Patenting software in New Zealand – in or out?

Posted on 08/07/2010

As is the case in Australia, New Zealand's patent law is currently being revised, though the New Zealand reforms are much further through the parliamentary system. New Zealand law has, of course, much further to come to meet modern standards: New Zealand law is currently based on the 1949 United Kingdom Act, which was replaced in that country in 1977, and in the case of New Zealand's closest neighbour, Australia, in 1990.

The New Zealand Patents Bill 2008 has been to the Commerce Select Committee and was reported back in March this year. Under the bill, New Zealand will change from examining only for novelty to examining for novelty, obviousness and utility, and from local novelty to absolute novelty, the objective being to reduce the number of patents of dubious quality being granted. Under the first draft of the bill, oppositions were removed, but following select committee consideration are now back in, following widespread concern from a number of quarters.

However, by far the most controversial topic has been patentability of software. The original bill made no specific mention of it and it was widely assumed that computer

programs would continue to be patentable as they are currently, provided they meet the standard tests for patentability.[1]

At the select committee stage, a well organised lobby of proponents of open source software managed to get the attention of a number of the select committee members, and to some extent caught many of those larger software developers in favour of patenting software napping. Given previous consultations on the exposure draft of the bill, and the wording of the bill itself, they had not unreasonably assumed that software patents would stay. Few made submissions to the select committee in support of patenting software.

It therefore came as a complete surprise when the select committee reported the bill back with a specific exclusion of computer programs from patentability. [2]

The select committee's alarmingly limited understanding of how patents work is illustrated by this statement:

"A number of submitters argued that there is ‘no inventive step’ in software development, as ’new’ software invariably builds on existing

software. They felt that computer software should be excluded from patent protection as software patents can stifle innovation and competition, and can be granted for trivial or existing techniques. In general we accept that position."

The select committee considered allowing embedded software only, but concluded that would be too difficult to manage and shut out computer programs altogether, on the

basis of their "understanding" that this would be unlikely to prevent the granting of patents for inventions involving computer software.

Apart from the observations that patents cannot in any event be granted for "trivial or existing techniques", that many, indeed most, inventions build on something that already exists, and that the Bill's substantive changes considerably raise the bar for patentability in New Zealand, the select committee's change would put New Zealand out of step with its trading partners around the world. New Zealand companies would still be liable for infringement of software patents in their overseas markets.

At the time of writing the Patents Bill is sitting well down the list of bills on the parliamentary order paper, but is likely to be dealt with before the end of the year. If changes are to be considered, the bill could be referred back to the select committee, or changes made by way of supplementary order paper during the passage of the bill. In the meantime, there is a great deal more lobbying underway, on both sides of the debate.

If you have any legal issues you would like to discuss contact Rosemary Wallis.

---

[1] Over 1000 software patents have been granted in New Zealand since 1995, and about 20 percent of them are held by New Zealanders.

[2] Clause 15(3A): “A computer program is not a patentable invention.”