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**Registered Copyrights: A Way to
Complement Your Patents and Strengthen
Your Intellectual Property Portfolio**



by Ariel Rogson, attorney, Marger Johnson & McCollom

Copyrights were the original form of intellectual property protection available for software until the mid 1990s when, through dedicated advocacy by the software industry and some significant court cases, the U.S. Patent & Trademark Office finally recognized

software as patentable subject matter. And while patents have become widely used in the software world because of their breadth of protection, copyrights still hold a useful place.

Virtually everything about copyrights differs significantly from patents, so it is important to understand those differences so you can use both vehicles appropriately. And in the software industry, it is often quite useful to use them both.

What is protected?

Copyrights and patents offer fundamentally different levels of protection. In the simplest terms, patents offer a shield that is broad but shallow, while copyrights provide a narrow but deep safeguard. In some cases, it is possible to recover damages for copyright infringement where none would be available under patent law.

A patent protects an idea or invention and prevents others from implementing that invention. A copyright protects the holder's expression of an idea. U.S. law provides for ways in which a copyright can be legally used without the copyright holder's permission, called "fair use." For example, a teacher might be permitted to show students a section of source code as part of the educational curriculum.

Is registration necessary?

A copyright exists from the moment an expression is put into tangible form, and it exists irrespective of whether it is officially registered with the U.S. Copyright Office. However, if the copyrighted material is not officially registered, the copyright holder's rights are limited.

When can you register for a copyright?

You can register a copyright as soon as the expression, in this case, software, is coded and stored on a computer-readable medium. However, unlike patents that must be filed within one year of publicly unveiling the invention, copyrights do not need to be filed within a certain timeframe. But, if registration is made within three months of publication or before infringement occurs, the copyright holder is eligible to recover attorneys' fees and statutory damages – between \$200 and \$150,000 in damages per infringement, regardless of the copyright owner's actual loss or the infringer's actual gain. If registration is not made within these time limits, the copyright owner can recover only his or her actual loss, plus the infringer's profit (to the extent such profits are not factored into the copyright holder's actual damages). In cases where an expression is a candidate for being copied, it is wise to register early because the timing of registration can affect your rights in a possible infringement suit.

Who has the right to register for a copyright?

In the patent world, only one party can obtain a patent. This is one reason why the U.S. Patent and Trademark Office reviews patent applications in great detail. In contrast, two people who independently come up with the same expression can simultaneously and independently secure copyright protection to their works, even if the works are themselves identical.

What is the government's role in registering copyrights?

There is no government approval process for copyrights; there is no prior art search or government allowance process as there is with

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patents. You can register a work for copyright by filling out a form, paying a fee and submitting copies of the work. In the software world, where such works can be very long, it is common practice to submit identifying sections of the code. For example, you might submit the first and last 25 pages of the source code, along with the page including the copyright notice, if one is included.

What are the registration costs?

Undoubtedly, money is a key factor in intellectual property portfolio strategy-making. Patent applications can be expensive to prepare, prosecute and file. Copyright protection is extremely economical by comparison. Not only is the registration fee trivial (for software, the fee is currently \$45 per work), but the time required to prepare a registration is typically minimal. Nevertheless, unless you are experienced with filing copyright applications, there are potential trouble spots, so consult your intellectual property attorney.

What if someone is trying to keep an expression secret?

Because registering a copyright requires submitting a copy of the work to the Copyright Office, the work becomes publicly available. The Copyright Office does provide procedures for a software applicant to submit object code when the applicant is unable or unwilling to submit source code, but the Copyright Office will then indicate that there has been no determination as to the existence of copyrightable authorship.

Who owns a copyrighted expression?

In the United States, a patent application initially belongs to its inventors. Companies must obtain assignments from the inventors before the companies can own the patents. But for copyrights, it is possible for a work to be corporately authored if the work was created by an employee under the company's direction.

The key to this test is whether the author is considered an "employee." An independent contractor who works without supervision from the company still owns the copyright in his or her work, so the company would need to obtain an assignment to own the copyright. In the software industry, where independent contractors are often used, this can be an important issue. A company that hires an independent contractor might end up with a right to use the software, but not with outright ownership or the right to further develop the software. An attorney will need to help determine ownership in these cases. In general, a company should require that its contractors assign ownership rights over to the company for works that are created under the company's direction.

How long are copyrights valid?

For copyrights that are registered to business entities, the copyrights are valid for 95 years from the date of first publication or 120 years from creation, whichever ends first. When the registered copyright holder is an individual, the protection endures for the life of the author plus 70 years.

How should copyrighted material be marked?

Although it is not required that copyrighted material include a notice of copyright, it is recommended. For instance, placing a copyright notice in the source code and another on the splash screen as the application executes are both prudent measures to indicate your rights. A typical example is "© John Doe 2007. All rights reserved."

What happens if an expression that is copyrighted is copied?

If a work of expression is copied, in whole or in part, the original creator of the work can sue those who copy it. As indicated above, the copyright in the work must first be registered. The timing of the registration can affect the potential recovery. If you suspect someone has infringed a copyright you own, contact an intellectual property attorney, because such litigation can be complicated.

While patents have been garnering an increasing importance in the software industry, copyrights on software still have value. They are less expensive and easier to obtain – although care still needs to be taken that the copyright is properly registered – and the potential recovery in a copyright infringement suit might be more valuable than the potential yield in a similar patent infringement suit.

About the author

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