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## Copyright Law in India – Special Reference to Software Piracy

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### ABSTRACT

*Copyright is a form of intellectual property protection granted under Indian law to the creators of original works of authorship such as literary works (including computer programs, tables and compilations, computer databases which may be expressed in words, codes, schemes or in any other form, a machine readable medium), dramatic, musical and artistic works, cinematographic films and sound recordings. The copyright infringement of software or software piracy refers to practices which involve the unauthorized copying of computer software. Pirated software hurts everyone- from software developers to retail store owners, and ultimately to all software users. Furthermore, the illegal duplication and distribution of software has a significant impact on the economy. The paper explains about the effects of the legislative provisions with respect to Indian Copyright Act (ICA) and its compliance of international treaties and conventions concerning copyright law. This paper briefly reviews the protection afforded under the statute and the problems relating to it.*

*The domain of software piracy were considered in this paper to identify the legal effects of the provisions and the role of the courts with respect to enforcement which protects the rights of the copyright owners and an initial approach to propose a reformation to be done safeguarding the interests of the copyright holders absolutely.*

**Keywords:** Copyright, Software, Piracy, Infringement.

### INTRODUCTION

Intellectual Property Rights are the legal rights that are granted to a person for any creative and artistic work, for any invention or discovery, or for any literary work or words, phrases and symbols or designs for a stipulated period of time. The owners of Intellectual Property are granted certain exclusive rights through which they use their property without any disturbance and can prevent the misuse of their property. Intellectual property is any innovation, commercial or artistic, or any unique name, symbol, logo or design used commercially. In

India, Intellectual Property is governed under the Patents Act, 1970; Trademarks Act, 1999; Indian Copyright Act, 1957; Designs Act, 2001, etc.

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. It is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work. The only criterion to determine whether a person is entitled to copyright protection is originality in expression.

### MEANING OF COPYRIGHT

Section 14 of the Act provides the meaning of copyright in following words: For the purpose of this Act, “copyright” means the exclusive right subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely:

**A.** In the case of a literary, dramatic or musical work not being a computer programme

- i. To reproduce the work in any material form including the storing of it in any medium by electronic means;
- ii. To issue copies of the work to the public not being copies already in circulation;

- iii. To perform the work in public, or communicate it to the public;
- iv. To make any cinematograph film, or sound recording in respect of the work;
- v. To make any translation of the work;
- vi. To make any adaptation of the work;
- vi. To do in relation to a translation or adaptation of work, any of the acts specified in relation to the work in sub-clause (i) to (iv).

**B.** In the case of a computer programme

- i. To do any of the acts specified in clause (a)
- ii. To sell or give on hire, or offer for sale or hire any copy of the computer programme, regardless of whether such copy has been sold or given on hire on earlier occasions;

**C.** In the case of an artistic work

- i. To reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;
- ii. To communicate the work to the public;
- iii. To issue copies of the work to the public not being copies already in circulation;
- iv. To include the work in any cinematograph film;
- v. To make any adaptation of the work;



- vi. To do in relation to any adaptation of the work any of the acts specified in relation to the work in sub-clause (i) to (iii).

**D.** In the case of a cinematograph film

- i. To make a copy of the film including a photograph of any image forming a part thereof;
- ii. To sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;

**E.** In the case of a sound recording

- i. To make any other sound recording embodying in it;
- ii. To sell or give on hire, or offer for sale or hire, any copy of the sound recording, regardless of whether such copy has been sold or given on hire on earlier occasions;
- iii. To communicate the sound recording to the public.

## **DEFINITIONS OF COPYRIGHT**

According to Free Encyclopedia “Copyright is a legal concept, enacted by most governments, giving the creator of an original work those exclusive rights to it, usually for a limited time. Generally, it is “the right to copy”, but also gives the copyright holder the right to be credited for the work, to determine who may

adapt the work to other forms, which may perform the work, which may financially benefit from it, and other related rights. It is a form of intellectual property (like the patent, the trademark, and the trade secret) applicable to any expressible form of an idea or information that is substantive and discrete”.

According to Margaret Rouse “Copyright is the ownership of an intellectual property within the limits prescribed by a particular nation's or international law”.

According to Commonwealth Copyright Act 1968 “A simple definition of copyright is that it is a bunch of rights in certain creative works such as text, artistic works, music, computer programs, sound recordings and films. The rights are granted exclusively to the copyright owner to reproduce the material, and for some material, the right to perform or show the work to the public. Copyright owners can prevent others from reproducing or communicating their work without their permission or may sell these rights to someone else.

