



FENWICK & WEST LLP

2004 Update:

International Legal Protection for Software

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Updates and questions concerning this report should be directed to Ralph Pais (rpais@fenwick.com) of our Mountain View office or Michael Egger (megger@fenwick.com) of our San Francisco office. Additional copies are available upon request.

Our Offices

Silicon Valley Center 801 California Street Mountain View, CA 94041 Tel: 650.988.8500 Fax: 650.938.5200	Embarcadero Center West 275 Battery Street San Francisco, CA 94111 Tel: 415.875.2300 Fax: 415.281.1350	Boise Idaho Office 877 West Main Street, Suite 706 Boise, ID 83702 Tel: 208.331.0700 Fax: 208.331.7723
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Introduction

This report summarizes the legal protection available for computer software in most significant markets around the world as of January 2004. It also identifies changes in the availability of legal protection since the 2003 version of this report. The methods of protection covered are copyright, trademark, patent and contract.

The accompanying chart summarizes whether software is currently within the subject matter protected under the copyright or patent law of each country listed. Since the extent of copyright protection for a software work also depends on mutual membership in an international convention or a bilateral agreement, the chart identifies convention memberships. Certain bilateral agreements between the United States and other countries are identified as well. *Thus, for both U.S. and foreign software, the current availability of subject matter protection in a particular country can be determined from the chart. Local counsel should be consulted, however, before distributing software in a particular market, to confirm and update this information and to advise on the practicality of enforcement, evidentiary considerations and other protection mechanisms.*

Not all national laws or convention memberships provide retroactive protection for previously published or unpublished software, so the effective date of the law and the membership can be critical in determining whether a particular work is protected. Such issues of timing are beyond the scope of this report.

Copyright Protection

The trend is strongly toward express statutory protection for software in copyright laws around the world. Statutory protection has become increasingly important because more software is mass-marketed through traditional channels or from a website without a signed license agreement. In many countries, courts have held software to be within the subject matter protection of existing copyright law. Generally, copyright laws protect the form of expression of an idea, but not the idea itself. With respect to software, this typically means that the computer program, in both human-readable and machine-executable form, and the related manuals are eligible for copyright protection, but the methods and algorithms within a program are not protected expression. Source code and object code are protected against literal copying. In addition, certain nonliteral elements of expression (including the structure, sequence, organization and “look and feel” of a program) have sometimes been afforded protection under U.S. copyright law. This trend has not clearly surfaced in foreign courts. Therefore, the current scope of protection of software under U.S. law is, at least in this respect, probably broader than under any foreign law.

A common requirement of copyright laws is that a work be original. Originality means that a work has been created independently and is the personal expression of the author. This factor must be distinguished from the concept of novelty, which usually is not required. Proof of originality is assisted in some jurisdictions by registration of a work with specified regulatory authorities.

Rights Protected

The exclusive rights of a copyright holder that are recognized and protected by most copyright laws are the rights to reproduce or copy, adapt (*i.e.*, prepare derivative works), distribute and publicly perform the work. The precise nature of these rights, however, often differs among countries. The exclusive right to display is not generally recognized outside the United States, except to the extent that it may be covered by the moral right of disclosure (discussed below).

A number of countries, and the EU Software Directive as well, also recognize “moral rights,” which may include the right to be known as the author of the work (right of paternity), the right to prevent others from distorting the work (right of integrity), the right to control publication of the work (right of disclosure) and the right to withdraw, modify or disavow a work after it has been published (right of withdrawal). Moral rights protection reflects the view that the individual, not only the work, is to be protected. The scope of these rights varies among the countries that protect moral rights of authors. The Berne Convention recognizes only the first two moral rights above.

In most such jurisdictions, agreements to waive or transfer moral rights are not enforceable. In those countries where moral rights are protected, such rights may restrict the transferee of the software (such as the party who commissioned the work) from making changes to the software without the express consent of the original author.

Formalities

Berne Convention countries provide for copyright protection without stipulating the observance of any formalities. Some countries (such as the United States prior to the effective date of its Berne membership on March 1, 1989, and some Latin American countries), however, require a copyright notice on published works. This notice is necessary on published works under the Universal Copyright Convention. Additionally, a deposit of all or portions of the work and/or registration is required by some jurisdictions in order to secure protection or prior to bringing a lawsuit for copyright infringement. Even if registration is not stipulated to obtain or enforce protection, it may provide important evidentiary benefits.

