

Software Piracy: An Indian Perspective

Dhanya K A

Assistant Professor

Symbiosis Law School, Hyderabad

Software has become an integral part of our life when everything in our life is connected with the digital world. Being a valuable technology in the internet age, software has also contributed for the development of economy as well. It has created large number of job across the globe and a boom in the economy is the result. India has become one of the biggest exporter of software in the world. But across the world, all the countries with huge software developing markets are facing a major threat: threat of Piracy. Software Piracy is the reproduction, distribution or use of a software without the expressed permission of its author. Software piracy had large implication upon the Information Technology industries and it has also shaken the economy. Though software piracy has been detected and various measures are adopted by the authorities, still the instances of software piracy has only lessened a little. In this scenario, the objective of this research paper is to understand the concept of software piracy, Issues and Challenges, and also to analyse the existing legal framework such as Information Technology Act, 2000, Copyright Act, 1957 and other related law if any. The paper critically studies the existing legal framework to find out the lacunas in the system and to come up with suggestions to tackle the menace of software piracy.

Keywords: Information Technology, Software, Copyright, Piracy

Introduction

The growth of Information Technology had contributed in different ways. The most influential contribution is the digitalisation of everything in and around us. Hence we are living in a digital world, every walk of our life is somewhere connected with Computers and Internet. So obviously, for the proper functioning of these system, require both hardware and software. Being an integral part software have also got much popularity and importance. It is a valuable technology and also contributed for the growth of the economy in leaps and bounds. With the advent of computer enhanced technology, software has actually captured much attention in such a way that it generated large number of job across the world with lucrative economic advantages. Though the development of software has generated large number of jobs, even the reproduction of these software also became highly lucrative. India is one of the leading manufacturer of software in the world, at the same time it has become home for pirated software as well. The way software is adding to the business and generating income, millions of rupees are generated through the pirated software business. This phenomenon is not only limited to India, rather with the expansion of the software industry another parallel industry is also being built across the world, i.e. pirated software industry. This has become a biggest threat to the existing software industry which had greater impact in terms of the revenue for these software manufacturing industries across the world. Threat of Piracy has been identified and dealt by the various countries and internationally various initiatives have been taken up to tackle the menace of piracy in the software industry. It has not only shaken the software industry but most of the revenue generated to the states are also affected due to the pirated industries. Even though various initiatives in the national and international level are taken up, still the instances of software piracy have only lessened a little. In this context the objective of this research paper is to understand the concept of software piracy, Issues and challenges and also to analyse the existing legal framework such as Information Technology Act, 2000, the Copyright Act, 1957 and other related law if any. The paper critically studies the existing legal framework to find out the lacunas in the system and to come up with suggestions to tackle the menace of software piracy.

Software Piracy: Meaning

Software is one of the important component for a computer to work efficiently. With the growth of information technology, the number of software required also has increase which resulted in the proliferation of large number of software developing companies in nationally as well as internationally.

Software is basically a set of instructions or programs instructing a computer to do specific tasks¹. It is basically those programs used by a computer to function the purpose or instructions given to them. Software is something which is virtual and it basically consists of lines of code written by the computer programmers that have been compiled into a computer program. These programs will be installed in the hard drive of the computer². Hence software is vitally important for the usefulness and functionality of the digital devices.

Being an important component, the availability of software in the market is not so easy. In normal cases, when a person purchases a computer either the software required will come as inbuilt or else you have to purchase the software required by you. Everyone wanted to use computer for certain purposes and depending upon that the software also changes. Hence that particular software need to be installed in the computer for the proper functioning otherwise the intended work may not be performed. But the availability of the software is not wide and at the same time the prices of those products are not pocket friendly. So the people turn to opt for pirated versions of these software which is easily available at cheaper prices. Which had actually resulted in the boom for pirated software in the market. From the point of view of customers, getting something cheaper is always happy, but what about the manufacturers, are they happy? Obviously not, because the buyers are decreasing for them thereby affecting the revenue and profit and for the government also the revenue is affected massively.

Software programs are basically programs created by the programmers and which are written in the computer codes or in binary codes. When these software programs are made, they are intended for single use of restricted number of use with the authority of the manufacturers. Being a product written in the code, software programs are treated as literary works and entitled to protection under the Copyright protection given to literary works. It is also appreciated that the software or computer programs are registered which will help at the event of the copyright violation to prove the ownership of the software in dispute as the courts will always look for registered copy of the copyright as proof.

