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ABOUT US

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COPYRIGHT PROTECTION AND INFORMATION TECHNOLOGY: AN INDIAN PERSPECTIVE

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INTRODUCTION:

“Property means the highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattels which does not depend on another’s courtesy; it includes ownership, estates and interests in corporeal things, and also rights such as trademarks, copyrights, patents and even rights in personam capable of transfer or transmission such as debts, and signifies a beneficial right to or a thing considered as having a money value, especially with transfer of succession and to their capacity of being injured”.²

The modern IPR now provides a range of distinct legal platforms for the protection of the fruits of human creativity that span from innovation in technical fields, products, services, literary art works, performance, computer programs, etc. It should be appreciated that each of these instruments is governed by a set of laws with frameworks that offer varying degrees of protection, rights, obligations, enforcement procedures, etc.³ One such right is the Copyright under the Intellectual rights. Copyright is a right given against the copying of defined types of cultural, informational and entertainment productions. Traditional histories of copyright provide adequate descriptions of the origin and evolution of copyright but lack explanation for its emergencies and functions. Different cultural attitudes, social organization and legal conceptions may explain why copyright in essence emerged as an outgrowth of the privatization of government censorship in 16th century in England, and the recent arrival of the printing press was if anything energizing to writers⁴.

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² R.C.Cooper v. Union of India, (1970) 1 SCC 248.

³ Prabuddha Ganguli, “Intellectual Property Rights: Unleashing the Knowledge Economy”, Tata McGraw Hill Education Private Ltd., 1st edn, 2001, pp.30-32.

⁴ Dr.Fareed ahmad Rafiqi, “Copyright Protection- An Indian Perspective”, Law Publishers (India) Pvt. Ltd., 1st edn, 2013, p.3.

In the 21st century, there have been significant developments in the way, digital entertainment technologies have been deployed towards improving our lifestyles and the manner we look. From the mobile phones to digital multiplexes and from Direct to Home (DTH) broadcasting to digital visual effects the digital entertainment capabilities built over the years. Modern management of science and technology has established formal processes for innovations, value creation and sharing of knowledge within communities for its rapid realization in the market place. Enhanced diffusion of knowledge has aided the rate of growth of new ideas and applications. Formal frameworks has been set up to grant recognition to the innovator b protecting his innovations via instruments of Intellectual Property Rights (IPR) Rules, conditions for legal use of the protected innovations have been set up and deterrents established to discourage copying. The communication and dissemination resources available on the internet and the ease of extracting and using them lure man online users to resort to the easy path of piracy. This trend of piracy may increase in the present era of Internet technology though Copyright law protects material sent over the Internet or stored on web servers in the same way, the material is protected in other media.

After the advent of Internet most of the corporate Intellectual Property is held in the digital form as it provides affordable access of all the IPR resources to the public at large. However, Internet has also made infringement of IPR, in particular coping of copyright material easy and simple. In the course of this epoch making generation, the world has witnessed the growing importance of affairs relating to the computer. The most essential feature of the computer is that it accumulates comprehensive data of both general and confidential nature, which can be viewed through the Internet from a country across the world. The Internet has now been universally accepted and acknowledged as a medium of knowledge, business and communication and it is now the preferred mode of interstate correspondence. The developments in this particular field have led to an increase in the standard of living and prosperity of the national and international society.

FUSION OF INTELLECTUAL PROPERTY AND INFORMATION TECHNOLOGY:

Intellectual property per se has always existed, but it was recognized only after people came to know its importance. With the advent of Information Technology in particular, people started realizing the significance of protecting the different aspects of information generally recognized as intellectual property in computers. Intellectual creativity is the result of combination of different ideas. Such combination of ideas has also led to the growth of Information Technology, which has

necessitated the protection of these technological aspects of human life. Copyrights and trademarks are the key issues of Intellectual property, which need to be tackled keeping in mind the technological progress of recent years. There has been a steady increase in matters related to copyright and trademark disputes in the field of computers. Every country is trying to resolve such disputes through its intellectual property law/law regime.

