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From Proprietary to Open Source: Legal Dimensions of Software Licensing in India

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ABSTRACT

This paper explores the evolving legal landscape of software licensing in India, focusing on the transition from proprietary models to open-source frameworks. As software becomes increasingly central to governance, commerce, and public infrastructure, understanding how the law accommodates new licensing models is critical. While the Indian Copyright Act, 1957, provides general protection to computer programs, it does not explicitly recognize open-source licenses or offer guidelines for their enforcement. Similarly, although the Information Technology Act, 2000 validates electronic contracts, judicial clarity on open-source license disputes is lacking. Through a comparative analysis of legal models from jurisdictions like the United States and the European Union, this paper highlights the gaps in India's regulatory and judicial approach. It recommends legislative recognition, judicial precedent, institutional support, and public awareness as key measures to ensure effective legal protection of open-source software in India. By addressing these challenges, India can strengthen its digital infrastructure, support innovation, and uphold legal certainty in software use and development.

Keywords: Open Source Software, Copyright Law, Software Licensing, Indian Legal System, GPL, IT Act, Contract Enforcement, Comparative Law, Public Policy, Digital Governance.

1. Introduction

Software is an essential part of modern life, used in everything from smartphones to banking systems. How software is licensed determines who can use it, how it can be used, and whether it can be modified or shared. Traditionally, software has been shared under proprietary licenses, where users are given very limited rights. In this model, the software company keeps full control over the software's use and code.

However, in the last two decades, open-source software has become very popular. Open-source licenses allow users not only to use the software freely, but also to study, change, and share it. This new way of sharing software has encouraged innovation, collaboration, and cost savings, especially in developing countries like India.¹

In India, while software is protected under the Copyright Act, 1957, there is no specific law for open-source software. This has raised several legal questions—such as:

- Are open-source licenses legally valid under Indian contract law?
- Can Indian courts enforce these licenses?
- What rights and responsibilities do users and developers have?

This paper aims to study the legal rules around software licensing in India and explore how well they deal with open-source software. It will look at Indian laws, compare them with other countries, and suggest changes to improve clarity and enforcement.

India is a growing technology hub, and with government support for digital tools and education, it is important to have clear legal rules that support both proprietary and open-source models. The aim is to ensure that software developers, users, and businesses have a legal system that supports innovation and protects rights.

2. The Legal Regime for Software Protection in India

Software today forms the backbone of digital systems, businesses, governance, and communication. As such, the legal protection of software is a crucial concern for developers, companies, and governments alike. In India, the protection of software primarily arises from copyright law, with supplementary roles played by contract law, the Information Technology Act, 2000, and judicial interpretation.

¹ Richard M. Stallman, Free Software, Free Society: Selected Essays of Richard M. Stallman (GNU Press, 2nd edn., 2010) 12.

2.1 Copyright Protection Under the Indian Copyright Act, 1957

The primary legal statute governing software protection in India is the Copyright Act, 1957. In 1994, the Act was amended to explicitly include "computer programmes" as a category of literary works under Section 2(0).² This inclusion brought software under the same protective regime as books, poems, and other forms of written expression.

Under Section 14(b) of the Act, the copyright owner of a computer program has the exclusive right to:

- Reproduce the work in any material form
- Issue copies of the work to the public
- Perform or communicate the work to the public
- Make any cinematographic film or sound recording of the work
- Make any translation or adaptation of the work³

More importantly, under Section 14(b)(vi), the owner also has the exclusive right to sell or give on commercial rental any copy of the computer program. This provision ensures that only authorized persons may distribute or license the software, whether it is proprietary or open-source.

The Copyright Act offers protection automatically upon creation of the software—registration is not mandatory.⁴ However, registration can act as prima facie evidence of ownership in legal disputes.

Notably, the Copyright Rules, 2013, support digital rights enforcement, allowing courts to address online infringements like illegal software distribution and reverse engineering.

2.2 Judicial Interpretations

Indian courts have recognized the importance of protecting intellectual property in the digital space. Although there are limited judgments specifically dealing with software copyrights, several cases have laid down broad principles.

