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PATENTING OF SOFTWARE: - LEGAL RECOGNITION IN INDIA

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Short Profile

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ABSTRACT:

The explosion of the information technology within the last fifteen year has created a mass system for communication and a new medium for business to flourish. This has also led to creation of new software's and databases. The information technology Or "information superhighway" has developed in to a new marked for businesses, attracting millions of internet users as potential customers.

In the beginning of 1970S, when increasingly complex and sophisticated computer programs began to be marked independent from hardware, development in computer software industry.

KEYWORDS

Patenting Of Software , information technology , communication, "information superhighway" .

INTRODUCTION:

Gained extraordinary momentum. In the past few years, enormous development has taken place in the area of information technologies. In parallel to these developments, protection of computer software , both domestically specially in India and internationally, has become important.

When we talk about India, India is a leading software hub in the world and due to it's dominance over the software industry, the issue of protection of the software has become very important. The rapidity of progress in software is very rapid. This means that the software industry is saturated with ideas, and that innvactors are outpacing each other every day to create newer software. By the time an immature technology develops to the point where it can be incorporated into products, it has a dozen or more patents on it which render it commercially intractable. This creates an uncertainty in the development of new software.

With the pervasive use of computers, modern society in increasinghly indebted to the software innovators for the enjoyment of " better living through software" As computer capabilities improve and computer- based devices and process proliferate, our reliance on software and improvements in software engineering is increasing. Information processing by computers is defining technology of our age, and software design is its guiding force.

As a part of emerging technologies and due to its importance in today's based economy where the software and computer software are being used in many computer controlled activities affecting all walks of life, it has become necessary to protect this new form of technology under the IPR regime.

Intellectual property is another class of property emanating primarily from the activities of the human intellect. It relates to the information which can be incorporated in tangible object and reproduced in different location ' what is worth copying is prima facia worth protecting ' is the genesis of intellectual property rights. These right refer to the property that is creation of mind i.e. invention, literary and artistic works, symbol, names, image and design used in in commerce. Intellectual property issue are becoming more and more important to an increase range of business activities. Currently the IPR regime is separated structurally between copy right for literary properties and patents for technological specification and processes .

' what is the best form of protection for software has been and still is a most unsettled and vexing and hence very topical issue is intellectual property (IP) law and practice. Presently there are to principal modes of protection of software: copyright as literary and artistic work and patents. In highly sophisticated technologies, " trade secrets" are also allowed.

According to the world Intellectual property Organksation (wipo) Article 27, "[a] patent is an exclusive right granted for an invention, which is a product or a process that provides a new way of doing something, or offers a new technical solution to a problem in order for an invention to be considered eligible for patent protection, it must fulfill the following conditions novelty, inventive step, and usefulness. The novelty, inventive, step, and usefulness. The novelty requirement necessitates some new characteristics not known in the body of existing knowledge , called "prior art" in its technical field .8 the invention must show an inventive Step, which requires that it must not be obvious to a person with ordinary skill in the field. To meet the usefulness requirement , an invention must be of a kind which can be applied for practical purposes.

Nevertheless, Article 27 does not have any guidance with regard to the patentability of computer programs. Therefore, the exact nature of software patentability becomes a complicated question under the trips agreement . it is the argued that TRIPS Agreement mentions computer programs in the context of the copy right protection, it does not mean that protection of computer programs by patent would be

exclude under TRIPS Agreement. on the contrary, opponents have argued that TRIPS does not entail any different agreement on patentability and that TRIPS does not entail any different agreement on patentability and that article 27 would not led to any extension of patentability.

2..Legal concept in India

Patents under the patent Act 1970 can be generated for invention. The word "invention" read with the word "invention step" means a new product or process that is capable of industrial application. Invention must be novel and useful it should not be obvious to a person skill in the art. It must be a significant advance in the state of art and should not be an obvious change from what is already known section of 3 of the patent Act 1970 talk about inventions which are not patentable and further section 4 categorically state that atomic energy cannot be patented .

Upon the grant of the inventor has a right to exclude other making, using or selling his/her invention. Thus , the exclusive right right making using or selling in the patented invention creates a quasi-monopolistic situation. for this reason, governments sometimes impose restriction on this right in this form compulsory licensing system which which allow other to use those patent considered to be of "national significance" to the public health, policy of walfere of the country. More ever, the protection conferred by the patent lasts only a short time, generally 20years, compared to copy right protection.

