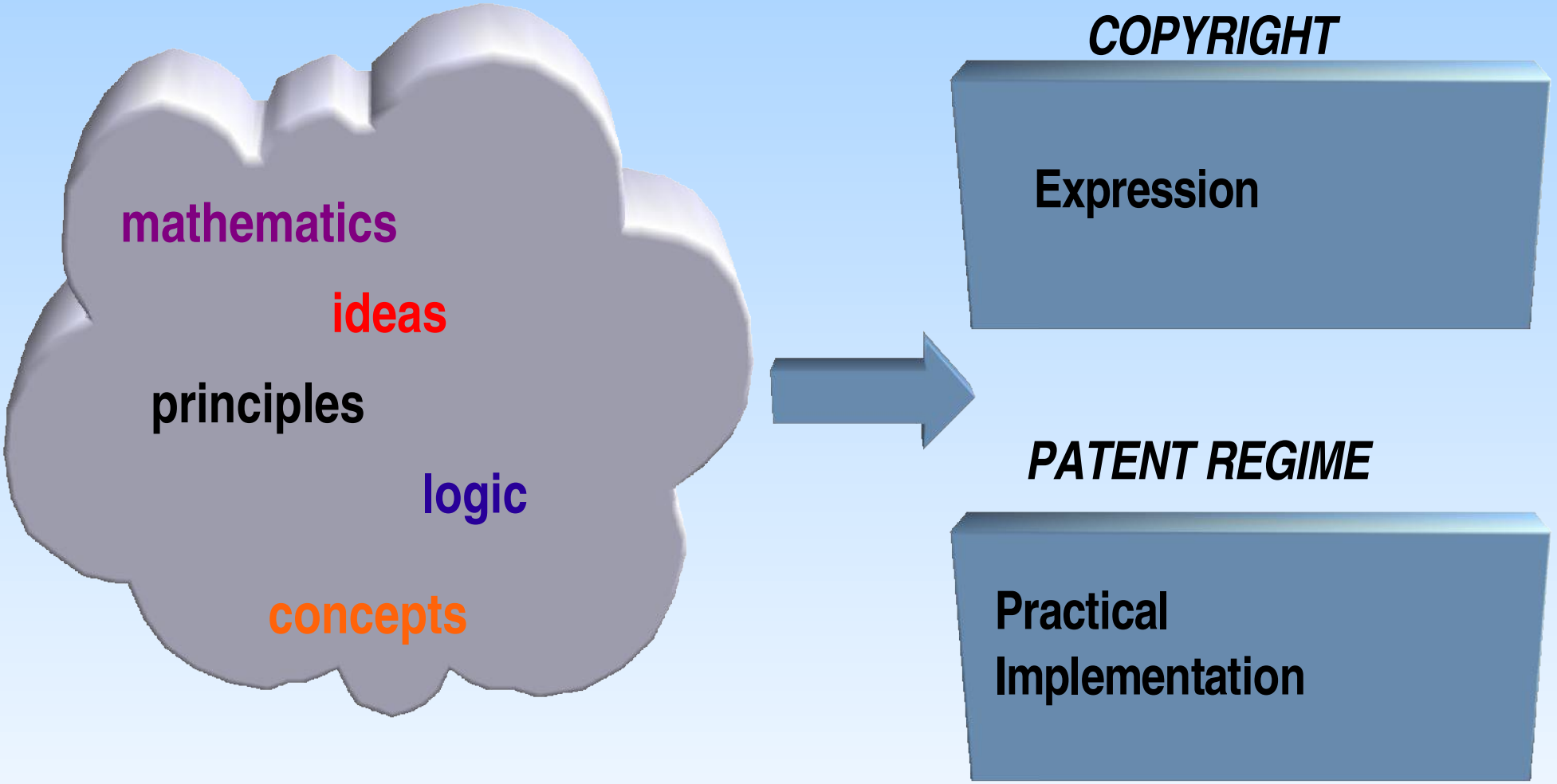
Where are we?



