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What would you choose: Copyright or Patent?

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The provision of Section 3(k) of Indian Patent Law, that says computer software per se is not patentable till it has technical applications, puts most inventors down. Even though in most of such cases, filing in the US is one of the preferred destination but inability to get a patent in home country is a bit disappointing. Knowing the fact that software patent in India is tough, the next question from the inventor is that, if not patent, can we at least get a copyright?

The fact of the matter is that the statutory right that one gets in the case of patent cannot be substituted by a copyright and it is important to understand difference between the two. Copyright and patents fall under separate legal regimes and for one single product, one may file for patent as well as copyright.

Prime difference between copyright and patent is that copyright protects only expression of the idea but not the idea itself, whereas, patent protects

idea or concept as well. For example, if there is a product, meant for administration of a hospital, the idea or concept is administration of a hospital, which does not get protection under copyright law. However the way code has been written is the expression of the idea and the author who has written the code has copyright over it. However if any other person writes another code (without copying code from first author), he also has his copyright on the product. On the other hand, if there is a patent on the product, meant for administration of a hospital, the patent holder can prevent all third party, ie, from duplicating the work in the jurisdiction where he has valid patent rights.

Independent creation of copyright is not an infringement whereas the same is not true for a patent. This means that if the work is not directly copied from the copyright holder, and created independently, it is not copyright infringement. This probably is the biggest advantage of having a patent. As soon as patent application is filed, the applicant may write ‘patent applied for' or ‘patent pending' on the product, whereas copyright notice, such as ‘(c) copyright, Origiin IP Solutions LLP' can be written without registration as well. Though copyright is an inherent right and needs no formal registration as such but registration becomes important and registration certificate serves as a proof of ownership in case of copyright infringement or even in case of merging/acquisition or to obtain funding/loan from bank or venture capital.

Novelty-Critical Requirement

Novelty is the most critical requirement for a patent which means that before the date of filing a patent application, there shall not be any disclosure of the invention. Whereas copyright, though requires originality in the work, does not have novelty as a critical requirement that enables one to file backdated application as well. Term of a patent is 20 years from the date of filing whereas term of copyright is 50-70 years from the date of death of last author.

It is interesting to note that copyright registered in any country which is a member of Berne Convention hold good in more than 160 countries which are members of Berne Convention. In order to get patent rights in multiple countries application shall be filed separately in each country. Though we have single patent application filing platform like PCT, patent rights are granted only be national offices.

Sample this...

In order to understand difference between copyright and patent, lets have a look at Stac vs Microsoft, an interesting court case in the USA, which Microsoft lost and was required to pay $120 mn for its willful infringement of #4,701,745 (a compression software patent). Stac had a software patent on the algorithm for its PC hard disc data compression software product. Microsoft expressed interest in working with Stac and in the process copied the compressed algorithm of the Stac product. Microsoft then wrote its own code to execute the Stac algorithm and used the code in MS DOS 6.2 product. Stac sued Microsoft for patent, trade secret, and copyright infringement.

A permanent injunction was given against Microsoft and was ordered to pay Stac $120 mn. Calculation of the damage was calculated on basis that Microsoft had included the infringed code which prevented Stac from marketing millions of copies of its separate data compression software. After

litigation, for about a week, a lobotomized version of DOS was shipped with the compression feature disabled. DOS manuals were shipped with stickers on the cover warning to ignore the chapter on compression. MS finally got license to use the algorithm in DOS and agreed to pay $1 mn per month for 43 months and to purchase about $40 mn of Stac convertible preferred stock.

Since Microsoft did not copy the source code and wrote a new code for same algorithm, Stac could only prove patent infringement in the Court but not copyright infringement as independent creation of the work is not copyright infringement. Patents can protect the basic concept of a software product, regardless of the actual source code but copyright only protects source code.

Before you decide between copyright and patent protection for the software product, it is essential to understand the difference between the two so that you are clear about what rights you are getting. Though both patent and copyright have their own pros and cons, it makes a lot of sense to consider registration process based on requirements.