Once the software is registered for Copyright protection and accordingly given with such protection it becomes the exclusive right of the copyright owner to enjoy it and anybody wanted to use the software need to take the proper authorisation from the copyright holder. Anyone who uses the software without proper authorisation will be violating the exclusive right of the copyright holder and will be committing the offence of software piracy.

Software piracy is the unauthorised copying or distribution of copyrighted software³. This can be done by copying, downloading, sharing, selling, or installing multiple copies onto personal or work computers. According to Nasscom, software piracy involves the use, reproduction or distribution of the software without having received the expressed permission of the software author.

Software piracy is basically an act done by any individual whereby he copies, download, shares, sells or installs copy of a software without the permission of the software author where the software author enjoys the exclusive right of copyright. Basically whenever an individual purchases a software he merely receives a licence to use the software not the copyright. In India Software programs are given copyright protection and anyone who uses it without the permission will be committing the offence on piracy on unauthorised use of copyright materials. But copying a software for the back up purpose is not prohibited but any act which will violate the exclusive rights of the copyright holder will involve the legal provisions against such persons.

¹Definition of Software avialble <https://www.techopedia.com/definition/4356/software> (Nov. 29, 2018)

² Available at <https://techterms.com/definition/software> (Nov. 29, 2018)

³ Ishwor Khadka, Software piracy: A Study of causes, effects and preventive measures, p 3. available at https://www.theseus.fi/bitstream/handle/10024/87274/Khadka_Ishwor.pdf (Dec.2, 2018)

Reasons for software piracy

Software piracy is a multimillion business across the world and even in India it is also not an exception. There are various reasons for software piracy to become rampant. They are:

High Price for Software

Software being a core element for the proper functioning of the computers is much needed in the market. But most of the software are priced at higher level which had given way for the birth of pirated software. Generally, the developed countries are the main developers of the software products which are sold at higher prices and in effect which becomes unaffordable for the developing countries. Developing country like India, though we have a good and expanded software industry and also caters the world in terms of manpower in the production of software, is not different when it comes to pirated software. It is all because of the higher price of software products and computer users turns to look for alternatives to satisfy their demands. This had paved way for the increase in pirated software.

Lack of Public Awareness

One of the interesting and influencing point in the software piracy is the lack of awareness among the people about software and related intellectual property rights. Though most of the countries provide intellectual property right to the software products either as patent or commonly as copyright, the knowledge about the same is very less among the computer users. The software companies provide proper information about copyright of the software when purchased by the computer users in terms of licensing agreements during the installation process, none of the users bother to read the license agreement completely before proceeding further with the installation of the software. At the same time, they also think that as they have purchased the software by paying an amount, they are the owners of the product, but none of them give much attention to the fact that it is only the licence which they have with them. In such a way they misuse the software product by making copy of it and giving it to others. Hardly they realises that they are doing an illegal act which is against the copyright laws of the country.

Increased demand for software products

In a society where there is a high demand for software products and there is less availability of the software product to the computer users, in that case also the people will turn to use the copy of available software. This also leads to the instances of software piracy to increase. It is also important that when everything gets digitalised, the related products must also be easily available in the market for the consumers. This can also have transnational character where unavailability of the software within the national boundaries will lead to the transportation of pirated software across the boundaries, either in through the medium of offline or online.

Inefficient Legal Enforcement

In order to deal with software piracy, each country need to have a proper legal framework. It must be clear with the kind of protection to be given to the software products, and also what kind of liability you wanted to establish on the commission of software piracy. As being given copyright protection in almost all countries, software piracy is looked upon as copyright infringement and it attracts both civil and criminal liability. It is also important that proper enforcement of law on copyright infringement is also required to tackle the software piracy. Untrained investigating officers will not be helpful to decrease the incidents of software piracy. If the law goes weak then there is always a chance for the commission of such kind of wrongs, hence a strong legal mechanism has to be adopted to deal software piracy.

Business profits from the software piracy

Software is a product which is made by investing lots of time and money. In the case of pirates, they have not invested anything rather they only have to reproduce and distribute it for making income. From the perspective of pirates, it is an easy earned money, where they get a huge profit which ultimately resulted in the increased number of software piracy.