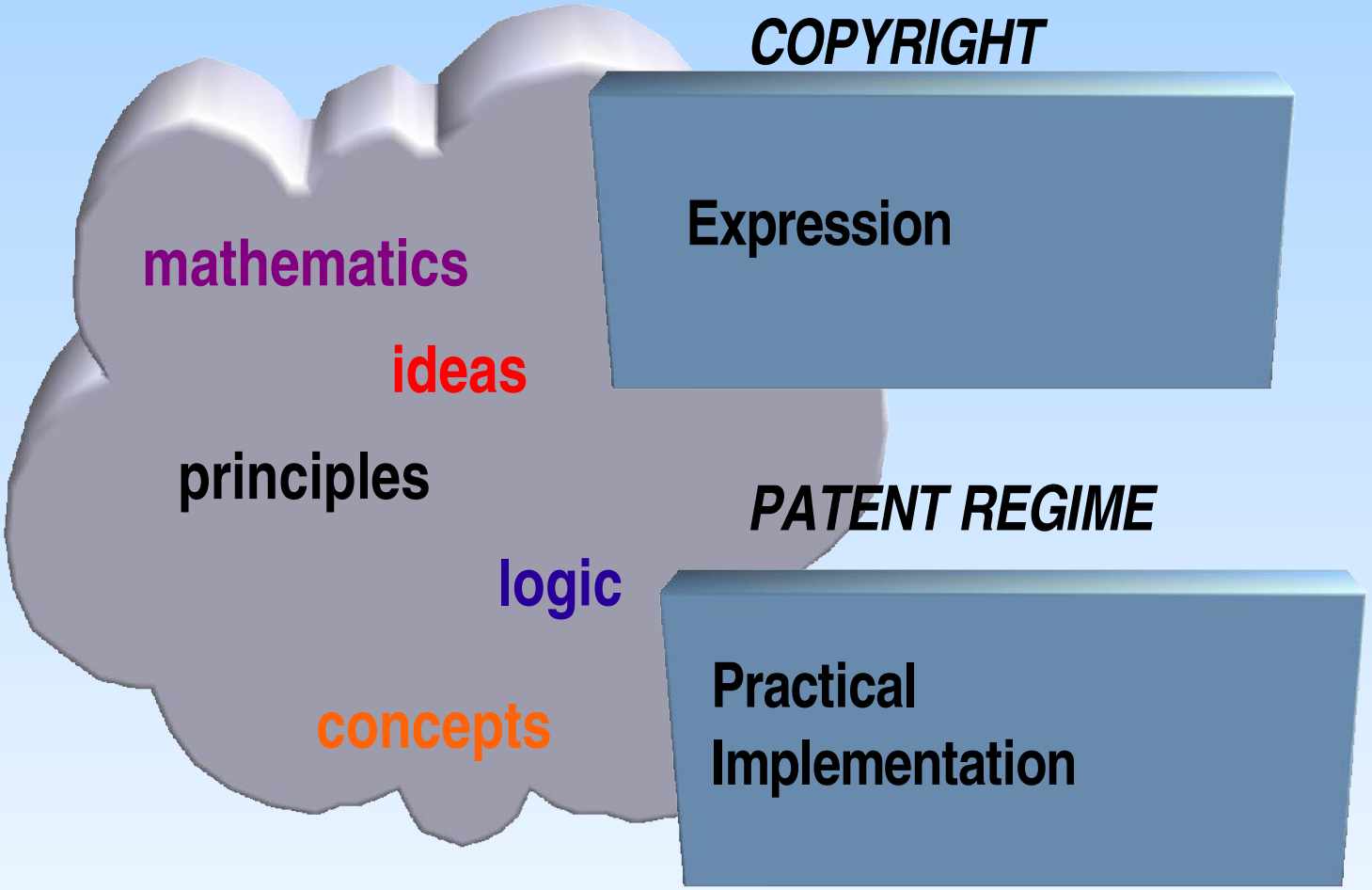
Where are we?



Where are we..part II



Where are we..part II



Crossing the line....

