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Software License Agreements: Main Types, Legal Aspects, and Regulations

Abstract

The article is discussing one of the contemporary laws – Software License Agreements in IT law. The concept of Software License Agreements, the main types of Software License Agreements, their legal aspects, law regulations on software and other important facts are mentioned in the article. At the same time there are some cases about the topic in the article that these cases are helpful for understanding Software License Agreements. And also in the article, you can see different countries' legislations on software law and how they are implemented nowadays.

Annotasiya

Məqalədə müasir dövrün ən maraqlı hüquq sahələrindən olan İnformasiya Texnologiyaları (İT) hüququnun bir institutu – Proqramlaşdırma müqavilələrin təhlili öz əksini tapmışdır. Məqalədə Proqramlaşdırma müqavilələri, onların növləri, hüquqi cəhətləri, hüquqi tənzimləmələri və digər mühüm məsələlərə toxunulmuşdur. Bundan başqa məqalədə proqramlaşdırma müqavilələri ilə bağlı müxtəlif kazuslara yer ayrılmışdır ki, bu kazuslar mövzunun təhlilində mühüm əhəmiyyət kəsb edirlər. Məqalədə müxtəlif ölkələrin qanunvericiliklərinin proqramlaşdırma müqavilələrinə münasibəti, onların tətbiqi sahələrindən söz açılmış və bu müqavilələrin günümüzdəki əhəmiyyəti qeyd edilmişdir.

Introduction

It has been too much that contracts and agreements were prepared by depending on sides' wills and these agreements started to change their places to the digital platforms. Nowadays electronic contracts, software agreements and such kinds of contracts are the products of online platform. In this article I've mentioned one of these kinds – software license agreements.

Many contracts have different positions in digital platform, and some of them are only presented to user as a “accept” or “deny” contract. “As the user may not see the agreement until after he or she has already purchased the software, these documents may be contracts of adhesion.”¹ Software companies often make special agreements with large businesses and government entities that include support contracts and specially drafted warranties. In general, software is licensed rather than sold to protect the owner's copyright interest in the software. When software is licensed each and every user of the software enters into an agreement with the owner regarding the use of the program. Surely, it is important to know which law regulates them or how are they regulated?

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¹ James Boyle, Shamans, Software, and Spleens: Law and the Construction of the Information Society, p. 19 (1996)

This article consists of 2 parts. You will see software contracts, their types, “shrink-wrap” and “click-wrap” licenses, legal aspects of software license agreements, legal status of software license agreements, and other important headings.

I. Understanding Software License Agreements

A. What is a Software License Agreement?

At the core of software and software contracts is the legal concept of copyright.² Copyright is the right for the owner or licensed proprietor to prevent anyone from copying their software without paying anything for it. Since the use of software requires copying to occur, then any user of software must have permission to use and thereby copy such software.³ Hence it is important to use software license agreements for software owners and licensees to purchase their products. But what is a Software License Agreement? Many authors have different concepts about Software Agreements, but generally we can define Software License Agreement or End-User License Agreement (EULA) as a contract between licensor of software and purchaser, defining purchaser rights to use and to purchase the software.

How is the software licensed? After a software company develops a software product, the company will generally attempt to capitalize on its efforts by licensing the software to others. These transactions may take a variety of forms. The typical software license provides that the software company will deliver a “finished” software product to the user. In many cases, the software company also agrees to correct any software defects or “bugs” that are discovered, and to periodically provide the user with improved, updated versions of the software. The software user, in return, pays one fee for the software, and may also agree to pay an additional fee, or royalty, if the software he licenses is incorporated into one of the products he (the user) manufactures. In addition, the software user often promises that he will not (1) disclose any of the confidential information the software company provides to the user, (2) reproduce or otherwise copy the software, and (3) assign or sublicense the software without the consent of the software company.⁴ At the same time I want to mention that, the licensor of the software can provide a general license for the all products of company, on the other hand, the licensee can determine separate licenses for each product of

² Robert T. J. Bond, *Software Contract Agreements: Drafting and Negotiating Techniques and Precedents*, p. 58 (2004)

³ *Id.* p. 58

⁴ Terence W. Thompson, *Software Licenses as Personal Service Contracts*, 9 *Computer L.J.* 491, p. 492 (1989)

company. For example, Adobe Systems Ltd. defines both types for their products.⁵

The licensor may own all rights to the software, or may have the permission of the owner to enter into license agreements with others. The licensee may be:

- a user of software;
- a distributor of software;
- a publisher of software;
- a party who modifies, translates or adds codes to the software;
- a value added reseller;
- a joint venture partner;
- an independent maintenance company;
- a technology escrow agent;
- an independent sales representative or agent and etc.⁶

In general, if the software in question is protected by patent, copyright, or trade secret law, the license agreement allows the licensee to deal with the software as specified in the license grant provision of the agreement without infringing the licensor's copyright or patent rights⁷, or without misappropriating the licensor's trade secrets.

