

## **UNIT- 13**

# **INDIAN LAW ON SHRINK WRAP CONTRACTS; DRAFTING OF CYBER CONTRACTS**

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## **13.1 INTRODUCTION**

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The Indian Contract Act, 1872 is one of the oldest legislations prevalent in our country. But that has not affected its relevance in business transactions today. However the scenarios of contract have undergone a sea of change ever since the inception of this law. The basic essentials of contracts still remain the same as specified under the provisions of the Indian Contract Act. With the passage of time, this act has been interpreted in different ways. Earlier, parties to the contract had to be physically present at the time of entering into the contract. But

it was the invention of the telephone that made the physical presence of parties unnecessary and redundant. Subsequently, wired communication was replaced by wireless communication with the coming of Mobile phones and the Internet. But it is the Internet that has had the most profound impact. Internet transactions have become commonplace in day-to-day contracts. Contracts relating to Software transactions are a relatively new phenomenon. But even they have undergone change in the past few years. Close to two decades back, software transactions were dealt by the Shrink-wrap agreements i.e. the customer is assumed to accept the terms and conditions of the contract as soon as he opens the packaging of the software. But now, the click-wrap agreements i.e. the terms and conditions are overtly displayed before the installation of a software and it gives a choice to the customer of acceptance of the terms and conditions of the software, is more popular and preferred over the Shrink-wrap agreements due to the growing popularity of the Internet.

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## **13.2 OBJECTIVES**

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After reading this unit you will be able to understand the following:

- What is shrink-wrap contract
- Indian law on shrink-wrap contracts
- Enforceability of shrink-wrap contract
- IP Protection of Software in India
- What is drafting
- Outline of a drafting
- Drafting of cyber contract

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## **13.3 SUBJECT**

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### **13.3.1 INDIAN LAW ON SHRINK-WRAP CONTRACTS**

#### **13.3.1.1 SHRINK-WRAP CONTRACT**

Computer software companies widely rely on the use of “shrink-wrap” license agreements in the mass market distribution of software. “Shrink-wrap” agreements are unsigned license agreements which state that acceptance on the part of the user of the terms of the agreement is indicated by opening the shrink-wrap packaging or other packaging of the software, by use of the software, or by some other specified mechanism.

The controversy around shrink wrap agreements is the fact that the terms of the agreement cannot be read until the consumer has paid and accepted the package, and has opened the product by taking off the shrink wrap, which then states that opening will constitute acceptance of the terms. The status of shrink wrap agreements is unclear. Courts have been split as to whether a consumer consents to the terms in a shrink wrap agreement since he pays for the product and goes so far as to open the package, but does not have actual knowledge of what the terms are until he opens the package to read them. End User License Agreement (EULA)

is a software license which also acts as a contract between the producer and the user of the computer software to specify the limits of use granted by the owner. The EULA is in effect immediately at the time of purchase regardless of how or when it was installed. Recent court decisions have challenged the use of EULAs within shrink wrapped software, and multiple complaints have forced some software companies and retailers to accept returns of opened software, or to provide EULAs on their websites for consumers to read before purchasing.

### **13.3.1.2 SOFTWARE- THE VERY ESSENCE OF SHRINK-WRAP CONTRACT**

The software industry is one of the fastest growing industries since the last quarter of a century. Software has a market value. With the Internet, software is deliverable through the Net anywhere in the world due to its nature, software cannot be treated on the same footing as other traditional goods. When an item of software is sold, the owner of the software does not complete a sale in the traditional sense. Instead, he assigns or licenses some of his rights in the software in favour of the purchaser. The rights assigned would be very specific in their scope, indicating clearly to the purchaser the actions that he/she is permitted to perform in relation to the software. Computer software, like biotechnology, is subject to fierce competition with a shorter life cycle and can be easily copied. Because of its nature, the owner will have two problems: (i) economic, i.e., others can access it without payment; and (ii) competition, i.e., competitors can make competing products very quickly. Apart from safeguarding the economic interests of the owner, the protection of software through an appropriate IPR mechanism is considered necessary to encourage creativity, innovation and investment. Because software may be copied effectively at no cost, some means of restricting the free copying and redistribution of software work is necessary to preserve an investment in a software product through an appropriate system. In this unit we examine the Indian law on software contracts and the nature of licences that are generally entered into by parties<sup>1</sup>.