"The idea/expression dichotomy is a strong rooted copyright doctrine, and it was unlikely any court would cross that legal line to extend protection to ideas. The result would be stifling..Exchanging ideas in the creative realm is an integral part of the creative process. Without such permissible use creativity would stop *because there are only so many themes, ideas and plot lines from which artists can build new and unique works*." C. Whitman, 4/07/2006, University of Richmond School of Law, IP Blog (emphasis added)

Crossing the line....

"Not only does copyright law refuse to protect a general idea, it freely allows the publication of similar works if there has been no copying. *Imagine what would happen if literary works could be protected by patent. Literary creativity would tend to be stifled*, and authors would have to conduct patent infringement searches before the expiry of their copy-deadlines"

- Prescott QC, paragraph 30, CFPH

Crossing the line....

"One of the most fundamental rights in a free society is the right to obtain, use and re-use information and knowledge, subject to prevailing law. We all benefit from the *free flow of ideas*."

"The raw materials of creativity – *ideas, facts and data – should never be in private ownership*."

John Howkins, "Who Owns the Law? A New Approach to Intellectual Property" (Adelphi Charter commission) Emphasis added

Piano keys

The patent system – an idea free zone

Links between copyright and patent exclusions

Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (the 'Software Directive')

Links between copyright and patent exclusions

"Whereas, for the avoidance of doubt, it ***has to be made clear*** that *only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive*;

Whereas, in accordance with this principle of copyright, ***t****o the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under this Directive.*

- from the preamble to the Software Directive (emphasis added)

Links between copyright and patent exclusions

"In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

section 102(b) US Copyright Act (emphasis added)

Links between copyright and patent exclusions

"(2) The following in particular shall not be regarded as inventions within the meaning of paragraph 1:

(a) discoveries, scientific theories and mathematical methods;

(b) aesthetic creations;
(c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;
(d) presentations of information."

-Article 52(2), EPC (emphasis added)

Software innovation free of the shackles of patents

"it is worth noting that the software industry in America developed at an astonishing pace when no patent protection was available"

- Prescott QC, paragraph 35, CFPH

"There is, so far as we know, no really hard empirical data showing that the liberalisation of what is patentable in the USA has resulted in -a greater rate of innovation or investment in the excluded categories. Innovation in computer programs, for instance, proceeded at an immense speed for years before anyone thought of granting patents for them as such. There is evidence, in the shape of the mass of US litigation about the excluded categories, that they have produced much uncertainty. If the encouragement of patenting and of patent litigation as industries in themselves were a purpose of the patent system, then the case for construing the categories narrowly (and indeed for removing them) is made out. But not otherwise. Lord Justice Jacob, paragraph 20, Macrossan, Court of Appeal (red font emphasis added)

