Submission

to the

Commerce Committee

on the

Patents Bill (235-1)

2 July 2009
Public Version
(There is no confidential version)

Introduction

1. This submission is from InternetNZ (Internet New Zealand Inc), a non-profit, non-partisan incorporated society which exists to protect and promote the Internet for New Zealand.

2. We do not wish to appear before the Committee to expand on this brief submission.

3. Our contact person and address details are as follows:

Jordan Carter
Deputy Executive Director
InternetNZ
PO Box 11 881
Wellington 6142

+64-4-495-2118 / jordan@internetnz.net.nz

4. This submission is public – there is no confidential version.

Summary

5. InternetNZ's interest in this bill arises from its experience with an e-commerce patent that was not 'inventive,' and from our concern that the Bill may allow for the patenting of software.

6. InternetNZ does not support software patenting and urges the Committee to pay close attention to the submissions by those groups familiar with the issues that software patenting would create (for instance, the NZ Open Source Society), for detailed and credible arguments as to why this should be avoided.

General policy matters

7. InternetNZ understands that it is not currently possible to obtain a patent in New Zealand for software, and that the current Bill will not necessarily change this.

8. InternetNZ further notes arguments by some parties that, due to New Zealand's current obligations under the WTO's TRIPS agreement (Article 27), Parliament is unable to exclude specific types of inventions from patentability and that software is one such type of invention.

9. InternetNZ does not necessarily agree with this point of view, as Article 27 is very broad, referring only to "fields of technology", and also given the references in Article 10 of TRIPS to software being best protected as a literary work under the Berne Convention (1971).

10. The New Zealand Parliament in our view does retain the ability under TRIPS to define what is and what is not patentable, and we consider that it would

be in the public interest to exclude software as a patentable invention, for the reasons discussed below.

11. In any case, both case law and matters of practice at the Intellectual Property Office provide restrictions on the allowability of patents relating to computer software. Legislating for this to occur would not be a major change from current practice.

12. InternetNZ supports a specific statutory exclusion of software from patentability.

Specific comments

Why should software not be patentable?

13. The growing importance of the Internet as an infrastructure that supports people in their social, economic and cultural pursuits is widely acknowledged today.

14. The Internet relies on software to underpin its functioning. With the growing importance of the Internet, and the software it relies on (whether that is commercially developed software or open source), one can no longer regard questions of free and open software development as a technical or narrow field. Everyone who uses or benefits from the Internet has an interest in software development.

15. Anything that Parliament does to possibly reduce the development of open and capable software could harm this important infrastructure. In our view, allowing for the patentability of software would make its continued development more difficult, which is not in the public interest.

16. Software patents reduce innovation. Patent owners can more easily monopolise a market than without such protection; such patents induce a chilling effect among software writers who would have to be checking their creative work against patents at every step; interoperability of various software platforms can be compromised if one type of platform obtains a patent over a key inventive step that others would have to replicate so as to allow end-to-end connectivity or service between systems.

17. We contend that **the production of software contains no 'inventive step' that is worthy of patent protection**. The true inventive step is in the creation of algorithms that software is an expression of, and algorithms themselves are not patentable.

18. **Software should instead be seen as a creative work** written in a computer language, similar to the writing of a book, where the plot of the book is the same as the algorithm in the software world. It is entirely legal for one author to write a book with a similar or even identical plot to another as these are entirely different creative works. One can reasonably claim there are whole genres of books and motion pictures that essentially portray the same plot in different ways and this same position should be allowed to exist within the world of software, where one algorithm may be encoded in software in many different ways.

19. If patents on software are granted then the effect is to prevent any alternative encoding of that algorithm. This is the same as allowing a patent on a book that then prevents anyone else from writing a book with similar elements of plot. In the same way that books receive adequate protection from copyright laws rather than patents, software too should be excluded from patent protection and receive full copyright protection.

20. Given the small size of many New Zealand software development companies, and given the state of the economy, it would seem wise to avoid the possible imposition of new and high transaction costs on the industry. To ensure this does not happen, Parliament should explicitly exclude software as a patentable object.

21. InternetNZ notes that the disallowance of software patents is widely accepted by many other jurisdictions, including the European Union, where a Commission proposal to allow for patenting of software was heavily defeated in the European Parliament in 2005.

22. The track record of software patents in those countries that allow them is believed by many in the industry to have led to the patenting of a vast range of 'obvious' inventions. There is a strong view within the industry that almost all granted software patents are for 'obvious' algorithms, which leads to the conclusion that the relevant patent authorities do not have either the appropriate skills or resources to correctly examine the patent submissions.

23. This has led to the misuse of the patent process by companies who can afford to submit large numbers of patent requests for trivial software development in the knowledge that some will inevitably be granted. The impact of this is a significant cost to any competitor who wishes to challenge the patent, along with the high risk of knowingly infringing that patent until an effective challenge is made. Rather than take this path, it appears that in those jurisdictions most companies are simply joining the game of registering 'obvious' patents in order to protect themselves, despite this adding no value to their economies or human knowledge.

24. Finally, the Society notes that the review process which led to the current Bill did not include extensive or thorough consideration of the benefits or costs of allowing for the patentability of software. The status quo of it being difficult to patent software should be reinforced in the absence of any apparent reasons to change it.

25. **The issue of computer software patentability could be resolved by adding a clause to section 15 excluding computer software from patentability.**

Other matters: examination to determine inventive step

26. Regardless of whether the Committee accepts or declines our advice to recommend a provision preventing the patenting of software, InternetNZ fully supports the requirement in the Bill for the Commissioner to establish by examination that there is an inventive step set out in the patent.

27. Several years ago a North American company, DET, managed to register a patent for multi-language multi-currency online transactions, and then demanded royalties from dozens of New Zealand companies which had e-commerce systems. This patent threatened many NZ online businesses. InternetNZ got involved on their behalf and our lawyers found the patent was not enforceable due to technical errors with filing dates.

28. The advice from our lawyers was that the patent would never have been able to be registered if the Commissioner of Patents had to determine there was a genuine inventive step – as is the case in most jurisdictions and as this Bill requires. It is the examination requirement which has been missing, and which we support.

Other matters: implications of trade negotiations

29. The Committee should note in its report on the Bill the importance of the issue of patenting of software, especially given the possibility at some point in the future of the negotiation of a trade agreement with the United States of America.

30. United States trade policy includes efforts to make it easier to patent software, a logical extension of U.S. policy to promote and protect its software industry.

31. Understanding that this is not a core issue for the Committee to consider at this time, we simply note that such an approach to patent law would not in our view be in New Zealand's interests.

Recommendations

32. InternetNZ recommends that the Committee add a clause to section 15 excluding computer software from patentability.

33. InternetNZ commends the intention to require examination to establish an inventive step.

With many thanks for your consideration,

Yours sincerely,

Jordan Carter
Deputy Executive Director