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SOFTWARE AS AN OBJECT OF PATENT LAW

Annotation

One of the frequent requirements of employers in the IT field is the absence of plagiarism in the code of programs and / or algorithms. However, due to the regulation of computer programs by the copyright institution, it is very difficult not only to check the work for the possibility of plagiarism, but also to protect one's rights as a copyright holder in court. In this article, we willconsider the possibility of registering computer programs as objects of Patent Law

Key words: Copyright, Patent Law, Intellectual Property Law, Software, Civil Law.

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БАҒДАРЛАМАЛЫҚ ҚҰРАЛ ПАТЕНТТІК ҚҰҚЫҚТЫҢ ОБЪЕКТІСІ РЕТІНДЕ

Аңдатпа

IT саласындағы жұмыс берушілердің жиі қойылатын талаптарының бірі - бағдарламалар және/немесе алгоритмдер кодында плагиаттың болмауы. Дегенмен, авторлық құқық институтымен компьютерлік бағдарламаларды реттейтінін ескере отырып, бағдарламада плагиаттың жоқтығына көз жеткізу ғана емес, сонымен қатар құқық иесі ретінде өз құқықтарын сот арқылы қорғау өте қиын. Бұл мақалада біз компьютерлік бағдарламаларды патент құқығының объектілері ретінде тіркеу мүмкіндігін қарастырамыз.

Түйінді сөздер: авторлық құқық, патент құқығы, зияткерлік меншік құқығы, компьютерлік бағдарлама, азаматтық құқық.

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ПРОГРАММНОЕ ОБЕСПЕЧЕНИЕ КАК ОБЪЕКТ ПАТЕНТНОГО ПРАВА

Аннотация

Одни из нередких требований работодателей в IT сфере, является отсутствие плагиата в коде программ и/или алгоритмов. Однако, ввиду регулирования программ ЭВМ институтом авторского права, весьма сложно не только убедиться в отсутствие плагиата в программе, но и защитить в судебном порядке свои права как правообладателя. В этой статье мы рассмотрим возможность регистрации программ ЭВМ, как объектов Патентного права.

Ключевые слова: авторское право, патентное право, правоинтеллектуальной собственности, программа ЭВМ, гражданское право.

In the last decade, one of the debatable questions is whether a computer program can be an object of patent law [1]. Software and algorithms, in one form or another, are used in almost all electronics that are used today. Due to the widespread need for software, this area is very important and profitable. That is why the solution of the issue of legal regulation of computer programs is so important from the point of view of entrepreneurial activity and authors.

Computer programs in the Republic of Kazakhstan are regulated by the Law of the Republic of Kazakhstan dated June 10, 1996 No. 6 "On Copyright and Related Rights" [2] (hereinafter referred to as the Copyright Law). According to Art. 2 of this law, a computer program is a set of commands expressed in the form of words, diagrams or in any other form of expression, when recorded on a machine-readable material carrier, the computer performs or achieves a certain task or result, including preparatory materials, the nature of which is that the computer program is their result at a later stage.

Article 7 of the Copyright Law includes computer programs among the objects of copyright and this regulation applies to all types of computer programs that can be expressed in any language and in any form, including source text and object code.

At the same time, in accordance with paragraphs. 5 p. 3 art. 6 of the Patent Law of the Republic of Kazakhstan dated July 16, 1999 No. 427-I (hereinafter referred to as the Patent Law) [3], is not an invention: programs for computers and algorithms as such. The same exception applies to utility models (clause 3, article 7 of the Patent Law). In view of such legal regulation, it is impossible to apply for a patent for a computer program or algorithm as such, due to the fact that they are considered non-patentable both as inventions (clause 3 of article 6 of the Patent Law of the Republic of Kazakhstan) and as utility models (clause 3 , article 7 of the Patent Law of the Republic of Kazakhstan). Such regulation is provided not only by Kazakh legislation, but also in some foreign countries, for example, in Russia [4].

However, the wording of the content of the norm of paragraphs deserves attention. 5 p. 3 art. 6 of the Patent Law - "computer programs and algorithms as such." It follows from the meaning of this norm that if a computer program or algorithm is registered as an integral or functional part of another object of patent law (for example, an invention or utility model) [5], then this is allowed

by law and, therefore, the program The computer (as an integral / functional part) receives patentability. Thus, legal protection of computer programs as an object of patent law is possible only in the form of a method or device.

At the same time, another option is used, when a computer program can be registered as part of another object of patent law, since the program itself, due to the requirements of the law, cannot be registered. Although computer programs are written for certain functions and equipment, the creator of the equipment and the program can be different people. Moreover, it is not uncommon for a situation where equipment is first created, and then additional programs are written for it. And in this case, it will no longer be possible to register a computer program as an integral functional part of the invention. It is for such cases that it is necessary to provide in the law the possibility of registering computer programs as objects of patent law.

In this regard, the experience of some countries deserves attention. For example, in the United States, the law provides for the patenting of computer programs (for the first time such a patent in this country was obtained on May 26, 1981 [6]. other countries.

The very possibility of registering computer programs does not raise any special questions. If we consider the possibility of registering computer programs, then from the point of view of patentability, it meets the criteria for both inventions and utility models.The only exception is the industrial design, becauseits content is a design and artistic solution. Regarding the criteria for an invention and utility model that are presented for a patent, computer programs can correspond to them:

• Novelty - lies in the fact that a specific program should be unknown from the objectively existing and available information [7, p.106].

• inventive step (in relation to invention) - there are a number of programs that use new solutions or solve new problems that were not solved before the creation of this program.