In Tata Consultancy Services v State of Andhra Pradesh,⁵ the Supreme Court held that software, whether customized or canned, is considered goods and can be sold. Although this was a tax law case, the Court's recognition of software as a product with commercial value supported its status as protectable intellectual property.

In Microsoft Corporation v Yogesh Papat & Anr,⁶ the Delhi High Court upheld the rights of Microsoft to seek remedies against copyright infringement of its software. The court granted an injunction and damages against the defendant for unauthorized use and distribution of Microsoft products. This case reaffirmed that computer programs are protected under the Indian Copyright Act and that courts can issue ex parte injunctions to prevent immediate and irreparable damage.

The courts have also responded to piracy and unauthorized reproduction. In Adobe Systems Inc. v Mr. Mahindra Jain,⁷ the Delhi High Court observed that software piracy is a serious issue that undermines the value of intellectual property. The court ordered permanent injunctions and costs against the defendant for illegal use and copying of Adobe software.

These cases show that the Indian judiciary acknowledges the need to protect software from infringement, and is willing to award remedies including injunctions, damages, and even criminal penalties under Chapter XIII of the Copyright Act.

However, it is important to note that no Indian court has yet ruled on the enforceability of open-source software licenses, such as the GPL (General Public License) or MIT License. This creates uncertainty in cases involving non-proprietary software, despite the broad coverage of copyright law.

2.3 Role of the Information Technology Act, 2000

The Information Technology Act, 2000 was India's first cyber law, enacted to provide legal recognition to electronic transactions, digital signatures, and cybercrime penalties. While not primarily an intellectual property law, it complements copyright protection by providing a digital framework for enforcement and regulation.

Additionally, Section 10A of the Act recognizes the validity of electronic contracts.¹⁰ This is crucial for open-source and proprietary licenses, which are usually accepted by clicking "I Agree" online (clickwrap or browsewrap agreements). Indian courts can now treat such licenses as valid and binding contracts, provided they meet the criteria of consent, offer, and acceptance under the Indian Contract Act, 1872.

Under Section 43 of the Act, any person who accesses a computer system without authorization or downloads data without permission is liable to pay damages to the affected party.⁸ This can apply in cases where software is illegally copied or distributed over networks or cloud systems.

Section 66 further criminalizes such acts when done with dishonest or fraudulent intent, providing for imprisonment up to three years and fines.⁹ This is particularly useful when dealing with software piracy or data breaches involving licensed software.

² Copyright (Amendment) Act 1994, No. 38 of 1994, s 2(o).

³ Copyright Act 1957, s 14(b).

⁴ Ibid, s 45 (registration not mandatory).

⁵ Tata Consultancy Services v State of Andhra Pradesh (2004) 1 SCC 308.

⁶ Microsoft Corporation v Yogesh Papat & Anr 2005 (30) PTC 245 (Del).

⁷ Adobe Systems Inc. v Mr. Mahindra Jain 2007 (34) PTC 95 (Del).

⁸ Information Technology Act 2000, s 43.

⁹ Ibid, s 66.

¹⁰ Ibid, s 10A (recognition of electronic contracts)

The IT Act also empowers government agencies to issue directions for cybersecurity and data protection, indirectly promoting the legal use of licensed software by requiring organizations to avoid pirated or unverified programs that could compromise security.

3. Understanding Open-Source Licensing

Open-source licensing is a way of sharing software that gives users more rights than traditional proprietary models. Instead of keeping the source code hidden and limiting its use, open-source licenses allow users to freely access, use, modify, and share the software.¹¹ This model supports collaboration, transparency, and innovation—values that are especially useful in education, government, and startup ecosystems.

3.1 Core Principles

Open-source licenses are built around three core principles:

- Freedom to use the software for any purpose
- Freedom to modify the source code to suit individual needs
- Freedom to distribute the original or modified software to others¹²

These freedoms are granted under conditions that aim to protect both the user's rights and the original creator's contributions. Unlike public domain software, open-source software is still protected by copyright, and licenses act as contracts that specify what is allowed.¹³

3.2 Types of Licenses

There are many kinds of open-source licenses, but most fall into two main categories: copyleft and permissive.