In certain countries where formalities must be observed in order to obtain protection, they apply only upon publication. As indicated below, the country where first publication occurs is often important in determining whether works of foreign authors will be granted copyright protection.

Copyright Protection Abroad

Copyright laws operate territorially. They usually provide protection only for a country's nationals or for works first published in the country. Conventions and bilateral agreements address the availability of protection for foreign authors and grant protection to foreign authors under the principles of national treatment or formal reciprocity. In general, under the principle of national treatment, which is the principle underlying the primary international copyright treaties, a country will grant the same protection to works of foreign authors as it grants to works of its own nationals. Similarly, under the principle of formal reciprocity, which is the principle underlying many bilateral agreements, a country will grant the same protection to works of authors from another country as it grants to works of its own nationals, but only if a country determines that the works of its own nationals are granted some minimum degree of protection in the other country.

The most significant international treaties relating to copyright protection are the Berne Convention, the Universal Copyright Convention and certain provisions of the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement. The United States is a member of the Berne Convention and the Universal Copyright Convention and, as a member of the World Trade Organization (WTO), is bound by the TRIPS Agreement (as well as other agreements administered by the WTO). The United States also has bilateral arrangements with several countries that do not belong to any copyright convention.

Universal Copyright Convention

The United States is a member of the Universal Copyright Convention (UCC). Under the UCC's national treatment provisions, software created by a U.S. author or first published in the United States is protected in other UCC member countries to the extent that the member country's copyright laws protect software. The UCC provides that any member country that requires, as a condition of copyright protection, compliance with formalities (such as registration, deposit or notice) must treat such formalities as satisfied if all published copies of a work bear the symbol "©," the name of the copyright proprietor and the year of first publication. This provision applies, however, only to works that (i) were first published outside the country requiring the observance of the formalities, and (ii) were not authored by one of that country's nationals. In contrast to Berne, formalities such as registration are permitted under the UCC in order to bring an infringement suit.

A current list of UCC member countries is available at http://www.unesco.org/culture/laws/copyright/html_eng/state1952.shtml and http://www.unesco.org/culture/laws/copyright/html_eng/state1971.shtml.

Berne Convention

The Berne Convention contains a more far-reaching regulation of copyright than does the UCC. Berne members constitute a union that is open to all countries of the world, provided that certain minimum protective requirements are satisfied. These requirements include (i) national treatment (whether or not a work is published), (ii) the granting of certain moral rights to authors with regard to the exploitation of their works, (iii) the granting of certain "economic rights" (such as exclusive rights of translation, reproduction, performance or adaptation with respect to protected works) and (iv) the adoption of certain minimum terms of protection (generally the life of the author plus 50 years) for various works. In addition, Berne provides copyright protection without requiring that any formalities, e.g., prerequisites to bringing infringement suits, be observed. Berne does not prevent a country from providing evidentiary benefits as an incentive to registration, such as in the United States. Some commentators interpret Berne as prohibiting the waiver or assignment of the "moral rights" of the author. As a practical matter, however, national law appears to govern whether "moral rights" may be totally waived, may be transferred or are applicable to a particular type of work such as software.

The United States became a member of Berne on March 1, 1989. Until then, U.S. authors could indirectly obtain protection under this treaty if first publication took place in a member country or simultaneously in a member and a nonmember country. "First publication" has different meanings, both strict and liberal, among countries. While the United States ratified the most recent version of Berne, some other countries have ratified earlier versions only. In addition, those who agree to assent to Berne under the auspices of entering the WTO need not implement the moral rights provisions of Berne.

With respect to retroactivity, unless otherwise agreed by special convention, a work whose “country of origin” is the United States will receive Berne protection from other member countries if that work had not fallen into the public domain under U.S. domestic copyright law as of March 1, 1989. Similarly, unless otherwise agreed by special convention, the United States is required to extend Berne-level protection to any work whose “country of origin” is a Berne member if that work had not fallen into the public domain in that member country as of March 1, 1989.