• industrial applicability Considering the ubiquity of computer programs, this criterion does not raise any questions, since an invention is industrially applicable if it can be used in industry, agriculture, healthcare and other industries.

If the program does not meet the criteria or the content of the patent is questionable [8], then this program may still be subject to copyright.

The need to provide the possibility of register-

ing computer programs as objects of patent law is due to the following circumstances.

First of all, I note that the registration of a computer program as an object of patent law should not replace copyright in computer programs, but should only supplement it. Mostly entrepreneurs, authors and individuals who have invested a lot of effort and money in creating their program will be interested in this. In addition, patents for computer programs are of particular interest to those who invented, created a completely new solution. The interest of such persons lies in the fact that patent law provides more effective and reliable protection for the right holder.

However, the proposal to use patent law in relation to computer programs is not shared by all researchers.

One of the arguments of the opponents of patenting computer programs is that despite the publication of a patent and its availability, this will still cause a deterioration in developments in this area due to the fact that the patent holder will prohibit the use of the program, algorithm, code he created [6].

However, in our opinion, the supporters of this position do not take into account all the circumstances. Firstly, copying someone else's computer program in whole or in some part of it is plagiarism, including from the point of view of copyright. Those. from the point of view of legislation, liability will come both in case of violation of copyrights and patents. Without the permission of the owner of the rights, no one will be able to legally use the program, except as provided by law.

Secondly, in accordance with paragraph 2 of Article 12 of the Patent Law of the Republic of Kazakhstan, "conducting a scientific research or experiment on a product containing a protected object of industrial property, if the purpose of such scientific research or experiment is not to generate income", is not a violation of the exclusive the rights of the patent owner. Thus, from the point of view of the development of science, patenting should not become such a major obstacle to scientific research. Of course, the income clause raises some doubts. But even copyright law provides for a ban on the use of someone else's object for commercial purposes without the permission of the copyright holder [9].

Another argument of the opponents of computer programs patenting is that, in their opinion, copyright provides sufficient protection for the authors of computer programs [10]. In case of copyright infringement, he can always go to court

with a lawsuit against those who copy or use his software without a license.

However, this argument is not without controversy, since copyright law, despite the longer term of copyright, nevertheless provides less protection. For example, the problem with the evidence base, if the case goes to court. In addition, there are questions related to checking work for plagiarism and borrowing someone else's code.

A patent, although it provides a shorter term of protection, but when applying for a patent, the closest analogues indicated by the applicants in the patent registry are checked for coincidence and possible plagiarism. The legislator does not provide for such requirements for registration of copyright. Meanwhile, in the field of programming, borrowing some code elements for a program is a common practice. For example, there are various specialized websites that post various pieces of code for public access, the use of which may lead to infringement of someone else's intellectual property. Therefore, if it is possible to register a computer program, after its verification, the right holder will be sure that his program does not violate the rights of third parties and there is no borrowed code in it.

As a result, the copyright holder can reduce or even eliminate the possibility of potential lawsuits regarding their program. Another undoubted plus is protection against unfair competition, including better protection and protection of the program than that provided by copyright law.

If we sum up the advantages and disadvantages that give copyright law and the Patent Law, we can draw the following conclusions

Copyright:

• a longer period of protection of exclusive rights - all life + 70 years after death [2].

• no need for registration, because. rights to an object of copyright arise upon the fact of its creation [2].

• lack of strict criteria for copyright objects, since copyright extends to works of science, literature and art that are the result of creative activity, regardless of their purpose, content and dignity, as well as the method and form of their expression [2].

• as a result of the above advantages, providing ample opportunities for independent developers, coders and other IT professionals, because a special registration procedure is not necessary.

• One consequence is the rapid development of this area.

Patent law:

• a patent provides greater protection - during the registration of a patent, it will be checked according to various criteria, including novelty, which eliminates the possibility of plagiarism and borrowing from similar programs. Thus, the probability of filing a lawsuit against the owner of a patent for plagiarism or program similarity, although not excluded, is significantly reduced. From the point of view of protecting the rights and interests of entrepreneurs (especially for small businesses), this is undoubtedly a significant advantage, because protects their business from possible lawsuits from third parties.

• The limited time of patent law, while certainly a disadvantage compared to copyright, still has a sufficient period to make a profit. Among other things, science does not stand still, including computer programs. A patent for a utility model is valid for 5 years with the possibility of its extension for 3 years, then this period is sufficient for, for example, a computer program to become obsolete. But at the same time, this period is sufficient to obtain potential profits. In addition, thanks to a patent, its owner actually becomes a "monopolist" on this object and can freely use it while prohibiting its use by other persons.

• An important advantage is that the publication of patents has an impact on the development of science.

At the same time, the question of the relationship between patent law and copyright remains unresolved.

In our opinion, first of all, it is advisable to consider the possibility of regulating computer programs both as objects of patent law and as objects of copyright [1]. With this approach, patent law will complement the existing system of regulation of computer programs, and not replace it. Their regulation as an object of only one institution, and not another, has certain disadvantages. Thus, the exclusion of a computer program as an object of copyright will, of course, entail significant negative consequences for both their users and their independent developers[11]. And the regulation of a computer program only as an object of copyright (in the form in which it is currently regulated), although both functionally and in practice has shown its ability to work, still does not have a number of advantages that computer programs that are registered as an object of patent law.

Therefore, the issue of their legal regulation remains relevant. In this regard, in our opinion, it is necessary to study and analyze foreign practice in order to use the most effective solutions and take into account potential shortcomings, which in the future may result in potential problems in the regulation of computer programs.

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