IP PROTECTION OF SOFTWARE AND SOFTWARE CONTRACTS: A STUDY IN INDIA

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Abstract

Technological advancement is actively pursued by most countries, including India. It can be attained if the intellectual property of authors is adequately protected. This is because protecting intellectual property encourages creativity and innovation. It further protects the economic interests of the authors of the software. However, India has recently been criticized for having sub-standard levels of protection of intellectual property. This paper emphasizes the importance of having stronger protection of Intellectual Property with respect to software and software contracts. Centred around the Indian scenario, this paper questions the adequacy of laws pertaining to substantial copying, fair use rights, rights of the author, and eligibility for patent protection. It examines the legality of software contracts and the bias present in license agreements. It also highlights the problems caused by the scattered nature of laws governing the issue. *Firstly*, the paper will first give a brief introduction to the topic at hand and lay out the problems being faced. *Secondly*, the problems will be analysed using case laws, studies, and expert opinions. *Thirdly*, the laws of various countries in this area shall be compared. *Lastly*, suggestions to improve the protection of intellectual property with respect to software and software contracts in India shall be laid out. These would include enactment of specific legislations relating particularly to the issue at hand, defining vague terms, and prescribing of concrete tests that judges can use to settle disputes. The author has concluded that the law relating to the scope of protection, rights afforded to the parties, and the legality of various kinds of protection is inadequate. India further lags behind other countries due to there being no specific requirement, test, or precedent to be followed. Therefore, the protection afforded to software is currently inadequate.

Key words: Software, Software Contracts, Patents, Copyrights, License Agreements, Contract Law, Sale of Goods, Trade Agreements, Fair use.

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Introduction

The software industry in India has seen rapid growth in recent times. The easy dissemination of data coupled with low barriers for entry in the age of the internet has resulted in technological advancements assuming prime importance. It has also resulted in software products being commonly marketed as computer readable material or over the internet. Computer software was even considered to be intellectual property according to the Supreme Court in *Tata Consultancy Services v. State of Andhra Pradesh*.[i] Though this may be advantageous in many ways, there arise issues of protection of the rights of the authors of such software. Therefore, there must be a balance between the economic interests of the owner and the extent of dissemination of software considered necessary to encourage innovation.

In India, the level of protection of intellectual property is criticized as being substandard.[ii] However, slow judicial systems, high piracy rates of software packaged products, etc. brought about a quicker rate of development of the software services industry. In doing so, there has been a shift in this industry towards more complex tasks of design and mass-marketed software products. Among other things, this required skilled technical labour and advanced technology. This means that the Indian software firms must now create new and advanced intellectual property and that they must protect it. Consequently, there is a need to examine the current legal position on protection of software and software contracts.

In this paper, the author attempts to examine whether the current law on protection of software and software contracts is adequate in contemporary India. In answering this, the insufficiency and vagueness of laws will first be looked at. Secondly, the nature of software contracts will be explored. Thirdly, there will be a comparative analysis of the laws governing this protection in various jurisdictions. Lastly, the author will lay out suggestions that would aim to improve the current legal scenario in India.

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Analysis

Insufficiency of Law

In this section, the author shall argue that the laws governing protection of intellectual property are not comprehensive enough to provide clarity in case disputes arise. Eligibility of patent protection, fair use rights, rights of the author, and limits of substantial copying will be discussed below.

a. Copyright, Patent, and Trade Secret Protection

Software is comprised of the "source code itself which contains the programmer's invaluable comments; any literature that may be supplied with the package which could be in the form of manuals or explanatory material regarding the running of the programme."[iii] Since these require a high level of skill and expertise, labour, and time, the resultant software must be protected.

Currently, copyrights and patents protect innovation in software products, both intending to prevent new software from being misused. Copyrights are granted to specific works and protect the expression of an idea. The TRIPS Agreement 1995, the Berne Convention, and the WIPO Copyright Treaty 1996 protect copyright of a software product for 50 years after the death of the author. These also state that both the source and object code of computer programs must be protected. However, smaller penalties, difficulty in proving the infringement of a copyright, low conviction rates, understaffed judiciary, frequent delays, and long trials have made them less effective of a method of protection of intellectual property than patents.[iv] Patents are not granted as often for software protection, but it offers better or more secure protection to new software innovations.[v] It not only protects the expression of the idea, but also the concepts of the invention. The holder of a patent also has monopoly rights over the licensing of the product, and others cannot use or sell the product for 20 years. However, patent protection does not extend to natural phenomena, abstract ideas, or mathematical expressions of scientific truths. Trade Secrets also may protect software innovations. This would include the idea, formula, structure, design, or

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process of the product.[vi] However, there is no recourse against those who reverse engineer the innovation from the information commonly available to the public.

In India, there is no specific law dealing exclusively with computer software, or even protection of trade secrets.[vii] The Patent Act, 1970 even excludes computer programs or algorithms from the scope of patentability.[viii] A major amendment was passed in 2003 which stated that computer programs with technical application to the industry and combined with hardware can be covered by patent law. However, this was repealed in 2005 and a blanket prohibition on patenting of computer software was enacted. This narrowed the scope of granting of patents to only those computer programs that were a part of a whole invention.