A current list of Berne member countries is available at <http://www.wipo.int/treaties/en/documents/word/e-berne.doc>.

WIPO Copyright Treaty

The WIPO Copyright Treaty of 1996 is a special agreement to the Berne Convention and requires compliance with Berne. This treaty makes explicit that computer programs are protected as literary works under Berne. It also states that compilations of data for which the selection or arrangement of the contents are sufficiently original are protected as compilations. Software makers are granted a right to control rentals of computer programs. One of the most software-oriented provisions requires treaty nations to provide adequate and effective protection against the circumvention of technical measures that restrict the ability of others to exercise the rights owned by the copyright owner.

A current list of countries that have ratified this treaty is available at <http://www.wipo.int/treaties/en/documents/word/s-wct.doc>.

Practical Variations

Among the countries where subject matter protection exists for software, there are substantial differences in the laws and regulations governing protection. For example, the author of a “U.S. origin” work who desires to file suit for copyright infringement in the United States must first register the work with the U.S. Copyright Office. Most other countries do not require that their nationals take such action prior to filing copyright infringement actions. In some countries, registration provides certain evidentiary benefits. In Japan, for example, the legal effect of one type of optional registration is to create a rebuttable presumption that the program was created on the date declared in the application, but a program must be registered within six months of its creation. In Venezuela, unless a U.S. author has already registered its software in the U.S. Copyright Office, when the author seeks to register its copyright in Venezuela (which one might do to prove originality for purposes of possible litigation in Venezuela), the author must also file assignments from each person who worked on the software.

Trademark Protection

The protection of trademarks via registration has long been accepted internationally. In most countries, rights are initially secured by registration and maintained by later use in the country. Generally speaking, use without registration does not provide trademark protection. Only the United States and a few other nations require use of the mark before registration (*e.g.*, Canada and the Philippines) or give some priority of rights based solely on use (*e.g.*, in addition to the United States, common law countries such as Australia, Canada and the United Kingdom).

Since November 16, 1989, applicants have been able to file for trademark registrations in the United States on the basis of “intent to use,” but actual use of the mark must occur before the registration is issued. The sole exception to this actual use requirement is that a foreign applicant relying on Paris Convention rights may obtain a registration without actual use of the mark.

With few exceptions, the three most notable of which are the European Community Trademark, the Madrid Agreement and the Madrid Protocol, discussed below, trademarks may be protected on a country-by-country basis only. The lead time from application to registration varies by jurisdiction from a few months to several years. While some countries examine the existing registry for potentially conflicting prior registrations (*e.g.*, the United States), others do not (*e.g.*, Germany, France and Switzerland), leaving it to the registrants to identify and resolve such conflicts.

Paris Convention

Under the Paris Convention for the Protection of Industrial Property, which has been signed by 162 countries, a trademark owner may have trademark rights “backdated” in a foreign country to the date of initial filing in its home country if application is made in another treaty country within six months of filing in the home country. Because the United States is a signatory to this agreement, timely Paris Convention filings may help protect new U.S. trademarks from pirates who register trademarks abroad and then attempt to sell them back to the true owners.

A current list of Paris Convention member countries is available at <http://www.wipo.int/treaties/en/documents/word/d-paris.doc>.

European Community Trademark (CTM)

Beginning April 1, 1996, it became possible for anyone to obtain protection in all member countries of the EU (currently 15, increases to 25 on May 1, 2004) with a single application filed with the CTM office in Alicante, Spain. Successfully obtaining a CTM likely will generate significant cost savings as an alternative to filing individual country applications. However, should the application encounter difficulties during examination or be opposed by a successful challenger and the applicant choose the option of converting the CTM application to individual country applications, the costs likely would be significantly higher than they otherwise would have been had the applicant directly applied in the individual countries initially.

Madrid Agreement

The Madrid Agreement is the second major exception to the need for registration on a country-by-country basis. Under this convention, to which the United States is not a party, once a national of a member country has registered a trademark in its home country, the trademark may be registered in all member countries by filing a single trademark application that ultimately would be filed with the International Bureau in Berne, Switzerland. Nationals of countries that are not members of this convention may not obtain such “international registrations” unless they have a “real and effective industrial or commercial” presence in, are domiciled in or are a national of a member country through which they can obtain the necessary home country registration.

