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The Patentability of Software and Economic Analysis of Copyright Protection of Ideas and Their Application through Court Evaluation

Copyright protection can be divided into four levels: subject matter, level of abstraction, exceptions and term limit. Although copyright exceptions, especially the fair use doctrine and term limit have been subject to significant economic analyses, studies on protection and the limit of protection of subject matter and level of abstraction in copyright are still fairly thin. The existing dominant explanation of optimal copyright protection offered by Landes and Posner (1989) is less convincing for it requires a standard based doctrine to achieve what was postulated. Since copyright doctrines in respect of protection based on the level of abstraction are more rule - based in nature, an alternative explanation is in order. In a recent article titled "Copyright as a Rule of Evidence", Douglas Lichtman (2003) hinted that the evidence might play a role in explaining this set of doctrines.

In this paper, I will try to perform an economic analysis of the evaluation of the patentability of the software in an abstraction model under existing copyright doctrines. Copyright doctrines such as an originality requirement, de minimus rule, substantiality requirement, merger doctrine, the idea expression dichotomy, which is most relevant to the software protection, and the scenes a faire doctrine, have the effect of creating a protection divide. Doctrines such as causal connection requirement, independent creation defense (since there are numerous of parallels between the algorithms and their application), and the objective similarity requirement, further create an inference divide.

I will try to show that the protection and the inference divides are relevant in protecting the expressions and ideas in a copyright work. Further more it will be shown that

between the regions below the protection divide and the region above the inference divide, there is no strict liability protection region, which will be violated under patent protection of the software. All those regions discussed above and the related copyright doctrines will be explained by evidences which might create the risk of court error in deciding infringement cases.