

17 August 2009

Support Document

This document accompanies the Patents Bill submission from Egressive Limited and Bevan Rudge

Our oral submission to the Commerce Select Committee is scheduled via teleconference on 20 August 2009.

Contact: David Lane, Egressive, dave@egressive.com 021 229 8147

We request that the select committee recommend the **explicit exclusion of computer software from patents**. **Computer software is sufficiently protected by copyright**, just like other creative works.

Software Innovation Stifled by Computer Software Patents

"If people had understood how patents would be granted when most of today's ideas were invented and had taken out patents, the industry would be at a complete standstill today." -- Bill Gates, Microsoft Corporation 1991¹ referring to the computer software industry.

Of course, unlike most of us, Bill Gates found himself at the helm of a multinational corporation with a monopoly in computer software.

He goes on to say:

"The solution is patenting as much as we can. A future startup with no patents of its own will be forced to pay whatever price the giants choose to impose. That price might be high. Established companies have an interest in excluding future competitors."

20 Years is nearly eternity for computing field

Moore's Law, first described by [Intel](#) co-founder [Gordon E. Moore](#) in 1965. His law can be paraphrased as follows:

"Every 18 months, the processing power of the average computer doubles and its price halves."²

In other words, the computing power per dollar quadruples every year and a half.

In the 20 year span of a New Zealand patent, the computing power per dollar has increased approximately 100,000,000 times. The sleek \$500 iPhone some of us have in our pockets is on par with the processing power of a multi-million dollar super computer from 20 years ago which required a large building, a team of operators, and power substation to run.

Remember back to the computer you used in 1989. Remember 5 ¼" floppy disks? If the software on that computer had been patented, we could well still be using that computer today.

Computer Software innovation occurs without patent protection

In 2002, when the initial request for submissions on this Patents Bill was made, software patents were not yet recognised as the threat they're now seen to be.

Only 14 submissions were received, and these failed to sway the authors of the Bill to exclude software patents.

The MED, in its 2005 "Review of the Patents Act 1953: Boundaries to Patentability"³ found that:

1 Source: <http://web.archive.org/web/20010218085558/http://bralyn.net/etext/literature/bill.gates/challenges-strategy.txt>

2 Source: http://en.wikipedia.org/wiki/Moore%27s_law

3 Source: http://www.med.govt.nz/templates/MultipageDocumentPage_____1461.aspx#P457_109172

"It is also argued that the software industry has flourished in the past without the incentive of patent protection. Much of the software developed in recent times is not the subject of patent protection. It has even been argued that it was the lack of patent protection, and consequent free access by developers to the innovations of others before them, that is responsible for the growth and prosperity of the software industry."

Corporations try to slip bad patents through the system to stifle competition

That same year, however, the New Zealand software industry woke up to the threat: Microsoft attempted to patent a method for saving word processor data in files using something called XML to organise it. Their patent application was seen as sufficiently innovative by IPONZ assessors to warrant awarding a software patent — the assessors were apparently unaware that

- 1 The use of XML for storing data in files was routine for most modern computer software packages at the time, and there was substantial prior art to demonstrate that Microsoft's assertion of originality was incorrect.
- 2 They also failed to recognise that the same patent application had already been denied as unoriginal in the US, European Community, South Africa, and Japan.

Huge risk to NZ industry from multinational Computer Software Patents

Luckily for the us, a couple members of the New Zealand Open Source Society — interested in protecting the freedoms of software developers everywhere — found out about this application and mounted a costly and gruelling, but ultimately successful challenge to Microsoft's application by providing evidence of prior art. Had these individuals not persevered, Microsoft would now be able to regulate NZ's software industry by the terms under which it licensed this patent, perhaps even denying a license to those pieces of software that it saws competing with its own offerings. And it would still have more than 15 years left to run on its government granted monopoly.

Copyright is already in place, and does exactly what we need

Software, like other forms of creative expression including film, music, writing, and art, are *already amply protected by copyright* in New Zealand.

Patenting a computer software concept is unnecessary and undesirable to all of society. It would be like patenting a musical cord progression, or a film script, or a novel plot device, e.g. a zombie thriller, a coming of age story, or a murder mystery. As you can well imagine, if these sorts of patents were possible, it would devastate the music, movie, and publishing industries. Imagine the impact it might have on New Zealand's cultural heritage if iconic stories were patented.

If that sounds ridiculous, consider the website <http://plotpatents.com>, which exists to help people patent applications for their storylines in jurisdictions not explicitly excluding patents on these forms of creative expression.

NZ's software industry is already innovative, only multinationals will benefit

Computer software, like these other forms of creative expression, does not need patents to encourage innovation — innovation is already rampant in these areas without patents.

By not explicitly excluding computer software from patentability, New Zealand's entire software industry, made up almost exclusively of tiny companies compared to their overseas competitors, would be stopped in its tracks by the mere possibility that any given line of computer software code might infringe on someone else's computer software patent.

Hundreds of thousands of software patents have been issues in the last decade, many of them trivial. The task of assessing whether our daily work is compliant with patents, domestic or foreign, is impractical. The cost of compliance would make software development unviable.