- GNU General Public License (GPL): A "copyleft" license that requires modified versions to also be shared under the GPL. This ensures that the software remains free in all future versions.¹⁴
- MIT License: A permissive license that allows users to do almost anything with the software, including using it in proprietary programs, as long as the original copyright notice is included.¹⁵
- Apache License 2.0: Similar to MIT but with added protection against patent claims. This license is often used in business and commercial environments.¹⁶

These licenses are not just technical-they are legal documents that explain what users can and cannot do.

3.3 Legal Enforceability

One important question is whether open-source licenses can be enforced in a court of law. In countries like the United States and Germany, courts have upheld the validity of open-source licenses, treating them as binding legal agreements.¹⁷

In India, there is no direct case law yet, but under the Indian Contract Act, 1872, an open-source license meets the basic requirements of a valid contract—such as offer, acceptance, and consideration.¹⁸ In addition, the Information Technology Act, 2000, recognizes digital contracts and electronic consent, making open-source licenses legally acceptable in electronic form.¹⁹

However, because Indian courts have not yet ruled on such licenses, there is some uncertainty about how enforcement would work, especially in cases involving international developers or contributors.

4. Indian Legal Perspective on Open Source

India has made significant strides in adopting open-source software (OSS) across public and private sectors. The government's Policy on Adoption of Open Source Software encourages OSS use in e-governance systems, aiming to promote affordability, flexibility, and transparency.²⁰ However, from a legal standpoint, the integration of open-source software into India's regulatory framework remains incomplete and somewhat unclear.

At present, India does not have any legislation specifically dedicated to open-source licensing. The existing legal infrastructure, primarily the Copyright Act, 1957, recognizes software as a form of literary work under Section 2(o), and grants protection through exclusive rights listed under Section 14.²¹ These rights are applicable to both proprietary and open-source software. In open-source models, authors typically use these rights to grant broader

²¹ Copyright Act 1957, ss 2(o) and 14.

¹¹ Lawrence Rosen, *Open Source Licensing: Software Freedom and Intellectual Property Law* (Prentice Hall, 2004) 3.

¹² Eric S. Raymond, *The Cathedral and the Bazaar* (O'Reilly Media, 2001) 34.

¹³ Pranesh Prakash, 'Legal Aspects of Free and Open Source Software' (2006) 2(1) Indian Journal of Law and Technology 81, 85.

¹⁴ Free Software Foundation, 'GNU General Public License' (Version 3, 2007) <u>https://www.gnu.org/licenses/gpl-3.0.en.html accessed 6 June 2025</u>.

¹⁵ MIT License, Open Source Initiative, https://opensource.org/licenses/MIT accessed 6 June 2025.

¹⁶ Apache Software Foundation, 'Apache License Version 2.0' https://www.apache.org/licenses/LICENSE-2.0 accessed 6 June 2025

¹⁷ Jacobsen v Katzer, 535 F.3d 1373 (Fed. Cir. 2008) (US case upholding enforceability of open-source licenses).

¹⁸ Indian Contract Act 1872, ss 2(a), 2(b), 10.

¹⁹ Information Technology Act 2000, s 10A (validity of digital contracts).

²⁰ Ministry of Electronics & Information Technology, 'Policy on Adoption of Open Source Software for Government of India' (2015) https://meity.gov.in/content/open-source-software accessed 6 June 2025.

The enforceability of open-source licenses in India depends heavily on contract law principles. According to the Indian Contract Act, 1872, a valid contract must have an offer, acceptance, and consideration.²³ In the case of OSS, these elements are satisfied when a user downloads software under a license, thereby agreeing to its terms. Courts in the U.S. and Germany have upheld this view, but Indian courts have yet to adjudicate on the enforceability of an open-source license directly.²⁴ This lack of judicial precedent creates legal uncertainty, especially for cases involving license violations such as improper attribution or redistribution without compliance.