The problem with the current law on patents is the exact eligibility or requirement needed to be met to be granted a patent. First, whether the computer software is merely an algorithm, or a technical invention must be decided. This is because patents may only be granted to the latter and not to the former. However, the term "technical" has not been defined and is subject to various interpretations. There is also a lack of patent examiners and precedents to decide the boundaries of the term. Hence, the growth and development of patenting of software and computer programs has been hampered. Laws relating to protection of trade secrets of software innovations do not exist, and courts must then look towards other jurisdictions to find rationale to strengthen their judgements. Therefore, comprehensive requirements need to be laid down in law to help objectively distinguish which computer programs are eligible for patent protection. This is especially important since patents are better methods of protection of software.

b. Fair Use and Rights of the Author

In India, Section 57 and Section 14 of the Copyright Act, 1957 mainly protect the author's moral and economic rights. These sections have specifically included computer programs to be within the scope of the Act's protection. However, this does not protect against all possible infringements of a person's intellectual property. For example, a lawful possessor of a copy of a program can make copies as well.[ix] Reverse engineering is also seen as a developmental need and is not restricted. It can be argued that these rights create an environment where programs can easily be

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disseminated. This further causes heavy economic loss to the original author, who would have otherwise had to have been paid for the usage or dissemination of the product.

Another right the author or owner of a copyright has is the right to assign or grant license for the copyrighted work. This would specify the duration, royalty to be paid, extension and termination of the license. The author has a right to exercise the special rights, also known as moral rights, even after he assigns or licenses the copyright to another.[x] However, a problem arises as to whether a license agreement takes away the rights to "fair use" from the licensee. Section 52 of the Copyright Act does not answer this question. The rights of licensees and consumers are further impinged upon by restrictions such as implied conditions and warranties, which state that they cannot disassemble a licensed program. Ideally, it is argued that a copyright owner should not further contractually constrain the licensees since the 'Fair Use Doctrine' already delineates the legal requirement.[xi] Conflicts are then created between contract law and copyright law. To avoid any disagreements, the legislators need to step in and find the delicate balance between the author's rights and the rights of the licensees. Therefore, the law regarding rights of the parties needs to be revised to be made more comprehensive and equitable.

c. Limits of Substantial Copying

Limits of Substantial Copying is related to the scope of protection afforded to software and computer programs. This area is largely untested with few laws governing it. The role of judges in interpreting each case, therefore, becomes important. The main question to be answered in such cases is the extent to which the program would fall within the scope of protection offered.[xii] In answering this, the 'idea-expression dichotomy' is explored. This dichotomy looks at the separation of the expression from the idea. Even though the Copyright Act does not recognise this dichotomy, it has been said to be linked to the jurisprudence that underlies copyright law itself.

Though legislations do not clearly lay down what is to be followed, numerous cases explore this dichotomy and prescribe tests for determination of scope of protection. The Supreme Court, in *R G Anand v. Delux Films*,[xiii] explored the 'look and feel' test and the 'abstraction test' laid down in the US cases *Nichols v. United Pictures*,[xiv] and *Computer Associates v. Altai*.[xv] The 'look and feel'

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test is the most predominantly applied by US judges. In this test, the work is looked at as a whole to see whether the rights of the owner have been infringed. This test has limited application with relation to software since software protection may require the protection of the non-literal and visual aspects as well. The abstraction test, which is particularly suited for computer programs, is done by identifying the generality in the theme of the film.[xvi] There is only an infringement in copyright if there is a clear case of copying of the original work, and not if there is merely a common theme.

However, these tests have not been followed in India. Instead, an 'abstraction-filtration-comparison' test has been applied. However, it was soon realised that it had limited applicability to the non-literal parts of the software. Therefore, there is still no answer to which parts were to be afforded protection and whether the protection afforded was appropriate. This is especially since no precise tests have been given for their determination. Leaving these important questions up to the interpretations of judges who may not have had the required technical knowledge to make an informed decision may result in injustice being done to either or both of the parties.

Software Contracts

Software contracts are governed by the principles embodied in the Indian Contract Act.[xvii] It can either be in the form of an assignment or license, or of that of a sale. If the computer software can be considered a 'good', then the Sale of Goods Act 1930 will be the relevant act governing it. It can be considered a good if "it provides that it has the attributes thereof, having regards to (a) its ability; (b) capable of being bought and sold; (c) capable of being transmitted, transferred, delivered, stored, and possessed."[xviii] For computer software, transaction in the form of licenses are usually preferred over transactions in the form of sales, for reasons such as the easier protection of trade secrets. In India, license agreements follow the standard-form of contract, where terms of the agreement govern all aspects relating to the contract, including specification of the warranty, distribution of the software, limitation of liability, etc.[xix] However, even though licenses are preferred, there are still many problems with the protection afforded by law to it. There are also

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inherent imbalances in the rights afforded to the parties to the software contract. This section aims to discuss and find solutions to these problems.