BASIC CONCEPT AND NATURE OF INTELLECTUAL PROPERTY:

Intellectual property is a business asset that offers a firm a competitive advantage over others. It very broadly includes the legal rights that result from intellectual activity in industrial, scientific, literary and artistic fields. Intellectual property has some features in common with personal property. It is described as property because it can be purchased, sold, mortgaged or licensed in a somewhat similar manner to personal property. However intellectual property is intangible in nature because of the difficult of identifying and defining its physical characteristics. Intellectual property is nevertheless something that can be owned and dealt with. Not only statutory forms of intellectual property but even common law forms have been recognized as producing form of property rights.⁵

The subject matter of intellectual property is very wide and includes literary and artistic works, films, computer programs inventions, designs and marks used by the traders for their goods and services. The Convention establishing the World Intellectual Property Organization (WIPO),⁶ concluded in Stockholm on Jul 14, 1967. Intellectual Property law is concerned with the legal rights associated with innovative and creative efforts or commercial reputation and goodwill. This law deals with creative ideas and expressions of the human mind that have commercial value and receive the legal protection of a property right. The major legal mechanisms for protecting intellectual property rights are copyright, patent and trademark statutes. Intellectual property rights enable owners to decide who may access and use their property and to protect it from unauthorized use. However every right has a reciprocal and associated duty. The various rights concerning intellectual property include the right to do certain things such as making copies of a

⁵ In the passing off case of *Leather Cloth Co. Ltd. v. American Leather Cloth*, 1861 L147.

⁶ WIPO is one of the 16 specialized agencies of the United Nation system. WIPO located in Geneva, Switzerland, was created in 1967 and is responsible for promoting the protection of Intellectual property throughout the world. It fulfills this responsibility by promoting cooperation among nations in intellectual property matters administering various unions and other treat organizations founded on multilateral treaties and creating modern laws for adoption by developing nations.

work of a copyright, adapting an artistic work for public display, manufacturing products with the patented machine or assigning the registered trademark for monetary benefit.⁷

GROWTH OF INTELLECTUAL PROPERTY IN COMPUTERS:

The world of Intellectual property prior to the invention of the computer was exhaustive and easily traceable. With the advent of computers and internet, the scope of intellectual property has increased in multiples. It is the field of the intellectual property which has made, in itself, a drastic change in emergence of computers. In every aspect of the Information Technology, we find some of the important features of Intellectual Property. In dealing with computers specifically, we find that computer programs are protected under the copyright of Intellectual Property. The evolution of World Wide Web, has led to the registration of a large number of domain names, which are a kind of trademark property. Trademarks and copyrights thus play a significant role in the world of computers and Internet. The various new software made by different software developers are also protected as patentable inventions. Thus we find that intellectual property is widely interwoven or interconnected with this new technology.⁸

SOFTWARE CONTRACTS:

Software contracts, like many other transactions, are governed by the common law principle as embodied in the Indian Contract Act⁹. Contract can be in the nature of Sale or Assignment/ License. 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, 1930 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.¹⁰

In *Tata Consultancy Services v. State of Andhra Pradesh*¹¹, the Supreme Court had considered that the Computer Software was an Intellectual Property, whether it is conveyed in diskettes,

⁷ Hohfeld, W.N., "Fundamental legal conceptions as applied in Judicial Reasoning", Lord of Hampstead, 4th edn. 1979, pp.260-266.

⁸ Pankaj Jain and Pande Sangeet Rai, "Copyright and Trademark Laws", Manav Law House, 1st edn. 2005, pp. 5-7.

⁹ V.T Thomas v. Malaya Manorama, AIR 1988 Ker 291.

¹⁰ <https://www.mondaq.com/india/copyright/262564/copyright-protection-for-computer-software-an-indian-prospective>, last visited on 30.11.22.

¹¹ *Tata Consultancy Services v. State of Andhra Pradesh*, 271 ITR 401 (2004)

floppy, magnetic tapes or CD ROMs, whether canned (Shrink-wrapped) or uncanned (customized), whether it comes as part of computer or independently, whether it is branded or unbranded, tangible or intangible; it 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 regards to (a) its ability; (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.'

