Technology and the Law

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Module 1: Computers

Part 2

III. The Debate on Software Patents

A. Software under Philippine law

Under Section 21 (Patentable Inventions) of the Intellectual Property Code (Republic Act 8293), provides that "Any technical solution of a problem in any field of human activity which is new, involves an inventive step and is industrially applicable are patentable. It may be, or may relate to, a product, or process, or an improvement of any of the foregoing."

As to the requirement of Novelty, Section 23 of the same law provides that "An invention shall not be considered new if it forms part of a prior art." Section 24 provides the inclusions of prior art, to wit: "Prior art shall consist of: (1) Everything which has been made available to the public anywhere in the world, before the filing date or the priority date of the application claiming the invention; and (2) The whole contents of an application for a patent, utility model, or industrial design registration, published in accordance with this Act, filed or effective in the Philippines, with a filing or priority date that is earlier than the filing or priority date of the application: Provided, That the application which has validly claimed the filing date of an earlier application under Section 31 of this Act, shall be prior art with effect as of the filing date of such earlier application: Provided further, That the applicant or the inventor identified in both applications are not one and the same." As to the requirement of involvement of an Inventive Step, Section 26 provides that "An invention involves an inventive step if, having regard to prior art, it is not obvious to a person skilled in the art at the time of the filing date or priority date of the application claiming the invention." As to the requirement of Industrial Applicability, Section 27 provides that "An invention that can be produced and used in any industry shall be industrially applicable."

Considering that the above are met, an invention is generally patentable. However, Section 22 (Non-Patentable Inventions) of the same law, up to the extent applicable to the subject matter, provides that "The following shall be excluded from patent protection: xxx 22.2 Schemes, rules and methods of performing mental acts, playing games or doing business, and programs for computers; xxx" Hence, although an invention may be patentable because it meets the requisites in Section 21, by express provision of Section 22, computer programs cannot be patented in the Philippines.

The protection provided to computer programs is limited, generally, to copyright. Section 172 (Literary and Artistic Works) of the IPL provides that "(172.1) Literary and artistic works, hereinafter referred to as "works", are original intellectual creations in the literary and artistic domain protected from the moment of their creation and shall include in particular: xxx (n) Computer programs; xxx"

The copyright over computer programs may be limited by fair use, especially as to access to the a computer program's source code. Section 185.1 provides in part that "Decompilation, which is understood here to be the reproduction of the code and translation of the forms of the computer program to achieve the inter-operability of an independently created computer program with other programs may also constitute fair use." On the other hand, even if, under the Chapter on Limitations on Copyright, the private reproduction of a published work in a single copy, where the reproduction is made by a natural person exclusively for research and private study, is permitted without the authorization of the owner of copyright in the work, as provided by Section 187.1 of the law, such permission is not extended to the reproduction of a computer program, as provided for in Section 187.2. Nevertheless, "the reproduction in one (1) back-up copy or adaptation of a computer program shall be permitted, without the authorization of the author of, or other owner of copyright in, a computer program, by the lawful owner of that computer program: Provided, That the copy or adaptation is necessary for: (a) The use of the computer program in conjunction with a computer for the purpose, and to the extent, for which the computer program has been obtained; and (b) Archival purposes, and, for the replacement of the lawfully owned copy of the computer program in the event that the lawfully obtained copy of the computer program is lost, destroyed or rendered unusable," as provided for in Section 190 of the Intellectual Property Law.

Other provisions of the Intellectual Property Law generally applicable to works enumerated in Section 172 are similarly applicable to computer programs. Note though that the law provides for the protection of copyright for the author/copyright owner, it does not preclude the owner from waiving his rights under copyright, from licensing the work, or assigning the copyright itself to another person.

B. Treatment of Software

The treatment of software in the Philippines lies within the framework of thought that mathematical expressions and scientific truths/theories are not patentable. The Philippines' appreciation of computer programs was congruent with the appreciation of the United States Patent and Trademark Office (US-PTO) that "computer programs and inventions containing or relating to computer programs as mere mathematical algorithms, and not processes or machines."[1]

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1 Tysver, Daniel. "History of Software Patents." http://www.bitlaw.com/software-patent/history.html Accessed 9 July 2008.