## **HISTORY OF COPYRIGHT LAW IN INDIA**

The evolution of Copyright Law in India is spread over three phases. The law of copyright was introduced in India during the reign of the

British Rule in India via the British Copyright Act, 1911. This Act had very different provisions in comparison to today's law. The term of the Copyright was life time of the author plus seven years after the death of the author. However the total term of copyright cannot exceed the period of forty-two years. The government could grant a compulsory licence to publish a book if the owner of copyright, upon the death of the author, refused to allow its publication. Registration of Copyright with the Home Office was mandatory for enforcement of rights under the Act. This was the first phase.

The second phase was in 1914, when the Indian legislature under the British Raj enacted the Copyright Act of 1914. It was almost similar to the British Copyright Act of 1911. However the major change that was brought in this Act was the criminal sanction for infringement. The 1914 Act was constantly amended a number of times. Subsequently, India saw the third phase of its copyright law evolution in the introduction of the Indian Copyright Act, 1957 which was enacted in order to suit the provisions of the Berne Convention. This Act was enacted by Independent India and is the main Act by which we are governed till date.

## **A GLANCE OF COPYRIGHT LAW IN INDIA**

In India, the Copyright Act, 1957 (as amended up-to-date), the Rules made thereunder and the International Copyright Order, 1999 govern the facets of copyright, related rights and neighbouring rights. The Act was originally divided into 15 Chapters with 79 sections. Moreover, the Central Government by virtue of Sec. 78 of the Copyright Act is empowered to make rules by its notification in the Official Gazette for carrying out the purposes of this Act. The Copyright is granted and protected as per the provisions of the Act and there exists no common law right.<sup>1</sup> Under the Constitution of India, the matter of Copyright fall under Entry 49 of List-1<sup>2</sup> which is the Union list and it is a subject of Central law. Thus, the parliament has the exclusive right to frame laws on this subject. On the international plan, India is a part of the Berne Convention for Protection of Artistic and Literary Works (1886), the Universal Copyright Convention (1952) and the Agreement on Trade and Related Aspects of Intellectual Property Rights, (TRIPs). However, India has not ratified

<sup>1</sup> Manojah Cine Production Vs A. Sudarshan, AIR 1976 Mad 22.

<sup>2</sup> Schedule 7, List I Entry 49, Patent, Inventions and Design; Copyright, Trade-marks and Merchandise marks.

the WIPO Copyright Treaty 1996 and WIPO Performances and Phonogrammes Treaty 1996.<sup>3</sup>

## WHAT IS SOFTWARE PIRACY

Software is defined as a set of instructions which when incorporated in a machine readable form or in capable of causing a computer to perform a particular task. To put it simply, it is a series of commands which can be understood by the machine. There are three essential types of software which help to function the computer, micro code which is a programme which controls the details of execution, the operating system software which controls the sources of a computer and manages routine tasks and which is a necessary requirement for a computer to function; application software which is designed to perform a particular task. Piracy occurs when copyrighted software is made available to users to download without the express permission of the copyright owner. Such illegal software is offered over online sources such as online advertisements newsgroups bulletin board service and auction sites. Piracy hampers creativity, hinders the development of new software and local software industry and ultimately effects e-commerce. Piracy harms

consumers and has negative impact on local and national economy. Consumers run the risk of viruses and having corrupted and defective programs. According to Nasscom,<sup>4</sup> software piracy involves the use, reproduction or distribution without having received the expressed permission of the software author. Software piracy comes in four common forms. The first is end user piracy, and it occurs when users of software install the software on more machines than they are entitled to under their license agreements. The second is hard disk loading, and it occurs when computer dealers install illegal copies of software onto computers prior to their sale. The third is software counterfeiting, and it involves the illegal reproduction, and subsequent sale of software in a form that is nearly identical to the original product. The fourth is Internet piracy, and it occurs when individuals place unauthorized copies of software on the Internet for download.<sup>5</sup>

## IP PROTECTION OF SOFTWARE IN INDIA

<sup>4</sup> The National Association of Software and Service Companies

<sup>5</sup> Palanissamy Ayyappan, THE FUTURE OF COPYRIGHT IN INDIA – A Special reference to software piracy, its challenges and proposal for reform, 2011 International Conference on Software and Computer Applications IPCSIT vol.9 (2011) IACSIT Press, Singapore