#### **13.3.1.2.1 IP PROTECTION OF SOFTWARE IN INDIA**

In India, the growth of software and service-related industry has been a phenomenon since the 1990s, which has registered a consistent compounded annual growth of software exports above 50 per cent. Within the global sourcing industry, India has been able to increase its market share from 51 per cent in 2009 to 58 per cent in 2011<sup>2</sup>. The high growth rate is attributable to the service portion, virtually making the industry as 'software services export industry'. India's market share in global packaged software so far has been as low as 0.5 percent compared to 23.1 percent in customized software. To keep its edge in the software sector globally, the Government of India formulated the Indian IT Action Plan in May 1995, and formed the National Task Force on Information Technology and Software Development in May 1998 with

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<sup>1</sup> 'IP Protection of Software and Software Contracts in India: A Legal Quagmire!' an article by S K Verma, available at <http://nopr.niscair.res.in/bitstream/123456789/14456/1/JIPR%2017%284%29%20284-295.pdf>

<sup>2</sup> <http://www.nasscom.in/indian-itbpo-industry>

the mandate to formulate the National IT Policy<sup>3</sup>. IP laws have also been suitably amended. Software is protectable under the copyright and patents laws and can also be protected through trade secrets. But despite the legal protection, the jurisprudence on software protection is not well developed in the country, and in most of the cases, the courts follow the American or British judicial approach. The Information Technology Act, 2000<sup>4</sup> accords legal recognition to digital signatures, electronics records and the framework for the prevention of computer crimes, but does not deal with IP protection to computer software<sup>5</sup>.

### **13.3.1.2.2 PROTECTION AS TRADE SECRETS**

Trade secrets as a mode of protection have certain limitations. In fact, any technology, that is easy to copy, like software technology is not fit for protection under trade secrets. Even with the stipulation of software licence that contains ‘the licensee shall not disclose any confidential information relating to the licensed software’<sup>6</sup>, may not prevent third party to access it. Common law remedies are available under the contract and tort law. Contractual protection of trade secrets is limited to the parties to the contract and has no effect against third parties that act in good faith. Parties standing in contractual, quasi-contractual or fiduciary relationship, with varied forms of contract, such as non-competition or non-disclosure agreements are covered under Section 27<sup>7</sup> of the Contract Act, 1872. Regulations that limit contractual restrictions on a licensee’s use of know-how once it becomes publicly known, or after the expiry of reasonable time once the licensing contract comes to an end are defensible. Similar is the position with respect to shrink-wrap licences that impede purchasers from reverse-engineering mass-produced, publicly distributed product. The trade secret protection is designed to guarantee the licensor’s rights to its technology. But in trade secret and know-how licences, the licensor and licensee can become potential rivals. In order to ward off such an eventuality, licensing agreements contain restrictive clauses, which make them subject to the scrutiny of the courts. If there are confidentiality or non-compete clauses, then the licensee is bound by those terms<sup>8</sup>.

### **13.3.1.3 SOFTWARE CONTRACTS**

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<sup>3</sup>Datta Ameet, Dhakad Keshav & Virk Azad, Managing the growth of software, Managing Intellectual Property India Special Focus, April 2004.

<sup>4</sup>later amended in 2008

<sup>5</sup> <http://nopr.niscair.res.in/bitstream/123456789/14456/1/JIPR%2017%284%29%20284-295.pdf>

<sup>6</sup>Zawels Edutronics Inc, 520 NW 2d 520 (Minn. App. 1994), where the misuse of confidential information about a computer based teaching system was held to constitute misappropriation of trade secrets; Mittal Raman, Licensing Intellectual property: Law & Management (Satyam Law International, India), 2011, p. 499.

<sup>7</sup>Agreement in restraint of trade, void- Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

<sup>8</sup><http://nopr.niscair.res.in/bitstream/123456789/14456/1/JIPR%2017%284%29%20284-295.pdf>

