TPP and the exclusion of computer programs from patentability

14/12/2011 by Chris Way

Paul Matthews, the Chief Executive of the New Zealand Computer Society, has expressed concern in the *National Business Review* over the possible reconsideration of the exclusion of computer programs from patent protection. As we reported in previous articles, it was always possible that this proposed legislation, whether intentionally or not, could be used as a bargaining chip in the Trans-Pacific Partnership (TPP) negotiations. Those in support of the software exclusion appear concerned this may now be a real possibility.

It goes without saying that any agreement involves compromises, and we can only guess at whether this is actually being used to secure more favourable terms around Pharmac, the dairy industry or something else.

If the rumours of the change in policy do ring true, this does not mean that New Zealand would have to revert to the status quo of essentially all forms of technology being considered patentable. The US has limitations on what forms of invention are patentable and this includes limitations on which software inventions are patentable. It seems unlikely that the US could reasonably ask New Zealand to protect inventions not patentable in the US and a similar scope of exclusion could be enacted in New Zealand by adding just two words to the

proposed legislation, *as such*. This wording has been used elsewhere to distinguish between software inventions that merely manipulate data and are not patentable, and those that address some form of technical problem and are patentable.

Those against software patents may not be pacified by such a change but as seen in some courts of Europe, with an exclusion along these lines being open to interpretation, it is possible to effect a broad exclusion even if it is not enacted as such. However, in the absence of economic evidence, we question the need for a broad exclusion of software from patent protection. As stated by Paul Matthews, software, IT services and high-tech manufacturing revenues have grown to $5 billion and are flourishing under the existing regime with software patentable, is there the need for change?