RIGHTS CORNER

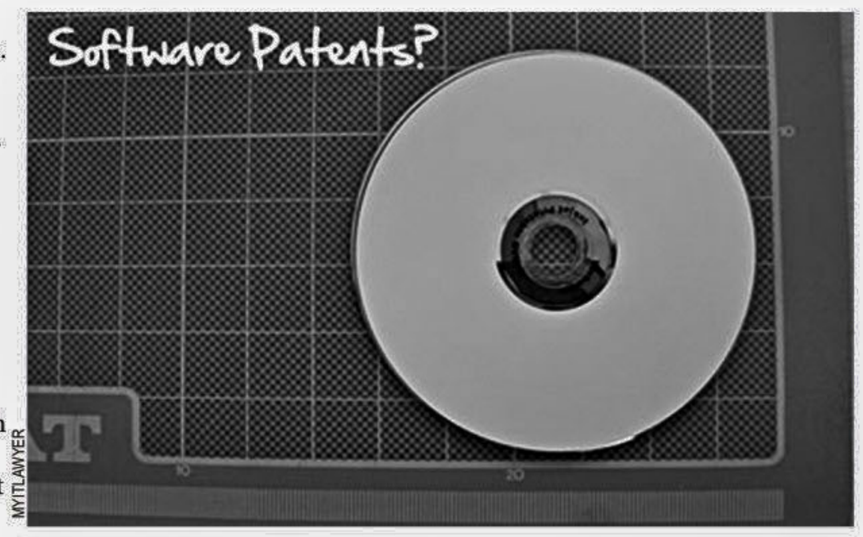
Patentability of Software: Issues to be concerned

MOHAMMAD YUSUF ALI

WITH the ever increasing software and the associated economic prospects, there have been occurring significant changes in the relevant legal arena. Patentability of computer program or software has already emerged as an issue. In fact, USA and the European patent office granted patent for software while LDCs are not ready to even grant existing copyright on software. Once software patent is granted, the LDCs with their poor technological base, are likely to be suffered emanating from linked issues like higher cost, rigidity of patent system, ambivalence, restriction on free use of brain etc. This is an attempt to find out the possible repercussion of software patent and the legal ambiguity inherent in the concept.

Let us define 'Computer Program' or software (used synonymously) first. Generally, computer program means a set of instructions applied to set a computer in action to perform a particular task. As per section 2(10) of the Copyright Act, 2000(In vogue in Bangladesh), Computer Program means a set of instructions expressed in words, codes, schemes or in any other form, including machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result. Having defined computer software we can have a look at the legal status of that. As the instructions in software are expressed in words, codes, schemes etc., it gets copyright protection as literary work. Section 2(46) of copyright Act, 2000; article 4 of WIPO Copyright Treaty (WCT); article 10 of TRIPS agreement, 1995- all treats software as literary work worthy of getting copyright protection.

However, It is evident that software comprises both source code and object code. The instructions in software are initially expressed as source code-lines of instructions in a computer language. To make it directly executable by the computer it has to be complied into Object code-machine readable instructions. So, computer program is not all about literary expression, it has some method also which make it machine readable. Generally it is suggested that as object code is the direct result of source code, its legal status must not be independent of that. While other suggests that there are some ideas (non literal, object code) in software that is not expressed in literature. As copyright protection does not extend to unexpressed ideas, it should come under patent protection which is available in case of product and process involving novelty, inventive step and industrial applicability. But current legal atmosphere discourages patentability of software as it has shortcomings and issues to be concerned. let us consider some points in this regard.



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Firstly, Obtaining copyright is much easier than obtaining patent. Only fixing a work in a tangible form is enough to invoke copyright protection while a more formalized procedure is to be followed for obtaining patent protection. An application for patent is to undergo a number of tests when only the inscription of © is enough for copyright protection. The formal and lengthy procedure patent is also costly and may precipitate law suits as it involves a lot of claim, counter claim giving rise to investigation and interpretation. Surely, it will result in higher cost of software. After the year 2013, the exemption that LDCs are enjoying in this regard is to be withdrawn. On top of it if patent is granted the situation will be worsened.

