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How to Think About the Blackboard Patent. Part I. Copyright vs Patent

For argument's sake let's assume that the Blackboard patent is legitimate. A patent is the granting of a property right associated with an invention.

1. What exactly then did Blackboard invent or claim to have invented?
2. And how has Desire2Learn purportedly violated Blackboard's property right?

To be fair to Blackboard we should try to understand these two questions objectively and dispassionately.



First, let's be clear what Blackboard is **not** claiming. Blackboard is not claiming that Desire2Learn violated copyrights associated with Blackboard software. Desire2Learn would be guilty of a copyright violation if somehow it had stolen Blackboard's "computer code" (i.e. pieces of Blackboard's software in products such as its Academic Suite) and then incorporated it into its own programs. That uncontroversially would be theft. Most of us, including those who support open source software, believe that copyrights should be associated with computer software and creators should be

granted property rights
associated with their creation.

I urge you now to read Blackboard's FAQ ("Why has Blackboard developed a patent portfolio") which I will argue is, at best, misleading and, at worst, disingenuous:

"Why has Blackboard developed a patent portfolio?"

We have invested heavily in the research and development of our products (well over \$100m). Few other companies have committed such resources to learning technologies designed specifically for educators. Patents help ensure that companies that do not make comparable investments cannot simply rely on copying to develop their products. While we believe that there is a large body of freely available ideas and technology within the industry, we seek to protect our most important technological advances with patents. Globally, we have over 30 patents and patents pending."

Substitute copyright for patent above and there is no problem or controversy.

"Why has Blackboard sought copyright for its software?"

We have invested heavily in the research and development of our products (well over \$100m). Few other companies have committed such resources to learning technologies designed specifically for educators. **Copyrights** help ensure that companies that do not make comparable investments cannot simply rely on **copying** (*emphasis mine*) to develop their products. While we believe that there is a large body of freely available ideas and technology within the industry, we seek to protect our most important technological advances with **copyrights**."

If you want to protect against unauthorized copying of your software to protect your investment, then obtaining copyright is a perfectly good means. Blackboard's stated rationale for developing a "patent portfolio" is, therefore, bogus: Blackboard states the justification for taking out copyright as its justification for taking out a patent.

Blackboard's claim concern patents, not copyright. A key difference between copyright and patent comes out in the word "expression". Patent protection can apply to a method or a process, whereas copyright protection protects the **expression** of the method. In its FAQ Blackboard is exploiting an ambiguity in the meaning of the word "copying" to create the misleading impression that Desire2Learn stole Blackboard's computer code in the same way that some illegally copy, download, and share music without paying for it. In the software world the primary meaning of copying is copying code, taking a computer program that someone has written (i.e. expressed) and passing it off as your

own. In the music world the primary meaning of unauthorized copying is copying the music itself and then playing it without paying for it. In both cases taking out copyright is sufficient for protecting your intellectual property.

We know that Desire2Learn didn't copy Blackboard's computer code. We come back then to our original questions, which we still haven't answered. We will do so in the next installment.