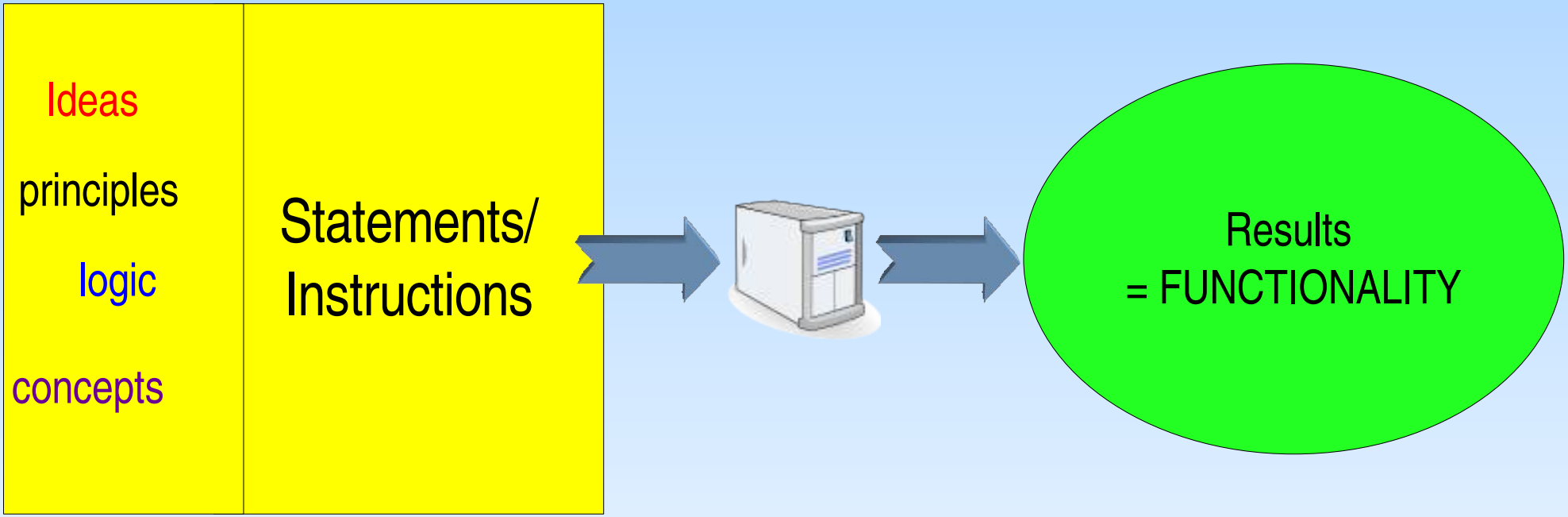
Welcome to the world of.....

Why software should not be patentable

What is software.....

"a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result"

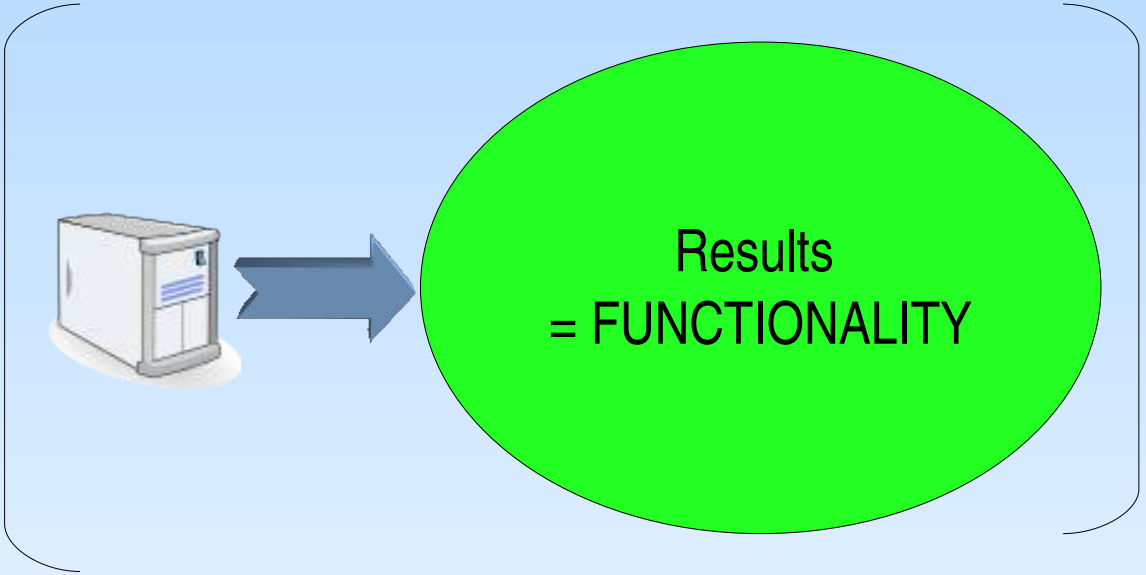
- U.S Copyright Act (emphasis added)



