

# Kluwer Patent Blog

## BRAZIL: protection of software and computer-implemented innovations

Roberto Rodrigues Pinho, Rhuan Quintanilha, Rodrigo Mourao (RNA Law) · Monday, September 23rd, 2024

Software-driven innovations have become so embedded in our daily lives that almost every single activity we perform has some degree of interaction with them. The massive presence of software-related innovations in our lives is accompanied by an increasing number of patent filings therefor. According to the World Intellectual Property Organization (WIPO), in 2023, computer technologies accounted for 10% of all published PCT applications, securing them the lead of the rank by technology field, which demonstrates that securing intellectual property rights for these inventions is becoming increasingly crucial.

In Brazil, one of the largest consumer markets, the legislation provides a few key ways to protect computer-implemented inventions (CIIs) or software.

The first and most obvious one is the software *per se* registration, protecting the source code itself for a 50-year term. Such protection is regulated by two different statutes: Copyright Statute (Federal Law No. 9.610/98) and Software Statute (Federal Law No. 9.609/98). However, it has its downside: although it prevents others from copying the same source code, it does not provide significant protection against codes performing the same function which were developed independently.

Another option is to adopt trade secrets as core protection. By implementing strict internal controls and executing specific confidentiality agreements with employees, contractors, and any third parties with access to the computer technology, companies may choose to protect their computer technologies as trade secrets rather than patenting them to avoid revealing their inner workings to the public. Even when the company chooses to file a patent application, data sets are often protected by trade secrets because they can provide a significant competitive advantage, particularly in AI development. These proprietary data sets are typically costly and time-consuming to compile, clean, and maintain. If competitors were to gain access to these data sets, they could replicate or improve upon the AI models without incurring the same effort or cost, undermining the original company's competitive edge.

A third option is the filing of patent applications covering CIIs drafted as method or process patents. In these cases, the protection relies on an algorithm that essentially follows a series of logical steps to perform an activity. When the steps performed by the claimed method are a technical solution for solving a technical problem, the BRPTO accepts the method claims as a valid

way to protect software-implemented inventions by patents.

To help inventors and applicants to navigate the complex process of having a computer-implemented invention granted in Brazil, here you will find five practical tips for drafting patent applications with that subject matter:

1. **Avoid Code-Specific Language:** Method claims for software-implemented inventions must not describe any part of the source code. The BRPTO considers source code to be protectable only as a software registration. Therefore, the patent office will reject an application containing source code in its claims as being not patentable. If it is necessary to disclose part of the source code for any reason, such as for better understanding of the invention, this disclosure must be incorporated in the specification, never in the claims.
2. **Minimize Software-Related Terminology:** Avoid using terms like “software,” “computer program,” “computer program product,” or “code” in the claims, especially in the preamble. The BRPTO considers such terms an attempt to protect software itself rather than an underlying invention. Their use would thus lead to the objection of the application as being not patentable.
3. **Ensure Accurate Technical Translations:** High-quality technical translations are crucial for successful patent prosecution. With computer-implemented inventions, it is even more important, given that several terms should not be translated, since they are largely used in their original English forms. Errors in translations can lead to unnecessary rejections and increased costs. Therefore, it is always advisable to use translators with a strong technical background.
4. **Include a “Computer-Readable Medium” Claim:** A “computer-readable medium” claim can strengthen the scope of protection of patent by defining the invention as a memory or other computer-readable medium that stores the instructions for performing the claimed method. This type of claim is very useful for enforcing the patent, since it represents the materialization of the claimed method. An interesting fact is that a computer-readable medium claim can be added to the set of claims even after the request for examination, since the BRPTO does not consider this addition broadens the scope of protection of the application. Further, to help the applicant save on examination fees, which are charged based on the number of claims, a single claim drafted in the following manner suffices to cover the entire group of method claims:

*Computer-readable medium, characterized by comprising instructions stored therein, the instructions being executed by a computer to perform the method as defined in any of claims x to y.*

1. **Focus on Technical Steps:** Be mindful of non-technical steps involved in the invention, since those are not patentable in Brazil. Software-implemented inventions are often used to solve complex mathematical problems. A method implemented on a computer involving mathematical concepts is considered an invention when such a method is linked to an application that produces a technical effect, such as a motor control method that uses a numerical integration technique, in order to obtain a result of greater actuation speed or stability. To improve the chances of successfully obtaining a patent for a computer-implemented invention, it is thus advisable to focus on the technical aspects of the invention in the claims.

Securing patent protection for those inventions requires a strategic approach, and by understanding the unique legal framework and incorporating the best practices into patent application drafting, applicants can improve their Intellectual Property portfolios and strengthen their market position. While challenges persist, the potential rewards for successfully protecting assets by patents make it a worthwhile endeavor.

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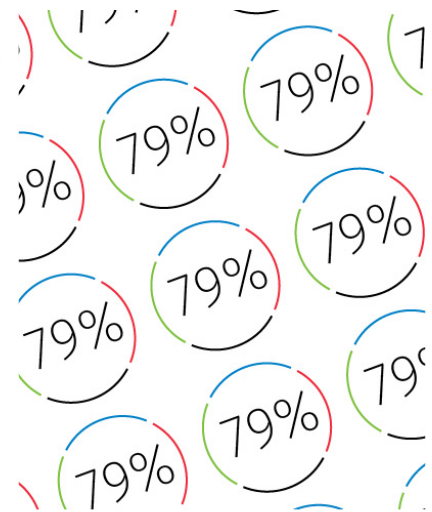
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