Patents on software: India’s CRI guidelines create impractical situation

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On June 17, 1965, Computerworld informed the world about a radical development with the headline “First Patent Issued for Software, Full Implications Are Not Yet Known”. Martin Goetz, the holder of this debut patent, still believes that software is an intellectual creation that requires legal protection akin to other patentable inventions.

There is significant public debate over patents on software, or in more unambiguous terms, patents on computer-related inventions (CRIs). As technology continues to make a big impact on the entire globe through advancement in CRIs, it is imperative that India takes the right path.

CRI guidelines in India were issued in 2015, after painstaking consultations with stakeholders, with the objective of bringing more clarity, uniformity and certainty in patent examination procedures followed by the four patent offices. These guidelines included positive examples about patentability of software-related inventions under Section 3k.

Several stakeholders contend that these guidelines were logically well-structured and eliminated several ambiguities related to software patents. Upon protests from certain IT groups, the rather logically-structured guidelines were kept in abeyance and revised guidelines to examine CRIs were issued on February 19, 2016.

The revised guidelines create an impractical and paradoxical situation, which makes patentability of software possible only if the inventor also invents a new hardware. This has drawn flak from multiple stakeholders whose biggest fear appears to be coming true. Since the revised guidelines were issued,
claims of at least 29 CRI applications have been rejected by the patent office under Section 3(k), i.e., on grounds of containing subject matter that is not eligible for patenting. Microsoft alone had to face the 3 (k) guillotine for 11 of its inventions.

Elite technology companies (including TCS, Yahoo, Samsung, Ericsson, Microsoft and Philips) from more than 10 countries had their CRI applications rejected in India in the past six months. Besides rejections, many applicants, including high-tech Indian companies such as Wipro, have started to receive negative examination reports calling for rejection of their patent applications. This can call into question the quality of patent examination in India for inventions in advanced software as well as communication technologies.

Albeit on appeal, the decision of the Delhi High Court in the Ericsson versus Intex matter made it clear that CRIs that have a technical contribution or technical effect are patentable in India, aligning with the position taken by courts in the EU and the UK. The revised guidelines, that brushed aside the Ericsson decision, provide a three-step test to ascertain patentability of software patents under which examiners have to (1) properly construe the claims; (2) check whether the contribution lies in the field of the computer program; and (3) check whether it includes novel hardware. It is the onerous requirement of novel hardware might be responsible for patents being denied even for worthy inventions.

The boundaries between computer hardware and software are highly permeable and underscore the advancement of technologies in several domains. For example, IoT innovations in automobiles (smart cars that can communicate) do not necessarily entail a novel hardware, but rely on new software that presents users with fascinating options. Further, a sound understanding of what constitutes technical contribution might be lacking.

There is an absence of coherent empirical evidence to support the view that excluding software from patenting would promote innovation. In an April 2016 Stanford paper, Marcel Fafchamps and his co-authors have offered empirical evidence on the impact of changes in the availability and strength of software patent protection on companies in India. Their analysis of market returns shows some clear patterns highlighting the positive market response to a softening of patenting restrictions and a negative response once these restrictions are reinforced. Their investigation of the characteristics of Indian firms reveals that comparatively smaller software companies (including most Indian software firms and start-ups) were most adversely affected by the tightening of patentability of software.

Software patents emanate from a field that is inextricably linked with engineering, technology and their myriad applications.

The opponents of software patents often cite cost of possible litigation as a reason why such patent should be excluded. But, this is true for all patent litigation. Software already stands at the intersection of an inherently hyper-complex technology and abstruse claim construction, which is further
obfuscated by issues of infringement and validity. Critics also suggest that creators of new software can protect their innovations through secrecy or through copyright protection, rather than patents—an argument which is deeply flawed. Copyright offers protection to only expression of an idea and not the idea itself. Thus, a potential infringer can re-express the idea in a different form and can easily come out of any liability of copyright infringement. The value in software comes from additional (and creative) functionality based on the embedded algorithm that further brings apparent value to the end user, be it an individual user of a smartphone or a network provider that has to process signals from towers. Any modern technology-based innovative company selling software or hardware to end users cannot afford to rely on trade secret protection for its inventions.

Industry is slowly moving away from hardware innovations. Future technologies, such as augmented and virtual reality, 3D printing, IoT-enabled smart devices and driverless cars will instead rely more on advanced software. This will reduce ecological footprint and minimise the delay in commercialisation of innovations allowing innovators to channel revenues towards meaningful activities. The revised CRI guidelines are also likely to curtail the global presence of Indian software firms that have so far relied mostly on software-enabled services. Growth of Indian software companies (including a host of dynamic start-ups) will be determined by their ability to come up with patentable innovations to reach out to the global marketplace.

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