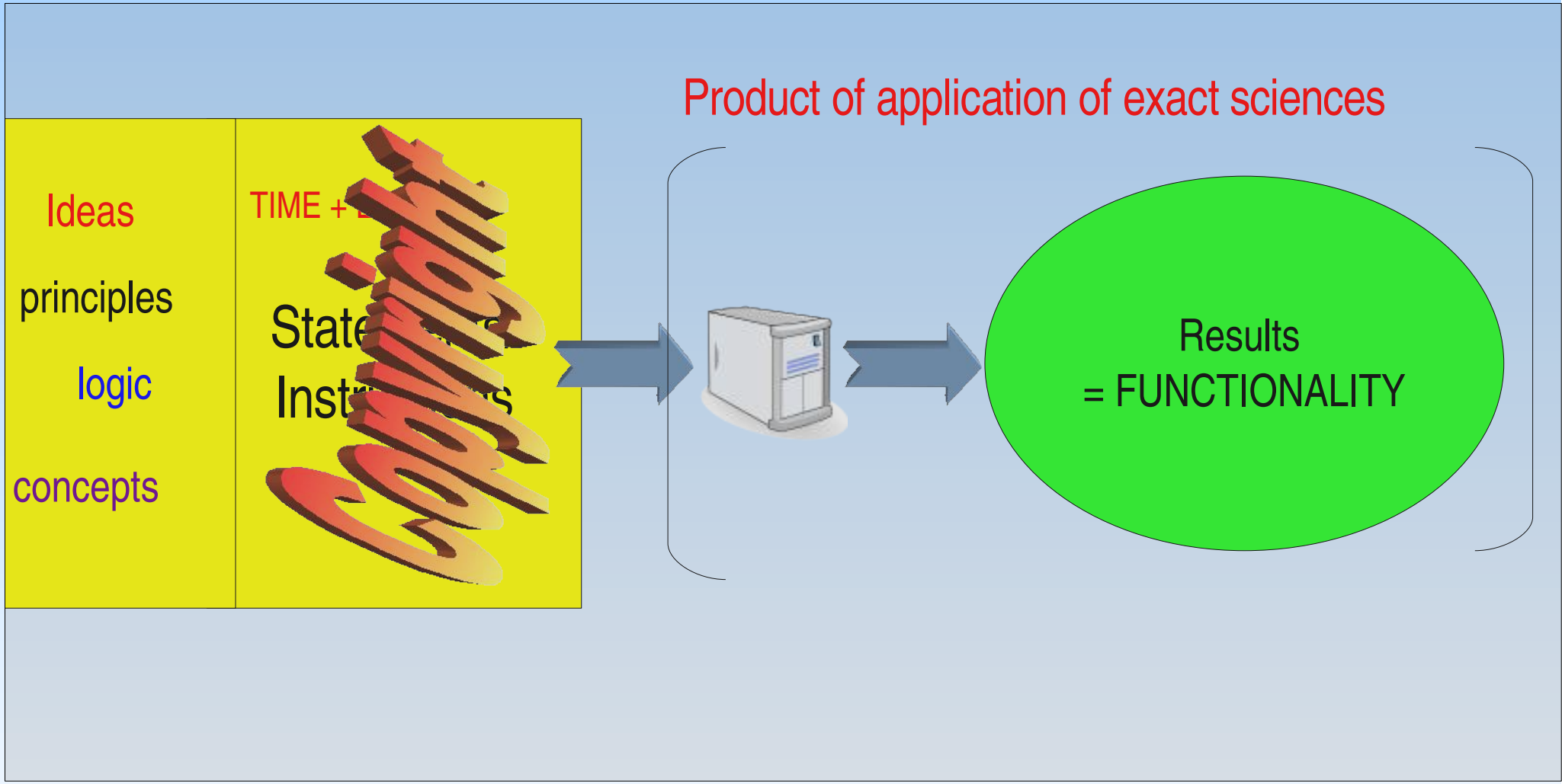
TIME + EFFORT

Statements/ Instructions

