

Patent protection for computer software.

There is a general misconception amongst software developers that software cannot be patented and reliance must be placed upon copyright to protect software.

This was the case twenty or more years ago but most major jurisdictions have now declared software to be patentable.

Patent protection can last for up to twenty years and provides the patent holder with the exclusive right to manufacture, use, market and sell products or services or license them to other parties in return for royalties. For the patent rights to be legally enforceable the invention must be new and inventive, ie not obvious to someone with common general knowledge and experience of the subject.

In Australia, there have been two relevant court decisions handed down in relation to computer software related inventions which have established their patentability. IBM v Commissioner of Patents 22 IPR 417 (the "IBM Case") in 1991 and CCOM v Jiejing 28 IPR 481 (the "CCOM Case") in 1994.

The IBM case concerned the patentability of an invention directed to an improved method and apparatus for producing curved images on a computer screen. The invention developed by IBM utilised a particular mathematical algorithm which enabled the creation of smoother and more accurate computer generated curves.

It was held that IBM were entitled to the grant of a patent as the production of an improved curved image was a "commercially useful effect" in computer graphics.

The CCOM case related to the storage, retrieval and display of Chinese characters on a computer screen and the means by which the characters were categorised for selection. The invention was held to be patentable and formulated in the case was a test for determining the patentability of computer software related inventions. The test formulated is whether there is "a mode or manner of achieving an end result which is an artificially created state of affairs of utility in the field of economic endeavour". This test is now used by the Australian Patent Office to determine the patentability of computer software related inventions.

The IBM and CCOM cases have established that in Australia any new and inventive software application, which provides a commercially useful effect is patentable.

Doesn't copyright protect my software?

Computer software has been protected under the Australian Copyright Act 1968 since the inclusion of computer programs in the definition of "literary work" in 1984.

Copyright provides only a narrow scope of protection in comparison to patent protection and only protects against direct reproduction of the software by end-users and the theft of code by competitors. It does not protect the underlying concept, idea, method and functional aspects contained in the computer program, so if a competitor produces a computer program with different but functionally equivalent code, copyright will not be infringed.

In contrast, a patent can protect functionality and methodology. So a program created by a competitor that provides the same functionality would be an infringement of patent rights, even if it was created with no knowledge of the patented program.

Reliance on copyright to protect your software will not prevent a competitor from independently creating, patenting and exploiting software with the same functionality. This would affect your right to use, license or assign the software.

A patent protects competitive advantage derived from your software development. A patent can secure a small company a place in the market and generate revenue from licensing or sale. By licensing a software development to a big company, smaller companies can avoid the problem of getting a software product to the market. A patent can provide an important strategic and defensive function. In the event of a dispute with a competitor, it can be cross-licensed bringing you extra income and avoiding litigation costs.

Victoria

T +61 3 9819 1664

New South Wales

T +61 2 9888 6600

Western Australia

T +61 8 9325 1900

E mail@watermark.com.au

W www.watermark.com.au

B www.intellectualassetmanagement.com.au

Twitter [@WatermarkIP](https://twitter.com/WatermarkIP)

LinkedIn [Watermark Intellectual Property](https://www.linkedin.com/company/watermark-intellectual-property)

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