



COPY RIGHT PROTECTION OF COMPUTER PROGRAMMES IN INDIA

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Introduction

To understand the copyright protection of computer programs, it would be useful to know the basic technology and technical terms involved. In this paper software and computer programs / programs will be used interchangeably. A program, written by the programmer in higher level language which is in human readable form, i.e BASIC, FORTRAN and COBOL is called source code. The main function of the computer programs is to tell the processor what need to do and it must be in binary form. Therefore computer work in binary code (a series of 0's and 1's). A compiler is a computer program, which converts the source code into binary code. This binary code is readable by machine which is also called object code. A computer operating system is used to programme the computers. An application program must be loaded into the computer, to carry out specific function which inform the operating system what to do. An application program consists of a number of routines or subroutines. Normally the programmer starts by creating a flow chart of the routine which creates the programs. Then these routines are translated into source code. Consumers of computer software cannot normally access to the source code ¹, because the source code, is protectable by copy right law, to the extent it is original expression under literary work whereas object code that basically runs on the computer is considered as simple part of a machine, particularly when stored in ROM. Hence computer programs are regarded as intellectual property that is why both source code and object code, operating system, application software are protected as literary work ² under the copyright act, 1957 which grants the protection to original expression but not the idea.

History of Copyright Law

The copyright protection emerged with the invention of printing in Britain because it made possible for literary work to be copied by mechanical process rather of being duplicated by hand.³ thereafter the United Kingdom a new trade of printing and book sellers called stationers came into existence. In order to protect 'stationers' against competition from the sales of unauthorized copies,

The pressure grew and kings granted certain privileges which gave the beneficiaries exclusive rights of reproduction and distribution for limited period with the remedies available for enforcement by means of

fine, seizure of infringing copies and possible damages.⁴ In this paper we will limit ourselves to brief origins of copyright which shaped the current law. History of copyright can be traced back to the 1710 statute of Anne.⁵ The statute was described as “an act for the encouragement of learning by vesting the copies of printed books in the authors or purchaser of such copies. The statute also allowed the importation of books in foreign languages. Thereafter copyright took different dimension when publisher” tries to promote that the basis of the copyright is the natural right of author and the agent of the author those rights assign to the publishers.⁶ the court held that in the case of **Donaldson v. Beckett**⁷ that author had a common law right in their unpublished works but on publication that right was regulated by the statute. This common right in unpublished works was abolished in the copyright act, 1911. In 1911 Act gave protection on a numbers of works whether published or not and including works of architecture, sound recording and films. In most cases protection was provided for 50 years after the death of the author of the work. The concept of copyright was firstly introduced in 1847 by Governor- General of India as an enactment during the regime of East India Company.⁸ Then Copyright Act 1911 was made applicable to all the British Empire and its colonies including India. In 1914, the Indian Copyright Act was enacted which modified some of the provisions of the copyright act 1911 and added some new provisions to it to make it applicable in India.⁹ this Act remained applicable in India until it was replaced by the copyright act, 1957 after the independence of the country¹⁰ and since then this act has been amended six times till now. The list of amended act is under:-

- The Copyright (Amendment)Act, 1983.
- The Copyright (Amendment)Act, 1984
- The Copyright (Amendment)Act, 1992
- The Copyright (Amendment)Act,1994
- The Copyright (Amendment)Act,1999
- The Copyright (Amendment)Act,2012¹¹

Copyright Protection in India

The Copyright Act 1957 was amended in 1999 to make it compatible with the provisions of TRIPS. Computer programs are protected as literary work which includes computer programs, tables and compilations including computer databases.¹² the act defines “computer” which includes any electronic or similar device having information processing capabilities¹³ and whereas “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.¹⁴ the grounds of protection as a literary work is that the work must be original and it should not be copied from another work of author. Copyright subsists in a computer program provided sufficient effort or skill has been spent to give it a new and original character.¹⁵ Apart from the concept of originality a computer program has the requirement of the first publication as stated in the Act. The work must be first published in India and if it is published outside India, then the author should be a citizen of India at the time of

publication. As regards unpublished work, the author should be a citizen of India or domiciled in India at the time of making of the work. The Government of India passed the international Copyright Order, 1999 whereby any work first published in any country which is member of the Berne Convention or the Universal Copyright Convention will be accorded the same treatment as if it was first published in India.¹⁶ the term of protection of computer software is life time + 60 years. The 60 year period is counted from the year following the death of the author.¹⁷ However, the registration of copyright is not compulsory in India but registration offers better protection to the author in case of infringement of copyright,¹⁸

- **Author's Rights in Case of a computer Programme**

A copyright grants protection to the creator for the works and prevents such works from being copied or reproduced without their consent. The author has the exclusive right to do or authorize to do any of the following acts in the case of a computer programme:

- (1) To reproduce the work in any material from including the storing of it in any medium by electronic means;
- (2) To issue copies of the work to the public not being copies already in circulation.
- (3) To perform the work in public, or communicate it to the public
- (4) To make any cinematography film or sound recording in respect of the work;
- (5) To make any translation of the work;
- (6) To make any adaptation of the work;
- (7) To do, in relation to a translation or an adaptation of the work any of the acts specified in relation to the work in the above;
- (8) To sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer program.

Provided that, such commercial renting does not apply to computer programs where the programme itself is not the essential object of the rental.¹⁹ to do any of the above acts related to the computer program or to use it, a license is required from its owner. Any person is liable to infringement of copyright law who knowingly using an infringing copy of a computer program.

