



## Copyright in Digital Era

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### ABSTRACT

*The success of cybernetics revolution has also created various challenges for the intellectual property law. There is a growing concern on; what form of intellectual property should be used with reference to the computer and computer technology and does intellectual property law protect the subject of technology?. What is the crucial factor in identifying the scope of copyright within the realm of the Internet technology? The present paper will be focusing on the relationship between computer technology and copyright law and also highlight the peculiarity of computer technology and content of copyright law in general with reference to subject matter of copyright and relevance of the same for offering protection to unconventional form of subject matter of copyright such as computer technology.*

### Keywords : Copyright, Information Technology, Computer Programme

Law is a response to a challenges; the challenge can be social, economic or technological. Copyright law is no exception to this general rule. Copyright protection, like patent protection, exist on the theory that "the public benefits from the creative activities of authors, and that the copyright monopoly is a necessary condition for such creative activities". Copyright protects the expression of an idea and not the idea itself, provides that the expression constitute 'the fruits of intellectual labour', and it should not be copied from elsewhere. Under copyright laws of different jurisdictions the world over, software is considered as a literary work. Copyright subsist in original works that are capable of being reproduced from a fixed medium. Movies, musical compositions, painting and other creative expressions are protected by copyright. The copyright regime is oriented towards the protection of existing works, already accessible to the public, the existence of the protection making it possible to regulate by subsequent contracts the way the public can access these works. It is a well established principle that computer programs are copyrightable subject matter, just like any other literary work. Both the TRIPS Agreement, 1995 and WIPO Copyright Treaty (WCT), 1996 state that computer programs, both in source and object code must be protected by copyright. Copyright protection applied to software, would protect only the intellectual property embodied in the software as a mode of expression. Copyright is a bundle of rights, which entitle the owner to prevent copying of the protected work, to prevent the distribution of copies and to prevent preparation of derivative works. The present article will be focusing on copyrights protection to computer programs or software and the relationship between computer technology and copyright law.

#### History of Copyright Protection of Computer Software

WIPO started to consider the question of the legal protection of computer programs in the 1970s, and, first, the idea of working out a sui generis system emerged. The sui generis protection covered all three elements of computer programs: object code, source code and documentation. "Source code" is the original code of the computer program written in program languages which can be read and understood by human beings, particularly those who are specialized in this field; "object code" is a version of the program that is directly usable by a computer, in binary form – a series of "zeros" and "ones" – that computer processors may understand, but human beings cannot unless it is "decompiled", that is transformed into source code. However, the WIPO Model

Provisions on the Protection of Computer Programs which provided for a sui generis system were not followed by national legislators, and the idea began to prevail that copyright should be applied for the protection of computer programs. In February 1985, WIPO and UNESCO convened in Geneva a joint Group of Experts on the Copyright Aspects of the Protection of Computer Programs. At this meeting, on the basis of a thorough study and an animated debate, a breakthrough took place towards the recognition of computer programs.<sup>1</sup>

National laws which already contained provisions on the copyright protection of computer programs, in general, granted the same kind of protection as for other categories of works. It is another matter that they also included certain "genre-specific" provisions, such as special exceptions for the making of back-up copies or for "decompilation" of programs in order to create other, interoperable programs. There were, however, still some countries which, although they were ready to keep computer programs within the general copyright paradigm, wanted to apply a regime which were similar to the protection of the borderline category of works of applied arts/industrial designs (with shorter term of protection and with the possibility of applying material reciprocity). There were then two developments which completed, at the level of binding regional and international norms, what had been worked out at the WIPO forums in the form of a "soft law" model: first, the publication, in July 1991, of the Computer Programs Directive of the European Community and the adoption, in April 1994, of the TRIPS Agreement, both of which clarified that computer programs should be protected as literary works under of the Berne Convention.<sup>2</sup>

Article 10 of The TRIPS Agreement contains an interpretive provision stating that computer programs, whether in source or object code, shall be protected by the Berne Convention. Article 4 of the 1996 WIPO Copyright Treaty (WCT) includes the same clarification in very similar terms. There are very few voices today that argue against copyright protection of computer programs. Computer programs are not "merely" technical solutions, even if software developers are sometimes considered as "outsiders" by other, more traditional creators in the musical or literary fields. Indeed software itself is not just a technical result, but an author's creation which has a technical character. The only difference is the "active" nature of the computer program, meaning that it has technical (physical) effects in computer hardware during its operation. But this is

not a reason for the exclusion of software – as a creative, original expression – from copyright protection.<sup>3</sup>

