SOFTWARE INNOVATIONS: PATENT OR COPYRIGHT? WHAT SHOULD YOU FILE!

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. Software can be protected under copyright law, and inventions related to software may as well be protected under patent law.

PROTECTION UNDER COPYRIGHTS:

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. Hence, software program can certainly be protected under Copyright law.

An example of software program registered as copyright in India is the copyright granted to the Hindi to Punjabi Machine Translation Software developed by Dr. Vishal Goyal and Dr. G.S.Lehal, from the Punjabi University Patiala.

Copyright protection extends for author's lifetime plus 60 years. Hence, protecting software program under copyright law (which in any case is automatic) may arrear to be attractive. However, it has to be noted that copyright protects expression of an idea and not the idea itself. Hence, in the case of software programs, it is the software program that is protected, and not the functionality of the software programs. Hence, it may not be a good idea to rely solely on copyright law to protect *software related invention*. One may wish to explore the option of protecting software related inventions using patents.

PROTECTION UNDER PATENTS:

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.

Most countries place some limits on the patenting of invention involving software. For example, U.S. patent law excludes "abstract ideas", and this has been used to refuse some patent applications involving software.

In Europe, "computer programs as such" are excluded from patentability. The EPO holds that a program for a computer is not patentable if it does not have the potential to cause a "further technical effect" beyond the inherent technical interactions between hardware and software.

It is very important to note that a computer program (source code) may not be patentable as such, but it does not mean that a software invention cannot be patented. One way of determining whether a software invention will be considered patentable subject matter or not, is by trying to judge whether the software invention offers a technical solution to a technical problem. The invention may be consider a patentable subject matter if the software invention offers a technical solution to a technical problem. A software invention once patented, will be valid for 20 years.

ADVANTAGE OF PATENT OVER COPYRIGHT

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.

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

- 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.
- 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).
- 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.

CONCLUSION

Any software program, whether there is an inventive aspect involved or not, is protected under copyright. However, the dilemma of whether to opt for patent protection arises when there is an inventive aspect associated with a software product or a process. In case the software product or a process has inventive aspects, then one should definitely explore the option of protecting the same using patents. The reason being, protection offered by patents as compared to copyright is much broader and stronger.

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