Though the software industry is widespread, the proper protection in law is lacking in many of the countries. Some of the countries does not have proper laws for the protection of the software and those countries with legal protection have weak enforcement mechanism resulting in the increased rate of software piracy.

Types of software piracy

Software piracy is rampant and it has different shades. Though the people think they have a right to copy and do whatever they like in terms of the software they have purchased for a high price, seldom they are aware of the implications coming out of it. In the process of reproduction and distribution of software without proper authorisation is carried out in different forms. The various types of software piracy are:

Reseller Piracy

Reseller piracy occurs in the software distribution channel, when distributors or dealers either make copies of software onto floppy disks, or the internal storage device or the hard disk of computers that they are selling, without authorisation from the software publisher⁴.

Counterfeit Piracy

Counterfeit piracy is 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 publisher⁵.

Mail –order piracy

Mail order piracy consists of the unauthorised copying of software onto diskettes, CDs, or other media and distribution of such software by post⁶.

Bulletin Board Piracy

Bulletin Board pirates engage in unauthorised reproduction and distribution of software via telecommunication. Typically, this involves an individual computer user who has installed a number of software programmes on his computer, and who allows other users to connect to his computer through the telephone line via modem and copy the programmes onto discs. The pirate in most cases has copied the programme onto his own computer without authorisation of the copyright holder's consent is also a copyright violation⁷.

End User Piracy

End user piracy takes place when a user copying software onto hard disk of more computers than the number authorised by the publisher. This form of piracy perhaps takes place on a wider scale than other forms because end-users often make substantial copies of the software possessed by them and then distribute or exchange the same. Though this harms the interests of right holders, end-users definitely gain out of it because this leads to obvious economic advantages for them⁸.

Legal framework on software piracy in India

India being a signatory to TRIPs Agreement had adapted its law in such a way that it gives maximum protection to the intellectual property in an international standard. In India, software is treated as a literary work and accordingly Copyright protection has been given to the software. The current patent law is not in any kind ready to extend its protection to software, hence software has been given protection under the Copyright Act, 1957. TRIPs being a major international agreement which primarily deals with the legal issues effectively on unauthorised use of intellectual property in commercial scale. The TRIPs Agreement

⁴ Available at <http://copyright.gov.in/documents/study%20on%20copyright%20piracy%20in%20india.pdf> (Dec. 2, 2018)

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

has given copyright protection for software⁹. With the changes happened in the international legal framework various amendments were carried out to the Copyright Act in 1994 whereby its applicability is extended to computer programs. It was also an extension of the Berne Convention to Computer Program and databases¹⁰. The definition of “ literary works” was amended in the Copyright Act, 1957 to include computer programmes and Computer Databases¹¹. The Copyright Act defines a computer program¹² and gives special status to computer software as compared to other forms of copyright work. The author of a computer programme has the same exclusive rights that are available to an author of a literary work such as , right to reproduce, publish, perform the work, make a film, translate or adapt the computer programme¹³. The Copyright Act considers software as literary works and grants extra ordinary exclusive rights in addition to the general exclusive rights such as right to sell or offer for sale, and the right to give on commercial rental or offer for commercial rental¹⁴. The copyright protection granted for software with an individual author lasts for the duration of the author’s life and continues 60 years’ after the author’s death. A software will be entitled to copyright protection if it is original and sufficient efforts are put in to impart its originality¹⁵. It is also required that the work should be published first in India or if the work is published outside India the author on the date of publication or if the author is dead at the time of his death should be a citizen of India¹⁶.

The protection to computer software is not only derived from the Copyright Act of 1957. Even the Information Technology Act, 2000 have also given consideration for the software piracy and it had included provisions accordingly. The IT Act, 2000 provides for punishment for tampering with the source code of a computer program and this protection applies to computer source codes “which are required to be kept or maintained by law for the time being in force”¹⁷. IT Act basically gives protection only for source code of computer programs of government agencies and the source code of computer programs or private users still stand unprotected.

