



**Submission on Patents Bill - Government Bill 235-1**  
**To the Commerce Committee**

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**The NZOSS would like to be appear before the Commerce Committee in support of this  
Submission**

**Peter Harrison will be representing the NZOSS.**

## Introduction

The following submission was prepared by the New Zealand Open Source Society to address the Patent Bill 235-1 currently before the Commerce Committee. The New Zealand Open Source Society wishes to be heard relating the the Patent Bill.

The New Zealand Open Source Society represents the interests of Open Source Software users and software developers in New Zealand. Our members include both commercial entities who are providing ICT services and end users.

It is the responsibility of our organisation to act as the authoritative voice of open source software development within New Zealand for New Zealand and for New Zealand overseas.

## NZOSS Position on Software Patents

The policy of the NZOSS is simple; we are opposed to software patents. We believe that software patents will damage the interests of our members and of the larger New Zealand Information Technology sector. We strongly encourage the Commerce Committee to consider adding software and other creative arts to the list of patent exclusions.

We specifically recommend adding the following to the end of Clause 15 of the bill;

**(6) Creative works such as literary works, film, music and software are not patentable.**

## Software as Free Expression

We wish to protect the democratic right of all people to express themselves freely. For software developers writing software is a form of creative expression. In the Open Source domain it is also a public service, providing value to the entire community. In order to better understand the impact of software patents on software developers let us consider the possibility of a similar situation that book authors would have if writing styles or plots could be patented <sup>1</sup>.

If such patents were made available to authors the act of writing a book would become a legal minefield. Authors writing original works might inadvertently infringe a plot patent and thus be liable for royalties. Imagine if a Chef wrote a cook book - and took out a patent for "book describing recipes".

It is obvious to any reasonably minded person that such restrictions for authors would be unconscionable. While software development is more technical in nature than authoring a book it is also a form of expression that should not be restricted unnecessarily.

The current bill under consideration does not contain explicit exceptions for authorship of other works that share many feature in common with software expression. This includes writing books, producing films and producing music. Although nobody has yet attempted to patent these other forms of expression it may be only a matter of time before large content producers realise they can protect their industry using patents in much the same way large software companies use software patents now to prevent competition.

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<sup>1</sup> Plot Patents - <http://www.plotpatents.com/>

## **Anti-Competitive use of Patents**

The idea of patents is to allow individual inventors to license their ideas to manufacturers who are in a position to produce goods. In this way the inventor benefits from his invention and manufacturers benefit from a larger pool of ideas and inventions. Historically patents have given inventors a state sanctioned monopoly for a limited period. In actuality this approach has had the precise opposite effect; to consolidate existing monopolies.

Most patents are now gained by large overseas companies, not individual inventors. Rather than patents being used to encourage the free flow of ideas and create innovative products they are being used to protect monopolistic behaviour. Large companies have tended to use patents to exclude competition rather than encourage development of innovative technology.

The New Zealand Open Source Society has had first hand experience of large multinational companies using patents to protect their monopolies in New Zealand. Since 2004 we have been involved with action opposing two patents covering the use of XML for word processing documents<sup>2</sup>. If it were not for our opposition to these patents the multinational software company concerned would have been able to threaten all potential rivals with patent infringement.

Microsoft's office productivity software is one of their primary revenue streams. Open Source software like OpenOffice.org is now threatening that revenue flow. One of the primary means Microsoft has of preventing people moving to other products is to control the file format used to save documents. By ensuring documents can't be opened by other products they lock users into their products.

The Government is aware of this issue and has been encouraging the use of open formats by software vendors. However, if Microsoft had gained patents sufficiently broad it would have been able to prevent any competing product from using the same general approach; that is using XML for the purpose it was designed; storing interoperable documents.

Microsoft applied for two patents around XML use in word processors in New Zealand. Several competing word processors were already storing XML documents when Microsoft filed it's patents in 2002. The NZOSS opposed both of these patents on the basis they were trying to patent things that clearly had prior art and were obvious. One patent was substantially limited, while the other opposition continues to this day.

Had these patents not been opposed Microsoft would have been able to threaten software developers offering word processing applications that used XML to store documents. These patents could have prevented other companies from delivering applications capable of interoperation with Microsoft's XML document formats.

So in summary patents are being used by large monopolies to protect themselves from competition; the precise opposite of the initial intent of patents. The New Zealand Open Source Society does not have the resources to oppose all software patents that are overtly broad or obvious. By excluding software patents we will be denying multinational companies the ability to unfairly protect their monopolies using legal mechanisms.

