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Summer June 20, 2011

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Available at: https://works.bepress.com/banday/10/
Indian Legal Approach to Licensing of Open Source Software Distribution: An Exploratory Study

Conference Paper

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National Seminar on Open Source Software Systems Challenges and Opportunities, 20-22 June 2011, Department of Library and Information Sciences, University of Kashmir, Srinagar
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Abstract

The pervading applications of Computer Technology are largely attributed to software. The developments in software technology have resulted in the growth of business as well as methods of business. There is a constant hunt for newer methods of developing and distributing software which has given birth to the “open source movement.” Open source software is developed in an open manner in which the source code (human readable version of the software) is widely available for review and modification by any developer, subject to the terms of the open source license. Open source software is becoming ubiquitous because of its low cost, ability to modify and ease of change to a different type of software. Many open source licenses require that the distribution of the object code (which is human readable) include either a copy of the source code or the right to receive the source code. Furthermore, these licenses give the licensee the rights, without charge, to (a) modify the software and (b) redistribute the software (whether or not modified). Open source software can be distinguished from other traditional forms of software by the structure of the license agreement under which open source software is made available. These license agreements have raised a host of legal issues that have far reaching implications which are compounded by the fact that there is no uniformity in laws in vogue in different jurisdictions. For instance, in US, the owner of the copyrighted work may license that work either in whole or in part with or without receiving a royalty or fee in exchange for the license. As against this, prior to amendment, Germany requires that the copyright owner receives adequate compensation in exchange for a license to that work. Only recently Germany has introduced what is popularly called as Linux Clause in its copyright law which makes it possible to grant a simple license to the general public for no fee or only a minimal fee. The obligations imposed by the open source licenses are generally complex and at times unclear or even ambiguous. The potential implications of using, modifying and distributing open source software vary greatly with each license. An attempt is made in this paper to explore the possible cause of action in Indian context which an open source license agreement would entail for a licensee.

Keywords: Law; information technology; Free and Open Source Software; OSS Distribution; OSS Licencing Issues; OSS Licencing.

1. Introduction

“Open-source software” is the concept that an expressive work can be better utilized and developed by allowing open access to the source code. The source code may itself be the subject matter of intellectual property jurisprudence that is protected by copyright law. This protection is also available to the derivative works base on the source code, should the author choose to exercise those rights, but the author can forego this protection either by abstaining from enforcing them or by offering a license to others. The software community could just allow this to happen without requiring licensing, but the safest way for those producing such derivative works from material protectable by the copyright laws is to obtain a general public license for such use. Otherwise, any derivative works produced from the source code could be the subject of an infringement suit.

The open-source concept works after an original version is released in the market. Software users from all walks of life are permitted access to the protectable source code and can stress it in ways that the original developer may not have considered or would not have had the expertise to consider. Development of a program from scratch would probably not be successful with open source access. Linux is a good example of open source software developed by Linus Torvald. The theory is that more eyes looking at the code will result in faster discovery and correction of errors than the traditional closed source code.

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1 Brian S. Boyer, Legal Research on Open Source Software Open Source Software: Current Law http://www.daviddfriedman.com/Academic/Course_Pages/21st_century...
There is no limit on the number of contributors as long as the project remains open source. An interesting path of inquiry is what happens to various property rights that follow from the original software program that has its own copyright protection. Each development that follows from the original program is a derivative work. Such derivative work has its own copyright protection but cannot be copied, distributed, used to produce additional derivatives, publicly performed or displayed, without permission of the original copyright owner. Such permission is provided by contract, and federal copyright law determines the scope of such contracts.