With the amendment of the Copyright Act in 1994, the copyright enforcement in India has improved. The amendment had made the copyright violation cognizable offence. So any original software work once committed to a tangible medium gets the copyright protection under the Copyright Act, 1957. It does not have to be published in order to receive copyright protection. Once the copyright protection is given to software, it comes up with certain exclusive rights and any person who violates the exclusive right granted under the Copyright Act, 1957 will be committing an offence under Section 51¹⁸ of the Act and is punishable under the provision of Section 63¹⁹ of the Copyright Act. But only one exception is provided under Sec 52 by allowing a backup copy of the software purely for a temporary protection against loss, distribution or damage to the original copy²⁰. Further Sec 63B a special provision has been incorporated through an Amendment in 1994 which provides for punishment to those who knowingly uses infringed computer software. The punishment provided for this act is imprisonment for a term of seven days to a maximum of three years and a fine between fifty thousand and two lakh rupees. In case of infringing copy of the computer software is not used for pecuniary gain or in the course of trade or business, then the imprisonment can be relaxed and fine can be maximum of fifty thousand rupees.

⁹ Article 10.1 of the TRIPs Agreement

¹⁰ T Ramappa, Intellectual Property Rights Law in India, p 29 (Asia Law House 2016)

¹¹ Anirudh Rastogi, Cyber Law p.298 (Lexis Nexis, 2014)

¹² Sec 2(ffc) of the Copyright Act, 1957

¹³ Sec 14 of the Copyright Act, 1957

¹⁴ Sec 14(b) and available at <http://www.ipcsit.com/vol9/19-B006.pdf> (Dec. 2, 2018)

¹⁵ Karnika Seth, Computers Internet and New Technology laws, p. 258 (Lexis Nexis, 2013),

¹⁶ Sec 13(2) of the Copyright Act, 1957

¹⁷ Sec 65 of the Informationa Technology Act, 2000.

¹⁸ Sec 51 – when copyright infringed

¹⁹ Sec 63 – offences of infringement of copyright or other rights conferred by the Copyright Act, 1957

²⁰ Anirudh Rastogi, Cyber Law p.301 (Lexis Nexis, 2014)

Remedies Against infringement of copyright in software

Any person who violates the copyright granted to software is committing software piracy. There are basically two types of remedies available for the infringement of copyright in software, i.e civil and criminal remedies.

Under the civil remedies, the civil court may be approached by way of civil suit for any of the following remedies: -

- Temporary and permanent injunctions
- Impounding and distinction of all infringing copies including master copies
- Actual monetary damages plus the infringers profits
- Statutory damages
- Court costs and reasonable attorney's fees

Criminal Remedies

Copyright infringement is a cognizable offence and a police officer can arrest the infringer without warrant. In the case of software piracy, the criminal actions are more stringer than the civil action as it has deterrent effect on the infringer. The criminal remedies basically provide for the imprisonment of the accused or imposition of fine to both as well as seizure of infringing copies. Under the Indian Copyright Act, a software pirate can be tried under both civil and Criminal law. Copyright infringement is punishable by imprisonment up to three years and fine up to two lakhs. Even Sec 63B, being added by amendment in 1994, act as a special penal provision for knowingly using an infringing computer software which is punishable for term of seven days to a maximum of three years and a fine between fifty thousand and two lakh rupees²¹.

There are various other provisions also in the Copyright Act making a strict law against copyright violation of software in India. Any police officer, not below the rank of a sub-inspector, may if he is satisfied that an offence in respect of Copyright in any work has been, is being , or is likely to be committed, seize without warrant, copies of the work, and all plates used for the purpose of making infringing copies of the work, wherever found and produce them before a magistrate as soon as practicable²². The Act also makes it punishable for any person to possess plates, machinery and equipment to produce infringing copies of software with an imprisonment up to two years and also with fine²³.

The legal framework in India has given protection against software piracy under the Copyright Act, 1957. But software piracy has become so common and the profit earned by the people by engaging in software piracy is huge. The common man is not having proper knowledge about the existing legal provisions and unknowingly he commits and offence. But ignorance of copyright cannot be excused, rather small instance of software piracy also to be dealt. The remedies available under the existing legal framework is enough to create deterrence for these small pirates, but the bigger pirates can pay the fine when the quantum of fine is less in terms of their margin of profit. Even the punishment provided under the law is also less to undergo for a person who commits software piracy.

