

15 April 2010

Hon Simon Power  
Minister of Commerce  
C/- Parliament Buildings  
Wellington

Dear Hon Power

I note with interest the **exclusion of software patents under the revision of the Patents Act** and your subsequent reported support for this.

The New Zealand Computer Society Inc (NZCS) is the professional body for ICT Professionals and is a non-profit charitable organisation focusing on ICT education and professionalism. The Society has been deeply involved in all areas of ICT at all levels for the last 50 years and works with industry, academia and Government to bring about positive change in this area for the benefit of all New Zealand.

The Society is constitutionally independent and forms positions on matters of interest based on the principle of what is best for New Zealand, and best for the ICT sector as a whole. We engage in active ongoing discussion and consultation with all stakeholders, however our position can be viewed as truly independent and free from influence.

As the professional body for ICT professionals it is appropriate for us to write to you and outline our position on this matter, and to **support the conclusions of the Commerce Select Committee** which I understand you have subsequently endorsed.

The Society is currently conducting a poll of ICT Professionals through our membership and at this stage it appears that approximately **80% of ICT Professionals support this position**. This is significant and indicates very strong support from the sector. As per the Society's Constitution, we must therefore take a public position in support of the Commerce Select Committee and have outlined some of the reasons for this support below.

### **Balanced View**

We are of the view that there are significant advantages *and* disadvantages to removing patentability of software, and there are a number of significant considerations and issues that need to be addressed. However on balance, the Commerce Select Committee's recommendation is one we support.

Notwithstanding the points raised by the Committee, we perhaps see the rationale for removing software patentability as being slightly different, however.

## **Right to Protect Property**

Firstly, we strongly believe that every individual or organisation has a fundamental right to protect their own property, and consequently support the concept and implementation of Copyright and Intellectual Property within reasonable bounds.

However this has to be a balanced view. As you are aware, the issue of software patents is a deeply complex one, but inevitably the best interests of New Zealand and an innovative New Zealand environment must come first (which is the reason for patents in the first place).

The point is, consideration must be given to what software is and whether it is simply the digital manifestation of a “real world” concept, an algorithm, a combination of science and art, or something different again in the context of patentability.

## **Open Source vs Proprietary Software**

The Society is part of a sector that is sometimes divided between Open Source and Proprietary Software. We work with those at either end of the open source/proprietary software spectrum, and it is outside our mandate to consider one model better or worse than the other – both exist, and both must have the opportunity to co-exist.

However we do **not** see the software patent issue as an Open Source vs Proprietary Software issue, and hence our support for the removal of software patentability should not in any way be construed as taking a position for or against an open source or proprietary model over the other. We believe the issues impacts upon proprietary software in a similar fashion to open source software.

## **Patents versus Copyright**

Conceptually, patents protect concepts or an idea whereas Copyright protects manifestation of an idea. Therefore consideration must be given to the nature of software before then considering whether patentability is appropriate.

We believe that in the same way you cannot patent a book or a movie, which successfully rely on Copyright, Copyright provides sufficient protection for software. By definition software is built upon a large layer of concepts and prior work, either knowingly or otherwise, much of which is often obvious within the context of the patent definition, and this unique nature cannot be ignored.

Copyright provides protection against a company or individual copying a competitor’s product, is entirely appropriate, and a protection we very much continue to support. The difference is that in many cases software patents prevent the fair use of what we consider the fundamental concepts and actions of the Internet and software, whereas Copyright protection is appropriately limited to manifestations.

If software is viewed as a manifestation of “real world” concepts then the real-world concept can be patented without the need for a separate software patent. From the perspective of a manifestation, Copyright provides the appropriate protection and a software-specific patent becomes superfluous.

If on the other hand software is considered as a separate concept from the physical world it must be considered an algorithm, in which case it would not pass the test of patentability in most jurisdictions.

## **Trivial Patents**

As a concept software patents have some rationale, however in practice they have led to numerous unreasonable outcomes affected all developers and computer users, with patents applying to what many would regard as “trivial” or “obvious” processes.

For example patents such as the Eolas Patent (“Distributed hypermedia method for automatically invoking external application providing interaction and display of embedded objects within a hypermedia document”) have, in our view, very negatively impacted on ALL users of the web by causing the disabling of unfettered interaction with things like Flash and ActiveX.

## **Damage to Innovation**

Given the nature of computer software, patents have the potential to (and in many cases have) significantly stifle innovation.

Software patents both provide a company with a significant weapon against fair competition, and have also led to “patent squatters” who attempt to obtain patents for early computing concepts then sue software companies that have built a product utilising these concepts. Neither of these are beneficial to innovation in New Zealand or around the world.

Microsoft Founder Bill Gates reportedly stated in 1991 that *“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”*. This would certainly appear to be somewhat prophetic given the problems that have emerged since in the jurisdictions where software patents have been exploited.

## **Other Considerations**

There are a number of other matters which the Select Committee members have no doubt considered such as the absence of manufacture of material goods (which is an essential component of non-software patents), without which software patents are reduced to simply monopoly protection rather than promotion of innovation.

At very least, many of the developments in software have occurred during times software patents weren't available, hence there is no evidence to suggest that innovation does not or cannot occur in the absence of patentability.

## **NZCS Position**

NZCS represents a broad church of ICT professionals and no doubt some of our members have different views on software patents (as with all things). However in the same way that Section 92a of the Copyright Act was harmful, albeit with the best intentions, the evidence certainly appears clear that software patents are simply too potentially harmful to our sector, and in fact innovation in New Zealand, to support.

Whilst this letter has focused on the main reasons we cannot support software patents in New Zealand, it should also be noted that there are good arguments to be made in their favour. People should have the option of commercial exploitation of their creations, however we believe this protection is inherent and appropriate in Copyright.

Hence on balance, and noting there are differing views, we **strongly support** the Select Committee's recommendation in relation to software patents and the position you have been reported as taking as Minister in support of this recommendation.

We believe the Select Committee considered this issue at length and gave good weighting to all competing factors.

We would also welcome the opportunity to discuss this further with you at your convenience if you believe it necessary.

Regards

A handwritten signature in black ink, appearing to read 'Paul Matthews', with a stylized flourish at the end.

**Paul Matthews**

*Chief Executive*

NZ Computer Society Inc (NZCS)