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<sup>2</sup> NZOSS Files Objection to Microsoft XML Patent - [http://nofud.linuxtoday.com/news\\_story.php3?itsn=2005-07-12-012-26-OS-CY-LL](http://nofud.linuxtoday.com/news_story.php3?itsn=2005-07-12-012-26-OS-CY-LL)

## Australia - US Free Trade Agreement

In 2004 Australia entered a Free Trade Agreement with the US. As part of the concessions made to the United States was agreement to modify law around intellectual property. There were provisions for copyright law, patent law and trademark law. Of specific interest are the provisions for patents.

The first provision was that business process patents would be patentable. There would be tight limitations on the exclusions from patentability. There would be limitations on revocation and compulsory licensing and changes to the prior publication rules. If these provisions appear familiar it would be because these features exist in the Patent Bill currently before the Commerce Committee.

In the paper "**The Economic and Cultural Impacts of the Free Trade Agreement Provisions relating to Copyright and Patent Law**" it was observed that<sup>3</sup>:

*The beneficiaries of the features of U.S. law that the U.S. Government wants to impose on Australian law are large U.S. corporations, in particular the large music and multi-media corporations generally, and Microsoft. But the case put forward by these corporations has been based on misinformation. No justification exists for the extensions to the monopoly rights that are being proposed.*

*Innovation is also being seriously constrained by legal actions initiated by corporations opposed to innovation. Copyright and patent laws provide large copyright-owners and patent-owners with the ability to deflect the attention of innovators from their work, to impose years of delays and very high legal costs, and in some cases even to prevent innovation from taking place. There is strong evidence of patent-owners in particular using their legal rights as strategic weapons against competitors. An innovative Australian company recently described patents as "a worthless must-have", because every innovative company needs to have a small collection of them in order to counter-threaten competitors when they seek to delay the implementation of innovative products.*

*In short, the long standing intention of copyright and patent law to stimulate innovation is being frustrated by the manner in which it is being used by its monopolist beneficiaries.*

*It is accordingly seriously against Australia's economic interest for copyright and patent laws to be extended at all, let alone in the manner that the U.S. is imposing on Australia through the terms of FTA 17.*

It is therefore a matter of public record that Australia sacrificed its intellectual property laws to benefit large US multinationals in order to secure the Free Trade Agreement with the US.

If we were to for a moment assume that we are prepared to make the same sacrifice as Australia in order to gain a Free Trade Agreement with the US it seems somewhat ill advised to pass the legislation without first negotiating for concessions in return.

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3 The Economic and Cultural Impacts of the Free Trade Agreement Provisions relating to Copyright and Patent Law - <http://www.rogerclarke.com/II/FTA17.html>

## **New Zealand – US Free Trade Agreement**

In March of this year the new US Administration put all Free Trade talks with New Zealand on hold<sup>4</sup>. Since then the US has introduced the US Dairy Export Incentive Program which is in effect a subsidy for the US dairy industry. These subsidies have substantially harmed milk prices on the international market, and thus harmed the New Zealand economy in a recession<sup>5</sup>. The question must therefore be asked; what impact will passing a Patent Bill have on our opportunity to enter a Free Trade Agreement with the US? Considering that Patent Law was one of the major concessions made in the Australia – US Free Trade Agreement it would seem somewhat premature to be passing this legislation.

## **Harmonization of Patent Law**

Some have argued that we should follow the US in order to make patent law more consistent internationally. It appears however that the US has substantial problems with its own patent system. It would not be an indifferent observer that would ask if it really is in the interests of New Zealand to implement laws that not even the US has decided on<sup>6</sup>. New Zealand could follow the European lead in patent law, and explicitly exclude software from being patentable. We could also reconsider any changes to current patent law that would benefit large US multinationals. This would allow us to retain a strong strategic position from which to negotiate any concessions in Free Trade talks.

In the paper “**Harmonizing the International Law of Business Method and Software Patents: Following Europe's Lead**” we see a suggestion that we take Europe's lead<sup>7</sup>.

