

# Role of Copyright Laws: In ERA of Software Copyright Infringement

Khushbu Prasad<sup>1</sup> and Mauli Ranjan<sup>2</sup>

<sup>1</sup>Student, Amity University Uttar Pradesh, Lucknow

<sup>2</sup>Student, Poornima University Rajasthan, Jaipur

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**Abstract**—Intellectual Property rights refer to the property that is a creation of the mind: inventions, literary and aesthetic works, symbols, names, images, and designs used in trade and commerce. The terms piracy and theft are often associated with copyright infringement. Computer programs are protectable under copyright law; it is the form of intellectual property protection granted under Indian law, with such protections extending to the source code and object code, as well as applications and operating system programs. In the 20 years since the law became settled concerning the copyright ability of software, varying accessions and assessments have been flourished by the federal judiciary to determine when infringement of computer software has raised. The copyright violation of software or software piracy refers to practices which involve the unauthorized copying of computer software.

Section I of the paper explores the conceptual background and importance of Intellectual property Right. Section II explores the aspects of copyright and software privacy. Section III explains the effects of the legislative provisions with respect to Indian Copyright Act (ICA) and its compliance of international treaties and conventions concerning copyright law.

*“What is worth copying, is prima facie worth protecting”*

—Paterson J<sup>1</sup>

## Section I

Genesis of the Copyright Law: In the year of 1847, the first copyright law was enacted by the then Governor General of India. When Copyright Act of 1911 came into force in England, it automatically became applicable in India because of British Raj. The act was in force until after independence, when a new copyright act (Act of 1957) came into force in the Country in the year of 1958. Prior to the Act of 1957, the Law of Copyrights in the country was governed by the Copyright Act of 1914. This Act was essentially the extension of the British Copyright Act, 1911 to India. The copyright in India has travelled a long way since it was introduced during the British period. Thereafter the act has undergone through many amendments. In order to keep a pace with the contemporary technological developments, India's copyright legislation had

been amended from time to time, e.g. in 1983, 1984, 1994, 1999 and 2012 since its commencement in 1958.<sup>2</sup>

Introduction: Intellectual property rights (IPR) are the rights given to persons over the creations of their minds. They usually consign the creator an exclusive right over the use of his/her creation for a certain period of time. Intellectual property is prorated into two categories: Industrial Property comprises patents for inventions, trademarks, industrial designs and geographical indications. Copyright coverlays literary works (such as novels, poems and plays), films, music, artistic works (e.g., drawings, paintings, photographs and sculptures) and architectural design. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and broadcasters in their radio and television programs.

As we enter an era of unprecedented knowledge and cultural production and dissemination, we are demanded to reassess the fundamentals of copyright law and how it succors the needs of life, liberty and economy in the 21st century. The current study has a spotlight on software piracy. A computer can be the subject of a crime by being stolen or damaged; the instrument of a crime, such as when it is used to store information illegally. Other forms of computer criminality include the propagation of copyright infringement through software piracy, Internet fraud and marketing scams, identity theft, the creation and transmission of child pornography, and the compromise of network security by hackers. The U.S. is the country most affected, as they provide about 80% of the world's software.<sup>3</sup> Software counterfeiting is claimed to be a large problem by some, resulting in a revenue loss of US \$11-12 billion, China and Vietnam are the biggest offenders.<sup>4</sup>

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<sup>2</sup> Copyright Office, Government of India <http://copyright.gov.in/>

<sup>3</sup> “What is Software Piracy: The Piracy Problem”

<http://www.siiia.net/piracy/whatis.asp>

<sup>4</sup> [http://www.nationmaster.com/graph/cr/cr\\_sof\\_pir\\_rat-crime-software-piracy-rate](http://www.nationmaster.com/graph/cr/cr_sof_pir_rat-crime-software-piracy-rate)

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<sup>1</sup> University of London vs. University of Tutorial Process Ltd.  
1916(2) Ch 601.

## SECTION II

### Aspects of copyright and software privacy

Copyright piracy is a phenomenon prevalent throughout the world. The word “original” means that it should not be copied from other works or alternatively it should be the outcome of independent efforts, whereas unauthorized use or reproduction of another’s work, importing or dispense either whole or substantial part of work preserved by copyright are termed as “Piracy”. The framer of a copyrighted work, latch on to certain exclusive rights with respect to his/her conducts by the virtue of Section 14 of the Act. These rights can be bestowed only by the possessor of copyright or by any other person who is duly licensed in this regard by the possessor of copyright. These rights include the right of adaptation, right of publication, to make translations and communication to public, etc. If any person other than the copyright proprietor or his authorised party undertakes any of the above mentioned activities with respect to a copyrighted product, it amounts to infringement of the copyright. Copyright piracy is thus like any other theft which leads to loss to the owners of the property. There are different ways through which piracy takes place. The nature and extent of piracy also vary across the segments of the copyright industry.

