

Patent and/or Copyright for Software: What Has Been Done So Far?

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“... the nineteenth-century vision that subdivided world intellectual property law into discrete and mutually exclusive compartments for industrial and artistic property has irretrievably broken down. The theory that the classical patent and copyright models coherently address the way intellectual creations behave has been discredited by its inability to deal adequately with the behavior of many commercially valuable, cutting-edge intellectual creations. ... Instead of a clear line of demarcation, there is a permeable line of demarcation that allows an intermediate zone of marginal subject matters to co-exist within a space that the classical system formally ignores.”

Reichman (1994, pp. 2500-01)

“The law has long had difficulties accommodating information products within the copyright-patent regime...modern developments make this regime unsuitable for the future...The time has therefore come to rethink copyright and patent, to unify the theory of intellectual property in order to create a system of law that is capable of providing the right incentives across the entire domain of human intellectual endeavor.”

Dreyfuss (1993, pp. 233-4)

Abstract: Although the above quotes were aimed at somewhat more general flaws in the patent-copyright regime, the particular case of software seems to have stretched the patent-copyright divide to the point of breakage. In spite of being traditionally excluded from patent, software is an obvious case of a single creation that embodies both “expression” and “innovation”, and so strong arguments exist for software to be both copyrightable and patentable material. The legal profession has looked carefully at the patentability of software over the past 15 years or so, both from a fully legal perspective, and using economic-type arguments. But we are still waiting for the economics profession per sé to set to work on this issue. Here, I shall go through some of the most well known arguments surrounding the protection of software, and then put forward a personal opinion as to what theoretical economists are likely to add, if and when they include this important question on their research agendas.