B. Some Important Types of Software License Agreements⁸ - "Click-wrap" and "Shrink-wrap" Licenses

1. Developer-publisher license agreements

A developer-publisher license agreement is an important type of software license agreements for all kinds of software, such as mainframe⁹, minicomputer¹⁰, and microcomputer¹¹. In the microcomputer software arena, these contracts are commonplace but vary in their approach to significant terms. For example, the license grant may transfer the developer's copyright interest to the publisher, or the publisher may acquire an exclusive license to

⁵ Adobe General Terms of Use (Last updated 7 April 2015), <http://www.adobe.com/legal/terms.html> (last visited 18.11.2015)

⁶ T. J. Bond, p. 59

⁷ *Id.* p. 60

⁸ The division of Software License Agreements is based on Robert T. J. Bond, *Software Contract Agreements: Drafting and Negotiating Techniques and Precedents*. There are many types of Software License Agreements, but when I mentioned types of Software License Agreements, I mainly substantiated to Robert T. J. Bond.

⁹ Mainframe – a large computer, generally requiring a special environmentally controlled room or data center, for processing large quantities of data (Robert T. J. Bond – *Software Contract Agreements: Drafting and Negotiating Techniques and Precedents*)

¹⁰ Minicomputer – a small computer which sometimes possesses equal features and capabilities with a large computer.

¹¹ Microcomputer - a complete computer, designed for an individual working. Synonym of personal computer (PC)

distribute the software during the term of the license agreement. Often such agreements cover several programs and it is not unusual for such agreements to cover several machine types or versions of each program, such as, a Mac and an IBM version of each program developed.¹²

Developers require minimum copyright payments in these agreements plus an advance royalty payment that is returned at a rate of less than 100% of all copyrights earned so that the developer receives some incremental revenue from initial copies distributed. Publishers will set milestones for the development of each version of program and insist that copyright advances are divided into payments that are tied to the milestones.¹³ And also, in these agreements publishers must pay attention that the license agreement includes warranty options, maintenance responsibilities, publisher rights and etc. Nowadays, many software and publisher companies use these agreements, for example, Apple Inc. uses these kinds of agreements for the marketing of its products.¹⁴

2. Escrow¹⁵ and TTP¹⁶ agreements

Although escrows play an important part in modern legal affairs, comparatively little litigation has arisen on the point. The attributes of an escrow were established early at English common law, and have been relatively unchanged by the passage of time. An escrow has been technically defined as an instrument which by its terms, imports a legal obligation, and which is deposited by the grantor with a third party to be kept by the depository until the performance of a condition, or the happening of a certain event; and then to be delivered to the grantee.¹⁷

Software or technology escrows sometimes involve a license agreement. Software escrows historically become important when the software user licenses an important or critical application in object code and there is no commercially available substitute that could be acquired and placed in use on short notice and at a reasonable cost. If the software publisher fails to maintain

¹² T. J. Bond, p. 74

¹³ *Id.*, p. 76

¹⁴ Apple Software License Agreements (last updated May 2015), <http://www.apple.com/legal/sla/> (last visited 29.11.2015)

¹⁵ Escrow - the holding on deposit by a third party of confidential material on certain terms as to its release or control and use. In software terms it is often source code which is placed in escrow. (Robert T. J. Bond – Software Contract Agreements: Drafting and Negotiating Techniques and Precedents)

¹⁶ TTP - The abbreviation for a Trusted Third Party; an independent individual, firm or company set up or licensed by the state to provide, amongst other things, escrow services and certification or verification services for public and private key algorithms or codes used in cryptographic software, and providing authentication services in respect of digital signatures used in e-commerce. (Robert T. J. Bond – Software Contract Agreements: Drafting and Negotiating Techniques and Precedents)

¹⁷ Lawrence J. Meyer, *Escrow Agreements*, 8 Miami L.Q. 75, p. 75 (1953-1954)

and enhance the software as required by the license agreement, or if the publisher falls into bankruptcy, the user would need to program source code and technical information about the source code in order to continue to maintain and enhance the important or critical program.¹⁸ Software escrows are a subset of a broader type of escrow known as the technology escrow. The major difference between the two is that a software escrow arrangement is limited to software and related items including updates, enhancements, technical documentation, user documentation, flow charts, etc; while technology escrows are used for non-software as well as software technology. Technology escrows are used by inventors and participants in research and development joint ventures to substantiate the creation of their inventions and the timing of those inventions, by government contractors to comply with the demands of procurement and RFPs.¹⁹ The inventions or technology of such parties may or may not involve or include software. There are various approaches to software escrows. The software publisher may establish an escrow in advance of customer demand, or in response to customer demand. The escrow may serve more than one customer or only a particular customer. The escrow agent may be one of the party's banks, insurance companies, accountants, or attorneys, or it may be an independent escrow company whose primary business is escrow service. Generally speaking, sophisticated users prefer an independent escrow provider to an agent of one of the parties.²⁰