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[http://shodhganga.inflibnet.ac.in/bitstream/10603/61938/11/11\\_chapter%204.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/61938/11/11_chapter%204.pdf)

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 percent. With in the global sourcing industry, India has been able to increase its market share from 51 percent in 2011 to 65 percent in 2016. The high growth rate is attributable to the service portion, virtually making the industry as 'software service 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 the mandate to formulate the National IT Policy.<sup>6</sup> IP laws have also been suitably amended. However, there is no specific law dealing exclusively with the computer software. 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 (later amended in 2008) accords legal recognition to digital signatures, electronics records and the frame work for the prevention of computer crimes, but does not deal with IP protection to computer software.

### **SOFTWARE PROTECTION UNDER THE COPYRIGHT REGIME**

Under the Copyright Act 1957, computer programmes are considered 'literary works' (Section 2(o)). 'Literary work' covers work, which is expressed in print or writing irrespective of the question of its literary merit or quality. It must be expressed in some material form, i.e., writing or print or in some form of notation or symbols, which means in a form capable of either visually or audibly recreating the representation of the original work. Although the Act defines a computer programme,<sup>7</sup> it does not differentiate between source code and object code and they are covered under the Act as the literal elements of computer programme. In addition, copyright law also protects the appropriate non-literal elements of computer programmes, i.e., their

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<sup>6</sup> <http://www.nasscom.in/indian-itbpo-industry>

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<sup>7</sup> Section 2(ffc) Copyright Act, 1957, computer programmes became protectable in 1984 under the Copyright Act.

overall structure or organization. Computer software includes many items like the programme manuals and papers, computer printouts, punch cards containing information in a particular notation, magnetic tapes, discs required for operation of computers or any perforated media or information storage device. Magnetic tapes and discs, including floppy disc containing information recorded by means of electronic impulses (as a form of writing in notation) may be considered as databases and are forms of literary work by definition. But the concept or idea of algorithms, frequently used in computer programming is not capable of copyright protection. However, Programmes devised for operating computers are accepted to be within the ambit of artistic and literary work and thus protectable.<sup>8</sup> Computer databases are protectable as literary work<sup>9</sup> even when they only involve ‘sweat-of-the-brow’ and no creativity or selection skills.<sup>10</sup> This is in contrast to US approach, as laid down in the *Fiest v Rural Telephone*,<sup>11</sup> where the US Supreme Court excluded the protection of white pages of

a telephone directory on the ground that copyright law only protects works involving creativity, judgement or skill but not labour. Further, programmes that are designed for operating computers are generally accepted as within the ambit of artistic and literary work. To qualify for protection as a ‘literary work’, however, a programme should be original.

The Indian courts in numerous cases have attributed the same meaning to ‘originality’ as under British law.<sup>12</sup> Originality for the purpose of copyright law relates to the expression of thought, not originality of ideas; and in the case of literary work, with the expression of thought in print or writing (in a concrete form). The degree of originality required for copyright protection is minimal; the emphasis is more on the labour, skill, judgement and capital expended in producing the work. To acquire a copyright, no formalities are required. It can be registered with the copyright office, but it is not mandatory. In the case of computer programmes, the law does not require the disclosure of source code and copyright for software can be registered without fully revealing the source code.

<sup>8</sup> Stewart S M, *International Copyright and Neighbouring Rights*, Vol 1 (Butterworths, USA), 1989

<sup>9</sup> *Sham Lal Paharia v Gaya Prasad*, AIR 1971 All. 182.

<sup>10</sup> *Govindan v Gopalakrishna*, AIR 1955 Mad. 391; *Burlington Home Shopping v Rajnish Chibber*, 61 (1996) Delhi Law Times, 6.

<sup>11</sup> *Fiest v Rural Telephone*, 499 US 340, 111 S Ct. 1282, 113 L. Ed 2d 358 (1991).

<sup>12</sup> *R G Anand v Delux Films*, AIR 1978 SC 1613.

## JUDICIAL VIEW ON SOFTWARE PIRACY<sup>13</sup>

Indian courts have presently come forward to acknowledge and compensate aggrieved parties when their IP rights are infringed. There are few cases decided by the courts by making precedents with respect to imposing a strict liability on the part of the infringers relating to software piracy.

