PROTECTING COMPUTER SOFTWARE

Welcome to another edition of Protecting Your Creativity by Livingston Loeffler. Each edition of Protecting Your Creativity will discuss various aspects of intellectual property law and related business matters. This edition discusses the three options available for protecting software as intellectual property and other associated intellectual property, such as trademarks.

Software may be protected as a literary work under copyright law, as an invention under patent law, and/or as a trade secret. Although copyright protection is available for all computer software, patent protection and trade secret protection may or may not be available depending on certain factors.

COPYRIGHTS

The most common and basic method of protecting computer software is by copyright. Under U.S. copyright law, software is considered to be a literary work and is given the same protections as other literary works. The owner of a copyright has the exclusive right to make and distribute copies, and to create derivative works of the copyrighted software. Derivatives may include updates, new versions and/or translations of the computer software. Copyright law may be used to prevent the exact copying of computer software, as well as to prevent others from creating and selling works that are "substantially similar" to the copyrighted work.

Although software is legally considered copyrighted as soon as it is completed, the software should still be officially registered as a copyright with the United States Copyright Office. Registration establishes a public record of the copyright claim and is a prerequisite to filing a copyright infringement suit.

A copyright registration also provides considerable legal advantages in the event of an infringement suit. First, a registration is prima facie evidence as to the ownership of the copyrighted work. Second, owners of registered works can recover statutory damages for infringements which occur after the registration of the work as opposed to recovering actual damages which are often difficult to prove. Statutory damages are damages which the court can award without regard to the amount of actual damages that the copyright holder has suffered. Finally, in addition to an award of statutory damages an owner of registered work

may also obtain attorney's fees if they are successful in enforcing the copyright registration through litigation.

PATENTS

While copyrights are the first line of defense in protecting computer software, copyright law only protects the expression of an idea in a tangible, fixed form, which in the case of software is the written code. On the other hand, a patent protects the underlying method employed by the software. Moreover, a copyright only protects against someone copying the software, whereas a patent protects not only against someone copying the software but also against someone who independently creates the same software. A patent gives the software owner the right to preclude anyone from creating, using, selling, offering to sell or importing devices or processes which fall within the terms of the patent, or perform equivalent functions. Therefore, software patents provide much greater protection for software than do copyrights.

Of course, a patent can only be issued when an invention is new, useful, and nonobvious. To determine this, it is necessary to have a patent search performed and an opinion as to the patentability of the software issued by a patent attorney. A patent search will uncover similar prior art such as issued patents and published patent applications which are then compared to the subject software to determine the patentability of that software.

TRADE SECRETS

Computer software may also be protected as a trade secret. Unlike copyright and patent protection, which is created by Federal statutory law, trade secret protection arises under statutory and contract law. Trade secret law protects any secret process, technique or information which gives the owner a competitive advantage. It is not necessary that the elements of the process or technique be original, unique, or secret, so long as the combination is secret.

To protect the software as a trade secret the software owner must take reasonable steps to maintain its secrecy. This may be achieved by limiting access to the software and the source code of the software to those who need access to perform their job duties. Further, those persons should be required sign confidentiality agreements wherein they agree they will not disclose the trade secret to anyone and that they will take steps to maintain secrecy of the trade secret. The same conditions should also apply to customers to whom the owner might license or sell the software.

While a patented process cannot be a trade secret because patents are published and available to the public, a copyrighted work may be a trade secret if proper procedures are followed. Therefore, if patent protection is not available, then it is important to follow the correct procedures when registering computer software with the United States Copyright Office so that trade secret protection will not be lost.

TRADEMARKS

Finally, in addition to protecting computer software as discussed above, the name given to the software should also be protected under trademark law to prevent others from using a confusingly similar name.

CONCLUSION

The protection of computer software requires careful review and consideration by a patent attorney as adequate protection often involves copyright, patent, trade secret and trademark law. Therefore, it is important that software companies and developers seek the advice and counsel of a patent attorney as early as possible in the development process so their software may be properly protected against competitors and to ensure they do not lose any of the protections available to them.

Livingston Loeffler specializes in all areas of intellectual property law including patents, trademarks, copyrights, trade secrets, franchising, litigation and business law. As the largest full-service intellectual property law firm in Southwest Florida with over seventy years of combined experience, Livingston Loeffler can be there to assist you from beginning to end with protecting your ideas and inventions and getting those ideas and inventions to market.

Thank you for taking the time to read this edition of Protecting Your Creativity. If you are in need of our services then please contact us to schedule an appointment.

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