



LEGAL TAKE

**PROTECTION OF SOFTWARE
INTELLECTUAL PROPERTY IN
KENYA**



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Introduction

We are living in an era where new technologies are being invented daily in Kenya and across the whole. Technology runs our day to day lives be it using our smart mobile phones, trading using bitcoins or conducting surgery using advanced robotics. When an inventor comes up with a technology solution be it hardware or software, they most likely intend on commercializing it and have exclusive rights over it for a certain period of time. Such rights would also exclude others from making, copying or using their creations without their consent. It has been a difficult journey in the intellectual property (IP) world to classify which type intellectual property protection software belongs. In Kenya, software may be protected under copyright or patents.

What is software?

Software is a set of instructions, data or programs used to operate computers and execute specific tasks. At the core of software is the source code which is the internal programming language. A source code is the fundamental component of a computer program that is created by a programmer using a computer.

There are two main ways in which software is created:

- **proprietary software** - the software is created by a person or a company and sold for financial gain and the source code is not released to the public thereby making it impossible to manipulate or use that software without a license from the proprietor; and
- **open-source software** - this is software that is usually free and anyone can download or manipulate it to create other software program.

Therefore, software intellectual property is a computer code or program that is protected by law against copying, theft, or other use that is not permitted by the owner.

Protection of software intellectual property in Kenya

Copyright in Software

Software is protected under the Kenyan copyright laws as a computer program which is classified as literary work.

Section 2 of the Copyright Act defines a computer program as a set of instructions expressed in words, codes, schemes or in any other form, which is capable, when incorporated in a medium that the computer can read, of causing a computer to perform or achieve a particular task or result.

A computer program shall only be eligible for copyright where:

1. sufficient effort has been expended on making the work to give it an original character; and
2. the work has been written down, recorded or reduced to material form.

Patentability in Software

Section 2 of the Industrial Property Act defines an invention as a new and useful art (whether producing a physical effect or not), process, machine, manufacture or composition of matter which is not obvious, or any new and useful improvement thereof which is not obvious, capable of being used or applied in trade or industry and includes an alleged invention.

For an invention to be patentable it must meet the following requirements:

1. it must be new;
2. involves an inventive step; and
3. is industrially applicable or is a new use.

While copyright protects the literary expression of software, patent offers protection to new and useful ideas, procedures and technologies. Therefore, while software itself is not patentable as it is already protected under copyright, a technological invention that results from the application of software is patentable as long as it meets the patentability criteria.

A comparative analysis of protection of software intellectual property in the United Kingdom

In the UK, software intellectual property is protected through patents, trademarks, registered design rights and copyright.

Patents serve to protect the technical ideas that underpin the way a particular piece of software works. For an application to be accepted for a piece of software, it must be demonstrated that it can help overcome a technical problem that goes beyond the normal execution of code. Trademarks may not protect the technical contents of the software itself, but they can be used to protect aspects such as the logo used. As with trademarks, the technical aspects of software cannot be protected by registered design rights. However,

design rights can be used to protect screen displays and graphics. Source code is protected as a form of literary work, the code itself will be protected not the ideas which are contained with it.

Recommendations

There should be a one-law enactment protecting intellectual property rights in computer programs since protection of software under various forms such as copyright and patent simultaneously leads to absurdities.

In case you require further information on this topic, please get in touch with **Anne Mumbi** at mumbi@fmcadvocates.com

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