**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 execute a particular task. Under the Copyright Act, 1957, computer<sup>5</sup> programmes<sup>6</sup> are considered “literary works”<sup>7</sup> [Section 2(o)]. Literary work covers work which is expressed in print or writing irrespective of the question of its literary merit and quality. According to Nasscom<sup>8</sup>, “the infringement of copyright in computer software simply means copying and distribution of computer programmes without the copyright holder’s permission.” The software industry, generally, consists of genesis and circulation of computer programmes. Piracy hampers creativity, hinders the development of new software and local software industry and ultimately effects e-commerce. Licensing is a routine practice in software industries. Piracy in software is more than in others because it is nearly easy to copy software in computers especially in PCs and for all practical purposes the pirated version looks and implements in an indistinguishable manner as the original. The five principal types of software piracy involve (1) counterfeiters (2) resellers (3) mail order houses (4) bulletin boards and (5) end-

user piracy. Counterfeiters are relatively new phenomenon in the software industry and most flagrant software counterfeiters produce disks, documentation and packaging that look very similar to those of the software publisher. 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 is associated with the illegal reproduction, and subsequent sale of software in a form that is nearly indistinguishable 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>9</sup>

## SECTION III

The Legislative provisions with respect to Indian Copyright Act (ICA) and its compliance with International treaties and Conventions concerning Copyright Law.

Intellectual Property Rights (IPRs) at a multilateral level have their genesis in the Paris Convention for the Protection of Industrial Property in 1883 which protected industrial property i.e. Patents and trademarks and the Berne Convention for the Protection of Literary and Artistic Works in 1886 for copyrights and related rights. World Intellectual Property Organization (WIPO) which began its work in 1967 taking over from the Bureau for the Protection of Intellectual Property that had been working since 1893, is the international agency under the United Nations that administers the work of these conventions. The WIPO administers many other international conventions on IPRs also. While the IPR Conventions and treaties create the international standards in protection of IPRs which are to be followed by the member countries, substantive trade related disciplines on IPRs under these international conventions have been adopted by reference into the WTO through the TRIPS Agreement. This means that the Agreement provides rules for trade and investment in ideas and creativity by incorporating standards laid down in certain exact provisions of the major IPR conventions. The WTO provides that “intellectual property” should be protected when trade is involved. Thus, through the TRIPS, the WTO makes it mandatory for all its member countries to follow basic minimum standards of IPR provided for under TRIPS and bring about a degree of harmonization of domestic laws in this field.<sup>10</sup>

<sup>5</sup> Per Section 2 (ffb) of the Copyright Act: “Computer includes any electronic or similar device having information processing capabilities.”

<sup>6</sup> Per Section 2 (ffc) of the Copyright Act: “Computer Programme means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing computer to perform a particular task or achieve a particular result.”

<sup>7</sup> Section 2(o) of the Copyright Act.

<sup>8</sup> The National Association of Software and Service Companies

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

<sup>10</sup> Trade Related Aspects of Intellectual Property Rights (TRIPS) <http://wtocentre.iift.ac.in/>

After the conclusion of the Uruguay Round of General Agreement on Tariffs & Trade (GATT), which led to the establishment of World Trade Organisation (WTO) in 1995, the issues relating to protection of intellectual property rights (IPRs) are increasing its importance worldwide. On the legislation front, copyright laws in India are comparable to those of many developed countries. The punishments for copyright violations had been made progressively more stringent. The present law is almost in full conformity with the Uruguay Round Agreement on Trade Related Intellectual Property Rights (TRIPs). Protection of copyright, therefore, is a priority matter within the national agenda of many countries especially from the developing world. Surely, it also has emerged as an important factor governing international relations.<sup>11</sup>

#### Protection and Compliance of International Instruments under Indian Law:

The immunity in reference to computer software is acquired out of two acts: Indian Copyright Act, 1957 and the Information Technology Act, 2000. Special status has been given to computer software as compared to other forms of copyrighted work in Indian Copyright Act, 1957. The Act considers the software as literary work and in addition to the general exclusive rights provided to other literary works. Punishment for tampering with the "source code" of a computer program is furnished under IT Act, 2000 but this protection appeals to the computer source code, which are need to be maintained by law for the time being in force. Hence, the protection provided by the IT Act is specifically for "source code" of computer programs of government agencies and not for private users. The situation with regard to copyright enforcement in India has been improved with the amendment of Copyright Act in 1994. The main reasons for amendments to the Copyright Act, 1957 include to bring the Act in conformity with WCT and WPPT; to protect the Music and Film Industry and address its concerns; to address the concerns of the physically disabled and to protect the interests of the author of any work; Incidental changes; to remove operational facilities; and enforcement of rights.<sup>12</sup>

Some of the important amendments to the Copyright Act in 2012 are extension of copyright protection in the digital environment such as penalties for circumvention of technological protection measures and rights management information, and liability of internet service provider and introduction of statutory licences for cover versions and broadcasting organizations; ensuring right to receive royalties for authors, and music composers, exclusive economic and moral rights to performers, equal membership rights in copyright societies for authors and other right owners and exception of copyrights for physically disabled to access any works.