Software contracts, like many other transactions, are governed by the common law principles as embodied in the Indian Contract Act. Contracts can be in the nature of sale or assignment/licence. If the computer software is considered as a 'good', the Sale of Goods Act, 1930 will have relevance in the formation and execution of the sale contract. Section 2 (7) of the Sale of Goods Act defines 'good' as 'every kind of movable property other than actionable claims and money, and includes stock and shares, growing crops, grass....' This definition of 'goods' includes all types of movable properties, whether tangible or intangible. However, the information content of the software, whether tangible or intangible, is of indeterminate nature, which has made the issue very debatable. In *Tata Consultancy Services v State of Andhra Pradesh*, the Supreme Court considered computer software as 'goods' and stated that notwithstanding the fact that computer software is intellectual property, whether it is conveyed in diskettes, floppy, magnetic tapes or CD ROMs, whether canned (shrink-wrapped) or uncanned (customized), whether it comes as part of the computer or independently, whether it is branded or unbranded, tangible or intangible; is a commodity capable of being transmitted, transferred, delivered, stored, processed, etc., and therefore, as a 'good' liable to sales tax. The Court stated that, 'it would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customized satisfies these attributes, the same would be goods.'<sup>9</sup>Citing the decision of the US court in *Advent Systems Ltd v Unisys Corporation*,<sup>10</sup>the Court held that 'a computer program may be copyrightable as intellectual property does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, movable and available in the market place. The fact that some programs may be tailored for specific purposes need not alter their status as 'goods' ....In all such cases, the intellectual property has been incorporated on a media for purposes of transfer...The software and the media cannot be split up.'<sup>11</sup>Labelling computer software as 'goods' would make them liable under different tax laws, viz. central excise duty<sup>12</sup>, customs duty on imports<sup>13</sup>, and royalty paid by the assessee for using the trademark of another person.<sup>14</sup>Once the software transactions are labelled as sale of goods or services, other laws related to goods will also be operative, viz., the Consumer Protection Act, 1986, the conditions and warranties, as contained in the Sale of Goods Act (Sections 11-17).

Off-the-shelf sale of software may be easily termed as sale but in such a 'buying', the title to the box, containing disk, manual etc., may pass to the buyer, but the title to IP in the software does not. Instead, the purchaser obtains a licence to use the software which, in fact, is the main purpose of the contract. But a software contract may be a licence of both — the physical carrier

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<sup>9</sup>*Tata Consultancy Services v State of Andhra Pradesh*, 271 ITR 401 (2004), 418.

<sup>10</sup>*Advent Systems Ltd v Unisys Corporation*, 925 F 2d 670 (3rd Cir 1991).

<sup>11</sup>*Tata Consultancy Services v State of Andhra Pradesh*, 271 ITR 401 (2004), 418.

<sup>12</sup>*Commissioner of Central Excise v ACER India Ltd*, 137 STC 596 (2004) [SC]; [2001] 4 SCC 593.

<sup>13</sup>*Associated Cement Co Ltd v Commissioner of Customs*, 124 STC 59 (2001) [SC]; *State Bank of India v Collector of Customs* [2000] 1 SCC 727, [2000] 1 Scale 72.

<sup>14</sup> *S P S Jayam and Co* (2004) 137 STC 117 [Mad].

and the IP contained therein. In such a case, it is restricted to the licensee to transfer the copy of the software to a third party. Similarly, right to rental, lease, lending or similar act is granted to the owner of copyright in a software (Section 14(b) (ii), Copyright Act). Therefore, the licensee unless specifically authorized, cannot rent or lease the software for any direct or indirect profit<sup>15</sup>.

Under the Indian contract law, incidents of contract are governed by the place where the contract is made.<sup>16</sup> This results into conflict of laws of states on software contracts, particularly where they are not outright sales and the buyer buys off the shelf (Section 9<sup>17</sup>, Contract Act).

### **13.3.4 Shrink-wrap contract**

In technical-support contracts, which are mostly provided by non-shrink-wrap products, the terms can be negotiated by the parties. Generally licensing agreements followed in India in the area of computer software are in the standard-form with foreign right-holder where the terms of the standard agreement, mainly in the form of shrink-wrap agreements, govern all aspects, including the limitations on the use rights of the licensee. Some of them are contracted through the Internet. Apart from per-use licences, per-workstation licences, concurrent licences, the much talked about licences are 'shrink-wrap' and 'click-wrap' or 'browse-wrap', which are also the mass-market licences, distributed in the retail outlets in the market. Both click-wrap and browse-wrap licences are designed for Internet retails and hence are Internet contracts. The typical 'shrink-wrap' agreement is a single piece of paper describing the licence terms, contained inside the box and wrapped in cellophane or transparent plastic along with the computer software installation diskettes or the owner's manual. End users will be bound and will be considered to have agreed with the licence if they tear open the package or, in the event that the licence is not shrink-wrapped, if they use the software<sup>18</sup>. Shrink-wrap agreements do not follow the normal practice of an agreement between the parties, where the terms of an agreement are negotiated between the parties. In the absence of licence terms, circumstantial evidence surrounding the transaction is taken into account.<sup>19</sup> In these licences, software developers or information providers do not receive a signed agreement from the user; instead they rely on the customer's manifestation of assent via the Internet.