The Information Technology Act, 2000 plays an indirect role in supporting the legal framework for OSS by recognizing digital contracts and consent through electronic means. Section 10A of the Act validates contracts formed through electronic communication, including "clickwrap" or "browsewrap" agreements commonly used in software licenses.²⁵ This provision reinforces the enforceability of OSS licenses, which are almost always accepted digitally.

Despite these general legal protections, there are gaps in clarity and awareness. For instance, many developers and organizations remain unaware of the difference between "freeware" and "open-source," leading to misuses that may breach license terms.²⁶ Additionally, the lack of statutory recognition or guidelines specific to open-source licenses complicates the resolution of disputes and interpretation of obligations under these licenses in India.

Moreover, Indian legal education and jurisprudence have not kept pace with global developments in software licensing. Unlike the U.S., where courts have ruled on cases like *Jacobsen v Katzer*, recognizing open-source licenses as legally enforceable contracts,²⁷ Indian courts have not addressed such cases, either due to lack of litigation or the informal nature of OSS disputes.

5. Challenges in Enforcing Open-Source Licenses

While open-source software (OSS) offers flexibility, affordability, and innovation, its enforcement in the Indian legal system presents several unique challenges. The lack of explicit legal frameworks and judicial clarity means that violations of open-source licenses often go unaddressed, leaving both developers and users vulnerable.

The first major challenge lies in the absence of judicial precedent. Indian courts have not yet ruled on the enforceability of an open-source license such as the GNU General Public License (GPL), Apache, or MIT License. In contrast, courts in jurisdictions like the United States have recognized these licenses as enforceable under contract law principles. In *Jacobsen v Katzer*, the U.S. Federal Circuit held that open-source licenses are binding agreements and their breach can lead to legal consequences.²⁸ Indian courts, however, have not yet encountered such disputes, creating legal uncertainty for both domestic and foreign developers distributing software in India under open-source terms.

Secondly, open-source licenses are often accepted through digital means, such as clickwrap or browsewrap agreements, where the user agrees to the license by downloading or installing the software. While Section 10A of the Information Technology Act, 2000, recognizes the validity of electronic contracts,²⁹ the enforceability of such agreements depends on whether they meet the essentials of a contract under the Indian Contract Act, 1872—i.e., offer, acceptance, and consideration.³⁰ OSS licenses may be challenged on the grounds that there is no monetary consideration, although legal scholars argue that the permission to use the software under defined terms itself qualifies as valid consideration.³¹ However, the lack of case law on this subject in India makes the issue far from settled.

A third issue is the problem of attribution and license compliance. Many open-source licenses—especially copyleft licenses like the GPL—require that the original authors be credited, and that derivative works be distributed under the same license terms.³² Indian developers or organizations using OSS may fail to follow these rules, either due to ignorance or misunderstanding. Since OSS is often free of cost, it is mistakenly assumed that it is also free of obligations. This misunderstanding leads to widespread non-compliance, especially in small businesses, educational institutions, and even public sector IT deployments.

Fourth, cross-border legal complexity is another obstacle. Many open-source licenses originate in foreign jurisdictions, particularly the United States and the European Union. When disputes arise over OSS misuse in India involving foreign licensors or contributors, issues of jurisdiction and applicable law become complicated. Indian courts may hesitate to enforce foreign licenses or interpret them without local precedent or statutory guidance.³³ The lack of harmonization between Indian IP law and global open-source licensing norms further complicates enforcement.

Fifth, open-source litigation is rare in India because of the costs and risks associated with legal action. Most open-source contributors are individuals or small communities without the financial means or legal infrastructure to pursue violations in court.³⁴ Unlike large proprietary software companies that

²² Lawrence Rosen, Open Source Licensing: Software Freedom and Intellectual Property Law (Prentice Hall, 2004) 7.

²³ Indian Contract Act 1872, ss 2(a), 2(b), 10.

²⁴ Pranesh Prakash, 'Legal Aspects of Free and Open Source Software' (2006) 2(1) Indian Journal of Law and Technology 81, 85.

²⁵ Information Technology Act 2000, s 10A.

²⁶ Nandan Kamath, Law Relating to Computers, Internet and E-Commerce (Universal Law Publishing, 5th edn., 2012) 172.

