

“ Plain speaking legal advice ”

## Intellectual Property Rights How To Protect Your Software

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This publication is written as a general guide only. It is not intended to contain definitive legal advice, which should be sought as appropriate in relation to a particular matter.

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How do you protect this core element of your business? There are some statutory provisions that govern software protection but these are, on the whole, limited in their application, complex and expensive to enforce. The main statutory provisions are copyright and patents both covered under the Copyright Designs and Patents Act 1998.

### **Copyright**

As far as copyright law is concerned, it is not the actual software program itself that may have the benefit of copyright protection, but the individual elements making up the program such as the source code, graphics and sounds.

Copyright protection arises automatically and protects the expression of recordable ideas. For example an idea for a snooker computer game will not without more have the benefit of copyright protection. If however the source and / or object code is recorded, the expression of the idea in this way will be protected.

Further, the user interface, icons and graphics of the game could potentially gain protection as artistic works once drawn.

Where a copyright exists, it will afford the author of the works protection for a period of 70 years in respect of the source / object code and any graphics.

Copyright will be infringed where someone other than the owner of the copyright copies the work or a substantial part of it without the consent of the copyright owner.

Copyright is not a monopoly right and so it is quite possible that two developers could come up with a software program that performs the same tasks and looks exactly the same as the other. Provided that one developer has not copied the work of the other he will not be in breach of any copyright that may exist in the others program. The Nova Productions Limited case heard earlier this year confirmed that this will be the case where one programmer has seen and been inspired by the work of another.

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### **Software Patents**

Only software programs that have a ‘technical effect’ are capable of patent protection. The Courts have issued very strict guidance to assist in deciding whether the necessary ‘technical effect’ is present, making such patents very difficult to obtain.

Programmers seeking to obtain a software patent must also satisfy all of the usual requirements for patentability before a patent will be granted and these are not particularly easy hurdles to cross.

If a software patent is obtained it will give the patent holder a monopoly right to exploit the software for a period of 20 years.

### **Conclusion**

As you will see from the above the law provides only limited protection for developers of software programs. Even where software does benefit from one of the statutory protections, enforcing such rights can be a lengthy and expensive process, especially where the breach occurs abroad.

The best way of protecting software is to limit access to the software and its core components. Where this is not possible, developers are well advised to take technical steps to protect their programs and deter potential plagiarists, for example:

- Including in the object code the programmer’s name
- Inserting redundant code
- Including in the object code encryption measures and unique serial numbers
- Include a copyright notice on software packaging
- Including pop up notices that appears on installation of the software

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With the growth and widespread use of the Internet, software protection is now more of an issue than ever. It is for this reason that you should take steps to protect your software now.

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If you have any questions or require any assistance in relation to the issues raised in this article please contact Yavan Brar, Company Law Partner, e-mail: [ysb@herrington-carmichael.com](mailto:ysb@herrington-carmichael.com)

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