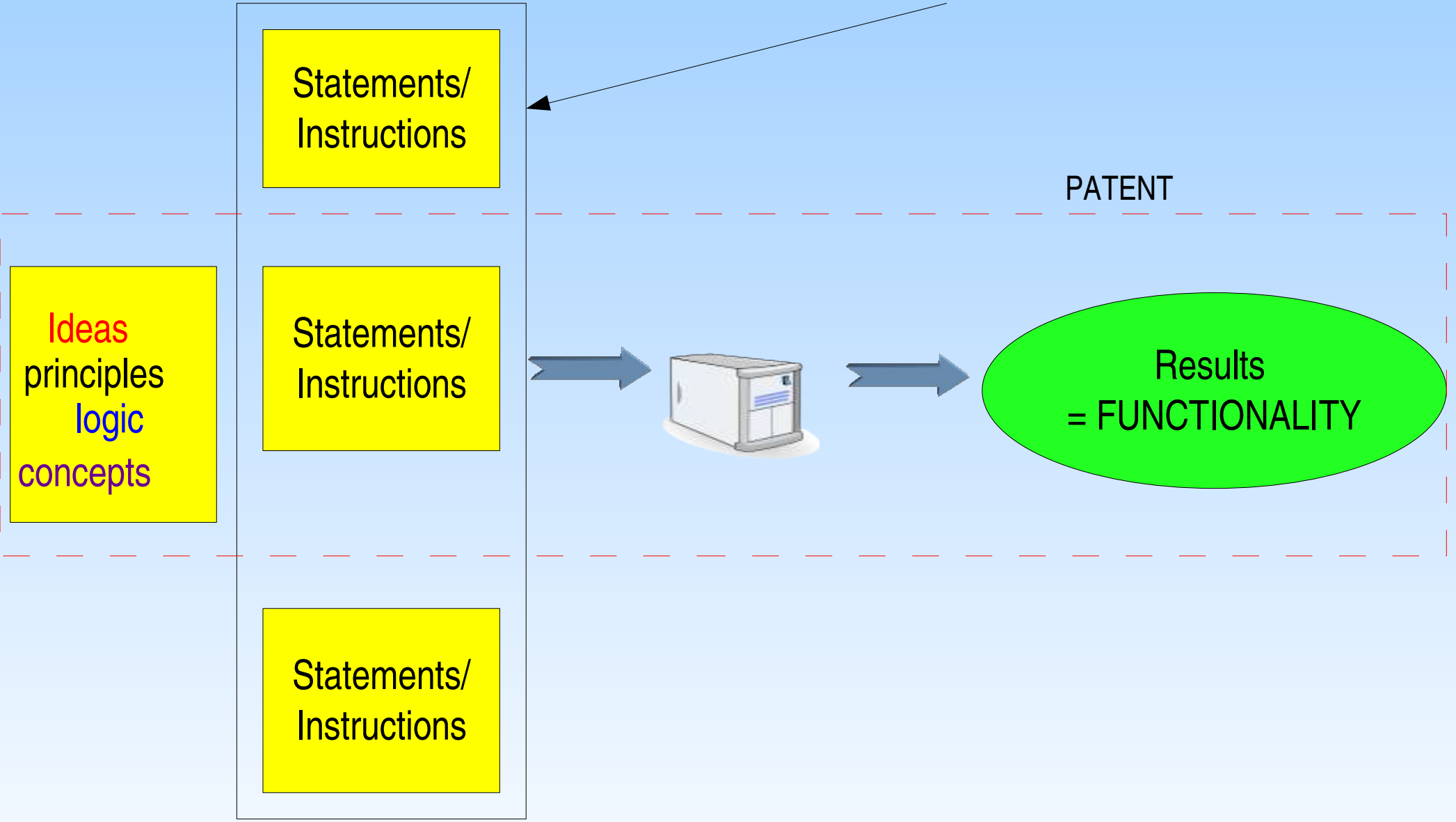
Product of application of exact sciences