2. Characterization of Open Source Software

The characterization of software as ‘open source’ is controlled by the open source community. In order to characterize software as ‘open source’ by the open source community, it must meet the following criteria.

a) Free Distribution. There should be no restriction on any party from selling or giving away the software as a component of an aggregate software distribution containing programs from several different sources. The license may not require a royalty or other fee for such sale. The essence of open source is its distribution without restriction.

b) Source Code. The fundamental difference between the traditional and open source distribution of the software is that of the source code distribution. The open source software must include source code, and must allow distribution in source code as well as compiled form. ... The primary object must be the distribution of the source code that will enable a programmer to modify the program. Deliberately obfuscated source code is not allowed. Intermediate forms such as output of a preprocessor or translator are not allowed.

c) Derivative Works. The primary object of open source is to allow improvements over the software. The license must facilitate it and allow modification and derived works to be distributed under the same terms as the license of the original software.

d) Integrity of the Author’s Source Code. The license should make a provision for the protection of morale rights of the author of the original software. The license may restrict source code from being distributed in modified form only if the license allows the distribution of “patch files” with the source code for the purpose of modifying the program at build time. The license must explicitly permit distribution of software built from modified source code. The license may require derived works to carry a different name or version number from the original software.

e) No Discrimination against Persons or Groups. The license must make distribution open without any discrimination against any person or group of persons.

f) No Discrimination against Fields of Endeavor. The license must not make the use of the software restrictive in character confining its use to a specific area of activity. For example, it may not restrict the program from being used in a business, or from being used for genetic research.

g) Distribution of License. The license should be ‘all encompassing.’ The rights attached to the program must cover all to whom the program is redistributed without any separate or additional license by those parties.

h) License must not be specific to a product. The rights attached to the program must not depend on the program’s being part of a particular software distribution. If the program is extracted from that distribution and used or distributed within the terms of the program’s license, all parties to whom the program is redistributed should have the same rights as those that are granted in conjunction with the original software distribution.

i) License must not contaminate other software. The license must not place restrictions on other software that is distributed along with the licensed software. For example, the license must not insist that all other programs distributed on the same medium must be open-source software.

3. Possible Legal Issues

3.1 Copyright Law
The Indian Copyright Act inter alia accords protection to literary works that includes computer programs, tables and compilations including databases. The computer program for the purposes of copyright protection means 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.

Copyrights are limited exclusive rights owned by an author of original expressions that are fixed in a tangible medium of expression. The copyright owners of computer program have the following exclusive rights:

- To reproduce the work in any material form including the storing of it in any medium by electronic means;
- To issue the copies of the work to the public not being copies already in circulation;
- To perform the work in public or communicate it to the public; to make any cinematograph film or sound recording in respect of the work;
- To make any translation of the work;
- To make any adaptation of the work;
- To sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer program. Provided that such commercial rental does not apply in respect of computer programs where the program itself is not the essential object of the rental.
- The open source falls in the category of derivate works but unlike American Copyright Law, Indian Copyright Act does not expressly enlist the derivates works in the category of copyrighted works. However, the copyright owner does have the right to make adaptations of his work. The adaptation inter alia means in relation to any work, any use of such work, any use of such work involving its rearrangement or alteration. The Open source code would fall in the category of adaptation in Indian context. The copyright owner of software has exclusive right to make modifications or improvements in his software. This right can be licensed by him.

Software involves expression in a literal sense and thus falls under copyrights. Open source project owners take advantage of copyright laws by claiming copyrights on their software. They then have the exclusive right to make copies, distribute copies, and create derivative works. If they just post the work and invite contributors to improve, copy, and modify, which in essence is creating a derivative work, the contributors may be liable for copyright infringement. In order to abide by the copyright laws and ensure that no contributor to the project will be liable for copyright infringement, owners issue licenses with terms allowing such conduct.

3.2. Locus Standi

The suit for infringement of the copyright may be instituted by:

- The owner of the right;
- The assignee of the owner of the copyright, where the owner has assigned the copyright in conformity with the provisions of this Act;
- An exclusive licensee, in case the owner of copyright has granted an exclusive license;
- Legatee, in case of transmission of copyright by testamentary disposition;
- In the case of an anonymous or pseudonymous work, the publisher of the work, unless the identity of the author is disclosed.

