

Dear Ms Collins

I enclose some short comments on the patenting of business systems in response to IP Australia's Issues Paper on that subject. Unfortunately I have not had the opportunity to address each of the queries listed in the paper independently. I am able to provide more details on any of the arguments presented if required.

Yours faithfully

Brendan Scott

Background:

I am a lawyer. I have worked in the area of information and communication technology since 1993. During that time I have acted on behalf of both vendors and customers on a broad range of technology transactions.

I make this submission on my own behalf, not that of my employer or any other person.

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Comments

Executive summary

Patents are statutory monopolies. These necessarily cause dead weight losses to the economy. Monopoly grants should therefore be approached with great caution and empirically justified. Monopolies should be treated like loaded guns to be handed out with extreme caution. In the realm of business patents, there are significant issues with the grant of such patents. As such monopoly protection should only be available where there are clear and empirically demonstrable benefits and where those benefits clearly outweigh the adverse impacts from the grant of a monopoly.

Discussion

1. It is my personal experience that in the last 18 months to two years some technology vendors have begun to refuse to give traditional warranties in relation to freedom of their products from competing patent claims. Previously blanket warranties, backed by substantial indemnities would be given to a buyer that the product was free from all copyright and patent claims. Recently, this has begun to be restricted to copyright claims (because the element of

causality required by copyright allows vendors comfort and ability to control risk). Vendors have begun to argue that they can't know or be expected to know all of the patents which are becoming available. Patents are therefore increasing business uncertainty when they should be decreasing it.

Initially this occurred with US based vendors. More recently I have noticed some Australian based vendors taking a similar approach.

2. It is my opinion that this is largely a result of: (a) the growth of patents granted on business methods; and (b) lack of confidence in the patent office to reject spurious claims at the examination stage.

I speculate that two factors behind this are: (c) lack of experience in the patent office with the area over which the patent is claimed; and (d) lack of review of "publications" (eg websites with systems implemented) which might disclose the invention.

3. There is no empirical evidence to suggest that innovation has suffered from a historical lack of patenting of business methods. Indeed, independent creation of business methods on the internet indicates that patents are not required to produce the majority of such innovations.

4. Innovation is not an end in itself. It would be foolish, for example, to devote the whole of GDP to R&D. Rather, incentives for innovation must be balanced against the returns from those incentives. There is no evidence to show that the benefits from providing patents on business processes outweigh the detriments. The questions therefore which are addressed to whether or not patents encourage this or that should be recast in net terms. It is clear that patents may encourage some things but still create a net loss to the community.

5. There are indications that, outside specialised areas in which massive infrastructure investment is required in order to participate in innovation, patents reduce innovation and delay the release of information to the public. The patent system is predicated on the assumption that the dissemination of information is prima facie difficult and collaboration between more than a handful of people impossible. It is prejudiced in favour of "big bang" innovation by isolated inventors. The patent monopoly is a 19th century innovation model. The internet has proven (at least in low barrier to entry markets) that collaboration is massively scaleable and that incremental innovation produces better results faster than the traditional model.

An incremental innovation model requires more information to be disclosed sooner than a patent model in order to motivate collaboration (the patent model effectively requires information to be kept secret until the invention is disclosed, thus delaying not only the release of preliminary information, but perhaps also the completion of the invention, since fewer minds are working on its development). Business processes are prime candidates for incremental innovation. Broad patentability increases uncertainty in large scale collaborative models and undermines the productivity gains such models promise (because collaborative models can't afford patent search or licensing costs and because the lack of a need for a causal link means that a patent can foreclose parallel innovation).

6. The nature of business processes is one such that publication is unlikely. Unlike products, where sale of the product is seen as the means of returning investment, processes return value through their exercise and are likely to be "invented" by customer organisations disinterested in vending their discovery. Process improvements are more likely to be worked in secret even in the presence of patentability (and the only use of patents in this area will be to foreclose reasonable competition). Patentability of processes is likely only to secure the disclosure of those processes which could not, in any event, be kept secret. This means that the publication pool against which process patents will be assessed is unrepresentatively small. This is a fundamental problem which cannot be solved by providing additional resources to patent examiners. It means further that there is nothing returned to society for the monopoly grant in relation to processes.

7. It is my perception that, in practice, the granting of monopolies by the State tends to favour big business at the expense of SMEs. This is because small businesses are unable to afford the cost of monitoring and reviewing patents, and a single patent in an area is often insufficient to give bargaining leverage. Patents tend to be used by large corporations to close out competition and innovation from smaller rivals, with cross licensing deals preserving the status quo at the top tier. As most big businesses are also foreign owned, the patent system acts in practice as a regime for protecting non Australian businesses from competition.

8. Real value to society occurs not through the initial invention, but through evangelisation and simplification (so that the process can be implemented with a minimum of fuss). Both of these can be provided by a customer side model, where innovations must compete for customer's

mindshare based on ease of use and effectiveness, rather than marketing funded off the back of a monopoly.

Conclusion

9. Patents are statutory monopolies. These necessarily cause dead weight losses to the economy. Monopoly grants should therefore be approached with great caution and empirically justified. Monopolies should be treated like loaded guns to be handed out with extreme caution. In the realm of business patents, there are significant issues with the grant of such patents. As such monopoly protection should only be available where there are clear and empirically demonstrable benefits and where those benefits clearly outweigh the adverse impacts from the grant of a monopoly.