COPYRIGHT:

With new technology and an increase in the importance of Intellectual Property, it is necessary to know more about copyright, computer programs and computer softwares, computer databases, and various programs in cyber space. Several countries have modified their existing copyright law and included computer programs within its definition of literary works. Many have assumed computer software to be in writing and have thus protected them under the umbrella of copyright. In computer software, ideas are expressed in the form of writing and broadly speaking, writing includes any form of notation or code, regardless of the method by which, and it is expressed. Apart from computer programs and computer databases, there may also exist other literary and musical or artistic works on the internet that can be protected under copyright. Copyright in computers mainly gives two forms of rights:

- i. The economic right i.e. the right to control the copying of ideas expressed through computers.
- ii. The moral right i.e. the right to commercially exploit one's own ideas expressed through computers.

A copyright is an intangible property right granted to an owner of a literary, dramatic or artistic production of a specified type. This specified type may include works like books, records, films art works, architecture, music videos, scripts and computer software. The two basic and important things in copyright are that the work is not copied and is the original work of the author. Copyright is a right, which a person acquires in a work, as a result of his intellectual labour.¹² Copyright safeguards specific expressions of ideas and notions. The primary function of copyright law is to protect from annexation by other people the fruits of a man's work, labour, skill or taste.

¹² Satsang v. Kiron C. Mukhopadhyaya, AIR 1972 Cal 533 at p.537.

RIGHTS CONFERRED BY COPYRIGHT FOR COMPUTER PROGRAMS:

Copyright is a collection of various rights. According to the Indian Copyright Act, 1957, different rights have been granted to owners of copyright depending upon the nature of work. The owner of a dramatic work possesses certain specified rights. Likewise owner of a literary work possess certain other specified rights mentioned in the Act. Computer program is included in the definition of literary work. However, depending upon the additional features of this new type of literary work, certain additional rights have also been enumerated in the Act. The owner of a copyrighted computer program thus has the following rights under Indian Copyright Act, 1957. Section 14 of the Copyright Act, 1957 provides that¹³:

For the purpose of this Act, “Copyright means the exclusive right subject to the provisions to do or authorize the doing of an of the following acts in respect of the work or an substantial work thereof”¹⁴, namely,

Thus the owner of the computer program in India has the following rights¹⁵:

COPYRIGHT AND INTERNET: A LEGAL PARADIGM:

A significant development of seminal importance took place in early 1970’s when FTP the (File Transfer Protocol) was reacted in 1973 which made the transfer of files possible between network of military and academic computers. The second major success took place only a year later in 1974 when TCP/IP (Transmission Control Protocol / Internet Protocol) was developed. It provided a guaranteed transfer of data between two computers. Millions of people around the world have downloaded P2P software and are increasingly using them to exchange music, movie and software

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- ¹³ a. In the case of literary, dramatic or musical work not being a counter program-
- i. To reproduce the work in a material form including the storing of it in an medium by electronic means,
 - ii. To issue copies of the wok 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 an cinematographic film or sound recording in respect of the work,
 - v. To make any translation of the work,
 - vi. To make an adaption of the work,
 - a. In the case of the computer program-
 - a. To do any of the acts specified in clause a,
 - b. To sell or give on hire, or offer for sale or hire any of the computer program, regardless of whether such copy has been sold or given on hire on earlier occasions.

¹⁴ Section 14 of the Indian Copyright Act, 1957.