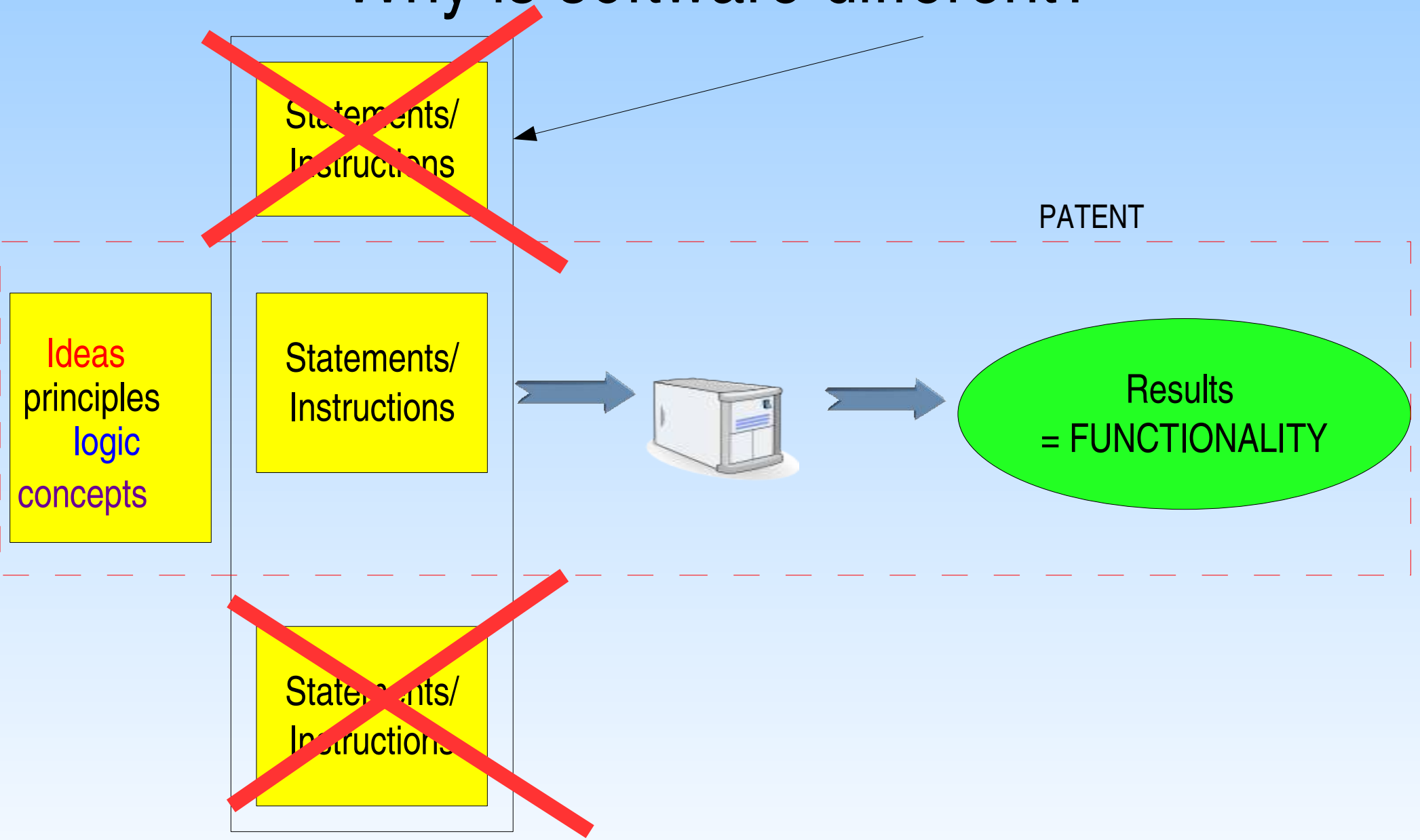
PATENT



Why is software different?



Why is software different?



Why do we have sw patents in Europe?

