Government maintains its hard line on software patents

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Recent rumours that there could be a re-wording of the exclusion of computer programs from patentability have been quashed by Commerce Minister Simon Power. Consequently, the blanket ban of computer programs from patentability remains and it is unlikely there will now be any change to this. However, the Minister repeated that inventions involving "embedded" computer programs "should be able to obtain patent protection" and has tasked the Intellectual Property Office of New Zealand (IPONZ) with the somewhat daunting task of drafting guidelines as to the types of inventions that will be allowed. Whether such a hotly debated matter should be left to IPONZ as opposed to those elected to define New Zealand's policies remains to be answered.

Despite concerns having been raised by various parties, it appears that the scope of the exclusion is still not fully appreciated and it is unclear what effect any guidelines will have with the proposed statutory exclusion clause overriding them. The change creates a high level of uncertainty in that any patents granted according to the IPONZ guidelines will be open to challenge based on the wording of the statute (when enacted). This is contradictory to the Commerce Comittee's desire for a clear and

simple approach. Surely any limitations of the scope of the exclusion would be best defined in the legislation, with IPONZ providing guidelines around those, particularly in view of the Committee having accepted that there is no agreed definition of "embedded software" or offering much in the way of explanation as to which inventions should or should not be patentable.

The definition provided in the Committee's report is that "embedded software" is "computer software which plays an integral role in the electronics it is supplied with (e.g. cars, pacemakers, telephones and washing machines)". On first reflection, this may seem helpful, essentially distinguishing between software that is used with PCs and that used to provide functionality within a piece of equipment, but it is quickly possible to see problems with it. Consider, for example, an operating system. It would be hard to argue that an operating system does not play an integral role in the computer in which it is installed, it essentially transforms a useless box of electronic components into a useful tool. However, it is unlikely that the Committee would have intended such software to be patentable. The proponents of open source software certainly would not have. This is further complicated by the ever increasing intelligence given to devices along with the ability for users to interact with them, blurring the lines between what is a computer and other electronic-controlled devices. Smart phones, for example, will clearly not fit neatly into either of these categories.

Reasoning given for the exclusion includes the argument that patents in the software field stifle innovation. One assumes that this is not considered to be the case in other fields as no similar exclusions are proposed for other technologies. Why software

should be treated different from other technologies is difficult to fathom, particularly in view of the Ministry of Economic Development's more considered review which concluded that there was no reason to treat software differently. Only time will tell whether removal of a barrier to imitation will actually promote innovation and the investment required to bring innovations to market, or whether the temptation of using another's creations will be too hard to resist.

Without any evidence or analysis backing the exclusion, it is difficult to assess what the effects will be. Further, these will not be felt in the short to medium term because any pending applications or granted patents in New Zealand that cover software inventions will remain pending or in force (patents have a 20 year term). Only applications filed after the new law comes into force will be assessed under the new exclusion clause. Even after expiry of the existing patents, the exclusion is only likely to have a significant impact for those Kiwi developers that market their products solely in New Zealand. The potential risk from damages overseas (particularly the US) typically dwarves that in New Zealand to negligible levels and exporters will be required to continue to assess freedom to operate in much the same way as they have always done. With the government pushing for the development of medium to large enterprises with a bias towards exporting, it is difficult to see how this fits into their overall strategy or the wider goal of trans-Tasman harmonisation (Australia allowing patents for software). Further, it is difficult to see how the targeting of these smaller developers will provide any significant benefit for New Zealand as a whole although it is possible that the exclusion will enable more enterprises to stay afloat or even develop beyond the startup phase. Without any indication as to the numbers of enterprises that have been adversely

affected by patents, this is difficult to evaluate.

While the focus on the exclusion has been on the freedom of Kiwi developers to fearlessly introduce their developments, this is a very blinkered view. The increasing competence of programmers in developing countries such as India and China should not be forgotten. Copyright provides protection against direct copying but does not provide any bar to others copying the concepts behind a computer program. Without the additional protection provided by patents, Kiwi developers will be more open to overseas-originating competing products, at potentially much reduced prices.

There is also the possibility that the proposed exclusion will impact on trade negotiations with other countries such as the US. While not likely to be the most significant issue in any negotiations, it is possible the exclusion could cause distraction, making it more difficult for the government push through other initiatives.

It is difficult to estimate when the Bill will be enacted because there are no hard timelines for its progress through Parliament. However, it is anticipated it will come into force before the end of 2012. Those on both sides of the debate will be keenly awaiting the release of the IPONZ guidelines.

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