A current list of Madrid Agreement member countries is available at <http://www.wipo.int/treaties/en/documents/word/g-mdrd-m.doc>.

Madrid Protocol

The Madrid Protocol, which became effective on April 11, 1996, and was originally intended to replace the Madrid Agreement by providing a truly international centralized trademark application system, currently works in parallel with the Madrid Agreement. This increasingly popular convention implements an international trademark application system similar to the one established by the Madrid Agreement, but does so with certain significant changes that have made the system more appealing to countries that found the Madrid Agreement system disadvantageous. On October 3, 2002, the United States agreed to accede to the Madrid Protocol. Implementing legislation for the Madrid Protocol went into effect November 2, 2003. As a result, it is now possible for applicants with citizenship, domicile, or a “real and effective commercial presence” in the United States to file a single application with the United States Patent and Trademark Office to seek international trademark protection in other Madrid Protocol member countries designated by the applicant.

A current list of Madrid Protocol member countries is available at <http://www.wipo.int/treaties/en/documents/word/g-mdrd-m.doc>.

Patent Protection

More than half of the 176 countries in the world that grant patents permit the patenting of software-related inventions, at least to some degree. There is a worldwide trend in favor of adopting patent protection for software-related inventions. This trend accelerated following the adoption in 1994 of the TRIPS Agreement, which mandates member countries to provide patent protection for inventions in all fields of technology, but which stops short of mandatory patent protection for software *per se*. Developing countries that did not provide such protection when the TRIPS Agreement came into force (January 1, 1995) have until January 1, 2005, to amend their laws, if necessary, to meet this requirement.

The most widely followed doctrine governing the scope of patent protection for software-related inventions is the “technical effects” doctrine that was first promulgated by the European Patent Office (EPO). This doctrine generally holds that software is patentable if the application of the software has a “technical effect.” Thus, for example, software that controls the timing of an electronic engine is patentable under this doctrine, whereas software that detects and corrects contextual homophone errors (*e.g.*, “there” to “their”) is not.

The EPO law regarding patentability of software tends to be somewhat more liberal than the individual laws of some of the EPO member countries. Thus, one desiring to patent a software-related invention in Europe should generally file an EPO application designating the EPO countries in which protection is sought, rather than filing separate patent applications in individual EPO countries.

For each country, the exact nature of software patentability is a complicated question. Even in countries that are liberal in granting patents on computer software, certain limitations apply. For example, in the United States, software that affects a physical process may be patentable. If the software preempts a mathematical algorithm, however, it is not patentable.

Japan is currently revising and liberalizing its intellectual property laws. As a result, it should become somewhat easier to obtain patent protection for software in Japan than it is in the United States or Europe.

Obtaining patent protection for any invention, including software, is relatively expensive. For each country in which patent protection is sought, the cost is typically several thousands of dollars in attorney fees, patent draftsman charges, and governmental fees. Why then would one seek patent protection for protection for software rather than rely on copyright protection? First, a patent is valid against everyone in that country who makes, uses or sells the patented invention, even if the infringer invented it independently. Second, while copyright law protects only the expression of an idea, patent law protects the underlying

idea. This is true as long as the idea is not so fundamental that it constitutes a law of nature. Thus, for example, under U.S. patent law a mathematical algorithm is not patentable if the patent claim preempts the entire algorithm, but may be patentable if it applies the algorithm to accomplish a specific technical purpose. Finally, because many software products are mass-marketed without a signed license agreement, the strong protection provided by patent laws is increasingly important.

Program Product Claims

Although patent protection for software is available in an increasingly greater number of countries, the manner in which software is claimed in a patent is not necessarily consistent. In particular, the practice of claiming a computer program stored on computer-readable media is a controversial issue. When a computer program is claimed in this manner, the infringing article is the medium that contains the computer program. As a result, the patent holder can enforce the patent against publishers who place an infringing program on the media rather than being limited to enforcing the patent against end users of the infringing program. This type of claim is known as a Beauregard claim in the United States, and is more generally referred to as a program product claim.