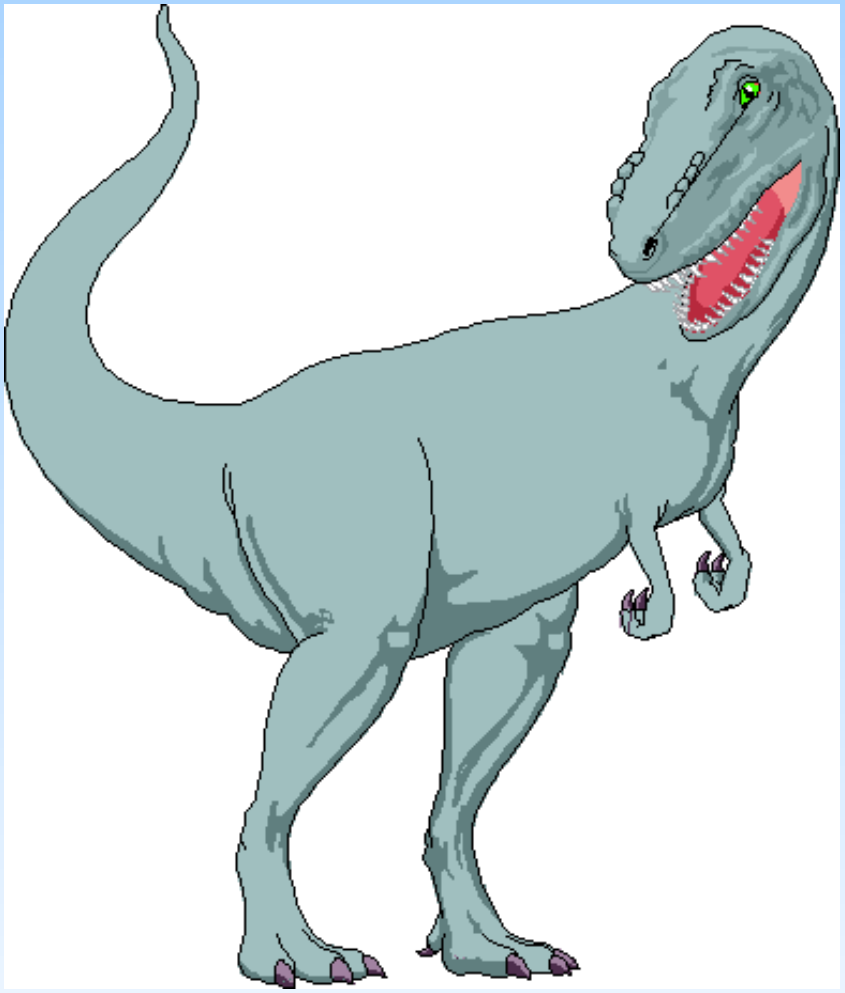
"Software Invention"

"Pure Software"

"Technical Software"

A 'technical' computer program or a 'pure' computer program are still both computer programs. If the outcome of patenting a computer program that supposedly has 'technical effects', is that the ideas, principles and functionality behind the computer program are monopolised and become the property of a single owner, then this is just as damaging as patenting the ideas, principles and functionality of a 'pure' computer program.

Dinosaurs



A question of choice

Closed source

FLOSS

A question of choice

Closed source

FLOSS

A question of choice

Closed source

FLOSS

"open source software represents the most significant all-encompassing and long-term trend that the software industry has seen since the early 1980s.IDC believes that open source will eventually play a role in the life-cycle of every major software category, and will fundamentally change the value proposition of packaged software for customers."

“Open Source in Global Software: Market Impact, Disruption, and Business Models" (IDC #202511; July 2006) - as reported by Tekrati, Inc (http://www.tekrati.com/research/News.asp?id=7614, 14th August 2006)

"some new forms of IPR scope extension risk leading to innovation resources being excessively allocated to defensive innovation"

"FLOSS provides opportunities in Europe for new businesses, a greater role in the wider information society and a business model that suits European SMEs; FLOSS in Europe is threatened by increasing moves in some policy circles to support regulation entrenching previous business models for creative industries at the cost of allowing for new businesses and new business models."

Rishab Aiyer Ghosh (UNU-MERIT), study commissioned by the EU Commission on the economic impact of open source software on innovation and the competitiveness of the Information and Communication Technologies (ICT) sector in the EU, November 20, 2006

THANK YOU

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