

# Pirating in Lacuna

D. S. Madhumitha

B.com LLB (Hons), Tamil Nadu National Law University, Tiruchirapalli., India

Email: madhumithads865@gmail.com

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## Abstract

With development of industries and a welcome to the era of globalization along with information technology, many software companies came into being. Tech and tech experts made it easier to pirate the software of the producers. Problems to the customer as well as to the content owner are present. One of major lacunas is the Judiciary being indecisive with the adamant growth of digital world as to the punishment and the reduction of crime, no separate laws by the legislators to protect the software piracy as a distinct crime. Lack of enforcement mechanism by the executive and administrative bodies leads to the increase of piracy in software.

## Keywords

Software, Law, Piracy, Judiciary, Punishment

## 1. Introduction

Software piracy is a theft by both direct and indirect means such as use of software, copying or distribution of software by illegal means. It is such profitable business that causes heavy losses for the publishers of the software, the result is the inflation in price for the consumer. There are other means of pirating, soft lifting, client server overuse, hard-disk loading, counterfeiting, online piracy. The problem is not only national but transnational, with the usage of internet anything is possible. The violation of the law can be considered as criminal or civil violation.

A tremendous growth is witnessed along with the change in the digital platform. One of the problems that it brought is the intellectual property rights protection. Indian Copyright Act, 1957 protects the software piracy in India under the literary works. It is still unknown as to how to stop the pirating works by the software copyright owners. On the other aspect on why it is pirated is due to non-affordable prices, the core issue is how to avail the balance between econ-

omy of the copyright owners to the price inflations. The damages which are got in case of violation of the copyright of the owner are uncertain and differ from cases. Punishment is meagre which is 7 days - 3 years. No certain statutory damage is provided. The enforcement mechanism in India also varies from state to state. Even though there exists an advisory council for enforcement, it lacks the administrative capacity.

The project will deal with the advent of growth of digital technology in India as the introductory part, followed by online software piracy in India, the history and evolution of piracy, organisations in India for software piracy as well as any international instruments protection to software piracy, following will be how the software piracy is protected in India through statutes, precedents, and executive bodies. An understanding of Judicial approach is made in case of any action taken against piracy. Upon understanding the concept, the solution and critical analysis will be given in the latter stage of conclusion and implications.

**Research Questions:**

- 1) Whether growth of digital technology has a massive impact in software industry?
- 2) Whether the aspect of non affordable prices affects the piracy issue at hand?
- 3) Whether there are any protection mechanisms or instruments protecting both the rights of the consumers and producers in India as well as International Instruments?

### **1.1. Software**

Software is a collection of data which instructs a computer on its functions, it is in a language in which the computer can be operated by and the programmer understands it. It is instructions set out by the computer through the software to achieve the result as desired by the programmer. There are three types of software: 1) System software which aids computers to run its hardware system 2) Application software which provides as a mechanism and air to computation 3) Programming software, it gives tools by which an assistance is provided to the programmer to use different programming languages in writing computer programs (Palanissamy, 2011).

Software is available to the customers in four different types: by pay ware where a payment is required before downloading or usage of the program but it is without any restrictions that the software can be used.

Next is Shareware, where there is limitation to the usage of software unless purchased, it limits the program features as well.

Freeware is open source software which can be used by all, for free. Open source is yet another type where it is available at free of cost and the only difference between the free source is that there is source code provided and the software can be distributed under license (Khadka, 2015).

### **1.2. Software Piracy**

With the advent of technology and innovation taking place every minute, new

software is created by the hour. Techies developing the industry and the globalization into another era with invention of new things also invites the problems, issues in piracy. New era demands adapting law and legal system as per the circumstances but even with the legal protecting the copyright of a person, illegal activities such as distribution, copying happens often and it can't be stopped. It will happen until the revenue for the illegal pirating is high. One of the transnational problem that exist in the world is software piracy going into the 21<sup>st</sup> century.

Software piracy is the illegal copying, distribution, downloading, or even installing of the software. It has caused major problems for the content owners as well as for the companies which distributes the software (Vikram, 2017).

Though internet and technology has made our lives simpler and easier as the day progresses such tools can be used as a mechanism for committing a crime. Most of the companies give the single licensed user, which means that the software which is downloaded can be downloaded by only one user and cannot be used by another whether by transferring the software or selling in a pirated version. Regardless of the conventions and the law present in the country to protect the commercial purpose and the copyright of the company this issue cannot be eradicated by any amount of consideration, it will prevail to exist as the market mostly prefers free downloading of software (The Indian Express, 2011).

