PROTECTING INTELLECTUAL PROPERTY RIGHTS IN A SOFTWARE: A JURISDICTIONAL ANALYSIS

In this section, using the UK, USA and Nigeria as case studies, we embark on a cross jurisdictional analysis of the legal regime on the ownership and registrability of the varying intellectual property rights in software.

There are four basic types of intellectual property rights relevant to software i.e. patents, copyrights, trade secrets and trademarks, with each providing a separate layer of legal protection. While patents, copyrights and trade secrets can be used to protect the technology itself, trademarks ensure that the names, logos and symbols used to brand and distinguish the software product are protected.

The most common form of intellectual property protection for software across jurisdictions is under Copyright Law, which is the primary Intellectual Property Right (IPR) underpinning the rights in software. However, other IPRs such as trademarks or design rights may also be relevant to software, depending on the jurisdiction.

NIGERIA

Nigerian Law provides for Intellectual Property Protection for Copyrights, Trademarks, Patents and Designs, however the recognized forms of Intellectual Property protection for software are under the Copyright Act¹ Cap 28 LFN 2004 and the Trademarks Act². Section 51 of the Copyright Act defines a literary work to include computer programs. This is because software and computer programs are written in computer language. The fact that they are written in a particular language ensures that copyright protection automatically reflects in the program as a literary work, irrespective of its functionality. They must however satisfy the usual requirements of originality and fixation in a permanent form³ before the Act applies.

Also, Copyright protection lasts for 70 years from the end of the year in which the author dies⁴. Where there is joint ownership, protection will last for 70 years beginning at the end of the year from the death of the last known author.⁵

Thus, by implication, a company or individual can secure copyright protection for its computer software, and also register its Trademarks at the Trademarks Registry.

Under the Patents and Designs Act⁶, patents are granted to protect new scientific and technological inventions only⁷. However, whether or not something is an invention is to be determined on a case by case basis given that there is no universally accepted definition or standard for it.

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¹ Cap 28 LFN 2004
² Cap T13 LFN 2004
³ S.1 (2) (a) and (b) Copyright Act Cap 38 LFN 2004.
⁴ See the First Schedule of the Copyright Act Cap 38 LFN 2004.
⁵ Ibid
⁶ Cap 344 LFN 2004
⁷ Section 6 (1) of the Patents and Designs Act Cap 344 LFN 2004
The requirements for patentability are however provided for under the Act8. It provides that an invention is patentable if it (x) is new, results from inventive activity and is capable of industrial application; or (y) constitutes an improvement upon a patented invention and also is new, results from inventive activity and is capable of industrial application. Therefore, whether an invention is the introduction of what is previously unknown or is simply an improvement upon an already patented invention, for it to be patentable, it must satisfy the triple requirements of newness, resultant from inventive activity, and capability of industrial application.

Thus, by law, Computer programs are registrable as Patents once the above conditions are satisfied. However, as a matter of practice, the Nigerian Patents & Designs Registry does not accept Patent applications for computer software on the ground that the Patents & Designs Act did not anticipate the registration of software Patents.

In view of this position, as a matter of practice, the only Intellectual Property protection for computer programs exists under Copyright and Trademarks.

**UNITED KINGDOM**

A computer program is protected as a copyright work under the UK Copyright, Patents and Designs Act 1988. The Act provides that copyright subsists in an original literary work, which is defined as including a “computer program”9 and the “preparatory design material for a computer program”. Although the Act does not define what constitutes a computer program, a computer program is defined in the Software Directive (2009/24/EC) as including:

“programs in any form, including those which are incorporated into hardware and preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage”.

Also, under the Act, Copyright cannot subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise and unless it is original10. Originality for the purpose of the Act does not require artistic or literary merit but merely means that the author must have created the work through his own skill, judgment and individual effort and must not have copied it from other works.

While copyright is the main form of protection for software, most proprietary software companies also ensure that the source code of the software is kept as a trade secret, and only disclosed under a secrecy agreement where disclosure is necessary, such as to producers of related software.

It is also possible to protect elements of a computer program such as screen-displays and graphics by registering them as Community designs.

In the UK, a patent may be obtained in respect of an invention which is new, involves an inventive step, is capable of industrial or technical application and does not fall within any of the exclusions11.

The owner of a patent can prevent any third parties from selling the product or process which is the subject of the invention, even if they developed the technology independently. However the Patents

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8. See Section 1(1) of the Nigerian Patent and Design Act
9. See Section 1(1) of the UK Copyright, Designs and Patents Act 1988
10. Section 3(2) of the UK Copyright, Designs and Patents Act 1988
Act provides that a patent will not be granted for "a program for a computer" to the extent that the patent relates to the program "as such". This is derived from a similar provision in Article 52 of the European Patent Convention (EPC).

While trademark law is not a means of protecting a computer program as such, it is important for IP protection, since the brands or logos used in relation to a computer program may be protected as registered trademarks or under the law of passing off. Trademarks are applicable to software products as they are to other goods or services.

Trademarks may also be protected by registration and this empowers the proprietor of the trademarks to bring proceedings for trademark infringement upon breach.

**UNITED STATES**

In the US, like other jurisdictions, Copyright Protection exists for original works fixed in a tangible medium of expression and is infringed by unauthorized reproduction, preparation of derivative works, distribution and public performance and display of copyrighted work and distribution of a computer program for direct or indirect commercial advantage by way of rental, lease or lending.

Current copyright law provides for copyright protection for unpublished as well as published works. This is important for computer software, because it facilitates simultaneous use of copyright and trade secret protections. The published version of the copyrighted program can be distributed as “object code” whereas the “source code” may remain unpublished so as to protect the program’s logic. Copyright is said to protect the expression in the program which may include such program elements as source code, object code screen displays, etc. The scope of copyright protection for computer programs thus largely depends on the interpretation of Section 102(b) of the Copyright Act.

For Patents, in the United States, any form of work can be the subject of a Patent grant provided it is a useful process, machine, manufacture, or composition of matter. This tends to open a blanket provision for all sorts of claims to be granted Patent protection. The Courts have however, sought to limit the claims that may be appropriate subjects of a Patent. For example the United States Federal Circuit in Re Bilsiki laid down the “machine or transformation test” which holds that a process is patentable if (x) it is tied to a particular machine or apparatus; and (y) it transforms a particular article into a different state or thing.

The U.S. Supreme Court has examined the issue of patentability of software on a number of occasions, in the cases of Gottschalk v. Benson, Parker v. Flook, and Diamond v. Diehr attempting to delineate the limits of patentable subject matter with respect to “mathematical algorithms.”

For trade secrets, in order to qualify for protection in the US, the owner of the trade secret must have taken reasonable measures to keep such information secret; and the information in question must derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by another person who can obtain economic value from the disclosure or use of the information.

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12. Section 1(2) of the UK Copyright, Designs and Patents Act 1988
13. Title 35 of the United States Code 101
14. 545. F. 3d 943 943, 959-960
Conclusion

Given the importance of software in the development of technology solutions, developers have to constantly explore means of protecting their intellectual property rights. Therefore, an understanding of the universe of software licensing framework is paramount. Beyond the generally applicable laws, developers and consumers must also be aware of the applicable laws in different jurisdictions.15

In this series, we have explored the rights and obligations arising from a software license, particularly as it affects the obligations of the user/consumer. One key finding is that the type of software developed largely determines the nature and extent of the rights and obligations of the both the developer and the user. It is our view that in the near future, more rights would be attached to software and potentially, stronger protective mechanisms may also be applicable..
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