The escrow arrangement typically requires the software publisher to transfer a copy of source code to the escrow service provider who is required by contract to deliver a copy of the source code to one or more users upon the failure of the publisher to maintain the program licensed by the user(s) in executable code form, or upon the bankruptcy of the publisher²¹. The escrow service provider may hold a copy of the source code under a license agreement with the publisher, or may take title to a copy of the source code. The user may receive a copy the source code from the escrow service provider under a license from the provider, or under the terms of the user's executable code license agreement. Alternatively the user may own the copy of the source code received from the source code provider, or other arrangements could be worked out. In any event, license agreements between publishers and escrow service providers, and license agreements between escrow service providers and software users are both considered escrow license agreements.²²

Trusted Third Party (TTP) agreements are a variation upon Escrow Agreements and are becoming used in the area of cryptography and electronic

¹⁸ T. J. Bond, p. 83

¹⁹ The abbreviation of Request for Proposals.

²⁰ T. J. Bond, p. 84

²¹ J. Meyer, p. 78

²² T. J. Bond, p 85

commerce.²³ The term "Cryptography and Encryption services" is intended to encompass any service, whether provided free or not, which involves any or all of the following cryptographic functionality:

1. key management
2. key recovery;
3. key certification;
4. key storage;
5. message integrity (through the use of digital signatures);
6. key generation;
7. time stamping;²⁴

In the UK policy paper, a TTP is described as "an entity trusted by other entities with respect to security related services and activities"²⁵. This description could cover a wide range of activities which do not involve the provision of encryption services, for which reason it is arguable that TTP's not offering encryption services are not subject to the licensing regime.²⁶ However, certain exclusions are explicitly set out in the policy paper:²⁷

- Intra-company TTP's: provision of encryption services by an organisation to its own employees or within its own group of companies, or other similarly closed user groups. If, however, the customers of that organisation can use these encryption services for communication among themselves, or if the organisation extends the encryption services it provides to its employees so they may communicate with another organisation, it would not be excluded from licensing;
- when the encryption services are an integral part of another service such as pay TV;
- encryption used in home banking services;
- key management and encryption services offered to credit card companies to authenticate credit card users.

In order to provide certification or authentication of cryptographic keys and digital signatures used in cybertrade transactions a number of corporations and bankers are offering their services as TTPs who hold in escrow algorithms and keys of the cybertraders in order to provide a verification service if requested.²⁸

²³ *Id.* p. 86

²⁴ Chris Reed, Juan Avellan, *The United Kingdom Policy on Trusted Third Parties and its Implications for EDI*, 4 EDI L. Rev. 81, p. 82 (1997)

²⁵ *Licensing of Trusted Third Parties for the Provision of Encryption Services: Public Consultation Paper on Detailed Proposals for Legislation*. Department of Trade and Industry. March 1997.

²⁶ Reed, Avellan, p. 83

²⁷ The report can be found here: <https://www.gov.uk/government/publications>

²⁸ T. J. Bond, p. 86

C. Shrink-wrap, Click-wrap and Browse-wrap Agreements

1. Shrink-wrap and Click-wrap agreements

Originally, the terms of software license agreements were written on or could be read beneath the plastic wrapping that encased the packaging in which the software was sold. In theory, you would read the license agreement before purchasing and opening the packaging. The license was worded in such a way that by purchasing and opening the packaging you would automatically be bound by the terms of the license agreement. These agreements came to be referred to as shrink wrap licenses. More recently, software developers have begun including the license agreement as part of the installation of the program. When you go to install the program, the license agreement appears on your screen and you are asked to accept the terms and conditions before you are allowed to proceed with the installation of the program. Some programs permit you to print a copy of the license agreement; others do not. Because you have to click on the accept button to proceed with the installation, these types of license agreements have become known as click wrap licenses. In other word, clickwrap agreements require the user to scroll through the agreement and confirm acceptance of the terms and conditions by taking some form of positive action, such as clicking an "I accept" button, prior to use of the program. The installation or use of the software is conditional on the user accepting the agreement and thereby consenting to abide by its terms.²⁹