Before agreeing to the terms of the licence, the user is generally asked to review the terms of the agreement and indicate the assent by clicking on the button with a mouse at the end of the

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<sup>15</sup>Mittal Raman, *Licensing Intellectual property: Law & Management* (Satyam Law International, India), 2011, pp 505-507.

<sup>16</sup>*Shankar v Manaklal*, 42 Bom. LR 873.

<sup>17</sup>Promises, express and implied.-In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

<sup>18</sup>Singsangob Anuya, *Computer Software and Information Licensing in Emerging Markets: The Need for a Viable Legal Framework* (Kluwer Law International, The Netherlands), 2003, p. 21, 68.

<sup>19</sup>Lai Stanley, *The Copyright Protection of Computer Software in the United Kingdom* (Hart Publishing, UK), 2000, p. 21, 169

licence. The buttons provided in these agreements include buttons on 'I agree' and 'I decline'. The 'I agree' or 'OK' button constitutes agreement to the click-wrap licence agreement. These agreements contain typical clauses on anti-reuse, anti-reverse-engineering and limited copying provision. Sometime it is doubtful whether the purchaser will have the right to decline the terms of the agreement by returning the software, where once the purchaser has clicked the 'OK' button after reading the terms. It may also contain the governing law clauses in case a conflict arises between the parties. There is no bargaining involved in these licences, whose terms are set by the licensor/vendor. Such agreements are often far-reaching and contravene other applicable laws, viz., as under the Copyright Act, a licence has to be in writing and should not affect the right of the licensee related to 'fair use' clauses by preventing the user from copying, modifying, translating or converting the program for any purpose. On fair uses, these licences conflict with Section 52 (aa) to (ad) of the Copyright Act which allows making of archival copies and adapting the computer programme to ensure that it runs on the user's programme. They also severely limit the rights of the consumers, such as implied conditions and warranties in a contract.

As the fair use doctrine indicates the legal requirement, it should not be constrained by the copyright owner in any manner. Since these agreements prevent the licensee from assigning its interest to a third party, they conflict with the contract law that makes any agreement which restrains anyone from exercising a lawful profession, trade or business of any kind as void (Section 27, Contract Act). This prohibition conflicts with the 'first-sale' doctrine also. In addition to using mass-market licences to get around copyright law, copyright owners attempt to enhance their control over their property via technological restrictions such as encryption technology and transactional design. Thus they create a clear conflict between copyright law and contract law, which have different purposes and objectives. To avoid future controversies, it is necessary that all these aspects must be addressed in the agreement.

### **13.3.1.5 ENFORCEABILITY OF SHRINK-WRAP CONTRACT**

The legality and enforceability of these agreements have not been tested by the Indian courts so far. No software licence has been invalidated so far on the grounds of not being in writing or signed.<sup>20</sup> If the contract is merely for use or a service contract, the Consumer Protection Act will be applicable and the software vendor/developer may be held liable if the product or service is found to be defective/deficient, as the case may be. Question may also arise regarding the extra-territorial application of the Indian law. Similarly, anti-trust issues may arise, which may be subject to competition law. The legality of shrink-wrap agreements, having restrictions on the development, use, services, may be called in question under the Competition Act, 2002. Whether Internet contracts would be covered by the Information Technology Act, which has very limited application in IP issues, has yet to be seen. So far as the contract law is concerned,

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<sup>20</sup>The Copyright (Amendment) Bill, 2010 seeks to do away with the requirement of signature for the purpose of constituting a valid licence. The Bill has been passed on 17 May 2012 by the Parliament.

the validity of the shrink-wrap agreements cannot be questioned as long as there is a sufficient offer, an acceptance of the offer, as well as a bargained-for exchange or consideration<sup>21, 22</sup>.