a. Bias in Licenses towards the licensor

As mentioned earlier, licenses usually conflict with the fair use doctrine and Section 52(a) of the Copyright Act. Implied conditions and warranties severely limit the rights of licensees and consumers. Their rights to decompiling and disassembling the computer program for any purposes are prevented. The contract also prevents the licensee from assigning its interest to third parties. This is in direct conflict with contract law since it restrains them from engaging in a "lawful profession, trade or business of any kind".[xx] This is also directly at odds with the doctrine of 'first-sale' as well. To circumvent these problems caused by copyright law, owners are forced to use technological restrictions like encryption or transactional design to obtain more of a control over their intellectual property. Due to this, conflicts between laws arise. Additionally, there is also an imbalance in the rights afforded to either party to the license agreements, especially seen in propriety licenses they are usually one-sided. In these cases, the courts usually intervene and declare the agreement to be unenforceable. Therefore, a method to ensure that the owners do not lose out on economic profits, while granting more freedoms to licensees must be devised.

b. Issues in Enforceability of Licenses

Indian courts have not yet affirmed or tested the legality or the enforceability of software contracts or license agreements. Some issues arise in contracts such as click-wrap agreements which may involve more than one jurisdiction, thereby causing a conflict of laws. Extra-territorial application of Indian contracts will also have to be explored. Current legislations like the Competition Act, 2002, may question the legality and enforceability of click-wrap or shrink-wrap agreements which impose restrictions on use, services, and development, though they are completely legal under Contract Law.[xxi] The relevance of the Information Technology Act in this area would also have to be questioned. The enforceability of open source software has also not been investigated by Indian

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courts. Therefore, specific legislations regarding licenses as a form of software contracts and protection afforded thereunder need to be drafted to bring clarity to the law.

c. Scattering of Law

The provisions governing protection of software and software contracts are scattered across other fields of law. Encryption of programs brings in competition law and sale of goods act comes in when the nature of the transaction is that of a sale. Contract law, patent laws, copyright laws, laws governing trade secrets, company law, laws relating to information technology etc. are others that are applicable to software. In India, there are no specific legislations governing protection of software or software contracts, and judges have to refer to laws across all these fields while deciding a particular case. This creates a potential conflict of law. Therefore, since the judicial process would become delayed, cumbersome, and confusing due to the vagueness and the scattered nature of the laws, it needs to be developed more thoroughly to ensure justice to all.

Comparative Studies

In this section, the laws governing protection of software and software contracts in the United States and the United Kingdom shall be contrasted with the laws of India. In doing so, the tests and definitions used in these jurisdictions shall be analysed to see whether the rights of parties have been protected and the object of the contract have been achieved equitably etc.

In India, the 'sweat of the brow' approach which emphasizes upon the labour put into the making of the product is used to check whether literary works can be protected. This is directly in contrast with the approach of the United States. In *Fiest v. Rural Telephone*,[xxii] it was held that copyrights should protect works involving creativity, judgement, or skill, but not labour. In the author's opinion, the US approach is more comprehensive, and ensures that the work borne out of the creative mind of the author is protected, as are the ideas. This is more in line with the jurisprudence underlying intellectual property law. US law also states that the work should be original if it is to

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be afforded protection. Indian Courts have followed British precedent set on the definition of 'originality' since no clear law has been laid down by Indian legislators.

The US Code 35, which protects patents in the US, has also clearly defined provisions for requirements to be met for the grant of patents with respect to software programs. However, India does not. Software programs are afforded protection on the same lines as in US, Japan, and Europe. In India, however, software programs are not protected under the law of patents. The number of patents being granted for software in the US have thus helped in the faster development and better protection of new innovations and rights of their authors.

The disparity in the level of equity and justice in the methods of protection is very noticeable. This disparity further affects technological advancements and innovation of a country. Therefore, the laws in India need to be reformed and made to be on par with international standards.

Suggestions

Considering the above arguments, the author will attempt to put forth some suggestions which may help in the making of laws on IP protection of software and software contracts more just and equitable.

1. Indian laws need to be made more comprehensive to reduce discrepancies. In doing so, the rights of both the parties, requirements for eligibility to various kinds protection, and enforceability of these kinds of protection will be made clear. This would also ideally put both the parties to a software contract on an equal footing.
2. A specific legislation relating to protection of software and software contracts must be enacted in India. This would aim to reduce the conflict of laws caused by the applicability of multiple areas of law to this issue.
3. Vague terms such as 'technical' must be given clear definitions, so that judges who do not have even precedents to abide by can adjudicate based upon the wording of the law and the definition laid down.

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Conclusion

In this paper, the author has attempted to show how the inadequacies of the law governing protection of intellectual property related to computer software in India. This is because of the vagueness of Indian Law with relation to the scope of protection, rights afforded to the parties, and the eligibility and legality of various kinds of protection. It has also been shown that India is lagging behind other countries such as the US and the UK in terms of the protection afforded by patents. This is mainly due to there being no specific requirement, test, or precedent to be followed. Therefore, reforms need to be made so that a field gaining such importance in contemporary times can be properly developed in India.

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