available at www.sciencedirect.com

ScienceDirect

www.compseconline.com/publications/prodclaw.htm

Computer Law & Security Review

Protecting software programmes vis-à-vis patentability of software☆

Harshita Kumar, Deepesh Kumar

RML National Law University, Lucknow, India

Keywords:
Software programs
Patent
Patentability

ABSTRACT

A patent is an official document that confers proprietorship of an invention on the recipient. A grant of a patent is preceded by examination of applications by the patenting authority but the final responsibility for validating or invalidating a patent lies with the courts under challenge. The fundamental principle behind patents is that the governmental authority awards exclusive control over an invention for a fixed number of years, to the individual who first discloses the invention within its territory. In most systems a patent is granted to whichever applicant is first to submit a detailed description of the invention, provided the applicant can satisfy the patent authority and the courts through litigation regarding certain conditions laid down by patent law. In instances where strong public policies outweigh the policies behind granting patent exclusivity, the scope of a patent may be limited.

1. Introduction

A patent is an intellectual property right relating to inventions and is the grant of exclusive right, for limited period, provided by the Government to the patentee, in exchange of full disclosure of his invention, for excluding others, from making, using, selling, importing the patented product or process producing that product for those purposes. The purpose of this system is to encourage inventions by promoting their protection and utilization so as to contribute to the development of industries, which in turn, contributes to the promotion of technological innovation and to the transfer and dissemination of technology. Under the system, patents ensure property rights (legal title) for the invention for which patent have been granted, which may be extremely valuable to an individual or a company. One should make the fullest possible use of the Patent system and the benefits it provides. Patent right is territorial in nature and a patent obtained in one country is not, as such, enforceable in another. The inventors/their assignees are required to file separate patent applications in different countries for obtaining the patent in those countries.[1]

Patents are granted in regard to inventions arising from new technology. The rights they ascribe to the inventor include the right to exclude others from utilizing the patented invention for a specified amount of time, which is usually 20 years. In return for obtaining this grant, an inventor must describe the invention in detail to give notice to the public to enable one of ordinary skill in the art to which the invention pertains to make and use the invention.

2. Efficiency of TRIPS vis-à-vis Article 27

Industrial countries in the past had their own patent laws and offices. Those seeking protection in a specific country had to

☆ This paper derives from a conference paper presented at the First International Conference on Computing Business Applications and Legal Issues (ICCBALI 2011) Institute of Management Technology Ghaziabad, India and Winona State University, USA, March 3–4 2011.

[1] General information for Filing Patent Application in India, published by Office of the Controller General of Patents, Designs and Trade Marks.

0267-3649/$ – see front matter
doi:10.1016/j.clsr.2011.07.011

apply for a national patent and obey local laws. With increasing globalization, international agreements were made and organizations founded to reconcile regional differences. The 1883 Paris Convention was based on the principle of reciprocal national treatment and therefore dealt more with international comity than the unification of patent laws. The1970 Patent Cooperation Treaty finally implemented international one-stop patents. Both treaties are administered by the WIPO (world intellectual property organization).

The new trend is to include property matters in trade agreements. In 1995, the WTO passed the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to reconcile the world's patent laws. The agreement imposes uniform minimal standards modeled after the laws of industrialized nations and is part of the General Agreements of Tariffs and Trade (GATT), the purpose of which was to eliminate trade barriers.

Under TRIPS, signatory countries are required to make patents available for "any inventions in all fields of technology".[2] Further they cannot discriminate against technologies (except, in some respects, in the field of biotech).TRIPS is subject to interpretation.

There is no any reason to doubt that having a strong patent regime will help in the promotion of industrial and scientific development but the real point is whether it is conducive to the win–win policy as adopted by the new globalization and economic order. Article 27 of the TRIPS Agreement in itself has provided some conditions to exclude patentability of products especially for reasons of public health, *ordre* public and public morality. As the least developed countries, have no legal framework and technical capacity to implement article 27 of the TRIPS Agreement, they can exclude some matters from patentability which can be a barrier to their technological and economic development. But such exclusion in their respective jurisdiction does not protect their interest at all as exclusion from patentability of certain subject matter does not exclude the same from patentability in another region or country.

The TRIPS treaty has no time limitation. It is valid as long as the WTO as a whole cannot agree to change it. The organization of WTO is far removed from democratic participation, and many WTO members are dictatorial states. If any country wants to opt out of TRIPS, it will have to leave WTO, thereby risking a collapse of its exporting industries. The Treaty was negotiated in backrooms between ministerial officials and, for most of the world's languages, translations do not even exist. All these considerations make it imperative to interpret the TRIPS Treaty with the greatest care and to make extensive use of the flexibility which it allows, so as to achieve a fair balance of rights and obligations under the overall objective of Free Trade which the Treaty serves.

The drafters were aware of these problems; therefore, they incorporated provisions such as Articles 7 and 8 in the TRIPS Agreement.

3. The varying treatment of patentable subject matter

Economics are the driving force behind the filing of patent applications. Software is now the main component for determining the success of a particular commercial application of computer technology. They now focus not so much on selling their proprietary hardware butmore on providing integrated computing solutions to business problems, of which the software component is a crucial part from the customer's point of view. Across the globe, computer programs or software have been given protection, i.e. a legal cloak either in the form of copyright or patents, etc.[3] However, with advancement of time and technology, talk about patent protection of software has gained momentum. Software patents are one of the most contentious issues in intellectual property rights worldwide. The growing economic significance of computers and computer programmes gives software patents this controversial status. The last decade has seen a decisive shift in economic and commercial focus away from the hardware component towards the software element. Software patents are used by firms and other enterprises to gain a competitive advantage vis-à-vis competitors in that they represent a government sanctioned monopoly permitting the patent

[2] Article 27

(1) Subject to the provisions of paragraphs 2 and 3 patents shall be available for any inventions, whether products or processes, in all field of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of article 65,para 8 of article 70 and para 3 of this article, patents shall be available and patent rights are enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.
(2) Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect or republic or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.
(3) Members may also exclude from patentability:
  (a) diagnostic, therapeutic and surgical methods for treatment of humans and animals:
  (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the pro-tection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.

[3] Methods of protecting intellectual property in computer programs.

- Copyright protects code from copying and public dissemination. However, the protection offered is for the particular arrangement of data, not for the ideas represented by that data.
- Database right protects databases whether created by software or created by human beings, for example, data tables which might be used by a computer program to do its job, however, this offers only limited protection to the constituent parts of the program itself.
- Confidentiality protects the source code itself from dissemination to anyone outside the owner/producer of it.
- Patents, however, protect the concepts and methods associated with the "Industrial Application" of computer programs.