

Protecting Software Through Patent Law

By: John Rizvi, Esq.

Patents, not copyrights, are now the only way to give adequate protection to the most important aspects of software. This is true because the “idea” behind a particular algorithm is much better protected as a patentable method than as a narrowly limited expression in copyright law. Most software designers are interested in preventing others from stealing the core methodology used in their software. As such, a patent on the software should be obtained. The principal benefit of protecting computer software through the patent system is the strength of protection that is provided by a patent.

In the past, the U.S. Patent Office rarely granted software patents, believing that they were nothing but mathematical algorithms and did not meet the statutory subject matter requirements for patent protection. Software related inventions often received “printed matter” rejections from the U.S. Patent Office. The uncertainty about the patentability of software led some companies to pursue copyright protection for their software-related inventions. Today, such an approach would not be prudent in light of the monumental changes in U.S. Patent Office’s examination of software.

The U.S. Patent Office has issued new software patent guidelines that provide their Examiners with instructions as to when they must find software inventions meet the statutory subject matter requirements. These guidelines are public documents and have proven to be quite helpful to both the Examiners and patent attorneys. The guidelines as well as recent decisions by the Court of Appeals for the Federal Circuit have made it much easier for an inventor to secure patent rights on software.

Copyright protection may sometimes be sought *in addition* to patent protection. It should be appreciated that copyright protection, without more, is woefully inadequate for the protection of software. For one thing, a skilled programmer can easily figure out how a program works and code the software in a different language or use different subroutines in an effort to avoid copyright infringement. Remember that a copyright only provides protection for the particular expression of an idea, and not the underlying idea itself. Another disadvantage of copyright protection for software is that it does not protect against independent invention, but requires copying in order for a finding of infringement. Independent development, however, is

not a defense to patent infringement. Anyone making, using, or selling a patented computer program without the inventor's permission is an infringer even if they did not have any prior knowledge of the program. Indeed, this is very powerful protection.

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