These contracts are by nature contracts of adhesion³⁰ - the possibility of negotiation is excluded; one simply declares one's acceptance or goes without.³¹ Shrink wrap and click wrap licenses are dramatically different from other types of agreements. First, shrink wrap and click wrap license terms cannot be examined prior to the purchase of the software. Second, if the terms of the license agreement are read, it is only after the transaction is complete. Third, the license agreement is presented to you on a take-it-or-leave-it basis. Fourth, the software is sold on the condition that you agree to the terms of the license agreement and that by opening the package, installing the software or using the program you are deemed to have accepted the terms of the license agreement. Fifth, if you do not agree with the terms of the license, you are instructed to return the software for a refund.³² Because of these differences, there are numerous issues with respect to the enforceability of shrink wrap

²⁹ Renee Zmurchyk, *Contractual validity of End-User License Agreements*, 11 Appeal Review, Current L. & L. Reform 55, p. 56 (2006)

³⁰ See Andrew Burgess, *Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and Suggestion* (1986)

³¹ See Ellison Kahn et al., *Contract and Mercantile Law: A Source Book: General Principles of Contract* (Vol 1. 1988)

³² Adrienne Waller, *Shrink-wrap and Click-wrap licenses*, 25 LawNow [32], [35] 19, p. 20 (2000-2001)

and click wrap license agreements.³³ There are two main reasons these issues arise. First, the license agreements purport to create a contractual relationship between the software developer and the end user and second, the terms of the license agreement are brought to the user's attention after the transaction is complete.

I mentioned above that the click-wrap and shrink-wrap licenses have some similarities and differences. And now I want to mention their unique features.

Shrink-wrap agreements have much importance on the implementation of software licenses. A shrink-wrap agreement is simply a printed standard-form agreement that is placed or printed on top of the package in which a computer program is marketed. A cellophane wrapper is placed around it - it is shrink-wrapped. Other terms used to describe this type of agreement are "box-top", "tear-me-open" or "blister-pack" agreements. They are used for mass-marketed software. The shrink-wrap agreement comes into effect when consumers break open the plastic shrink-wrap or install the software on their computers as assent to the terms of the license.³⁴

The shrink-wrap agreement purports to create a license agreement between the buyer of the computer program and its producer. It grants the user a non-exclusive license to use, subject to certain limitations, the program and accompanying documentation. Sometimes it also states that the license does not constitute a sale: ownership of the program and the copyright in the program, the accompanying documentation, and any copy made by the user remain with the software developer or publisher. Typically, the relationship entered into for the acquisition of software is either a license, or a single payment for use in perpetuity: in both cases the ownership of the copyright is not transferred to the buyer.³⁵

Are these agreements enforceable by either party? The foundation of a contract is agreement by the consent of two or more parties. The main components of agreement are offer and acceptance. At common law, no formalities are required for the conclusion of a valid and enforceable contract. So a contract may be concluded in writing or orally, or by a mixture of the two (such as where the offer is made in writing but accepted orally). A tacit (or inferred) contract is concluded partly or wholly by the conduct of the parties - the agreement is inferred from the actions of the parties.³⁶

So the terms of the shrink-wrap license printed on the packaging constitute an offer made by the owner of the copyright in a computer program to a potential buyer. In a Canadian case (*North American System Shops Ltd v. King* (1990) 27 CPR (3d) 367), a computer program was sold shrinkwrapped, but

³³ *Id.* p. 20

³⁴ Tana Pistorius, *Shrink-wrap and Click-wrap agreements: Can they be enforced?*, 7 *Juta's Business Law Review* 79, p. 79 (1999)

³⁵ *Ibid.*

³⁶ *Id.* p. 80

no copyright notice or license agreement was visible until the package was opened (the “license statement” appeared inside the back cover of the booklet accompanying the computer program). The court held that as the license statement was not visible or known to the defendant when he acquired the program, he bought the program without any notice of conditions attaching to the sale and was free to deal with the program as he wished.³⁷ Today, though, few computer programs are packaged in such a way that the terms of the proposed agreement are not visible.

In another case, in *ProCD, Inc. v. Zeidenberj (“PMCD”)*³⁸ it was held that a shrink-wrap license was binding on the purchaser. In this case, the purchaser had notice of the license terms as there was a disclaimer on the outside of the box indicating the transaction was subject to a software license. Under the terms contained inside the box, the purchaser had a right to return the software if the terms were unacceptable. The Court noted that shrink-wrap licenses are enforceable as a general matter unless their terms are objectionable on grounds applicable to contract, such as violation of a rule of positive law or unconscionability.³⁹

In short, a shrink-wrap agreement is a valid and enforceable contract, provided that the requirements of offer and acceptance have been met. If a consumer disputes the validity or enforceability of such an agreement, the following principles will assist the software developer: the consumer will be bound by the agreement