## **13.3.2 DRAFTING OF CYBER CONTRACT**

### **13.3.2.1 ABOUT DRAFTING**

Drafting may be defined as the synthesis of law and fact in a language form. Perfection cannot be achieved in drafting unless the nexus between law, facts and language is fully understood. In fact drafting can be described as the practice, technique or skill involved in preparing legal documents that set forth the rights of the parties. The following steps may be followed in drafting a document:

1. A proper title of the document, describing the nature of transaction in brief.
2. Name of the parties to the transaction/agreement or the persons executing the document representing the parties. The particulars of identity like father's/husband's name, residential/official address, age, date of incorporation in case of company etc. should also be mentioned.
3. Note down the transaction/agreement and the consideration involved.
4. State the mode and manner of payment of consideration.
5. Note down the various terms and conditions of the agreement. These terms actually state the rights and liabilities of each party under the agreement. These terms should be drafted in very clear and precise language. The words used should be unambiguous so that only one meaning/interpretation is possible. It should be ensured that no condition is left out.
6. At the end, the document should bear signatures and stamp/seal where necessary of the executing parties. The date and place of execution should also be mentioned.
7. Some documents also require to be witnessed by some independent person who is not party to the document.
8. Where a document is required to be executed on stamp paper, then the stamp paper should be of prescribed value as applicable in the concerned state.
9. If a document is required to be registered, it should be presented for registration before the appropriate authority, within a reasonable time after execution.
10. Necessary number of copies of the document should also be prepared on stamp paper of appropriate value, if so required.

### **13.3.2.2 OUTLINE OF A DRAFTING**

While drafting agreements following points should be kept in mind:

1. First of all an outline is to be prepare.

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<sup>21</sup>It may be expected that the courts in India would follow the American precedent of *Pro CD v Zeidenburg*, 39 USPQ 2d, where such a licence has been held to be a valid contract.

<sup>22</sup> 'IP Protection of Software and Software Contracts in India: A Legal Quagmire!' an article by S K Verma, available at <http://nopr.niscair.res.in/bitstream/123456789/14456/1/JIPR%2017%284%29%20284-295.pdf>



2. Then divided the subject matter into major topics.
3. Arrange the topics in logic sequence.
4. Give the appropriate headings to each topics.
5. While drafting a document the audience/ reader/ addressee should be kept in mind.
6. The text should be in clear writing.
7. There is no need of unnecessary elaboration hence use concrete words and be concise.
8. Write in short sentences.
9. Use proper punctuations.
10. As far as possible put statements in a positive form and make definite assertions.
11. Keep related words together as the position words in a sentence is the principal means of showing their relationship.
12. Express co-ordinate ideas in similar form.
13. In summaries, keep to one tense, especially the present tense.
14. The emphatic words of a sentence should be placed at the end

Avoid the following:

1. Avoid gender-specific words as far as possible.
2. Avoid drafting in the passive voice and use active voice as it is more direct and vigorous than the passive voice.
3. Avoid unnecessary, hesitating and non-committal language.

### **13.3.3 PRIVACY POLICY AND USER AGREEMENT**

The document (for example xyz) is an electronic record in terms of the Information Technology Act, 2000. This (xyz) electronic record is generated by a computer system and does not require any physical or digital signatures.

A person (user) who uses the website is governed by the contract. User shall have deemed to have agreed to be bound by privacy policy and user agreement, whenever he/she access or use the site in any way.

#### **Privacy Policy**

.....respects the privacy of visitors to this website. This policy describes how and when we gather information from visitors to our website.

#### **Aggregate Data**

Owner generally record certain usage information, such as the number and frequency of visitors to the website. This information may include the websites that user access immediately before and after visit to owner's website (xyz), the user's Internet browser you, and his IP address. If owner use such data at all, it will be on an aggregate basis, and he will not disclose to third parties any information that could be used to identify user personally.

#### **Personally Identifiable Information**

If user voluntarily submit information to the website, for example, in a request for general information or through the submission of a business proposal, owner may record and use any personally identifiable information, such as user's name, phone number and e-mail address, for reasonable business purposes including, but not limited to, fulfilling user's request. Owner will

not use user's personally identifiable information for any other purpose without user's permission. Owner may use internal service providers to operate his website and employ other persons to perform work on his behalf, such as sending postal mail and e-mail. These persons may have access to the personally identifiable information, the user submit through the website, but only for the purpose of performing their duties. These persons may not use user's personally identifiable information for any other purpose.