²⁷ Jacobsen v Katzer, 535 F.3d 1373 (Fed. Cir. 2008).

²⁸ Jacobsen v Katzer, 535 F.3d 1373 (Fed. Cir. 2008).

²⁹ Information Technology Act 2000, s 10A.

³⁰ Indian Contract Act 1872, ss 2(a), 2(b), and 10.

³¹ Lawrence Rosen, Open Source Licensing: Software Freedom and Intellectual Property Law (Prentice Hall, 2004) 51.

³² Free Software Foundation, 'GNU General Public License Version 3' https://www.gnu.org/licenses/gpl-3.0.en.html accessed 6 June 2025.

³³ Pranesh Prakash, 'Legal Aspects of Free and Open Source Software' (2006) 2(1) Indian Journal of Law and Technology 81, 86.

³⁴ Nandan Kamath, *Law Relating to Computers, Internet and E-Commerce* (Universal Law Publishing, 5th edn., 2012) 178.

actively police license compliance and pursue violators, open-source communities often lack the resources to do the same. This means violations—such as using GPL-licensed code in a proprietary software product without releasing source code—go largely unchecked.

Finally, government policy and enforcement bodies have not yet prioritized open-source legal compliance. While the Indian government encourages the use of open-source software, especially in public IT procurement,³⁵ there are no regulatory bodies or monitoring mechanisms to ensure that organizations using OSS comply with licensing obligations. Without government support or institutional mechanisms for compliance and enforcement, the legal protection of open-source licenses remains weak.

6. Comparative Legal Models

Understanding how different jurisdictions handle open-source licensing is crucial to evaluating India's current position and identifying areas for legal and policy improvement. Countries like the United States and members of the European Union have not only recognized the legal validity of open-source licenses but have also developed judicial and institutional mechanisms to enforce them. These comparative models offer important lessons for India, especially in the absence of clear domestic precedent or statutory guidance.

In the United States, courts have taken a proactive stance in affirming the enforceability of open-source licenses. A landmark decision in *Jacobsen v Katzer* (2008) by the U.S. Court of Appeals for the Federal Circuit held that violations of open-source license terms could give rise to a claim for copyright infringement rather than mere breach of contract.³⁶ This decision marked a turning point by recognizing that OSS licenses are not merely contractual but have legal implications tied directly to intellectual property rights. Additionally, many U.S.-based organizations such as the Software Freedom Law Center provide legal support to open-source communities and advocate for compliance and enforcement.³⁷

The European Union has also embraced open-source licensing within a structured legal framework. The European Commission has published guidelines that encourage the use of Free and Open Source Software (FOSS) in public sector IT infrastructure.³⁸ Moreover, courts in Germany have ruled on multiple cases involving open-source licenses, including the GPL, affirming their enforceability. For instance, in *Heise Zeitschriften Verlag GmbH & Co. KG v D-Link International*, the German court held that the GPL was valid and legally binding, and that failure to comply with its terms could lead to injunctions.³⁹ The court emphasized the importance of license conditions like disclosure of source code and proper attribution, treating OSS obligations with the same seriousness as those in commercial contracts.

Both the U.S. and EU approaches share a few key characteristics: recognition of open-source licenses as legally enforceable, availability of judicial mechanisms to address violations, and a culture of legal awareness among developers and companies. These frameworks offer greater predictability and legal certainty, which are essential for encouraging innovation and compliance.

In contrast, India's legal system has yet to develop an equivalent jurisprudence. While Indian laws such as the Copyright Act, 1957 and the Information Technology Act, 2000 theoretically support the recognition of OSS licenses,⁴⁰ the lack of judicial rulings on such matters creates uncertainty. For instance, if a company in India were to modify GPL-licensed software and sell it without releasing the modified source code, it is unclear how an Indian court would interpret or enforce that license violation.