- if she has read it;
- if she has not read it, but the supplier drew her attention to its terms, or the agreement by its nature drew her attention to its contents.⁴⁰

2. But what about click-wrap agreements?

The use of click-wrap agreements is growing. Click-wrap agreements have evolved as a concept analogous to shrink-wrap agreements. I mentioned the concept of Click-wrap agreements above, and also these agreements have many purposes. Today there remains no doubt that legally binding contracts between users and manufacturers may be formed online. The momentous case of *Rudder v. Microsoft Corporation, (“Rudder”)*⁴¹ established that click-wrap agreements are valid and legally binding contractual agreements. In *Rudder*, Microsoft filed for a permanent stay of proceedings, claiming that the plaintiffs agreed online to the exclusive jurisdiction clause stating that the State of Washington was the governing jurisdiction for any disputes. The plaintiffs argued that the online agreement should not be enforced because

³⁷ *Id.* p. 80

³⁸ 86 F.3d 1447 (7th Cir. 1996) [*PmCD*]

³⁹ Zmurchyk, p. 59

⁴⁰ Pistorius, p. 81

⁴¹ (1999), 2 C.P.R. (4th) 474 (Ont. S.C.J.)

they did not receive specific notice of the clause and were therefore unaware of its existence. In rejecting the plaintiffs' claim, the Court noted that the plaintiffs were required to click an "I agree" button twice during the process and that the forum selection clause was no more difficult to read than any other term. The Court compared the online agreement to an agreement in writing, holding that it must be given the same enforcement.⁴²

Are click-wrap licenses enforceable? The recent U.S. case of *i.LAN Systems, Inc. v. Netscout Service Level Corporation*⁴³ has confirmed that a click-wrap license agreement is enforceable but, under Massachusetts law would be interpreted under the Uniform Commercial Code. Of interest in this case was that i.LAN Systems were a reseller of Netscout's products. i.LAN has signed a detailed value added reseller agreement. i.LAN having signed the VAR⁴⁴ agreement, then placed a purchase order for software products. The software products as delivered to i.LAN were subject to a click-wrap agreement which included language to the effect that nothing in the click-wrap agreement would affect any pre-existing agreements between Netscout and its licensee.⁴⁵

3. Browse-wrap agreements

Browse-wrap agreements set out the terms somewhere within the site but do not require the user to review or agree to the terms prior to use of the program.⁴⁶ "Browse-wrap" agreements, as distinct from "click-wrap" agreements, do not require the active consent of the user. Acceptance of a browse-wrap is implied from the user's browsing or other activity on the web site, even if the user has not reviewed the electronic contract.⁴⁷ Browse-wrap agreements are typically found at the bottom of a webpage in the form of a link to another page on which the terms and conditions are posted. The user is not required to review the contract, much less access the page where it's located, in order to proceed. Actually, these agreements are not so widely enforced, but there are some cases about these.

One of these cases is *Register.com, Inc. v. Verio, Inc.*⁴⁸ Distinguishing Register from Specht, the Second Circuit held that the defendant, Verio, unlike the defendant in Specht, was "fully aware of the terms on which Register offered the access." The other case on browse-wrap agreements is *Southwest Airlines*

⁴² Pistorius, p. 83.

⁴³ 183 F.Supp.2d 328, *i.LAN Systems, Inc. v. Netscout Service Level Corporation*, see the full case here: http://www.internetlibrary.com/cases/lib_case22.cfm

⁴⁴ The abbreviation of Value Added Resellers

⁴⁵ T. J. Bond, p. 82

⁴⁶ Zmurchyk, p. 57

⁴⁷ Jeffery E. Wittmann, *Electronic Contracts, Negotiation and Drafting Major Business Agreements* Conference Federated Press 2, p. 4 (2007)

⁴⁸ 356 F.3d 393. See the full case here:

http://www.duanemorris.com/site/static/356_F_3d_393.pdf

Co. v. BoardFirst, LLC.⁴⁹ In a recent case, *Southwest Airlines Co. v. BoardFirst, LLC*, the Northern District of Texas recognized the evolution of commercial transactions in enforcing browse-wrap agreements. Recognizing that "browse-wraps have become more prevalent in today's increasingly e-driven commercial landscape," the court succinctly summarized that "one general principle that emerges is that the validity of a browse-wrap license turns on whether a website user has actual or constructive notice of a site's terms and conditions prior to using the site."⁵⁰

II. Legal Aspects of Software License Agreements

A. How Does the Law Regulate Software License Agreements?

Every jurisdiction has its own national laws which vary for protecting intellectual property rights and software licenses. In the UK the law which applies includes the Copyright, Designs and Patents Act 1988, the Patents Act 1977 and the Trade Marks Act 1994. In the US the Patent Act, the United States Commercial Code, the Copyright Act, the Uniform Trade Secrets Act and various State laws all apply to intellectual property in computer programs.⁵¹ The Software License Agreements may be regulated by Patent Law, Copyright Law, Trade secret law, Trademark law, Tax law and mainly Contract Law. And also there are many EC directives, Court decisions and other international papers which regulate this field.