The open source code per se does not fall under any of the above mentioned categories. There is no single licensee in open source and by definition it has many contributors, this could mean a lot of plaintiffs. The plaintiff has to establish that the particular copyright infringed in an open source essentially belongs to him. It is to be ascertained first which copyright in an open source has been infringed and who is the owner of that right because there will be multiple owners of multiple copyrights existing in it.

3.3. Derivative Work

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Section 2(0) of the Copyright Act,1957
Section (ffc)
Section (a) (v)
Section 54(a) of the Act
Section 20 of the Act

Available online at http://www.bepress.com/banday/10/download/
DOI: 10.13140/RG.2.1.2355.7203.
Broadly speaking there would be two classes of literary works (a) primary or prior works: These are the literary works not based on existing subject-matter and therefore would be called primary or prior works; and (b) secondary or derivative works. These are literary works based on existing subject matter. The Supreme Court in Eastern Book Co. v. D. B. Modak,11 outlined the requirement of originality in case of derivative works. The apex court opined:

The originality requirement in derivative work is that it should originate from the author by application of substantial degree of skill, industry or experience. Precondition to copyright is that work must be produced independently and not copied from another person. Where a compilation is produced from the original work, the compilation is more than simply a re-arranged copyright of original, which is often referred to as skill, judgment and or labour or capital. The copyright has nothing to do with originality or literary merit. Copyrighted material is that what is created by the author by his skill, labour and investment of capital, maybe it is a derivative work. The courts have only to evaluate whether derivative work is not the end-product of skill, labour and capital which is trivial or negligible but substantial.12

The apex court did not follow the traditional standard of originality in the above case and relied on the US13, Canadian14, and English decisions.15 It was observed.

The sweat of the brow approach to originality is too low a standard which shifts the balance of copyright protection too far I favour of the owner’s right, and fails to allow copyright to protect the public’s interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creative standard implies that something must be novel or non-obvious—concepts more properly associated with patent law than copyright law. It was further laid down:

To claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creative in the sense that it is novel or non-obvious, but at the same time it is not a product of merely labour and capital. The derivative work produced by the author must have some distinguishable features and flavor to original text. The trivial variation or inputs put in the judgment would not satisfy the test of copyright of an author.

Open Source Code is essentially a derivative work and the above standard of originality pronounced by the apex court would be applicable to it as well. Any one claiming copyright protection over an improvement has to satisfy the requirements as enunciated in the above mentioned ruling.

3.4. Copyright Infringement:

Copyright in a work shall be deemed to be infringed when any person, without a license granted by the owner of the copyright or the Registrar of the copyrights under the copyright or in contravention of the conditions of a license so granted or of any condition imposed by the competent authority under the Copyright Act does anything, the exclusive right to do which is by the copyright Act conferred upon the

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11 (2008) ISCC 1
12 Id.p104
13 The Chancery Court in University of London Press Limited v. University Tutorial Press Limited (1916) 2 Ch601 observed: “Assuming that they are “literary work,” the question then is whether they are original. The word original does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of literary work with the expression of thought in print or writing. The originality which is required relates to the expression of thought but that does not mean that the expression must be in an original or novel form. The work must not be copied from another work— that it should originate from the author. See also Designers Guild Ltd v. Russell Williams (Textiles) Ltd., (2000) 1 WLR 2416 (HL), Ladbrooke Football Ltd. v. William Hill (Football) Ltd., (1964) 1 WLR 273 (HL); Water and Another v. Lane (1900) AC 539 (HL); University of London Press Limited, (1916) 2 Ch 601
14 The Supreme Court in Feist Publications Inc. v. Rural Telephone Service Co. Inc., 499 US 40 (1991) observed thus: The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. Explaining the scope of the word originality, M. Nimmer and D. Nimmer, celebrated authors on Copyright observe: To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be.  M. Nimmer and D. Nimmer, Copyright p 2.01(A), (B) (1990). Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.
15 The Supreme Court in CCH Canadian Ltd. v. Law Society of Upper Canada, 2004(1) SCR 339 observed thus: “I conclude that the correct position falls between these extremes. For a work to be “original” within the meaning of the Copyright Act, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill I mean the use of one’s knowledge, developed aptitude or practiced ability in producing the work. By judgment, I mean the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For instance, any skill and judgment that might be involved in simply changing the font of a work to produce “another” work would be too trivial to merit copyright protection as an “original work.” Para 16.
owner of the copyright. So by making a copy, derivative work, or distribution without the owner’s consent will be an act of infringement.