### What is Copyright

The word “copyright” is derived from the expression “copier” of the words, first used in 1586. In the simplest terms copyright can be defined as an exclusive right to “copy” certain intellectual works created by a person.<sup>4</sup>

“Copyright” according to Black’s Law Dictionary, is the right in literary property as recognized and sanctioned by the positive law. An intangible incorporeal right granted to the author or originator of certain literary or artistic production, whereby he is invested for a specified period with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.<sup>5</sup>

The statutory definition of copyright is that, it is the exclusive right to do or authorize others to do certain acts in relation to;

- Literary, dramatic or musical works;
- Artistic works
- Cinematograph films; and
- Sound recording.

### Meaning and Definition of computer programme

According to Indian Copyright Act, 1957:

Sec 2(ffb) – “Computer” includes any electronic or similar device having information processing capabilities.<sup>6</sup>

Sec 2(ffc) – “Computer Programme”

“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 a computer to perform a particular task or achieve a particular result.

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### Copyright: The substance

Conventionally, copyright is a right to reproduce the work in which copyright subsists. Where the original work is created it acquires copyright and becomes the subject of protection under copyright law. “Copyright means” section 14 of the copyright Act 1957 provides as follows:

For the purposes of this Act, “copyright” means the exclusive right by virtue of and subject to the provisions of this Act:

In the case of a literary, dramatic or musical work, to do or authorise the doing of any of the following acts namely:

(a) In the case of a literary, dramatic or musical work, to do or authorise others to do the following acts namely:

- To reproduce the work in any material form
- To publish the work
- To perform the work in public
- To produce, reproduce, perform or any translation of the work
- To communicate the work to the public
- To make any adaptation of the work
- To do in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (1) to (6)<sup>8</sup>

### Understanding copyright in Information technology

Copyrights protect “original work of authorship”. Work includes Literary, dramatic, musical and artistic works cinematograph films and sound recordings. In the digital world, every web page accessible or published in the World Wide Web is to be taken as a literary “copyrightable” work. It protects

all written text materials, graphic images, designs, drawings, video files.

### Copyright protection to Computer Programme

The copyright Act protects Computer programs but it does not protect individual files or parts of a program just like protecting novel as literary work rather than each individual chapter of the novel. Copyright law protects computer program if it is satisfied with fundamental principles such as originality, expression and fixation of the work.

#### Originality:

like literary work, Computer program attracts copyright protection only if it is original. The Act does not define the word “originality”. To determine this question, Indian courts borrow the principles from English case laws. Ironically, there is no definition of originality in the English law as well and English court resort to European Copyright Directive. This lack of definition of the concept of originality in the copyright law makes difficult to determine infringement of computer programs.<sup>9</sup>

#### Expression:

The fundamental principle of copyright law is that copyright only protects expression and does not protect ideas. What is an idea? What is the starting point to consider computer programme, is not known. In the famous “American Whelan Associates Inc. v. Taslow Dental Lab. In.”<sup>10</sup> The court held that the idea of computer program includes not only the code lines of the program but also its structure. However, a clear boundary between idea and expression is needed to be drawn especially to face the challenges posed by computer technology and computer software.<sup>11</sup>

#### Fixation:

Fixation the mode of recording computer program is the written draft version of the source code of a program. It is indeed reasonable to expect that many software developers would write the source code down and develop flow charts and other similar things while developing a new computer program. It is not required that the fixation of the work should have certain amount of permanency? The program exists in the Ram memory in the form of electrical currency and when the power is interrupted, the program disappears. As such fixation of the computer program constitutes a difficult problem.<sup>12</sup>

### Copyrightable works on the Internet

Since is the world’s largest repository of information, many copyright works are available on the Internet. Foremost and the most significant among them is the “Computer Software”. Besides this news stories, novels, screenplay, graphics, pictures, Usenet messages, the unique underlying design of web page and its content including links, original texts, graphics, audio, video, html, url, and unique markup language sequence, list of websites compiled by an individual or organization, even e-mails and all other unique elements that make up the original nature of the material are copyrightable on the internet. Therefore the reality is everything on the internet is protected by copyright law.<sup>13</sup>

### Copyright Infringement on Internet

Copyright is infringed when any person reproduced the work of another or publishes, communicates to the public, or performs the work in public, makes adaptations and translation of the work and doing of any of the acts in relation to a substantial part of the work. The requirement is that the reproduction, publication etc., should be done without the consent or license of the owner of such copyright. Materials available on the internet are subject to infringement when they are downloaded without the permission of its creator.<sup>14</sup>