Most foreign countries have an absolute novelty standard that requires the patent application in that country to be filed before any sale of the invention or offer to sell it, and before any publicity, advertising, or distribution of promotional literature that describes the invention sufficiently to disclose it to the public. There is a prevailing idea that the possession of a patent gives the patentee the right to make the thing covered by the patent. This is a mistake. The Government only gives the inventor the right to prevent others from making the thing patented; that is the extent of his monopoly. If the inventor can make his or her product without infringing any prior patents, well and good, but this question does not enter into the discussion in obtaining the patent nor is the Government interested in that question. It frequently happens that an inventor may procure a broad patent on a machine of some kind, but subsequent experiments may show that the machine is costly to operate and impractical to some extent. A subsequent inventor may improve the machine and make it practical.⁵²

⁴⁹ 2007 WL 4823761 (N.D. Tex. Sept. 12, 2007). See the case here:

http://itlaw.wikia.com/wiki/Southwest_Airlines_v._BoardFirst

⁵⁰ Sam S. Han, *Predicting the Enforceability of Browse-Wrap Agreements in Ohio*, 36 Ohio N.U. L. Rev. 31, p. 42 (2010)

⁵¹ T. J. Bond, p. 104

⁵² Charles F. Murray, *Patent Law*, 3 Chi.-Kent Rev. 5, p. 7 (1924-1925)

When the software is patented, the patentee can sell or give it to a company, or a person. It is often said that you can patent an idea (or invention) but you can only copyright the expression of the idea (or invention). For an idea or invention to be patentable, it must be new, involve an inventive step, be capable of industrial application and must not be one of the statutory exceptions of which a “computer program” is one and “a method of doing business” is another.⁵³

There have been many cases on the patenting software, such as US case of *State Street Bank & Trust Co v. Signature Financial Group Inc.*⁵⁴

The UK Patents Act 1977 provides patent protection for 20 years and for countries which are signatories to the European Patent Convention the term is for the same period. Whilst it may appear harder and, therefore, less desirable to obtain patent protection in the UK than it may be in other countries such as the US, this is still no reason to discount patent protection as a means of securing suitable rights for software.⁵⁵

Copyright is at the core of intellectual property right protection for computer software and globally is recognised as the main protection for the rights of the owner.⁵⁶ The author, that is the person who creates the work, is generally regarded as the copyright owner except that, where the software program is made by an employee in the course of his employment, the employer is the first owner of the copyright.

Until recent years in many countries computer software was not specifically referred to in statutes as having its own right to protection for copyright purposes and certainly in the UK in the Copyright Act of 1956⁵⁷ there was no mention of computer programs and therefore copyright was deemed to apply to computer programs because they were “written” and therefore might well be regarded as “literary works” which were specifically referred to in the Copyright Act 1956.⁵⁸ The Copyright, Designs & Patents Act 1988 (the 1988 Act) replaces previous UK copyright statutes.⁵⁹

Whilst it is not necessary to display any statement or wording regarding copyright on a software product it is generally considered good practice to display a copyright statement as an assertion of copyright ownership and statement to the world at large as well as to the licensed user.⁶⁰ Therefore,

⁵³ T. J. Bond, p. 105

⁵⁴ 149 F 3d 40368 (Fed Cir 1998) – Cert. Denies – 1999. See the case here:
<https://law.resource.org/pub/us/case/reporter/F3/149/149.F3d.1368.96-1327.html>

⁵⁵ See the UK Patents Act 1977: <http://www.legislation.gov.uk/ukpga/1977/37>

⁵⁶ T. J. Bond, p. 106

⁵⁷ See the UK Copyright Act 1956:
<http://www.legislation.gov.uk/ukpga/1956/74/contents/enacted>

⁵⁸ T. J. Bond, p. 107

⁵⁹ Brian Subirana, Malcolm Bain, *Legal Programming: Designing Legally Compliant RFID and Software Agent Architectures for Retail Processes and Beyond*, p. 142.

⁶⁰ T. J. Bond, p. 109

where the owner of a computer program wishes to assert or further enforce copyright ownership, the statement that is usually suggested is as follows:

© [name of copyright owner] [year of first publication].