The courts in India are yet to establish authoritatively the principles for determining infringement in the realm of software. The questions to be answered are: what is the standard for finding an infringement in a source code? How much of a code must be the same before there is a presumption that it was copied and not created independently?

Courts in America have compared source codes side by side to determine infringement. In Cadence Design System Inc. v. Avant! Corp., the court found likelihood of success on an infringement claim even though only fifty-six lines of code matched between the programs. The argument was that even though the “quantitative amount of what has been copied is minor, it still can be qualitatively significant”. These principles can prove useful in determining infringement in open Source Code in India.

4. Application of Contract Law

An open-source software license is essentially a contract, which would be governed by the principles of the law of contract. An indispensable component of the open source distribution is the open source license. Owners of open source software claim copyright in the code and then licensing it like the old shrink-wrap/click-wrap licenses. These licenses place the purchaser to take it or leave it situation. He cannot alter those terms or even discuss them. He does not undertake the laborious and profitless task of discovering what the terms are. The terms of the licenses generally include the following:

a) Redistribution – Source code is distributed through mass marketing and has to be unrestricted. The licensee may not prevent any party from selling or giving away the software as long as the source code is also distributed.

b) Source code required – The essence of open source is its distribution along with source code. The license will expressly provide that the program be in source code form so that a programmer may modify the program.

c) Derivative works – The object of source code distribution is to allow the licensee to make modifications or improvements in it. The licensee must have a right to create derivative works and own copyright over them with a right to distribute those works.

d) Integrity - licensee may acknowledge the contribution of those whose source code has been used for creating a derivative work but that does not mean that the licensee must insist on using the name of an author to endorse products derived from the original code if necessary.

e) Licensing restrictions – the licensee may in turn license his derivative work but he will have to undertake that the same terms will also apply to any future license that the licensee enters into.

4.1. Validity of Open Source Licenses

Open source license is essentially a contract and its validity has to be tested from the stand point of the law of contract. This license can be equated with shrink-wrap/click-wrap licenses for software. These licenses have stood the judicial scrutiny in other jurisdictions but the courts in India have not found such opportunity. The courts in other jurisdictions have laid down principles which could prove useful guide in resolving issues involving open source licenses. Shrink-wrap licenses contain the terms that are visible through the shrink-wrap boxes that contain the software program. The buyer is deemed to have agreed the terms for using the software and a contract is formed. As against this, when a user downloads a program from the Internet, he cannot have access to the program unless he clicks the “I accept button” on the screen. When he clicks this button a contract is ripened between the parties. This is popularly called as click wrap contract. The courts in India have not yet found opportunity to discuss the validity of these contracts. However, the case law in America has focused on several factors to evaluate enforceability of click-wrap licenses. They include “whether the consumer received adequate notice of the license, whether...

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16 Section 51 of the Copyright Act
18 Ibid
19 Lord Denning in Thornton v. Shoe Lane Parking Ltd., (1971) 1 All ER 686CA said: No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat.
20 See F. Kessler, Contract of Adhesion_ Some thoughts about the Freedom of Contract, 43 Columbia LR 629(1943)

sufficient competition in the market existed to equate the relative bargaining strengths of the transacting parties, and whether the consumer received adequate time to review the license and return the software.  

