Software Debate Continues

Posted on 24/09/2009 by Chris Way

There has been much debate and controversy in recent month's surrounding the proposed changes to New Zealand copyright law, particularly s92A which initially required ISPs to disconnect customers after 3 allegations of copyright infringement, with little or no consideration as to whether the allegations had any basis. This low-cost but simplistic solution was clearly open to abuse and the revised proposal provides an independent tribunal to assess allegations, rather than placing the burden on ISPs.

Proposed changes to the New Zealand Patents Act have received less prominence in the media. The changes aim to modernise the law and will make it more difficult for patents to be granted. The key changes are that, to obtain a patent, the same invention must not have been previously disclosed anywhere in the world (rather than just in New Zealand); an invention must be non-obvious with regard to prior solutions (not simply novel); and issues open to debate during examination will be decided on a balance of probabilities approach (as opposed to giving applicants the benefit of doubt).

As reported in the National Business Review on 14 August, one sector that has been vocal on these changes is the software industry, particularly those in favour of open

source software. Open source arrangements essentially enable software developments to be made available for free, provided that those who make use of that software agree to distribute any developments on a similar basis. Many advocates of open source software are calling for the government to use the current re-drafting of the legislation to exclude software from patent protection. Some of the arguments for this are that patents stifle rather than promote innovation, that software merely constitutes an algorithm, and that, outside of open source distribution arrangements, copyright provides adequate protection for software.

The question of whether patents in general promote innovation (by forcing inventors to disclose their inventions) is also a thorny issue but why should computer-related inventions be handled differently from other inventions? Due to the significant impact on our everyday lives, it is even arguable that they should be given stronger protection.

There are widespread misconceptions with regards both patenting of software and what protection copyright provides. For example, even under the present regime, a mere algorithm is not generally protectable as it is just a mental process and it is at least usually necessary to limit to a computer implementation of the algorithm.

By making it harder to obtain granted patents, the changes to patent law will result in fewer software patents and help to ensure that those granted are restricted more specifically to inventive aspects. Also, since Patent Office examiners tend to focus on prior patent publications when challenging the patentability of an invention, it should become more difficult for inherently "bad" patents to be granted as more applications

are filed and the "library" of earlier publications available to examiners grows.

If the New Zealand software industry is to continue to grow and establish more medium to large size companies, it is vital that informed decisions are made based on a good understanding of the options available. Open source distribution arrangements or reliance on copyright may provide the most appropriate and commercially successful solution in some instances, but this is not always the case, due largely on the developer's business model and the type of software. Other considerations may include a need for a return on investment or adequate protection may be required to give outside investors the confidence to provide capital. Patents can assist in achieving these goals. However, patents are also not appropriate or the best solution for all circumstances (e.g. developments likely to have a short life) and it is important that a considered strategy is drawn up at an early stage.

For more information see guide for Software and Computer-Related Inventions.