¹⁵ Reproduction right, Right to issue in public, Public performance or public communication right, Right to make a cinematographic film or sound recording’, Translation right, Adaptation right, Right to do in relation to a translation or an adaptation of the work of any of the acts specified above and, Right to sell or give on hire, or offer for sale or hire any copy of the computer program.

files. Service providers have direct access to Internet and any system holder can have access to internet only via direct link holder.¹⁶ The position in India is shallow due to a dearth of case law rendered by either the Supreme Court or the High Court even after two decades of inclusion of the provisions relating to computer programs under the Copyright Act. However there are few decisions delivered by courts with reference to determining non-literal infringement in other classes of works. In *R.G.Anand v. Deluxe films and Ors*,¹⁷

DOCTRINE OF PASSING OFF ACTION:

Passing off is a form of tort and is based on the common law principle that one should not pass off his goods as that of another. According to Halsbury, “nobody has any right to represent his goods as the goods of somebody else”.¹⁸ The object of this law is to protect the reputation and goodwill of the business from being encroached upon by dishonest competitors and safeguard the public from deception by providing a right of action against anyone who tries to pass off his goods or services as those of someone else. It is based on the general preposition that no man may pass off his good as those of another.

Essentials of passing off action:

Lord Diplock described the essential elements for passing off action as:

1. Misrepresentation.
2. Made by a trader in the course of trade.
3. To prospective customers of his or ultimate consumer of goods or services supplied by him.
4. Which is calculated to injure the business or goodwill of another trader,
5. Which causes actual damage to a business or goodwill of the trader by whom action is brought or will probably do so,¹⁹

Subsequently, Lord Oliver in *Reckitt & Coleman v. Borden*,²⁰ redefined Lord Diplock’s ingredients for passing off action in a concise and much more precise manner. According to him, for an action of passing off,

¹⁶ Internet access provider refers to a consortium that provides high speed access to the internet to business, universities, non-profit organizations and individuals. Most ISPs offer a range of connection option, ranging from dial-up modem connection to high speed ISDN and ADSL. It also provides email, Use-net and web hosting facilities. Bran Pfaffenberger, *Webster’s New World, Computer Dictionary*, 9th edn. (2004) at 203.

¹⁷ The existence of copyright in non-literal element has been decided in affirmative in relation to other category of works, the fact of the dispute related to the violation of the copyright in the play staged by the appellants by the screening of the cinematographic film based on the same theme.

¹⁸ *Reddaway v. Banham*, (1896) AC 199 at p.304.

¹⁹ *Erven Warnink Besloten Vennootschap v. J.Townend & Sons (Hull) Ltd*, (1979) AC 731.

²⁰ *Corby Ltd v. Wards Mobility Services Ltd*, (1991) FSR 169.

1. The claimant must establish goodwill,
2. The claimant must establish a misrepresentation as to the goods or services offered by the Defendants,
3. The claimant must show damage or likely damage to the claimant's goodwill. In many cases, the court subsequently started applying the three main ingredients laid down by Lord Oliver for determining the criteria for a passing of action.²¹

Computer programs which are commercially distributed in object codes (machine-readable form) contain ideas embodied in the program. Generally to maximize the profitability and gain monopoly, a programmer may not be willing to part with such valuable ideas by which he could ensure that a substitute or better product is not available in the market. Thus, programmers seeking copyright protection must not be allowed to keep the information in secret, as it will destroy the delicate balance underlying the copyright law. In this regard, the Indian Copyright Act, 1957 provides for certain important provisions expressly permitting reverse engineering within a defined ambit.²² Even while the Indian Copyright Act, 1957 afforded protection to computer programs back in 1980, extensive amendments to the Act were made in 1994, which were aimed to provide some concrete form of copyright protection to computer programs considering initial phases of development in the Indian software industry. The 1999 Amendment provides for the following:²³

Further, the provisions relating to the Internet Service Providers are specifically legislated in the Information Technology Act, 2000.²⁴ In 2005, Telecom Regulatory Authority of India (TRAI) had set up a target of 6 million internet subscribers and as many broadband subscribers, whereas the actual user base achieved was 5.55 billion.²⁵ The issue of online copyright infringement liability for ISPs has been increased since the use of the Internet started to expand rapidly in the early

²¹ Dechem Ltd. v. Cadbury (India) Ltd., 2000, 5 SCC 573.

²² Sec. 52 (1) of the Copyright Act, 1957.