This research focus of the protection and the copyright aspect of software as well as in protection through law, the lacunas present in legal provisions.

### Online Software Piracy

With one click the world is in our hands, this is due to the advancement of technology and software with growth of internet. As much as internet and development of technology over time and communication over wide, it comes with its problems and conflicts. One of the problems is with intellectual property rights, copyright faces challenges in the technical and software field as it grows day to day (BBC News, 2010). Copyright law protects the literary, artistic, dramatic works which are original in nature. This also includes the software protection under literary works in India while US, Japan give patent right and protection to the software.

## 2. Current Scenario

Today the internet forums occupy much of the same social and technological space as what the BBS did, and the term BBS is often used to refer to any online forum or message board. The new millennium has made software piracy more common and usual occurrence with so many new developed programs like the peer-to-peer network, which is used for distributing large amounts of data without the heavy load on the source company or the network through the internet. Peer-to-peer technology connects individual computer users to each other directly, without a central point of management (Chaitanya et al.).

To access a P2P network, users download and install a P2P client application. Millions of individuals have P2P programs installed on their computers, ena-

bling them to search for files on computers and download the files they want including software, music, movies, and television programs. Popular P2P networks include BitTorrent, eDonkey, Gnutella, and FastTrack (Karpakavalli & Arunadevi, 2017). The first decade of the twenty first century faced an extensive technological advancement, which brings the same into the hands of common people. This development in the field of technology has assisted the expanded accessibility to high speed internet service that makes possible new avenues of content distribution, made the easy illegal reproduction of the copyrighted materials with little or no loss of quality and the wide distribution of such copies.

The latest technology permits the users to steal the software and teaches how to steal and how to crack it to make it workable. Search engines are the major tool available with the internet users to search the contents on the internet (Haj Fraj, 2015). In fact, it helps the internet users to find the site or way they wanted to proceed and indirectly helps the pirates to find out the place where the pirated software is available. The rise of the search engine technology makes the task of the pirates much easier than ever before, as it creates the list of the website where the pirated items are available for download. Before its arrival, the users of the internet had no any idea of where these materials are available, because it is difficult for the users to have any knowledge about the sites which has a particular pirated program.

It is not only technologies and its development which is urging the piracy but also the copyright software company themselves. One of the best examples, would be Microsoft in Windows office and Linux. When connected with internet windows can make the pirated software stop and even cancel the license, like by making updates not available etc., the actions of the pirates have merged with the interest of Microsoft to create a near monopoly in the operating systems market for the personal computer. Microsoft has admitted that piracy of its windows operating system has helped and gave it a huge market share in China that will boost its revenues, when these' users "go legit" (Nair et al., 1999).

## **2.1. 2015 Piracy Case in US**

Six people were involved in software piracy schemes to which they pleaded guilty in US. The software piracy included a worth of \$100 million worth illegal products having been sold to customers through internet (Economic Times, 2015).

There was about 170,000 access codes in stolen software which included the company Adobe Systems and Microsoft products. The key codes are used for getting the copyrighted version of software programmes.

Ross purchased around 30,159 product key codes along with the key cards to which he later admitted in the court, the purchase was made at a low price than what a licensed software user would buy. It was made to appear like the genuine products of Microsoft and adobe.

Annamalai who was also included one among the six pleaded guilty on July

29, 2015, to selling and distributing of the copyrighted software and his role. He is the owner and operator of Vegascart, LLC.

Annamalai the intermediary purchased almost 2569 product key codes belonging to Microsoft from Ross between March and December 2013. Every key code was \$250 each, by calculation the loss amount is estimated at \$642,250.

## 2.2. Intermediaries

Bill Gates in the year 2007 said, “It’s easier for our software to compete with Linux when there’s piracy than when there is not”. It is the internet service providers and the search engines which are the major providers for piracy of software, they act as intermediaries. Search engines provide ideas and platform to view vast store of material generate revenue through adverts. It mainly involves the reproduction of the copyrighted copies to the third parties, there for the case of copyright infringement. The same procedure is followed by the service providers. The only defense they use frequently would be their absence of knowledge that there is no copyright. Internet service providers also take part through as intermediaries providing access to the websites and hosting the website till the end user is satisfied. They transfer the data, admitting and dispatch to the internet customers (Basheer, 2009).