In *Microsoft Corporation v Yogesh Popat CS*,<sup>14</sup> the Delhi High court took an extremely serious view of the defendants' infringing activities. The court relied on the principles adopted in various jurisdictions for assessing the quantum of damages and granted Rs. 1,975 million to the plaintiff by way of damages.

The court used this precedent in *Microsoft Corporation v Kamal Wahi*,<sup>15</sup> when it granted damages of Rs. 2.3 million in favour of the plaintiffs. This award of damages is highest ever in India's IP history. The issue of copyright infringement was considered by the Delhi High Court in *Microsoft Corporation v Deepak Rawal*

(2006).<sup>16</sup> In this case, the plaintiff, Microsoft Corporation, is a company under the laws of the state of Washington, United States. It has a global presence for business software such as Microsoft Windows and Microsoft Office, which is installed globally, including in India. The software developed and marketed by the plaintiff is classified as computer programs within the meaning of Section 2(ffc) of the US Copyright Act 1959; it is also covered by Section 2(o) of the same act as literary works. Although Microsoft's employees created these programs, under US copyright law Microsoft owns the copyright in these works. The copyrights are registered in the United States. Since India and the United States are both signatories to the UCC and the BC, Microsoft's works are protected in India under Section 40 of the Copyright Act 1957, read with the International Copyright Order 1999. As Microsoft owns the copyright in the software programs, it is thus entitled to all the exclusive rights this ownership entails, as set out by the copyright laws. Microsoft claimed that it had suffered incalculable damage to its IP rights and business as a result of various forms of copyright piracy. The court held that as Microsoft owns the registered trademark

<sup>13</sup> Palanissamy Ayyappan, THE FUTURE OF COPYRIGHT IN INDIA – A Special reference to software piracy, its challenges and proposal for reform, 2011 International Conference on Software and Computer Applications IPCSIT vol.9 (2011) IACSIT Press, Singapore

<sup>14</sup> O.S. No. 103/ 2003, Delhi High court, India.

<sup>15</sup> O.S. No. 817/ 2004, Delhi High court, India.

<sup>16</sup> (33) PTC 122(Delhi), 2006.



Microsoft, the defendant had no right to use this trademark and trade name in respect of related goods. Therefore, Microsoft successfully proved that the defendant had infringed its copyright in Microsoft Dos and Microsoft Windows, as it had not granted the defendant a licence for this purpose. In addition, the defendant also infringed the Microsoft trademark. In the course of its judgment, the Indian court discussed various other cases worldwide in which Microsoft had sued for piracy and counterfeiting, and cases in which the Indian courts had considered damages for infringement.

For example, in *Time Incorporated v Lokesh Srivastava*,<sup>17</sup> the court granted punitive and exemplary damages of Rs500,000 even though the defendant chose to remain *ex parte*. To meet the ever increasing challenges, as posed by the changed circumstances and latest technology, the existing law can be so interpreted that all facets of copyright are adequately covered. This can be achieved by applying the “purposive interpretation” technique, which requires the existing law to be interpreted in such a manner as justice is done in the fact and circumstances of the case. Though the courts were given enormous discretionary power to make

appropriate principles concerning protection of software, they are highly reluctant to exercise their powers to punish the violators of IP with award of damages. Among the judicial pronouncements made in the Indian courts concerning copyright infringements, majority were from the High court of Delhi which originated only from the year 2005. Although, these verdicts can be regarded as legal principles (*Stare decisis*) to be applied in future cases, which has the same effect as a legislative rule, it is highly persuasive for the other States High Courts. Though the country has such a sound and strong legal base for the protection of IPR, the judiciary should play an active role in the protection of these rights, including the copyright.

## CONCLUSION

The copyright laws of India are as good as those of many advanced countries where concern for copyright is at a high level. Punishments imposed for infringers are quite strict but the only problem is that it lacks enforcement. Laws can do little justice unless properly implemented. This includes police personnel, who can play a major role in combating piracy, are not fully aware of various provisions of the law. There is also a lack of adequate number of personnel who can fully devote to copyright

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<sup>17</sup> (3) PTC 3 (Delhi), 2005



crimes alone. The police are more concerned with usual law and order problems and copyright related crimes are attached least priority. The awareness level among end-users is also very low. Software piracy can be reduced effectively at a higher rate only if the enforcement and the procedure are made strong and the judiciary should be pro active.