Acceptance of and use of program product claims varies by national or supra-national patent office. In the United States, computer programs embodied in a tangible medium are patentable subject matter. The European Patent Office has for many years issued software patents that include program product claims, even though the European Patent Convention nominally excludes computer programs and business methods from the statutory definition of “patentable inventions.” The Japanese Patent Office also issues software patents that include program product claims. However, reliance on program product claims in Japan has decreased due to the strengthening of patent protection available for software in general through issuance of patents with claims to the computer programs themselves, rather than just to computer programs stored on computer-readable media.

In summary, there seems to be a general trend toward acceptance of the use of program product claims in providing software patent protection. With the United States Patent and Trademark Office, the European Patent Office, and the Japanese Patent Office all issuing patents that include program product claims, there is an increasing chance that patent offices in other countries will eventually follow suit in accepting the use of such claims.

Paris Convention

Most of the industrialized nations of the world adhere to the Paris Convention for the Protection of Industrial Property. The most notable exception is Taiwan. This treaty provides that one who files a patent application in any of the member countries has up to one year to file subsequent applications in other member countries and be able to backdate the effective filing dates of the subsequent applications to that of the first-filed patent application. For

example, one could file a patent application in the United States on June 1, 2004, then file corresponding applications in the United Kingdom, Japan and Canada up until June 1, 2005, and be able to backdate the filing dates in the United Kingdom, Japan and Canada to June 1, 2004. Backdating is important because public disclosures of an invention (whether by the inventor or by somebody else) that occur between June 1, 2004, and June 1, 2005, will not have an adverse effect upon the U.K. Japanese and Canadian applications. Such public disclosures would bar applications in these countries if the provisions of the Paris Convention could not be invoked. In addition, backdating provides an earlier filing date for priority purposes when the first to file is the critical timing factor, as it is in most countries, in determining which of two or more competing applicants will be awarded the patent. Nationals of countries that are not members of the Paris Convention might not be allowed to file patent applications in certain countries.

European Patent Convention

The European Patent Convention is the treaty that established the European Patent Organization (EPO). Twenty-seven direct countries plus 4 extension countries can be designated via the EPO. In each of those countries, one can apply for a patent via either the national route or the EPO. The EPO grants patents that are valid in those member countries designated in the EPO application and subsequently perfected in those countries. Enforcement of the EPO patent is obtained through the national courts of the various countries.

A current list of EPO member countries is available at <http://www.european-patent-office.org/epo/members.htm>.

Eurasian Patent Convention

The Eurasian Patent Convention is the treaty that established the Eurasian Patent Organization. (All of the member countries of the Eurasian Patent Convention are former republics of the USSR.) The main purpose of the Eurasian Patent Convention, which operates in much the same way as the European Patent Convention, is to create a regional system of legal protection for inventions on the basis of a common Eurasian patent covering the territory of all the member countries. As in the EPO, an applicant may apply for a patent via either the national route or the Eurasian Patent Organization, and the Eurasian Patent Organization grants patents that are valid in those member countries designated in the Eurasian Patent Organization application and subsequently perfected in those countries. Enforcement of the Eurasian Patent Organization patent is obtained through the national courts of the various countries.

A current list of Eurasian Patent Convention member countries is available at <http://www.eapo.org/eng/information/about.html>.

Patent Cooperation Treaty

The Patent Cooperation Treaty (PCT) provides a means for filing patent applications simultaneously in more than 120 countries. The major value of the PCT is to enable one to defer normal filing and translation deadlines and costs in PCT countries beyond the country in which the first patent application is filed for up to an additional 18 months beyond the 12 months provided by the Paris Convention. This extra time can be critical, because it may be what is needed to evaluate the results of the patent prosecution in a first-filed country. If the prosecution does not go well or the product in which the invention is embodied is not commercially viable, the subsequent foreign patent applications can be stopped, thereby avoiding additional expenses.

A current list of PCT member countries is available at <http://www.wipo.int/treaties/en/documents/word/m-pct.doc>.