²³ Section 52(1): 1. Doing of any act necessary to obtain information essential for operating interoperability of an independently created computer program with other programs by a lawful possessor of a computer program provided that such information is not otherwise readily available,
2. The observation, study or test of functioning of the computer program in order to determine the ideas and principles which underline an element of the program while programming such acts performed for the functions for which computer programs were supplied,
3. The making of copies or adaptation of the computer program from a personal legally obtained copy for non-commercial personal use.

²⁴ The term Internet Service Provider has been defined under section 79 of the Information Technology Act, 2000 as: "Network Service Provider" means an intermediary. An intermediary is defined with respect to a particular electronic message as a person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message.

²⁵ https://traai.gov.in/sites/default/files/ar_06_07.pdf, last visited on 23.11.2022.

1990s and has been the subject of extensive debates worldwide. Worldwide man nations have tried to define the liability of ISPs in disseminating third party content. Many of these laws relates to Criminal Law, Information Technology Law or Copyright Law. These statutes have tried to solve the problem by adopting either of the two approaches: horizontal approach and non-horizontal approach.²⁶

INFRINGEMENT OF COPYRIGHTED SOFTWARE:

Copyrighted Software is also otherwise known as Software Piracy. In simple terms, Software Piracy is a theft – i.e. stealing of someone’s original idea and product. In legal terms, it means reproduction, distribution or use of a software product without the permission of the Author²⁷. It is done in following manner:

- The right to store the work in any electric method or even reproduce the work.
- (i) **End User Privacy:** The company or individual users who have obtained license of installation of software for one’s computer, installs it on more computers under the license agreement. This is called ‘under licensing’ and it is becoming a grave concern to the Business Software Alliance (BSA). To avoid this, End User Licensing Agreements (EULA) are executed between the author and the purchaser of the software²⁸.
- (ii) **Hard Disk Loading:** Illegal pre-installation of software on to the computers by computer dealers prior to its sale or installation of legally acquired copy on more than one machine and such computers are usually sold without any form of licensing documentation.
- (iii) **Software Counterfeiting:** The illegal duplication and sale of software in a form that is almost identical to the genuine product.
- (iv) **Internet Piracy:** Here the software programs are placed on the internet for free downloads by third parties and also represented for its sale. This is the latest and fastest growing form of software piracy.

²⁶ See for US formulation: “[http:// en.wikipedia.org/wiki/ Digital Millennium Copyright Act.](http://en.wikipedia.org/wiki/Digital_Millennium_Copyright_Act.)”, last visited on 23.11.2022.

²⁷ <http://www.proind.in/blog/legal-protection-for-computer-software-in-india/> last visited on 28.11.22

²⁸ Ibid.

REMEDIES FOR INFRINGEMENT OF COPYRIGHT:

- 1. Temporary and Permanent Injunctions.
- 2. Monetary Damages caused along with infringers profit.
- 3. Statutory damages.
- 4. Impounding and destruction of all infringing copies, including masters.
- 5. Court Costs along with Attorney fees.

CONCLUSION:

With increase in competition and e-business in all aspects and all fields of economic growth, it is necessary for every software author to register copyright not only for his personal protection but also as to not hamper the economic growth of the country in any manner vide software piracy. It should be noted that the copyright only protects the expression, not the idea that lies behind it. This is the key difference between patent and copyright. Thus, taking the complexity of the patent protection in the view, copyright is the most conducive option in the current scenario to safeguard authors work's creativity. The copyright protection for computer programs is important if the product holds some considerable value or has the potential to transform human life. Thus, computer programs or software tools with their diverse aspects work as an important input in Information Technology with copyright dimensions. In short, protective immunity and insulation of online service providers from liability in the name of free flow of information is not feasible legally. The provision giving extra territorial jurisdiction is bound in Information Technology and specific legislations of other jurisdictions also. Obviously the need for such provision is driven by the borderless nature of the Internet. These provisions are, however, viable only if there is mutual co-operation amongst the enforcement authorities and Governments.²⁹

²⁹ Indira Carr, India joins the Cyber-race: Information Technology Act, 2000(2000) Int. T.L.R. 122 at p.123.