

Copyrights vs. Patents

Copyrights vs. Patents

- Copyrights protect expression, patents protect ideas
- Copyrights prohibit derivative work, patents do not
- Copyrights last a lifetime, patents do not
- Copyrights are cheap, patents are not
- Copyrights are easy, patents are not

How Much is This Going to Cost?

- It costs tens of thousands of \$\$\$ to get a patent, and millions to enforce
- Copyright protection begins at time of creation for FREE
- Costs \$300 to apply for registration
- Costs significantly less than patent to enforce

How Long Is My Protection?

- Patents –
 - 20 years from date of filing, or 17 from issuance which ever is longer
 - design patent 14 years
- Copyright –
 - author, lifetime plus 70
 - corporation, 95 years from publication or 120 years from creation

What Are My Disclosure Duties?

- Patent – all non-cumulative, material prior art, written description, enablement, best mode
- Copyright – just deposit the copy and can even withhold half

Who's The Inventor?

- Patent – inventors for each claim, independent right to enforce, no duty to share
- Copyright – collective works, only rights to part created, must account to others for profits

Who is the Owner?

- Patent – inventor unless patent formally assigned
- Copyright – employer unless independent contractor

How Difficult is it to Enforce?

- Patent law breaks each claim into elements
 - Infringement = proof of presence of each element
- Copyright law views work as a whole
 - Substantially similar

Defenses

- Patent – non-infringement, invalidity, unenforceability
- Copyright – non-infringement, fair use

Copying

- Patent – not necessary to show infringement, only legally relevant to willfulness and secondary considerations of non-obviousness
- Copyright – must show copying to prove infringement

Patent \$\$\$

- Reasonable royalty or lost profits
- Injunction
- Treble for willful
- But attorney fees only if case is exceptional

Copyright \$\$\$

- Greater of actual or statutory
- Plaintiff need only show gross revenue
 - then burden shifts to defendant to attribute \$ to something else
- Statutory \$750 -- \$30,000
- Injunction
- Willful up to \$150,000
- But, attorney fees routinely granted

What Happens To My Appeal?

- Patent – Federal Circuit, 50% reversal rate
- Copyright – regional circuit, 3% reversal rate

So Do I Have To Choose?

- Mazer v. Stein, 347 U.S. 201 left question open
 - General view is no
- Except for Vessel Hulls
 - Vessel Hull Design Protection Act (VHDPA)
- MPEP § 1512
 - Tells examiner what to do if overlap between design patent and copyright

Patent Trolls

- Discovery
- Venue
- Permanent Injunction

Your Days Are Numbered

- EDTX – Paice L.L.C. v. Toyota Motor Corp. U.S. Dist. LEXIS 61600 (E.D. Tex. 2006)
- No permanent injunction because Paice not a manufacturer
- Court followed Justice Kennedy's concurrence in eBay
- Companies not in direct competition
- No threat to market share or concern re: brand recognition
- No irreparable harm to a licensor because injunction not necessary to get others to license

Your Days Are Numbered

- Z4 Techs, Inc. v. Microsoft Corp., 434 F. Supp. 437 (E.D. Tex. 2006)
- No PI because plaintiff's invention small component of Windows©
- No irreparable harm likely