- **Certain Acts do not Constitute Infringement**

In order to comply with the provision of the TRIPS, the act has made clear that the following acts do not constitute infringement of copyright in computer program:

- (a) Making copies or adaptation of a computer program by a lawful possessor of a copy of such computer program from such copy.
 1. In order to utilize the program for the purpose for which it was supplied or
 2. To make back-up copies purely as a temporary protection against the loss, destruction or damage in order to utilize the program for the purpose for which it was supplied.²⁰

- (b) Doing 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.²¹
- (c) Observation, study or test of functioning of the computer program in order to determine the ideas and principles which underline any elements of the program while performing such acts necessary for which the computer program was supplied.²²
- (d) Making copies or adaptation of the computer program from a personally legally obtained copy for non-commercial personal use.²³

Therefore, if someone uses the computer software in accordance with or for the above stated purposes, it will not amount to infringement, so this part of the section of the act is an exception to infringement.

- **Remedies Available in case of Infringement**

Section 51 defines infringement of copyright and states that a person infringes copyright of another if he does unauthorized act which only the copyright owner has exclusive rights to do. There are civil remedies available to copyright infringements such as injunction damages, account of profit and damage for conversion which are mentioned in chapter XII of Copyright Act, 1957. Whereas, criminal liability provisions are provided in chapter XIII of Copyright Act, 1957 such as knowing use of infringing copy of computer programme to be an offence and punishable with imprisonment for not less than seven days extendable up to three years and a fine not less than Rs. 50,000/- which may extend to Rs. 2 Lakh rupees.²⁴

- **International Position**

There are no such things as “international copyright” that will itself protect an author’s right everywhere in the entire world. Instead most countries have their own copyright law, which are not applicable outside of their borders. It depends on the national laws and rules of the country to provide the copyright protection against any infringement of such work.²⁵ A Computer program can be protected under two regimes, for example, copyright and patent. At international level copyright is developed under the Berne Convention for the Protection of literary and Artistic Works (“Berne Convention”), whereas under the Paris Convention rights are developed for the protection of Industrial property (“Paris Convention”).²⁶ in this article there is no concern about the patent law so its aim is to discuss copyright protection of computer programs.

- **Trade Related Aspects of Intellectual Property Rights (TRIPS)**

The TRIPS agreement, through the appropriate enforcement and resolution machinery, provided protection of intellectual rights and specifically, computer programs. It is expressly provided in Article 10(1) of the TRIPS agreement is that: “Computer Program, whether in source or object code, shall be protected as literary work under the Berne Convention of 1971.”

The TRIPS agreement effectively placed computer programs on the library shelf adjacent to books and other literature. However, the member countries have a right to provide more extensive protection of intellectual property rights within their national legal framework.²⁷

- **Berne Convention**

In the Berne Convention the owners of copyright have exclusive rights to reproduce translate, adapt, communicate and perform publicly their work, although computer software is a new creation and thus it is not much developed by the Berne Convention. Article 2(7) of the Berne Convention makes the protection of works of applied art dependent on domestic legislation. The terms of protection may be applicable accordingly with respect to different countries. Copyright law is developed on a national basis. Therefore, works such as computer programs that exhibit under the ambit of work of applied art.²⁸

- **Universal Copyright Convention**

Under the UCC's national treatment provisions, software created by a U.S. author or first published in the U.S. are protected in other UCC member countries to the extent that the member's county's copyright laws protect software. The UCC provided that any member country that requires, as a condition of copyright protection, compliance with formalities (such as registration, deposit or notice) must treat such formalities as satisfied if all published copies of a work bear the symbol ©, the name of the copyright protection proprietor and the year of first publication. This provision applies, however, only to works that (i) were first published outside the country requiring the observance of the formalities, and (ii) were not authored by one of that country's nationals. India being a member to the UCC, authors of software in US will get protection in India also as per the terms and conditions laid down in the Indian Copyright Law.²⁹

- **World Intellectual Property Organization (WIPO)**

In 1996, two copyright treaties were negotiated under the umbrella of WIPO. These treaties are: WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonogram Treaty (WPPT). The WCT of 1996 is a special agreement under the Berne Convention which deals with the protection of the rights of the authors in the digital environment. This treaty makes explicit that computer programs are protected as literary works under Berne convention and states that compilations of data for which the contents are sufficiently original are protected as compilations.³⁰

Conclusion

The copyright has travelled a long journey since the emergence of printing press and from the passing of the statute of Anne, the copyright act 1911, 1914 till the copyright Act, 1957. This great journey has seen many changes such as the advancement of technology. About a century ago, Paterson J said, 'what is the worth copying is prima facie worth protecting'. This is the route of all intellectual property rights, that's the reason with the passing of time the subject matter of copyright has gradually increasing. The Indian Copyright Act has been amended several times in order to keep pace with the changing needs of the society. In past there was not much awareness about the copyright protection but now people has more knowledge about the copyright protection of the creative work. There are many economic rights provided to the author and in case of infringement the owner of the computer program have civil and criminal remedies available to them. The area of technology is vulnerable hence it requires more attention. Either we can extend and use technology or other things in computer programs and can be made so difficult so that it should become tough to engage in piracy. National law can be according to the needs of the individual country but uniformity for international matters is necessary.

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