SOFTWARES IN INDIA- PATENT OR COPYRIGHT?

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ABSTRACT

Software is an intellectual property which is per se copyrightable in India unlike patentable in other countries of the world. They Copyright Act, 1957 governs the issues of software copyright in India. Computer program are literary works under the definitions part in the Act. This paper analyses the need for software protection and why are softwares copyrighted in India and not patented.

Key words: software, patent, copyright, program

INTRODUCTION

Intellectual Property is basically a form of intangible property which can actually be owned by individuals, even though it does not exist in physical form. Intellectual property can be in the form of patents, copyrights, trademarks, designs or trade secrets. Intellectual property law is designed to offer protection to creators or owners of intellectual property so that they may derive benefit from their creation.[1]

MEANING OF COPYRIGHT AND ITS SCOPE

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. In fact, it is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work. There could be slight variations in the composition of the rights depending on the work. Chapter VI of the Copyright Rules, 1958, as amended, sets out the procedure for the registration of a work.

Copyright ensures certain minimum safeguards of the rights of authors over their creations, thereby protecting and rewarding creativity. Creativity being the keystone of progress, no civilized society can afford to ignore the basic requirement of encouraging the same. Economic and social development of a society is dependent on creativity. The protection provided by copyright to the efforts of writers, artists, designers, dramatists, musicians, architects and producers of sound recordings, cinematograph films and computer software, creates an atmosphere conducive to creativity, which induces them to create more and motivates others to create.[2]

[1] Should One Apply for a Copyright or a Patent for a Computer Software Program?, http://yourstory.com/2012/07/should-one-apply-for-a-patent-for-a-computer-software-program/ (last visited on: September 8, 2015)
[2] Copyright office, http://copyright.gov.in/frmfaq.aspx (last visited on: September 8, 2015)

NEED FOR COPYRIGHT

Computer software or programs are instructions that are executed by a computer. These are in the form of source codes and object codes, which take a lot of skill, time and labor to develop them. Computer programs have a market value and hence can be copied and used by unauthorized persons. These should hence be protected under a strict legal regime.[3]

WHY IS SOFTWARE A COPYRIGHT AND NOT PATENT?

In India, computer software does not form the subject matter of patent as it does not fulfill the requirement for an invention which is provided under the Indian Patent Act in conformity with the provision of TRIPs, Berne Convention, WIPO Copyright Treaty etc.[4]

Computer program are literary works under the definition in the Copyright Act. The Copyright Act of India was amended to include 'computer program' as 'literary work'. Further, Section 2(ffc) of the Act defines 'Computer program' as a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result.[5]

Subject matter of copyright can be only their literal presentation of software which includes coding decoding or algorithm form and more precisely it is their algorithms form that the Indian Patents Act does not consider the patentable subject matter.[6]

A software patent is defined by the Foundation for a Free Information Infrastructure (FFII) as being a "patent on any performance of a computer realized by means of a computer program". While The Indian Patent Act allows a new product or process involving an inventive step and capable of industrial application to be patentable, it also provides a list of subject matter that cannot be patented. Section 3 of the Act lists down subject matter that cannot be patented, and Section 3(k) specifically states that "computer program per se" is not a patentable subject matter. Just as a copyright came into being when the original lines of source code were written by the programmer, so another copyright comes into being for each addition or modification to the source code that shows sufficient originality. Because of this, a computer program generally is protected not by a single copyright but by a series of copyrights starting when it is first written and continuing through the last modification.[7]

BASIS OF PROTECTION

The basis of protection of literary work in India is that the work must not be copied from another work, but must originate from the author. Author, in relation to literary work which is computer generated, is

[3] InvnTree Intellectual Property Services Pvt. Ltd., Software Innovations: Patent or Copyright? What Should You File!, http://www.mondaq.com/india/x/355316/Trademark/Software+Innovations+Patent+Or+Copyright+What+Should+You (last visited on: September 8, 2015)

[4] Sugandha Nayak, Copyright Protection For Computer Software An Indian Prospective, http://www.mondaq.com/india/x/262564/Copyright/Copyright+Protection+For+Computer+Software+An+Indian+Prospective (last visited on: September 07, 2015)

[5] Supra note 3

[6] Aswal Associates, Software Patents in India, http://www.hg.org/article.asp?id=5508 (last visited on: September 8, 2015)

[7] Supra note 3

the person who causes the work to be created. Therefore, copyright subsists in a computer program provided sufficient effort or skill has been expended to give it a new and original character. However, a computer program, which does no more than produce the multiplication tables, or the alphabet, cannot lay claim to copyright protection. That is because the amount of skill or effort entailed in such an exercise is too trivial to render the resultant work something which is new and of original character.