*U.S. court recognition of business method and software patents created a substantial divide in international patent law. Without regard to pragmatic considerations, U.S. courts, so far, have seen no reason under law to constrain the recognition of either business methods or software patents. By contrast, Europe and Japan have attempted to limit the negative social welfare implications of expanding patent recognition by legislatively prohibiting non-computer- implemented business method patents and imposing limitations on the patentability of software.*

*The broad recognition of the patentability of all types of business methods by U.S. courts, including the recognition of non-technical or non-computer- implemented business methods, is the source of significant social welfare losses in the U.S. Europe and Japan's attempts to draw a line between high and low quality business method and software innovations better balance the need to stimulate innovation while preventing unnecessary anti-competitive or overly broad patent recognition. Furthermore, the lack of consistency and harmony among members of the Trilateral Patent System, due to the U.S. recognition of business methods, increases the costs of engaging in international business.*

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4 Obama puts off trade talks - <http://www.stuff.co.nz/business/2131050/Obama-puts-off-trade-talks>

5 Obama's Dairy Export Incentive Program - <http://www.infonews.co.nz/news.cfm?l=1&t=141&id=37275>

6 Analysis: patent reform bill unable to clean up patent mess - <http://arstechnica.com/tech-policy/news/2008/03/clean-up-patent-mess.ars>

7 Harmonizing the International Law of Business Method and Software Patents: Following Europe's Lead [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1114085](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1114085)

## Gowers Review of Intellectual Property

In 2006 the UK Government conducted a review of Intellectual Property Law<sup>8</sup>, This was an extensive review addressing many issues around software. In relation to the European approach to software patents the report says:

*Currently, only if computer programs have a 'technical effect' can they be patented in Europe. However, there is little authoritative definition of this phrase, and its scope is widely contested. This has led to some computer programs being patentable in one country, such as the USA, but not patentable in the Member States of the EU. Recent attempts to agree a Directive to harmonise the law relating to software patents was rejected by the European Parliament in response to fears about the negative implications that a US-style system for software patents would have on innovation.*

With regard to the effect of software patents on the innovation in software the report identifies issues with patents being used to protect incumbent manufacturers.

*Cohen et al. show that 65 per cent of firms in complex technologies use patents as a trading strategy to licence a technology (while only 12 per cent use patents as a fence). In simple technologies, 28 per cent of firms use patents as a trading strategy to licence a technology, while 46 per cent use patents to fence off an area to competitors and provide more intellectual 'space' to innovate. **This strategy can be problematic in areas where thousands of patents are used in the design of new products especially in the electronics and software industries.***

The report provides an example of how broad software patents can stunt competition :

*Blackboard, a US maker of online learning management systems, recently took the academic community by surprise when it announced it had been granted a broad patent in the USA. The patent covers 44 claims related to learning management systems and implicated infringement by many other products on the market. On the same day that it publicly disclosed its patent, Blackboard started a patent infringement suit in a Texas court against Desire2Learn. Many companies that have been working on educational software are now concerned that Blackboard will either sue for infringement or enforce complex and expensive licensing agreements.*

The report made the following recommendation in relation to software patents:

***Maintain policy of not extending patent rights beyond their present limits within the areas of software, business methods and genes.***

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8 Gowers Review of Intellectual Property - [http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)

## **Patent Trolls and Submarine Patents**

A Patent Troll is an organisation which produces no actual products, but rather operates by purchasing patents and then approaching companies that do manufacture products and negotiate license agreements. The permissive patent system in the US has led to many patents being awarded that are of dubious quality.

For a manufacturer of a specific product it may be possible to search for related patents in order to avoid infringement or to license the patent. Software however is generally far more complex than manufactured products. In addition software can be written by individuals and small companies who do not have the resources to ensure that their software does not infringe any of the thousands of software patents. An example of this was the case of RIM, makers of the Blackberry infringing a patent belonging to NTP for mobile email<sup>9</sup>.

*The maker of the Blackberry e-mail device has reached a \$612.5m (£349m) settlement to end a dispute that could have closed the service in the US. Canadian firm Research In Motion (RIM) said on Friday that the deal with American patent-holding business NTP was a "full and final settlement". NTP, which had claimed RIM stole its technology, had tried to get the Blackberry service shut in the US.*

In addition to Patent Trolls there are companies who make products, but which release patented ideas and encourage them to be introduced into standards without disclosing the patents. Once the standard is adopted they then are able to force those who implement the standard to license their patent. This form of undisclosed patent is called a "submarine patent", because they are designed to ambush companies. Once again small software companies who implement standards in good faith would potentially be targets of this kind of unethical behaviour.

## **Summary**

There is no benefit and substantial harm in permitting software patents in New Zealand. The impact of software patents will be felt on the entire ICT Industry. Even if few actual patent actions are taken the cost of compliance and patent searches will increase while at the same time discouraging innovation.

The interests of our members will also be harmed, as it will potentially open up open source developers to massive liability even though they are performing a public service without expectation of compensation.

For this and all the reasons above we strongly encourage the Commerce Committee to introduce the suggested text to clause 15:

**(6) Creative works such as literary works, film, music and software are not patentable.**

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<sup>9</sup> Settlement ends Blackberry case - <http://news.bbc.co.uk/2/hi/business/4773006.stm>