Furthermore, in countries like France, national agencies such as the Direction Interministérielle du Numérique (DINUM) actively manage and promote open-source adoption and compliance within government departments.⁴¹ India lacks such institutional support, relying instead on general policy recommendations that do not have binding force. While the Government of India's open-source policy (2015) encourages adoption in e-governance, it does not offer concrete mechanisms for monitoring or enforcing compliance with license conditions.⁴²

Another notable example is South Korea, where the Open Source Software Promotion Act was introduced to build legal awareness and support infrastructure around OSS.⁴³ This includes legal aid, education programs, and national repositories of OSS used in government projects. India could benefit from similar legislative or administrative steps that bridge the gap between policy intent and practical enforcement.

7. Conclusion and Recommendations

The transition from proprietary to open-source software represents a significant shift in the technological and legal landscape, especially for a country like India, which is rapidly digitizing its economy, governance, and public services. Open-source software offers numerous benefits, including reduced costs, greater customization, technological self-reliance, and community-driven innovation. However, these advantages also bring legal complexities, particularly in the realm of licensing, compliance, and enforcement.

The current Indian legal framework, although not hostile to open-source licensing, is not adequately equipped to deal with its nuanced requirements. The Copyright Act, 1957, and the Information Technology Act, 2000 provide the basic legal recognition of software as intellectual property and digital

³⁵ Ministry of Electronics & Information Technology, 'Policy on Adoption of Open Source Software' (2015) https://meity.gov.in/content/open-source-software accessed 6 June 2025.

³⁶ Jacobsen v Katzer, 535 F.3d 1373 (Fed. Cir. 2008).

³⁷ Software Freedom Law Center, 'About Us' https://www.softwarefreedom.org/about/ accessed 6 June 2025.

³⁸ European Commission, 'Open Source Software Strategy 2020–2023' <u>https://commission.europa.eu/open-source-software-strategy-2020-2023_en</u> accessed 6 June 2025.

³⁹ Heise Zeitschriften Verlag GmbH & Co. KG v D-Link International, LG München I, 21 O 6123/07.

⁴⁰ Copyright Act 1957, ss 14(b), 2(o); Information Technology Act 2000, s 10A.

⁴¹ DINUM, 'Open Source Software and the French Government' https://www.numerique.gouv.fr/publications/ accessed 6 June 2025

⁴² Ministry of Electronics & Information Technology, 'Policy on Adoption of Open Source Software' (2015) https://meity.gov.in/content/open-sourcesoftware accessed 6 June 2025.

⁴³ Korea Ministry of Science and ICT, 'Open Source Software Promotion Act' (2014) https://www.msit.go.kr/eng/ accessed 6 June 2025

agreements, respectively. Still, open-source licensing remains under-explored in Indian courts, and there are no specific statutes or government notifications that explicitly define or address the enforceability of open-source licenses.

A comparative study reveals that jurisdictions like the United States, Germany, and France have successfully integrated open-source licensing into their legal systems through judicial recognition, statutory interpretation, and proactive governmental support. India, on the other hand, suffers from a lack of judicial precedent, low public and institutional awareness, and absence of centralized enforcement or advisory mechanisms for open-source compliance.

To bridge this gap and create a robust legal environment that supports the open-source ecosystem, the following recommendations are proposed:

- Indian courts must begin to engage with open-source license disputes when they arise. A few well-reasoned judgments that uphold opensource license conditions would establish legal precedent and reduce ambiguity for future disputes.
- Amendments to the Copyright Act could include explicit mention of open-source licensing frameworks and their enforceability under Indian law. This would offer clarity to both developers and users regarding their legal rights and responsibilities.
- Establish a government-backed Open Source Legal Advisory Board under the Ministry of Electronics and IT to provide guidance, resolve disputes, and promote awareness regarding open-source compliance—similar to models in South Korea and France.
- When adopting open-source software in public projects (e.g., Digital India), the government should implement compliance mechanisms that
 ensure license obligations—such as attribution and source code disclosure—are strictly followed.
- Incorporate open-source licensing and software IP into the curriculum of law schools, engineering colleges, and judicial training academies. This will foster a generation of professionals equipped to navigate the legal intricacies of OSS.
- India can engage in global open-source communities and legal forums to co-develop licensing norms, dispute resolution protocols, and
 educational material that reflect both international best practices and domestic legal sensibilities.

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