Besides satisfying the criteria of "originality," a computer program also has to conform to the requirement of first publication as stipulated in the Act. The work must be first published in India and if it is published outside India, then the author should be a citizen of India at the time of publication. As regards unpublished work, the author should be a citizen of India or domiciled in India at the date of making of the work. However, the government of India passed the International Copyright Order, 1958 whereby any work first published in any country which is a member of the Berne Convention or the UCC will be accorded the same treatment as if it was first published in India. It is pertinent to mention here that registration of copyright is not compulsory in India.[8]

ADVANTAGES OF PATENTING A SOFTWARE

A patent over a software invention can be used to prevent others from utilizing a certain algorithm without permission, or to prevent others from creating software programs that perform patent protected functions. In contrast, copyright law protects only the expression of an idea and not the idea itself. In other words, copyright can only prevent the copying of a particular expression of an idea i.e. copying of source code or a portion of it, and not the copying of the idea/functionality. Hence, patents offer much broader protection.[9]

Patents protect software against reverse engineering, where the source code of a program is recreated from the supplied object code. In its source form, a computer program is much easier to amend. Many software and hardware companies have so far taken advantage of the copyright law's lack of protection against creation of 'clones' through reverse engineering, says India Today. For example, under the Indian Copyright Act, copying from an engraving is an infringement of copyright, but an engraving produced independently from the same picture is not. Copyright laws generally do not protect the owner from independent creation or reverse engineering. Unfortunately, there is no provision for software to be patented. A software program is an algorithm and patent law does not protect algorithms per se. , there are no guidelines or stated procedures followed by the Indian patent office with regard to computer software. The IT Act, 2000, also does not provide any lead in this direction. Consequently, Indian firms/individuals have to go to the US for getting their products patented-a cumbersome and expensive process. [10]

There are significant differences in protection offered by patent and copyright. Some major contrasting features of these two forms of protection are:

1. Patent law protects functional aspects of an invention. Copyright protects the idea that is expressed. Under copyright, the form of expression is protected, and not the idea or concept.

[8] PSA, Legal Counselors, Software Protection- India's Adoption of the International Instruments, http://www.hg.org/article.asp?id=4965 (last visited on: September 8, 2015)
[9] Supra note 3
[10] "Software Patent and Copyright Laws in India.", http://www.123HelpMe.com/view.asp?id=36962 (last visited on: September 8, 2015)

2. Copyrights become effective the moment a work is created in a fixed, tangible form of expression. Patents need to be applied for before the same is made public (some countries provide a grace period for filing a patent application post public disclosure).
3. Copyright protection extends for author's lifetime plus 60 years (may vary based on the type of work being copyrighted), whereas term of a patent is 20 years.[11]

In intellectual property law, copyright protects a particular creative expression of an idea from being duplicated whereas a Patent protects the idea itself. This is important because a software program is not just an expression of an idea, sometimes it is the idea itself. A problem arises with giving strict monopoly in software programs, because most contain what is known as source code which is simply put like the words and alphabets in a language. A strict monopoly of this would mean no one else could use it. This is definitely undesirable, but at the same time, giving less protection in law means that we are not "incentivizing" creativity.[12]

The analysis of the data of patents granted by Indian Patent Office reveals that the patents granted to software are the part of computer systems and business method processes. Only the patent granted for software per se is to the patent granted to Intel Corporation, US for the software used for 'compiling'. Most of the patents are granted for CII Software and business method software used for organizing the data, downloading the information and sorting of information. The patents are also granted for software used apparatus, devices more particularly for wireless communication devises and systems software for sorting out the information about the hardware and software components. Some patents are granted for the software used for data updating systems, methods for authenticating, software by using hidden intermediary keys. The patents cover Method and system for remote distribution and installation of computer programs. The patents granted belong to class of communication systems and distribution methods covering the downloading and updating of information. The patents granted to the software belong to the computer software programs, application software, system software, software products, software used in business methods and processes. Thus, they are beyond the scope of Indian law 'software per se'. It is because the software granted are nothing more than extending the protection of software patents granted in USA under the multinational treaties.[13]

PATENTS VS. COPYRIGHT[14]:

1. Automatic Right- A copyright existsregardless of registration or other formalities whereas patent rights only exist if the patent in respect of an invention is granted by a Patent Office.
2. Jurisdiction- A copyright in a literary work (which includes software) is recognized automatically in about 165 countries (which are members of the Berne convention) without any formalities such as registration. A patent on the other hand has only territorial jurisdiction i.e. the patent of one country would not be recognized in another.
3. Speed- obtaining a patent in India or the USA takes upwards of 5 years. Having ones copyright registered in the USA takes 3-4 months.

[11] Supra note 3
[12] Supra note 2
[13] Software Programs: Protection In India, http://shodhganga.inflibnet.ac.in/bitstream/10603/20952/13/13_chapter_7.pdf (last visited on: august 31, 2015)
[14] RK Dewan & Co, Protection of IPR in software – copyright registration a viable alternative, http://www.lexology.com/library/detail.aspx?g=d81790fc-a746-4136-b777-a7f7a416b711 (last visited on: September 8, 2015)

4. Duration- the term of patent is 20 years. Protection under copyright law is for a much longer time period.
5. Rights and Examination- Patents protect the idea whereas copyright protects the expression in the work. For the purposes of grant of a patent, requirements such as novelty, inventive step and technological advancement need to be satisfied, however in the case of a copyright there are no such requirements. In case of a copyright, the work has only to be original.

CONCLUSION

Therefore it can be said prima facie that softwares are not patentable in India but only copyrightable. The issue of whether the copyright has to be given or patent has to awarded is still a debated topic in India. There are pressures from international communities to allow softwares to be patentable. But the fact that softwares fall under the scope of copyright is very clear. As such an amendment is required to make a software patentable in the Indian Patents Act, 1970. Until and unless an amendment is not carried out in the Act or any agreement is not entered into internationally, no software can be patentable in India.

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