Software Patents Panel

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Abstract

Over 6000 patents were issued last year in the US for software related inventions. Patent protection is available for software developments in Australia, US and Europe in addition to copyright protection. However, little use of the system has been made in Australia.

We review the different types of intellectual property systems, and the use of the patent system in Australia in relation to protection of software-related inventions. Our panelists will discuss the meaning of the patent system, rights obtained, applicability to software, myths, and the process of applying for a patent in Australia.

1. Patents and other Intellectual Property systems

Different types of intellectual property systems have developed throughout the years to protect the product of human’s intellect and to promote the innovation of ideas. The most common systems for protecting computer software are: copyright, patents, and trade marks. We briefly describe each one.

Copyright protects the expression of an idea in a tangible (material) form. The recent Copyright Treaty by the World Intellectual Property Organization [13] confirms that computer software is to be protected by copyright as a literary work throughout the world. Literary works, such as books and poems, have traditionally been expressed in a written form which is readable to humans. Computer software source code is clearly an expression of ideas in a written form. And by extension, object code is an expression of the same ideas in machine language, hence it is also considered a literary work and therefore attracts copyright protection.

Patents protect the underlying ideas of a product which has commercial value in industry. Computer software incorporates ideas in the form of algorithms and data structures. These ideas can be protected by patents if proven to be innovative enough and of commercial value.

Trade marks protect the name that uniquely distinguishes a company or product from the rest. Trade marks are available in regards to computer software in software names and software company names.

2. Myths or not

Several myths have been created in relation to patents protecting software-related inventions. People who oppose this system, e.g. the League for Programming Freedom [8], are normally against particular decisions taken in the early days of software patenting (when the Patent Office had little experience in reviewing software-related inventions), the large period of protection granted for software that may not live that long, the increased cost in development of new software that licenses someone else’s patent, the apparent monopoly that some developers get with some patents, and the fear that innovation in software will be harmed by patents. However, several computer scientists and lawyers argue in a different way, e.g. [5, 9, 3]. Our panelists will discuss some of these issues.

3. Panelists

Our three panelists are leading experts in the area of software patents in Australia.

John Swinson is a Senior Associate at the Brisbane law firm of Mallesons Stephen Jaques where he specialises in intellectual property and technology law. John graduated with a major in Computer Science from the University of Queensland in 1986, and an LLB with First Class Honours in 1988. He was awarded a University Medal in 1988. As a Fulbright scholar, John obtained an LLM from Harvard Law School. He practised as an attorney at Kenyon & Kenyon in New York for six years, specialising in software and computer law. He has represented both large and small US software companies and universities.
David Webber is the partner responsible for the computer science patent practice of Davies Collison Cave. He is an experienced patent attorney who holds a Bachelor of Electrical and Electronic Engineering Degree with Honours from the University of Adelaide. He majored in VLSI semiconductor chip design, and Computer Science. He is a Registered Patent Attorney and specialises in patent, design and copyright advice for electrical, electronic, computer and telecommunications products. He has given lectures in computer software protection and integrated circuit legislation for Masters of Laws, Technology Law and Intellectual Property Diploma courses at the University of Melbourne. He has also given lectures in patent law and computer software protection for the Bachelor of Laws course at Monash University, Melbourne. He is regularly invited to speak on issues related to computer software protection and contributes to a number of intellectual property journals.

David Herald is a Deputy Commissioner of Patents at the Australian Intellectual Property Organisation (AIPO), with qualifications in Physics. His responsibilities include the setting of patent examination practice, and the conduct of dispute resolution processes before the Commissioner. David is well acquainted with the legal issues surrounding the patentability of software in Australia.

4. Chair

Anne Fitzgerald is a solicitor. She received an LLB(Hons) from the University of Tasmania, an LLM from London University, and LLM from Columbia University, and is a JSD candidate at Columbia University. From 1991 to 1995 she was a lecturer at the University of Tasmania Law School, where she taught Intellectual Property Law. In 1995, she was appointed by the then Justice Minister to the Expert Advisory Group assisting the Copyright Law Review Committee in its review of Australia's copyright laws. In 1996, she was appointed by the Minister for Science and Technology to the Advisory Council on Industrial Property.

References