Owner will not provide any personally identifiable information to any other persons, except if he is required to make disclosures to the government or private parties in connection with a lawsuit, subpoena, investigation or similar proceeding. He can (and user authorize him to) disclose any such information in those circumstances.

## **User Agreement**

### **Restrictions on Use**

Any person using the (for example xyz) website is permitted to copy and print individual website pages for non-commercial purposes. Users may also copy or print minimal copies of any research or reports posted on the site solely for informational, non-commercial use. These copies must not alter the original website content, including all legal notices and legends. Owner's prior permission is required for (i) any commercial use of materials on the website; (ii) making more than minimal copies of website materials; and (iii) copying large portions of the website, such as by bots, robots or spiders that "harvest" the website. If user seek permission for such use of the website, contact the owner as provided.

### **Linking and Framing**

Owner do not permit others to link to or frame the website (for example xyz) or any portion thereof. It is also notable that the Privacy Policy and User Agreement (for xyz) will apply only to the particular website and not to other websites that may be accessible from the website via hyperlink. The owner is responsible only for the content of their own website. Owner encourage user to review the privacy policies and user agreements of all other websites that the user visit.

### **Ownership**

All content included on the (for example xyz) website, such as graphics, logos, articles and other materials, is the property of owner's organization or others and is protected by copyright and other laws. All trademarks and logos displayed on the website are the property of their respective owners, who may or may not be affiliated with owner's organization.

### **Submissions**

As the (for example xyz) website indicates, owner welcome user's questions about them and their products and services. Any comments, suggestions, ideas or other information that user send to owner through their website will not be treated as confidential, and owner will own and have the right to use them as they choose, without payment to user.

### **International Use**

Due to the global nature of the Internet, the (for example xyz) website may be accessed by users in countries other than India. Owner make no warranties that materials on the website are appropriate or available for use in such locations. If it is illegal or prohibited in user's country of origin to access or use the website, then user should not do so. Those who choose to access the site outside India can do so on their own initiative and are responsible for compliance with all local laws and regulations.

### **Limitations of Liability**

Owners are not responsible for any damages or injury, including but not limited to special or consequential damages, that result from user's use of (or inability to use) the (for example xyz) website, including any damages or injury caused by any failure of performance, error, omission, interruption, defect, delay in operation, computer virus, line failure, or other computer malfunction. User acknowledge that owners provide the contents of the website on an "as is" basis with no warranties of any kind. User's use of the website and use or reliance upon any of the materials on it is solely at user's own risk.

### **Governing Law**

User agree that user's use of the (for example xyz) website, the Privacy Policy and User Agreement and any disputes relating to any of them shall be governed in all respects by the laws of the State of 'abc', India. Any dispute relating to the above shall be resolved solely in the courts located in 'abc', India.

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## **13.4 SUMMARY**

Internet transactions have become commonplace in day-to-day contracts. Close to two decades back, software transactions were dealt by the Shrink-wrap agreements i.e. the customer is assumed to accept the terms and conditions of the contract as soon as he opens the packaging in the software. The status of shrink wrap agreements is unclear. Courts have been split as to whether a consumer consents to the terms in a shrink wrap agreement since he pays for the product and goes so far as to open the package, but does not have actual knowledge of what the terms are until he opens the package to read them. When an item of software is sold, the owner of the software does not complete a sale in the traditional sense. Instead, he assigns or licenses some of his rights in the software in favour of the purchaser.

Computer software, like biotechnology, is subject to fierce competition with a shorter life cycle and can be easily copied. Because software may be copied effectively at no cost, some means of restricting the free copying and redistribution of software work is necessary to preserve an investment in a software product through an appropriate system. The Information Technology Act, 2000 accords legal recognition to digital signatures, electronics records and the framework for the prevention of computer crimes, but does not deal with IP protection to computer software.

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parties that act in good faith. Software contracts, like many other transactions, are governed by the common law principles as embodied in the Indian Contract Act. In *Tata Consultancy Services v State of Andhra Pradesh*, the Supreme Court considered computer software as 'goods'. Once the software transactions are labelled as sale of goods or services, other laws related to goods will also be operative, viz., the Consumer Protection Act, 1986, the conditions and warranties, as contained in the Sale of Goods Act. In technical-support contracts, which are mostly provided by non-shrink-wrap products, the terms can be negotiated by the parties. The typical 'shrink-wrap' agreement is a single piece of paper describing the licence terms, contained inside the box and wrapped in cellophane or transparent plastic along with the computer software installation diskettes or the owner's manual. End users will be bound and will be considered to have agreed with the licence if they tear open the package or, in the event that the licence is not shrink-wrapped, if they use the software. Shrink-wrap agreements do not follow the normal practice of an agreement between the parties, where the terms of an agreement are negotiated between the parties.