The two Internet Treaties were negotiated in 1996 under the auspices of the World Intellectual Property Organization (WIPO). These treaties are called the 'WIPO Copyrights Treaty (WCT)' and the 'WIPO Performances and Phonograms Treaty (WPPT)'. These treaties were negotiated essentially to provide for protection of the rights of copyright holders, performers and producers of phonograms in the Internet and digital era. India is not a member of these treaties; amendments are being mooted to make Act in compliant with the above treaties in order to provide protection to copyright in the digital era. Though India is not a member of the WCT and the WPPT, the Copyright Act, 1957 is fully compliant with the Rome Convention provisions. The provisions of the Act is also in harmony with two other new WIPO treaties namely, the Beijing Audiovisual Performers treaty, 2012 and the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired or Otherwise Print Disabled Persons, 2013.<sup>13</sup>

The Copyright Rules, 2013 was notified on 14 March, 2013 replacing the old Copyright Rules, 1958. The Rules, inter alia, provide for procedure for relinquishment of Copyright; grant of compulsory licences in the matter of work withheld from public; to publish or republish works (in certain circumstances); to produce and publish a translation of a literary or dramatic work in any language; licence for benefit of disabled; grant statutory licence for cover versions; grant of statutory licence for broadcasting literary and musical works and sound recordings; registration of copyright societies and copyright registration.<sup>14</sup>

Section 64<sup>15</sup> provides that "Any police officer, not below the rank of a sub-inspector, may, if he is satisfied that an offence under Section 63 in respect of the infringement of copyright in any work has been, is being, or is likely to be, committed, seize without warrant, all copies of the work, wherever found, and all copies and plates used for the purpose of making infringing copies of the work, wherever found, and all copies and plates so seized shall, as soon as practicable, be produced before a magistrate."

The response of Indian Judiciary regarding the copyright protection, Indian courts have presently come forward to acknowledge and compensate aggrieved parties when their rights are violated. *Microsoft Corporation v Mr. Kiran & Another*<sup>16</sup> Microsoft Corporation instituted a suit for permanent injunction restraining the infringement of copyrights etc. against Mr. Kiran. Mr. Kiran was illegally loading Microsoft software on computers that his company was assembling and selling. A decree for permanent injunction was passed in favour of Microsoft against Mr. Kiran restraining him from using or otherwise copying, selling, offering for sale, distributing, issuing to the public,

<sup>11</sup> Id.

<sup>12</sup> Copyright Office, Government of India <http://copyright.gov.in/>

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Section 64 of the Indian Copyright Act, 1957

<sup>16</sup> C.S. (OS) 111/2003

counterfeit/unlicensed versions of Microsoft software, in any manner, amounting to infringement of Microsoft's copyrights in the said computer programs and related manuals. A decree of damages was also passed in favour of Microsoft for Rs. 5 lakh. In *Microsoft Corporation v Yogesh Popat CS<sup>17</sup>*, the Delhi High court took an extremely serious view of the defendants' infringing 105 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>18</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. These 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.

#### SECTION IV

##### Conclusion

The provisions of the abovementioned two enactments demonstrate that the Copyright protection Laws in India are strong and effective enough to take care of the Copyright of the concerned person. The on-line copyright issues are not protected under the aforesaid Act in clear and express term. Software piracy can be proclaimed as a need to protect the technological innovation from their illegitimate reproduction, which tends to be an important objective for copyright owners. Civil and criminal remedies are available to software program owner, the damages recovered through Courts are uncertain. Therefore, appropriate amendments are to be made in the Copyright Act to include provisions concerning statutory damages. Government established 'The Copyright Enforcement Advisory Council' for boosting the enforcement but it is inactive. Though the punishments imposed for infringers are quite strict but there is lack of enforcement. Laws can do little justice unless the statute is properly implemented.

Secondly, the principal issue is how to maintain equilibrium between availability of cultural works at affordable prices while assuring a dignified economic existence for creators and performers. There is an urgent need to reform the law where the government can avoid frustration in the mind of software owners with respect to damages available to them and which will for sure protect the interests and the efforts of many software companies. Thus, the existing Laws should be amended as per the requirement of the situation. Now, the situation is alarming, Government should take initiative to set up special courts to deal with intellectual property cases exclusively as existing in Malaysia since 2007.

To combat copyright piracy completely, the foremost industry to be considered would be colleges and universities in India

where the piracy rate is high. The next stage of research would be to conduct a study through a survey among students to analyse the incidence of the copyright piracy on the campuses, specifically in the form of software and music piracy and to propose a legal framework to curb piracy effectively.<sup>19</sup> But the law is scattered and vague on these issues, which need to develop this area more clearly.

<sup>17</sup> O.S. No. 103/ 2003, Delhi High court, India.

<sup>18</sup> O.S. No. 817/ 2004, Delhi High court, India.

<sup>19</sup> THE FUTURE OF COPYRIGHT IN INDIA – A Special reference to software piracy, its challenges and proposal for reform; Ayyappan Palanisamy; 2011 International Conference on Software and Computer Applications IPCSIT vol.9 (2011) © (2011) IACSIT Press, Singapore