Secondly, the dual character of software discards the notion of software patent. Almost all the works in a computer program is literary in nature and the ongoing trend is to attribute copyright protection. The international treaties do not really cover the issue of patentability of computer software. Rule 39.1 of the Patent Cooperation Treaty (PCT), the closest one in this regard, states: "No international searching authority shall be required to search an international application if, and to the extent to which, its subject matter is any of the following:.....(vi) computer programs to the extent that the international searching authority is not equipped to search prior art concerning such programs". It indicates that the international authority is not prepared to grant such patent. So, the concept of software patent is not flawless.

Thirdly, there is dichotomy in idea and expression to the effect that no copyright exists in abstract ideas. Infringement of copyright arises if one really reproduces or makes unauthorized use of software. Hence, up gradation of using the current one does not constitute the infringement in this case. But, in case of patented software the situation would be reverse. Patents, even could restrain the free use of brain power. Suppose, a situation arises which demand software to be developed to diagnose a disease. In so doing, the potential researchers would not go for checking if there has been any related invention so that infringement might not occur. Instead, he will devote himself to prepare the program. It is only then, when they are sued, that they find out someone has already made a solution. If inventors are apprehended with suits, then how can they use their brain freely?

Fourthly, granting a patent for a period of 20 years seems ridiculous at an age when technologies are rapidly changing. Even within a few months a generation of technology is becoming obsolete. Ultimately the earlier one will bear little or no significance. Again, at a time when open source software is available, patenting of software may bring sad result. It may be argued that open source software is sub-standard, but things are changing rapidly.

Last but not the least, many complicated diseases and environmental issues are to be addressed through software driven process. Once the patent on software is in vogue, the whole process shall see a steeply rise in costs having repercussion on the health and environment of the developing and climatically endangered countries.

To conclude it can be well said that patenting of computer program involves a lot of issues to be concerned. Hence any initiative in this regard, both national and international, should be scrutinized, studied carefully and addressed according to the findings.

The writer is Assistant Director (Assistant secretary) BPATC, Savar, Dhaka.

LEGAL EDUCATION

Critical approach to legal study: The phases and fusion(s)

M A SAYEED, SAIFUZ ZAMAN

SHARON Hanson in his book **Legal Method and Reasoning** once commented that "the study of law is about critiquing the choices made, as well as critiquing the rules themselves." Law students may, by and large, be familiar with the message contained in the word 'critiquing', particularly when they come to know that legal learning involves 'critical approach,' that is, they must learn law critically. What do we understand by 'critiquing' or approaching critically? Is it a 'state of mind' or a mere process? What does critical approach to legal studies actually require? How should we then approach critically?

There is no doubt that 'central to the task of every study is cultivation of excellent critical thinking.' But how critical thinking process can well be cultivated in the peculiar field of legal study seems still confusing to many students. The confusion arises partly from their failure to comprehend the reasons of such special emphasize in critical learning, and partly from their failure to capture a 'manifestly pursuable angle' in the way of their endeavor.

Through this writing, we will thus try to take this confusion out by attempting to show a general route of how we can apply critical thinking in the process of legal learning. However, in doing so, we will not concentrate on the traditional concern of what materials we should deal with and how we should actually begin in dealing with the same. Our purpose is rather confined to the aim of clarifying what the aspects of critical legal learning are and what they virtually imply.

In the pursuable parlance, the aspect of critical legal learning implies the exercise of a strong intellectual skill or an outstanding outlook in 'thinking about law.' It therefore, necessarily involves the existence of two important dimensions, namely, i)) a careful and curious "state of mind" capable of reflecting, subjecting and comparing the legal learning with our experiences of practice, and ii) a "productive process" affording alternative intellectual ways of understanding the dynamics of law and legal assumptions.

Both the aspects, as identified above, have a coinciding consequence that requires understanding not only the inner dynamics of law but also its deeper ramifications as "foundational to critical legal study." In other words, the aspects of critical legal learning demand no more than an entry into a holistic approach to the theoretical and practical study of law. At this moment, we will thus attempt to clarify what constitute the contents of this (holistic) legal learning process and what are the phases a "critical learner" should go though for the cultivation of such process.