The legality and enforceability of these agreements have not been tested by the Indian courts so far. The legality of shrink-wrap agreements, having restrictions on the development, use, services, may be called in question under the Competition Act, 2002. Whether Internet contracts would be covered by the Information Technology Act, which has very limited application in IP issues, has yet to be seen. So far as the contract law is concerned, the validity of the shrink-wrap agreements cannot be questioned as long as there is a sufficient offer, an acceptance of the offer, as well as a bargained-for exchange or consideration.

Drafting may be defined as the synthesis of law and fact in a language form. Perfection cannot be achieved in drafting unless the nexus between law, facts and language is fully understood. In fact drafting can be described as the practice, technique or skill involved in preparing legal documents that set forth the rights of the parties. The steps that have to be followed in drafting a document are discussed above.

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## 13.5 GLOSSARY

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1. SOFTWARE- Software does not have any universally accepted definition as yet and may cover in its ambit computer programmes, computer databases and may include items produced by the operation of a computer programme such as documents, drawings and other works stored or transmitted electronically or even printed out on paper. 'Computer software' and 'computer programme' have been used interchangeably in Bainbridge David, *Software Licensing*, 2<sup>nd</sup> Ed, (CLT Professional, Publishing Ltd, UK), 1999, p. 6.

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## 13.6 SAQS

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### 1. TICK THE RIGHT CHOICE:

- (i) In case of an item of software is sold, the owner of the software assigns or licenses some of his rights in the software in favour of the purchaser, hence does not complete a sale in the traditional sense.
  - (a) true

- (b) false
- (ii) In *Tata Consultancy Services v State of Andhra Pradesh*, the Supreme Court considered computer software as:
  - (a) intellectual property
  - (b) part of the computer
  - (c) goods
  - (d) computer program
- (iii) Shrink-wrap agreements do not follow the normal practice of an agreement between the parties, where the terms of an agreement are negotiated between the parties.
  - (a) true
  - (b) false
- (iv) Shrink-wrap agreements contain typical clauses on:
  - (a) anti-reuse
  - (b) anti-reverse-engineering
  - (c) limited copying provision
  - (d) all of above
- (v) The legality and enforceability of these agreements have not been tested by the Indian courts so far, as software licence has been invalidated so far on the grounds of not being in writing or signed.
  - (a) true
  - (b) false
- (vi) While drafting a cyber-contract following point(s) has/have to be avoided:
  - (a) Avoid gender-specific words as far as possible.
  - (b) Avoid drafting in the passive voice and use active voice as it is more direct and vigorous than the passive voice.
  - (c) Avoid unnecessary, hesitating and non-committal language.
  - (d) All of above
- (vii) Information Technology Act has very limited application in IP issues.
  - (a) True
  - (b) False

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## 13.7 REFERENCES

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6. <http://www.caaa.in/Image/30%20.pdf>
7. A book on drafting on commercial contracts and agreements by Rajkumar S. Adukia

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9. <https://books.google.co.in/books>

10. Cyber and E-Commerce laws, P. M. Bakshi and R. K. Suri

11. Gupta & Agarwal, Cyber Law; Ist edition, Premiere Publishing Company

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### **13.8 SUGGESTED READINGS**

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1. Cyber and E-Commerce laws, P. M. Bakshi and R. K. Suri

2. Gupta & Agarwal, Cyber Law; Ist edition, Premiere Publishing Company

3. A book on drafting on commercial contracts and agreements by Rajkumar S. Adukia

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### **13.9 TERMINAL QUESTIONS AND MODEL QUESTIONS**

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1. What do you understand by shrink-wrap contracts? How is it differ from click-wrap contract?

2. Write the main points to be remember in drafting a contract.

3. Discuss the legality and enforceability of shrink-wrap contract.

4. Write short notes on the following:

(i) Software service agreement

(ii) Privacy policy and user agreement

### **13.10 ANSWER**

#### **SAQS**

1. (i) (a); (ii) (c); (iii) (a); (iv) (d); (v) (a); (vi)(d); (vii)(a);