However, in 1981 and in the case of Diamond v. Diehr (450 U.S. 175 [1981]), the U.S. Supreme Court ordered the US PTO to grant a patent on an invention even though computer software was utilized. Therein, the invention utilized a computer to calculate and control the heating times for the rubber.[2] *Note that the invention here is not the software alone, but that the software was integral to the invention.* The execution of a process, controlled by running a computer program was patentable.[3]

Nevertheless, considering the confusion that arose after the decision in Diamond vs. Diehr, the US Federal Circuit Courts clarified the patentability of software in the United States, and stated that "if the invention utilizes the computer to manipulate numbers that represent concrete, real world values, then the invention is a process relating to those real world concepts and is patentable." Subsequently in 1998, the Federal Circuit issued a decision in State Street Bank & Trust v. Signature Financial Group (149 F. 3d 1368, 47 USPQ2d 1596 [Fed. Cir. 1998]), which further clarified the patentability of computer software in the United States. The Federal Circuit upheld the patent of Signature Financial Group by declaring that business methods can form patentable subject matter. Subsequent to the State Street Bank case, it was no longer of doubt that software, which are not mere mathematical expressions or algorithms, are patentable in the United States.[4]

The enforceability of software patents in other jurisdictions, however, is in doubt. Although Article 27 paragraph 1 of TRIPs partly states that "(...) patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. (...) patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced"; it is unclear whether it can be enforced in a jurisdiction which categorically states that computer programs are not patentable,[5] such in the case under European law, and also in the Philippines.

IV. Free Open Source Software (FOSS)

A. Software types beyond commercial/proprietary

Shareware is "a marketing method for computer software in which the software can be obtained by a user, often by downloading from the Internet or on magazine cover-disks free of charge to try out a program before buying the full version of that program. If the "tryout" program is already the full version, it is available for a short amount of time, or it does not have updates, help, and other extras that buying the added programs has."[6] On the other hand, freeware is "computer software that is available for use at no cost or for an optional fee."[7] Freeware should be distinguished with free software, inasmuch as free software or software libre is "software that can be used, studied, and modified without restriction, and which can be copied and redistributed in modified or unmodified form either without restriction, or with minimal restrictions only to ensure that further recipients can also do these things."[8] Usually, free software are licensed under GNU-GPL (General Public License).

B. GNU Philosophy

GNU means "GNU's Not Unix," which is a recursive acronym. The philosophical articulation of GNU licensing is that "Free software is a matter of freedom: people should be free to use software in all the ways that are socially useful. Software differs from material objects—such as chairs, sandwiches, and gasoline—in that it can be copied and changed much more easily. These possibilities make software as useful as it is; we believe software users should be able to make use of them."[9]

C. The Four Freedoms[10]

Free software is a matter of the users' freedom to run, copy, distribute, study, change and improve the software. More precisely, it refers to four kinds of freedom, for the users of the software:

* The freedom to run the program, for any purpose (freedom 0).
* The freedom to study how the program works, and adapt it to your needs (freedom 1). Access to the source code is a precondition for this.
* The freedom to redistribute copies so you can help your neighbor (freedom 2).
* The freedom to improve the program, and release your improvements to the public, so that the whole community benefits (freedom 3). Access to the source code is a precondition for this.

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2 Ibid.
3 Diamond vs. Diehr. Wikipedia, the free encyclopedia. http://en.wikipedia.org/wiki/Diamond_v._Diehr. Accessed 9 July 2008
4 Tysver, History. Supra.
5 Software Patents under the TRIPS agreement. Wikipedia, the free encyclopedia. http://en.wikipedia.org/wiki/Software_patents_under_TRIPs_Agreement. Accessed 9 July 2008.
6 Shareware. Wikipedia, the free encyclopedia. http://en.wikipedia.org/wiki/Shareware Accessed 9 July 2008.
7 Freeware. Wikipedia, the free encyclopedia. http://en.wikipedia.org/wiki/Freeware. Accessed 9 July 2008; citing Merriam-Webster definition of Freeware. http://www.merriam-webster.com/dictionary/freeware
8 Free Software. Wikipedia, the free encyclopedia. http://en.wikipedia.org/wiki/Free_software Accessed 9 July 2008
9 Philosophy of the GNU Licenses. http://www.gnu.org/philosophy/ Accessed 9 Jul 2008.
10 GNU Operating System. http://www.gnu.org/philosophy/free-sw.html Accessed 9 July 2008