

Software patents questioned

Posted on 27/11/2009 by [Chris Way](#)

Sectors of the software industry have voiced their concerns over the patent-eligibility of software as part of the review process of the Patents Bill, claiming that patents for software stifle rather than promote innovation. This was previously reviewed back in 2005 and the conclusion then was that there was no reason to treat software differently to other technologies. However, it now appears that there will be some review and possible restriction on the patent-eligibility of software, although nothing has been officially released as yet.

New Zealand (and Australia) has a very broad definition of what constitutes an invention and this generally covers software applications and business methods, provided they are more than a mental process (i.e. they are embodied on a computing device). Unlike many other jurisdictions, there is no definition of invention using negative limitations as to what is not an invention, although this is introduced to some extent in the Bill. The New Zealand approach is accommodating to new technologies and those within the profession question the need for change when case law already provides a reasonable degree of certainty.

There are questions over whether restriction of patent-eligible subject matter is required in view of other changes in the Bill, namely a move to absolute novelty, examination for inventive step (not just novelty), and no longer giving applicants the benefit of doubt. These will all make obtaining patents more difficult, including those for software.

Perhaps a better way of approaching the issue would be to better train examiners and place greater emphasis on searching non-patent literature, at least while the software patent base grows.

Irrespective of the outcome, this is likely to further delay passage of the Bill, which is being reviewed by the Commerce Committee. Under the existing transitional provisions, any change in patent-eligible subject-matter will not be retrospectively active and applicants may wish to consider establishing an early New Zealand filing date for software or business method inventions. One worry is that the legislators will over compensate so that even software inventions including technical advancements will be excluded, although TRIPs may provide some safeguard against this.