Often the words “All rights reserved” are added to the copyright statement. The usual places to display the above copyright statement are:

- on all packaging for the software product;
- on the front cover or inside front cover of any accompanying documentation and user manuals;
- as an opening page on the first loading of the program so that the copyright statement is clearly displayed as the program is “scrolled through”; or
- physically on the media within which or upon which the program is embedded or incorporated.⁶¹

Trade secret protection may have originated in the 1851 English case of *Morison v. Moat*,⁶² and later it may have been first recognised in the United States in a Massachusetts case, *Peabody v. Norfolk*.⁶³ One goal in the judicial development of trade secret law has been to discourage unfair competition and trade practices.⁶⁴ A second goal has been to encourage research and innovation.

Trademark rights arise from commercial use or the intention to use them commercially followed by commercial use. Trademarks may be registered or not, but registration gives some advantages and is usually preferable to not registering your mark.⁶⁵ If a mark is registered, the registration must be renewed from time to time. The duration of trademark protection is potentially unlimited. The trademark owner’s exclusive rights to use the mark with respect to certain goods and services may continue as long as the trademark owner uses the mark in commerce⁶⁶; uses it correctly, e.g. as a trademark rather than a generic name; controls the quality of the products bearing the goods; and as long as customers continue to perceive the mark as an indicator of source or sponsorship of the products bearing the mark.

In the United Kingdom trademarks and service marks are protected by statute under the Trade Marks Act 1994⁶⁷. Under the existing law trademarks may be applied for in respect of computer programs generally speaking under Class 9 for the program itself and Class 16 for accompanying user manuals.⁶⁸

⁶¹ T. J. Bond, p. 109

⁶² (1851) 9 Hare 241. See the case here: <http://swarb.co.uk/lisc/Info18491899.php>

⁶³ 98 Mass 452 (1868)

⁶⁴ T. J. Bond, p. 111

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ See the Act here: <http://www.legislation.gov.uk/ukpga/1994/26/contents>

⁶⁸ International trademark classes, <http://www.oppedahl.com/trademarks/tmclasses.htm> (last visited 01.12.2015)

One difficulty which many software houses have is that they tend to use descriptive marks as trademarks which maybe unregistrable although the Trade Marks Act 1994 is considerably more lenient than the previous UK legislation.⁶⁹ It is now possible to register not only names and words but also distinctive shapes and configurations.

As other laws, Contract law has a unique position on the regulation of Software License Agreements. The Contracts (Rights of Third Parties) Act 1999 applies in the United Kingdom to contracts which are entered into on or after 11 May 2000. The Act enables a third party to enforce contractual rights as if it were a party to the contract.⁷⁰

The Contract Law has various regulations on softwares and cores all over the world, such as the ALI Principles or Brazilian Software Contracts and etc. The ALI Principles⁷¹ constitute specialized contract law. They apply to "agreements for the transfer of software for a consideration," including sales, licenses, leases or access contracts, whether negotiated or standard form and whether the delivery of software is by a tangible or electronic medium.⁷²

In the United States, where the transaction relates to a sale, then the Uniform Commercial Code applies and in many parts of Europe specific civil codes apply to contracts for sale. However, in Scotland, many European countries and parts of the United States, such rights can be conferred.⁷³ This is significant where software is distributed by OEMs⁷⁴, VARs⁷⁵ and other resellers appointed by the original provider. Care needs to be taken if the provider is to create a right to enforce rights against a licensee or receive the protection of any limits of liability in the sub-license.⁷⁶

B. Open Source Licenses and Their Regulations

There is considerable discussion about the different definitions and variations of what is generally understood as open source software, particularly because there is currently a divergence of opinion between different camps in whether one should use the terms "open source" or "free software" to define the movements implicit in the permissive distribution of software.⁷⁷ So, the open source licenses are licenses that comply with the Open

⁶⁹ T. J. Bond, p. 113

⁷⁰ T. J. Bond, p. 115

⁷¹ The American Law Institute (ALI) undertook a project to resolve this uncertainty in 2004. The end product was the *Principles of the Law of Software Contracts (Principles)*, which approved in May 2009.

⁷² Robert A. Hillman, *Contract Law in Context: The case of Software Contracts*, 45 Wake Forest L. Rev. 669, p. 673 (2010)

⁷³ T. J. Bond, p. 114

⁷⁴ Abbreviation of Original Equipped Manufacturers

⁷⁵ Abbreviation of Value Added Resellers

⁷⁶ T. J. Bond, p. 114

⁷⁷ Dan Burk, *Open Source Genomics*, 8 B.U.J. SCI. & TECH. L. 254 (2002)

Source Definition — in brief, they allow software to be freely used, modified, and shared.