The patent system have played a vital role in promoting the development of the underlying technical infrastructure, information technology relies in a critical way on the various computer network and technology, both hardware, and software. The market exclusivity established through effective patent protection has provide a reward of investment has justified the expenditures on research and development to achieve to further technological progress .

Patenting of computer programs was formally13 introduced in the patent Act 1970 ("the Act") in 2002 iornically, through an amendment that excluded "computer program per se" from the scope patentability.

The newly introduced Section 3(k)of the act read:
The following are not invention within the meaning of this Act.
.......(k) a mathematical or business method or a computer program per se or algorithms"

Importantly, no definition of the four new categories or what was meant by the qualifier "per se" was supplied15 and the various patent officers appear to have arrived at their own sometimes inconsistent determination of what the clause meant . although legislative analogue 16, in the similar to the wording employed by the European patent convention which exclude " computer programs as such" from the scope of patentability. Generally it can be said that the word "per se" means standing alone, or by itself . it shows the under section 3(k) a computer program standing alone or by itself cannot be patented.

This has been interpreted to mean that computer programs which achieved a "technical effect" were fit subject of patent protection Subsequently in December 2004,a further amendment was effected through an Ordinance which bifurcated this clause and sought to narrow the exclusion of computer programs from patentability. These resultant clauses read as follow

(k) a computer programs per se other than its technical application to industry or a complication with hardware

(ka) a mathematical method or a business method or algorithbms
however, this ordinance did not survive for very long and in April 2005 it was replaced by an amending enactment which reverted to the 2002 position –once again " computer programs per se" were excluded"

3.Legal concept in India at international level

Based on the U.S Constitution the patent Act which is codified under Title 35 of the Untied States code regulates the requirements for obtaining a patent.

Section 101 of the "title requires that "[w] however invents or discover any new and useful process machine, manufacture of composition of matter ...... may obtain a patent therefore subject to the conditions and requirements of the title . this sections sets out the three general requirements namely novelty usefulness and non-obviousness for obtaining a patent the novelty requirements which his defined as section 102, requires that an invention cannot be patented if certain public discloser of the invention have be made. while the term "usefulness" refers to the condition the subject the matters has a useful purpose ,Section 103 clarifies the non- obvious requirements that the invention should not be obvious to a person having an ordinary skill in the art. Apart from these general conditions, there are no further statutory requirements for patentability.

This firs court case in the computer software was Gottschalk v. Benson. Decided by the U.S Supreme court in the cause the patent claim was a method for converting binary numerals into a pure binary numerals for use by a computer. The court found the computer program in the cause implemented a mathematical algorithm defined as "[a]" procedure for solving a given type of mathematical problem .... And rejected the patent claim the grounds that grating a patent claim on the grounds that granting a patent for algorithms would monopolize the law nature .

In a subsequent software case Parker v. Flock , the Supreme Court once again rejected a patent application submitted for a computerized method of updating alarm limits in a chemical conversion process. The Court held that only novel feature process. The Court healed that the only novel feature of the invention was mathematical formula implemented in the computer program . it further noted that the process of post- solution activity – the adjustment of the alarm limit to the number calculated by the computer – was insufficient to transform the non- patentable process to patentable.

In 1988, the Court of Appeals for the Federal Circuit decided a landmark case ,State Street Bank and Trust Co. v. Signature Financial Group Inc, in computer software patent . the invention at issue is a software – implemented financial system which automatically calculates and allocates profits from a joint stock account . the District Court rejected both the mathematical algorithm and business method exception the Court again stressed that the freemen Walter Abele test "Has little, if any, applicability to determining the presence of statutory subject matter," it stated , rather, that the devices test is whether an invention produced a "useful, concrete and tangible result" Concerning the business method exception, the Court determined that this exception has never existed; prior business method inventions had always been denied on other grounds. Therefore, if a business method produces " useful, concrete and tangible results" and bears the other statutory requirements it can be patented in the U.S

The Federal Circuit Court affirmed the State Bank reasoning in AT&T v. Excel communication the patent claim in this case was a software implemented method for " the generation of a message record for long – distance telephone calls" and recording to whom the calls should be billed . The Court applied the " useful, concrete and tangible result" test and concluded that the invention comfortably fell within the scope of patentable subject matter.

4.CONCLUSION

Currently the law relating to computer programmed is still little more than an embryonic collection of laws and principles. But it is evident from the currents state of affairs that maore radical reforms in form of legislations are needed in respect of protection being provided to computer programmed. While stronger protection is needed for software invention in India, the patentability of such invention remains ambiguous. It is important to impose a software patent regime as it would impact the quality of patent which might then prove counter productive in the development of Indian software industry.

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