Considering the effects of software piracy to the software manufacturers as well as the state, the quantum of punishment need to be made more along with increasing the amount of fine to be paid. Though the judiciary in India has given judgment in cases on software piracy, the proactive role to be played by the judicial is still lacking. The judiciary in India have started to acknowledge the Intellectual property rights and grant compensation to the aggrieved parties when it comes to the infringement of IP rights. There are some cases which have made its on landmark as precedent in imposing liability upon the cases of software piracy. In **Microsoft Corporation v. Yogesh Popat and anr**, the Delhi High Court has casted their serious views on the software piracy and have granted Rs 1,975 to the plaintiff for the alleged software piracy

²¹ Anti Piracy Laws in India, available at <http://www.ianimate.in/antipiracy.htm> (Dec. 2, 2018)

²² Sec. 64 of the Copyright Act, 1957

²³ Sec 65 of the Copyright Act, 1957

committed by the defendants in the form of damages²⁴. Using this as case as a precedent the Delhi High Court again granted damages of Rs. 2.3 million in favour of the plaintiffs in **Microsoft Corporation v. Kamal Wahi**²⁵. With the growth of computer across the world, Microsoft being a giant in the manufacturing of software products had faced serious threats from the software piracy. There were various cases filed by Microsoft Corporation claiming incalculable damage to its IP rights and also violation of other IP Rights across the world. Such kind of cases were also discussed by the Indian Courts while deciding the matters connected to software piracy which came up before them. One such case is **Microsoft Corporation v. Deepak Rawal**, where copyright violation of Microsoft Dos and Microsoft Windows were alleged and damages were awarded by the Court²⁶. The judiciary can play an active role in the cases of software piracy but mostly they are reluctant to exercise their powers. The decisions given by the judiciary so far can act as a legal principle which can be applied by the other courts for future cases. In this process the judiciary should play an active role which will definitely strengthen the protection of IP rights in India. The instances of software piracy will also lessen there by creating more revenue for the manufacturers as well for the government.

Conclusion

In India copyright law allows copying of a copyrighted material for fair use. But with the development happening in the information technology and with the ongoing digitalisation, the pirated software industry has grown to a higher extend. With the adoption of international standard into the national law has actually strengthened the law according protection to software in India. But still India is one of the major hub for pirated software. Though India have a strong and toughest copyright law, software piracy is rampant in India. There are various reasons for it such as lack of proper implementation of copyright law, lack of awareness among the people about the copyright laws, the unavailability of the software in terms of quantity and pricing etc. Even the judiciary also has started giving much importance to the software piracy cases when it comes before them. Yet the more consideration has to be given by the judiciary while intercepting in the matters of software piracy by giving an appropriate decision in a quick time. Otherwise the rate of piracy will not be diminishing.

²⁴ O.S NO 103/2003, Delhi High Court

²⁵ O.S NO 817/2004, Delhi High Court

²⁶ (33) PTC 122(Delhi), 2006.

Suggestions

India have a strong law on copyright, but most of the problem lies in the enforcement of the same. Though the punishments are prescribed for the infringement of copyright including software, somewhere it is lacking the deterrence and this has to be increased. There must be an increase in the minimum term of imprisonment awarded to copyright violations. Above all the proper implementation or enforcement must be there. The strengthening of the enforcement system can be done by giving proper training to concerned authorities including police personnel, who are major contributors in the elimination of software piracy. Most of the enforcement authorities are not aware of the various provisions of the law and it can be avoided by giving proper training to them. The same way the number of persons with knowledge about the copyright law and its violations are also less. While imparting training to the authorities, it also to be ensured that adequate number of officials are getting proper training.

End user awareness is another block while dealing with software piracy. Proper awareness has to be create among the end users when they think that they have all the right to use the software in whichever way they want. Creating awareness about copyright and related laws will have high impact upon the end users which will help in the reduction of software piracy.

As the penetration of computer and internet increases day by day in our daily life, the availability of the requisite software in the market must be enhanced. Not only in terms of the number but also in terms of accessibility for end users. Quality software product at affordable prices will also play a major role in combating software piracy. The major stakeholders can take various measures to eliminate software piracy. It is not only the responsibility of a single individual, rather all the stakeholders have to act together for the elimination of software piracy. All the organs of state, legislature, Executive and the Judiciary have to act hand in hand together with the software industry to curb the menace of piracy.