TRIPS

TRIPS (Trade-Related Aspects of Intellectual Property Rights) is an annex to the agreements that established the World Trade Organization (WTO), the international trading organization that came into force on January 1, 1995, as the successor to the General Agreement on Tariffs and Trade (GATT). TRIPS sets forth certain minimum standards for the protection of the principal forms of intellectual property rights, including patent and copyright, by requiring member countries to comply with the substantive obligations of the primary international intellectual property conventions, including the Berne Convention and the Paris Convention. TRIPS includes a specific provision that expressly requires member countries to protect software, whether in source or object code, as literary works under the Berne Convention. Because TRIPS establishes only minimum standards for the protection of intellectual property rights, member countries have the right to provide more extensive protection of intellectual property rights within their national legal systems.

In addition to setting forth these minimum standards, TRIPS establishes certain procedures and remedies that member countries must make available to holders of intellectual property rights. TRIPS also provides that any disputes between WTO member countries regarding their TRIPS obligations will be resolved through the WTO's binding dispute settlement procedures. Whether an individual member country is in compliance with its TRIPS obligations is a potential basis for dispute, because TRIPS does not mandate the methods that member countries must follow to implement these minimum standards within their national legal systems.

A current list of WTO member countries (as well as countries that are in various stages of applying for membership) is available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

Contractual Protection

Contractual protection (in contrast to statutory protection) is available in most countries if any required governmental registrations, approvals and other actions are taken to assure enforceability. Even then, the scope of available remedies may be restricted, and their application is generally limited to the other party to the agreement. Confidentiality requirements are implemented by specific agreement both with licensees and in employer-employee relationships. Unless expressly provided for in the agreement, injunctive relief is usually not available for breach of contract in most nations other than the United States.

U.S. Border Enforcement

U.S. Customs is authorized to make its own independent infringement determinations in the areas of copyrights, trademarks and trade names. With respect to copyrights, Customs is authorized to detain imports that are merely believed to infringe the rights of a U.S. copyright owner. Customs ordinarily makes such detentions based on allegations by U.S. copyright owners of possible infringement. Imports may be detained at the port until after Customs makes a decision concerning the validity of the infringement claim. Significantly, such imports are detained before Customs makes a decision concerning infringement and may remain in the custody of Customs for many months pending a final infringement decision.

Customs also has authority to detain imports that are merely alleged to infringe U.S. trademarks or trade names before there has been any formal infringement finding. Under existing regulations, however, Customs does not make its own independent infringement determinations with respect to patents or semiconductor mask works. Because of the complexity of infringement issues relating to patents and mask works, Customs historically has deferred to the institutional expertise of the U.S. International Trade Commission (ITC) and the courts to make patent and mask work infringement findings. In the case of both patents and mask works, Customs simply enforces exclusion remedies that have been issued by a court or the ITC at the conclusion of a formal infringement case.

Customs has developed an online database that links each U.S. port with the intellectual property records that are maintained at Customs headquarters in Washington. Because each local Customs district director has authority to take action against imports that may infringe protected intellectual property rights, this development provides a greater degree of national uniformity with respect to overall U.S. border enforcement efforts. Such a policy is required to avoid a situation where a work would be “cleared” at one port, but “believed to be an infringing copy” at another. Also, because intellectual property rights become

eligible for Customs protection only after they are registered with Customs headquarters in Washington (or an ITC or court order is issued at the close of an infringement case), there is a need for uniform notification of the ports concerning the status of works eligible for Customs protection.

Conclusion

Although the availability of legal protection for software has increased rapidly around the world over the past ten years, the scope and enforceability of that protection continues to vary significantly by country. The use of the Special 301 provisions of the 1988 U.S. Trade Act has resulted in greater protection for software, as well as other intellectual property, in several countries. The Business Software Alliance and the Software & Information Industry Association have been effective forces for monitoring software piracy around the world, promoting legislative and attitudinal changes and taking legal actions to enforce copyright protection. The accession of the United States to the Berne Convention, the NAFTA provisions and the establishment of the World Trade Organization (as a successor to the GATT), which fosters the protection of intellectual property rights through the TRIPS Agreement, were important milestones in the use of multilateral agreements for dealing with protection for software. These multilateral efforts are intended to promote adequate and effective protection of intellectual property rights while ensuring that national laws enforcing such rights do not themselves become barriers to trade.