Overall, the enforceability of the shrink-wrap/click-wrap licenses has been upheld subject to certain procedural requirements. The fate of open source licenses remains to be tested while case law on the shrink-wrap/click-wrap licenses may serve as a useful framework for analysis.

5. Application of Consumer Protection Act

An interesting question likely to be debated in India before the consumer courts established by the Consumer Protection Act, 1986 (CP Act) is whether the licensee of open source be called a consumer under this Act? This Act accords protection to the purchaser of goods and hirer of services for consideration but excludes any person who purchases goods for resale or for commercial purpose. If a consumer finds goods purchased by him defective or services hired by him deficient, he can file a compensation claim. Can this compensation claim be filed against the person who has licensed a defective open source program under the CP Act? Or can he take advantage of the fact that licensee is also licensing this open source program after making improvements or modification in the program which would fall either in the category of resale or commercial purpose.

6. Application of Sale of Goods Act

At present, the closest analogy from contract law to open source licenses is the Implied Warranties provided under the Sale of the Goods Act. This Act provided that there is no implied warranty or condition as to the quality of fitness for any particular purpose of goods supplied under a contract of sale except where (a) the buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller’s skill or judgment, and the goods are of a description which it is in the course of the sellers business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to fitness for any particular purpose. Provided that, in case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose, (b) where goods are brought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality. Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed. An implied warranty or condition as to quality or fitness for a particular may be annexed by the usage of the trade. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

The above provisions will be time and again invoked to determine the liability of the licensor of the open source. There is no statutory definition of the term merchantability in India unlike America and England. What would constitute merchantability in open source program is a moot point. This issue is left to the court to decide.

Another issue of seminal importance is the validity of the exclusion clauses. The open source licensor may disclaim all implied warranties which is possible under above law but it is not quite clear whether courts will enforce such exclusion clauses where the disclaimer is unconscionable especially the open source program involves mass market licenses where there is neither negotiation nor any scope for change in terms. There is every possibility that such contract may turn to be a contract of adhesion.

7. Tort Liability

Open source software licenses could involve tort jurisprudence to determine liability for negligence, product liability, property damage and economic loss to businesses using open source software. There are well established principles to determine negligence but their application to open source program is yet to

References:

22 Section 2(d) of the CP Act
23 Section 14 of the CP Act
25 UCC 2-314
26 (English) Sale and Supply of Goods Act,1994
be determined. The ingredients of negligence established by the courts are: (a) duty of care to the plaintiff 27 (b) breach of that duty 28 (c) damage as a consequence thereof 29. It is to be seen how courts will apply these principles. It will be difficult at times to prove (a) who owned the duty? (b) who breached the duty? (c) to whom the duty was owned?

8. Conclusion

Open source program has raised a host of unprecedented legal issues which could be debated before the courts in days to come. Open Source program has source code embedded in the program so that other could improve it and make necessary modification in it. This would essentially bring on fore issues pertaining to its copyright and infringement thereof. The open source program is, like other software’s, licensed which is primarily a standard contract. It has been observed that these standard contracts contain terms that are either harsh or unreasonable. The courts have laid down principles to mitigate the rigour of these exemption clauses. Will these principles be applied to the standard terms containing in the open source distribution? Will the principle of privity be done away with in case of open source distribution which in fact is an anti-thesis to basic philosophy of open source? It remains to be seen, whether the open source community can retain the level of control it currently has over open source software. Can the licensee of the open source be called as a consumer entitled to the protection accorded to him under the CP Act? Will the principles of sale of goods be made applicable to open source and how will courts expound the scope of the doctrine of merchantability in case of open source program in absence of any statutory definition of merchantability. Will the principles of negligence be made applicable to opens source distribution? If so, question arises who owes duty and to whom it is own?