The first step to develop critical approach relates to the challenge of understanding the peculiar character of legal language. The laws are carried in language, and very often, the language itself (which contains the law) is taken as the law. To be true, it is hardly possible in practice to dismantle a law from the language by which the law itself is expressed. This fact seems to explain why lawyers are usually described as "wordsmith" or why Lord Templeman views lawyering as "trading with the words".

Since language always becomes the "bare bones" of legal learning, the law students must initially be aware of the technique of overcoming the linguistic difficulties. In terms of legal education, the linguistic difficulties originate both from the feature and from the structure of legal language. The distinctive feature of legal language is that it employs concepts that may not be explicable in terms of everyday definition. As regards the "structural difficulty", the fact is most commonly addressed with reference to the legislative format of legal language. In practice, it is more likely that the language of law will be found "in an unusual grammatical form, potentially confusing, tediously literal, dense text, exhibiting scant punctuation, [and] liberally prepared with alphabetical and numerical dividers." (Legal Method and Reasoning, p, 37) Considering the layers of such difficulties, it has been usual to ascribe the importance of excellent language skill for the study of law. But there remains a crucial point, excepting that usual ascription, on which a critical learner must concentrate more.

Being closely allied with political and theological rhetoric, the language of law has the potential for persuasive power. Thus, it is instructive for a critical learner to consider simultaneously such persuasive power for becoming alerted to the influence of figurative language. Practically, this will add an additional phase to the understanding of legal language by requiring the learner to analyze the language carefully for the purpose of reaching into the root of it. This entire process of becoming familiar with legal language can be termed as "legal analysis", for the analysis of language will ultimately result in the analysis of law.

The outcome of legal analysis is further flourished with an original skill of factual analysis. Coming next to the phase of legal analysis, the aspect of factual analysis requires primarily that the learners of legal text would strive to ascertain the real meaning of the words always being held out as an attainable and sensible goal. More importantly, the promotion of this skill makes the law students accustomed to study law through a method that relies heavily on the acquisition of "argumentative strategies". To determine the relevance and rationality of law to be applied in particular fact-situations the exercise of such strategy is indispensable.

The necessity of developing argumentative skill to legal enterprise gets momentum in the theoretical orientation of law itself. Long ago, Aristotle defines law as "reason without passion". This classical view of law as reason [which actually forms the major part of natural law formulation] was clearly indicative to law's assimilation with argument. Moreover, the contemporary philosopher Roland Dworkin's concept of "argumentative attitude" seems to confirm that law is nothing but the argument for best answer. The overwhelming win of positivist's pedigree in the modern law making process results in the disregard of natural law doctrine that deserves law to be found in the reason. Nevertheless, the "domain of reasoning" in relation to legal enterprise has not been diminished altogether.

Being largely dependent on codification, the modern legislative project has to face with some inevitable problem arising out of the relationship between law and language. To be true, the language merely expresses the thoughts that contain the "spirit of law" in words. But the words have their own limitations. Due to the limitation of our linguistic expression, it becomes more likely that the "letter of law" may often fall short of the exact expression of the "spirit of law." Moreover, by the limits of our language, what Edward Sapir poignantly described as the "limits of our world", the laws may themselves be shaped, and may thereby be moved to a wrong drive.

Thus at this stage, critical legal learning requires heavy reliance of the role of reasoning. On the way of searching the spirit of laws, the "dispassionate appeal to reason" is necessary, because it helps the learners to go beyond the limits and cultural boundedness of our language. By using the skill of legal reasoning or argumentative strategies, the critical learners need to look for the hidden assumption underlying the face value explanation of the legal text. They must be able to understand the logic and the limits of such logic in relation to the "legal argument."

We have termed this phase of legal argument as "factual analysis" in order to emphasis that it involves an analysis of facts. However, at this phase, the critical learners will not be confined to analyze the facts only; they will rather set forth their argument to search for the hidden assumption of law to be applied in those particular facts. In this respect, they will actually go for a total logical confrontation which demands a delicate balance of facts, theories and the application of existing rules connected by reasoned comment. By logical confrontation, the learners will thus be able to persuade the validity of adopting the outcome suggested by them.


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The writers are studying law at the University of Dhaka.