



Australian Government

IP Australia

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Ben Sturmfels
8/6 Pottery Court
BRUNSWICK VIC 3056

Dear Mr Sturmfels

Thank you for your letter of 11 August 2010 to the Minister for Innovation, Industry, Science and Research, Senator the Hon Kim Carr, and copied to the Parliamentary Secretary for Innovation and Industry, the Hon Richard Marles MP, concerning software patents on behalf of 1000 people in the Australian software industry. The Minister has asked me to respond on his behalf.

The number of signatories to your letter shows that there is significant concern in the industry over this issue. In the letter you state that patents are not necessary in the software industry and that they actively discourage innovation. Under the current law, software must meet the same criteria for patentability as other technologies. To be patentable, software must be new, inventive and meet a 'manner of manufacture' test. This latter test requires that the software provides a practical solution to a technological problem.

In 2000, a wide-ranging review by the Intellectual Property and Competition Review Committee found that all fields of technology, including software, should be subject to the same criteria for patentability. As you noted, in 2008 the Venturous Australia report expressed some concern about software patents and recommended that patent laws be reviewed to ensure that the inventive step required to qualify for a patent is considerable. In 2009, IP Australia commenced consultation on a series of proposed intellectual property reforms, designed to bring the standards of eligibility for a patent into better alignment with the standards prevailing in our major trading partners. More information on these proposals can be found on the IP Australia website at:
http://www.ipaustralia.gov.au/pdfs/news/consultation1_proposed_reforms.pdf

In your letter you list software that has been developed and widely adopted without the use of patents. Obtaining patents and controlling the distribution of the initial software is only one of the business models that are available in the information technology industry. The businesses responsible for the software you mention have successfully adopted other models, such as allowing the software to be distributed freely and instead basing the business on providing high quality service and updates of the software.

In your letter you state that there has been little involvement by the software industry in the review of patentable subject matter being conducted by the Advisory Council on Intellectual Property (ACIP). I regret that many in the industry were unaware of the review and therefore unable to make a submission. ACIP endeavours to consult with Australian business as widely as possible. ACIP publishes its reviews on the government consultation website business.gov.au, directly contacts a range of stakeholders, including industry peak bodies, and places advertisements in major newspapers. Those bodies contacted for the patentable subject matter review include the Australian Information Industry Association and Australian Computer Society. ACIP expects to provide its final report to the incoming government by the end of the year.

You also express concern about the 20 year term of protection provided by a patent, as most software is of little value after this period. A patent may last for up to 20 years but must be renewed every year and fees are payable each year. As such it is up to the owner to decide whether it is worthwhile maintaining the patent for the full term. This business decision will be affected by such issues as the value of the invention and the availability of alternative products in the market.

Patent applications must include a full description of the invention and are published by IP Australia around 6 months after they are lodged. The early publication of the invention enables others to use the information to further develop the area of technology.

During the period before an election, the Government acts as caretaker, abiding by conventions which generally limit its functions to routine administration. Due to these conventions, I can only provide you with the factual information set out above. After the election, you may wish to pursue some aspects with the incoming Government, including your request to meet with the Minister with responsibility for these matters. As indicated above, I would expect the incoming Government to consider the ACIP report late this year or early next year, and any comments you wanted to make in that context would certainly be taken into account before the Government approved its response to ACIP's report.

Yours sincerely



Philip Noonan
Director General
IP Australia