As the technology is advancing, newer avenues are being opened for the infringers. The following are some of the new ways of infringements:

### Catching and Proxy Catching

Catching is storing of web pages in computers memory at

user level or server level .It is the service provided on which the website is stored on automatically .It makes a copy of it and holds it accessible for the user's computer where it is stored by the web browser software either in the RAM, the hard drive or any other storage facility. Proxy catching takes places where user's service provider might keep a copy of the site in order to provide fast access to that page for the next time to one of his clients who wishes to access this site. When the author's work, the web site ,is reproduced several times there may be infringing acts.<sup>15</sup>

### Providing links

HTTP (hyper text transfer protocol) as such facilitates linking of one web site with another without the knowledge or consent of the owner of the linked website. Linking raises questions whether the link provider is liable for copyright infringement or not? This issue was considered by the English courts in *Shetland times Ltd. v. Wills*<sup>16</sup>. In this case one of the two online news papers had provided a link (called hyperlink) to the many stories published in the other newspaper, without the consent of the proprietor of the latter newspaper. Therefore it became easy for the online newsreaders to read the stories in other website just by "clicking" on the mouse. Moreover the headlines and the links created were also the copy of the headlines in the website of another.

It was held that the "linking" alone does not constitute infringement. Regardless of any provisions of copyright law, there is no barrier to prevent the site owners permitting others to link to their materials. Regardless of whether sites are designed for academic, commercial or personal purposes, it will be a rare site developer who does not wish to receive "visitor".

There is an argument that the materials available on the net are in the public domain since the materials available on the net are in the public domain since the creator of such work posted that work to the Internet to make it available freely, to anyone without restriction. But this argument cannot be regarded as correct as to download or to reproduce the material, one ought to obtain license (which should be in the written form) from the owner of such copyrighted material. Therefore it can be stated that unregulated copying on the internet amounts to copyright infringement. In *LFG, LCC v. Zapata Corp.*<sup>17</sup> the defendant registered domain name zapte.com for carrying on business over the internet. The plaintiff is providing financial service under the service mark Zap futures. The defendant's web site is having three hyperlinks, which could connect users to other financial service website including that of plaintiff and his competitors. The plaintiff objected this hyperlink on the ground that wrong impression is created in the minds of the public because they may associate him with his competitors.

In *Washington Post Co. v. Total News Inc.* Total news<sup>18</sup> operated a website providing links to web-sites of many news purveyors including the Washington Post, Time Cable News Network (CNN), times Mirror, Dow Jones and Reuters. By clicking on the links, the web-sites of these news purveyors were displayed in the frame of Total News. The frame contained the 'Total News' logo Total News URL and advertisements managed by Total News. The claimants brought an action against the defendant alleging copyright infringement and they got succeeded.

Once the unauthorized copyright material has been uploaded and made available, the next possible thing is that Internet users will download it from the internet. There is little doubt that users are liable for downloading such material without the authority of the copyright owners. However copyright owners are reluctant to bring actions against millions of individual infringers. Much of the attention has been paid to the possibility of holding liable those parties who provide the equipment or facilities used for infringing activities.<sup>19</sup>

### Fair use and Abuse

Copyright law tolerates some of the acts which otherwise amount to "abuse" of copyright of the authors. This system is provided to enable the reproduction /use of the copyrighted works for certain public purposes, for the private study and research and promotion of education. A lengthy list has been provided under S.52 of the Copyright (Amendment), Act 1999, which enumerates the making of copies or adaptation of the computer programme from a personally –legally obtained copy for the non –commercial personal use does not result in the infringement.<sup>20</sup>

### Conclusion

Copyright in the Internet has been provoking the legal fraternity to come out with the sophisticated legal measures to tackle the problems posed by the internet. In India, the copyright Act, 2000 and the Information Technology Act, 2000 deals with the problem of copyright in the Internet. However, there arises a question, whether the IT Law protects the copyrighted work on the Internet? The present copyright law also does not address this issue. In US, there is Digital Millennium Copyright Act, 1998 that identifies the piracy of copyright on the Internet and compensates the economic loss of the owner of such work. In view of this, if the piracy has to be controlled effectively through the copyright law, so as to enable enforcing agency to prevent the infringement of copyright on the internet. The guidelines under the WIPO Internet Treaties and WIPO Copyright Treaty 1996 may be utilized as a source for strengthening the present copyright law.

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