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Mr Jeff Carl
Secretariat
Advisory Council on Intellectual Property
PO Box 200, Woden ACT 2606

Via email to mail.acip@ipaustralia.gov.au

4th October 2013

Re: Submission to the Review of the Innovation Patent System

Dear Mr Carl,

Electronic Frontiers Australia (EFA) appreciates the opportunity to provide the following submission in relation to the Review of the Innovation Patent System currently being conducted by the Council.

Please contact me if you require any further information.

Yours Sincerely,

Jon Lawrence
Executive Officer
Electronic Frontiers Australia, Inc.

Electronic Frontiers
AUSTRALIA

Submission to the Review of the Innovation Patent System
4th October 2013

About EFA
EFA has been a leading voice for digital rights in Australia since 1994.

EFA is an independent, national non-profit organisation funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting online civil liberties.

Our major objectives are to protect and promote the civil liberties of users and operators of computer based communications systems such as the Internet, to advocate the amendment of laws and regulations in Australia and elsewhere (both current and proposed) which restrict free speech and to educate the community at large about the social, political, and civil liberties issues involved in the use of computer based communications systems.

EFA's diverse membership includes many leading individuals involved in the Australian software development industry, as well as other innovators in other technological contexts, commentators, academics and consumers. EFA strongly supports the continued development of a broad-based digital economy in Australia and is also a strong supporter of the open source approach to software development.

General Comments
This submission is focused only on issues relating to patents within the context of software development.

EFA agrees with the assertion that the term 'software patent' is misleading and unhelpful as it is not software itself that is patented, but rather the ideas used within software. EFA believes terminology such as 'computational idea patents' or 'patents on computation and information processing' better capture the nature of patents in the software context, as they make it clear that it is the method used, rather than the code itself, that is patentable.

EFA is nonetheless concerned about computational idea patents, and believes that they are not appropriate for the particular context of the software development industry.

Appropriateness of Patents to the Software Development Industry
EFA believes both Standard and Innovation Patents are generally harmful to innovation in the software development industry.

The development of software is a process of innovation that is, in many respects, unlike the processes of innovation in most other industries. The barriers to entry into the software development industry are very low and the process of software development can be very rapid, creating fertile conditions for widespread independent innovation

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globally with a high likelihood of multiple persons or teams addressing similar issues concurrently. The history of the software development industry is one of continuous rapid innovation, stretching back well before the granting of the first patent on a computational idea.

Best practice software development requires the reuse of existing ideas, and the relative complexity of software systems means that a single software application may contain dozens, if not hundreds, of ideas. The granting of patents on computational ideas involves a much broader reach than would be the case for physical products.

Much software development is also undertaken on a bespoke basis for an individual client and is therefore not released into the wider market. This limits the ability for prior art to be properly assessed in the context of patent applications relating to software development.

The granting of patents on computational ideas therefore involves serious risks to continued innovation within the software development industry, risks that are compounded by the very fast moving nature of that innovation. The potential for a patented idea to have ceased to be of utility to the industry by the time a patent expires is very real, thus potentially hampering the development of the wider industry and constraining the social value derived from the granting of the patent.

EFA therefore believes that the granting of patents for computational ideas is generally harmful to, rather than supportive of, innovation within the software development industry.

Recommendations

EFA recommends that the preferred approach at this point to minimising the potential constraining effects of patents on continued innovation with the software development industry is to define certain acts as not constituting patent infringement. These acts should include the development, distribution or operation of a software program on commonly-used computing hardware, and should be considered to not constitute patent infringement for both Standard and Innovation Patents.

EFA also believes that creating an exclusion for computational ideas from patentable subject matter would also be a potentially effective approach for minimising the potential constraining effects of patents on continued innovation with the software development industry, however this approach is likely to involve greater legislative and administrative complexity.