## 3. Computer Software Protection in India

### 3.1. Indian Copyright Act, 1957

Copyright protection is given under the Section 13(1) (a) to all literary works which also includes software protection, the infringement of Section 13(1) (a) would attract the civil remedies available under the Copyright Act. In 1994 the amendment in ICA, 1957 introduced the punishment for copyright infringement of computer programmes and brought within the ambit of literary work under Section 2(o) the software. The amendment gave a turn about to even Section 51(a) (ii) it will be an infringement if an act is made to communicate the copyrighted work to public in lieu of profit. However if we look at the definition, public is defined as under Section 2(ff) as an act which involves being heard, seen or enjoyed by other means than that of issuing the copies of the work, so here it does not attract Internet Service Provider’s Liability.

It is also to be noted that not only did the amendment give way to provision for civil remedies in case of infringement but also to criminal remedies under Section 63 B, the minimum punishment which is provided is 7 days and the maximum can extend upto three years. The fine amount ranges between 15,000-2 lakhs when the infringement is caused from the knowledge of the person pirating the computer software (Rao, Iyengar, 2010). Even if it is not been used for profit motive, this provision applies unless it is protected by fair use provision. Search engines never are without any profits, they keep no filter mechanism to check up on whether that particular content is copyrighted or not, anything and everything can be published online in cyber space. When the per-

son can be specified then the act of infringement can be abetted to but when the act cannot be specified, the search engines cannot be held accountable they merely provide a platform. Section 69(1) provides for protection against the act of any company causing copyright infringement.

### **3.2. Information Technology Act, 2000**

Section 2(w) speaks about intermediary it says that intermediary is a person who stores, receives or even transmits data (Ogheneovo & Japheth, 2016). This definition covers full of online and ISPs. Under Section 79 of the Act, the ISPs are exempted from under Section 79(1) of Information Technology Act, 2000, they are as follows:

- 1) Storage of third-party data;
- 2) Link hosted by ISPs;
- 3) Transmission of third-party information.

With this section the Internet Service Providers escape with posting of contents without any precaution or filters to understand whether the content is a copyrighted version or not. It just simply harbours a safety for the internet service providers without attaching any liability. Neither on the request of the copyrighted owners the service providers are not obliged to find or give details about the subscriber of their websites or the content uploaders. No liability has been given under the act for the copyrighted version uploaded with the knowledge of the service provider. However this was all stopped on the issuance of rules and regulations by the internet service providers to their subscribers which includes a warning that a copyrighted version cannot be uploaded without any acknowledgement-Rule 3(1) & 3(2) (d) Information Technology (Intermediaries Guidelines) Rules, 2011, this was given in Apr 2011 by the Ministry of Communications and Information Technology in its rules in accordance with the provisions of Section 79.

Rule 3(4) as per the Ministry of Communications and Information Technology mandates that the intermediary should remove the content which is copyrighted and not a acknowledged version which is hosted in their services, either when they come to know of it or when the person who is affected by the post gives a notice, it should be removed within 36 hours as per Rule 3(2), it is also mentioned that any exemption like that in Section 79 is not provided to the intermediary if with knowledge he didn't remove-Section 79(3) (b) of Information Technology Act, 2000. The rules and regulations also mentions that the intermediary is to remove the content of its users anytime it comes to know about it-Rule 5 of Information Technology (Intermediaries Guidelines) Rules, 2011. There is legal consequences under the Act if by any illegal means they provide the content to another person, a third party-Section 79(3) of Information Technology Act, 2000.

The rules and regulations are to be provided before to the user before he/she publishes any further content in the service provider's page is given under Rule

3(2)(a) & (e) of Information Technology (Intermediaries Guidelines) Rules, 2011. Only the central/state government is to order or issue directions to block any information or monitor any information in the service provider's page. That is given only on a threat to national security and public order. (Section 69 & 69 A of Information Technology Act, 2000) Whoever it shall be, will be punished if the content is not taken down even after the orders are issued.

### 3.3. International Documents

TRIPS Agreement, 1994: First time the recognition of software and protection of IPR to computer programmes was given effect in TRIPS, 1995. The only difference from the Paris Convention, 1967 and the Berne Convention, 1971 is the Binding nature of TRIPS. It obligates more than 115 countries which also includes India to make laws in protection of Software and computer programmes. Art.9(1) of TRIPS agreement takes the same pattern on copyright protection as provided in Berne Convention (Karpakavalli & Arunadevi, 2017). Art. 10(1) of TRIPS Agreements provides protection for the software and computer programmes to be protected in Copyright. It takes the format as in Berne Convention, so under Art.2(1) of Berne Convention which defines "Literary and artistic Works" it includes in its definition, literary, scientific, artistic works whatever maybe the form of expression, so under this they brought in software as well. However the definition for computer programmes is not given in the TRIPS agreement to interpret. Art.27 TRIPS agreement states that patent protection must be given for any kind of inventions in any field of technology with the conditions priori met with. This was brought into notice by WTO Dispute settlement Body in 1999 by USA.