Suffice it to say, there are different terms that can be used to describe the word “open source”: Free Software ("FS"), Open Source Software ("OSS"), Free Open Source Software ("FOSS"), Free Libre Open Source Software ("FLOSS"), Open Code, and nonproprietary software. The reason behind the many different terms and definitions is mostly historical, and comes from the fact that each denomination, particularly FS and OSS, have become attached with specific philosophies and ideologies, and, moreover, each of these definitions will usually inform the type of licenses used to distribute the work." This work will use the term "open source software" when talking specifically about the many different licenses used in software development.⁷⁸

The ability of open source software providers to dedicate their programs to free public use, while at the same time using copyright law to control the distribution and modification of their work, has long been an unresolved legal issue. A recent decision by the U.S. Court of Appeals for the Federal Circuit has resolved many questions about the enforceability of open source licenses.⁷⁹

There are many popular open-source licenses on the digital platform. The following OSI-approved⁸⁰ licenses are popular, widely used, or have strong communities (as defined in the 2006 Proliferation Report):

- Apache License 2.0
- BSD 3-Clause "New" or "Revised" license
- BSD 2-Clause "Simplified" or "FreeBSD" license
- GNU General Public License (GPL)
- GNU Library or "Lesser" General Public License (LGPL)
- MIT license
- Mozilla Public License 2.0
- Common Development and Distribution License
- Eclipse Public License and etc.⁸¹

What's about future? IBM has joined the Open Source world, and the venture capital community is discovering Open Source. Intel and Netscape⁸² have invested in Red Hat⁸³, a Linux⁸⁴ distributor. VA Research⁸⁵, an integrator

⁷⁸ Andris Guadamuz Gonzalez, *Open Science: Open Source Licenses in Scientific Research*, 7 North Carolina Journal of Law and Technology 321, p. 326 (2006)

⁷⁹ Matthew A. Goldberg, *Open Source Software Licenses Held Enforceable*, 34 Litig. News 3, p. 3 (2008-2009)

⁸⁰ Abbreviation of Open Source Initiatives-Approved

⁸¹ Licenses and Standards, <http://opensource.org/licenses> (Last visited 30.11.2015)

⁸² Netscape – the most popular browser - claims 70% plus of the market.

⁸³ Red Hat, Inc. - an American software company which provides open-source software products.

⁸⁴ *Linux* – an open source operating system.

⁸⁵ See the site: <http://www.research.va.gov/>

of Linux server and workstation hardware, has announced an outside investor. Sendmail Inc,⁸⁶ created to commercialise the ubiquitous Sendmail e-mail delivery program, have announced six million dollars in funding.⁸⁷

Two internal Microsoft memos, referred to as the Halloween Documents⁸⁸, were leaked to the online public. These memos clearly document that Open Source and Linux threaten Microsoft, and there is a school of thought that suggests Microsoft will launch an offensive against them to protect its markets. It is likely that Microsoft will use two main strategies: copyrighted interfaces and patents.⁸⁹ They may also extend networking protocols, including Microsoft specific features in them that will not be made available to free software. They, and other companies, will aggressively research new directions in computer science and will patent whatever they can, before others can first use those techniques in free software. In the second Halloween document, a Microsoft staff member comments on the exhilarating feeling that he could easily change part of the Linux system to do exactly what he wanted. Additionally, it was so much easier to do this on Linux than it was for a Microsoft employee to change NT.

Open Source allows software to be shared easily. Businesses are adopting the Open Source model because it allows groups of companies to collaborate in solving a problem without the threat of an anti-trust lawsuit. Moreover, because of the advantage they gain when the computer-programming public contributes free improvements to their software.⁹⁰ However, the most reliable indication of the future of Open Source is its past.

In just a few years, it has gone from nothing to a robust body of software that solves many different problems and is reaching the million-user count.⁹¹

Conclusion

As I mentioned, all of these mean that Software License Agreements have a unique position in our life. Each type has important role and almost every country implements at least the basics of laws of Software License Agreements. Software Law is a modern law institute and it is developing day by day.

⁸⁶ Sendmail Inc – a company which regulates email connectivity, message notifications between people, companies, systems, softwares and applications located on different devices.

⁸⁷ T. J. Bond, p. 100

⁸⁸ The Halloween documents – consist of some private Microsoft memos on relating free software, open-source software and etc.

⁸⁹ Supra note 86

⁹⁰ T. J. Bond, p. 101

⁹¹ *Ibid.*

Producing new softwares, designing new software templates, preparing new contracts and licenses for softwares and such other facts affects the Software Law, and the patentees' and licensees' rights also influences softwares.

Of course, all the softwares are not these. There are, much more in the Software, including an implied indemnification obligation against infringement, streamlined parole evidence and interpretation rules focusing on issues that arise in the software licensing setting, and others.