Sometimes Software also includes secrets and undisclosed information, it can be protected under trade secrets having commercial value under Art.39(2) of the TRIPS Agreement.

### 3.4. WIPO Copyright Treaty, 1996

WCT says that any software is copyrighted as an literary and in expression eligible for protection under the Berne. Art.4 is just a restatement for TRIPS agreement to protection of computer software. Only difference is that TRIPS addresses this with Source Code and Object Code, while this expresses in different form. Art.11 and Art.8 of WCT provides for member countries to come up with legal protection for any techs used by the owners of the software.

"Regardless of its renowned character as one of the 'Internet Treaty', WCT failed to relate copyright with specific remarks on the internet transformations. WCT was specifically drafted to counter the challenges posted by the new phenomenon of the Internet, but at that time the negotiating parties couldnot reach an understanding as to the liability of ISPs" (Raman, 2004).

## 4. Judicial Approach

With the growth of technology and services, the judiciary and the law is provid-



ing with adequate protection to the intellectual property rights for the computer software and the programmes. The first case came up before the Indian Court was with Microsoft, in the case of *Microsoft v. Deepiak Raval, MIPR* (2007) (1) 72. The term internet piracy was at stake here, the court ascertained that the defendants have infringed the plaintiff's copyright over the three applications such as: Microsoft Windows 98, Microsoft Office 2000, Microsoft Visual Studio 6.0, and Windows XP Professional Version. By analysing the provisions in the UK, Canada, Australia and China with regards to the software piracy the court came to the Conclusion (Aishwarya & Rajan, 2018).

“Coming to the legal position in India, a positive trend has started. Here also as Courts are becoming sensitive to the growing menace of piracy and have started granting punitive damages even in cases where due to absence-of the defendant's exact figures of sales by the defendants under the infringing copyright and/or trade mark, exact damages are not available.”

The damages which were paid to the plaintiffs were Rs.1, 28, 23, 200 it was given in three categories-Actual damages, Exemplary damages, and also damage to goodwill and reputation.

Search Engine Liability: *Super Cassettes Industries v. Yahoo Inc.*, CS (OS) No.1124 of 2008 the plaintiff filed a suit against the defendants that their *Microsoft Corporation v.. Mr. Kiran & Anr* In later case, the court expressed its opinion on software piracy by stating that statement which it says software piracy is a menace, it can't be stopped by simple legislation and needs to be put down.

*Reliance Big Entertainment Pvt. Ltd. v. Multivision Network & Ors* CS (OS) No. 3207 of 2011: John Doe order given by the Court to release the names of the infringers by the website providers in case of a valid copyright infringement.

### Rights Given

- The most important right is the right to deny entry which is in defendant's favor when there is a raid by the police officials, the discretion lies upon them to allow the police unless a warrant is issued.
- If there happens to be a raid, the defendants are allowed to ask for the court orders or a warrant issued, District Court being the main jurisdiction.
- “As per the provisions of Article 64 of Copyright Act, the police can only seize the systems that use pirated software, but in many cases it is alleged by people that police who are given plenary powers misuse it, and all the equipment of the defendants' company are seized through these raids being carried out by Local Commissioner appointed by the courts along with the technical experts who work for the Plaintiff” (Haj Fraj, 2015).

### 5. Conclusion and Suggestion

Piracy once it is started has no end, it will keep on happening in loop with the growth of modernised technology in the world as a dynamic change. The only possible solution is prevention and control of software piracy so as to protect the



interest of the software companies and the customers. In order to make that possible, there has to be effective protection of interest through laws, economy at stake, administrative bodies having better enforcement mechanism. It is the role of all three tiers of governance to take burden and possible actions to transform the laws as the inevitable change takes place. Seeing the crime rate growth in piracy, it could be advised for the software producers for the beneficial of the customers to reduce the rate of software which can also contribute to the reduction in the rate of piracy.

## Suggestion

- 1) Effective Administrative body with rules and regulation upgraded as per the growth in Information Technology and Software.
- 2) Restrictive and deterrent damages and punishments should be improved or improvised or changed to suit the piracy crime rate.
- 3) Separate Judicial Adjudicating body must be set up to deal with Piracy and cases relating to information technology for speedy trial and efficient functioning.
- 4) Awareness programs for software producers and customers warning them about the presence of intermediaries and remedies in infringement or loss should be spread.
- 5) Jurisdiction of Courts for accounting the intermediaries to be expanded in case of effect of infringement or loss felt in the domestic country.

## Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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