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CURRENT LEGAL DEVELOPMENTS

Computer Programmes vis-a-vis the Copyright (Amendment) Bill, 1992

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Introduction

The current changes in the economic climate of the country induced changes, *inter alia* in the field of copyrights. In May, 1992, the Copyright (Amendment) Bill was introduced with the goal of making the Indian copyright law and the beneficiaries under it on par with the best in the world.¹ One of the major changes introduced in the Bill is as regards computer software protection.

The three major components of computer material are — software,² hardware and algorithms. The development of software requires tremendous R and D and investment when compared to other areas of copyright protection, with the exception of hardware. However, software and database can be copied very easily. This leads to the erosion of the original author's market.³ Moreover, computer engineers in India are paid much lesser than their foreign counterparts. In spite of working with lesser facilities, the ability of our engineers has been recognised worldwide. This was proven by the creation of MPP⁴ which was perceived primarily as an Indian product to meet foreign challenges.

The growth of the Indian computer industry has been on the rise since 1988. During this period, major policy differences cropped up with the US government. When permission to import the Cray computers was refused, India was forced to further develop her own software industry.⁵

However the real success of the Indian industry depends on its ability to effectively tap the international market and the legal regime should therefore be geared to protect computer engineers, strengthen the development and marketing of software technology.

Protection Prevalent in India

In the past, the computer industry heavily relied upon trade secret protection and contract law for protecting computer programmes against piracy. However, trade secret protection is based upon restrictions on the flow of information. This form of protection is limited to programmes which are communicated with an obligation of confidentiality and

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1. G. S. Krishnamoorthy, "Field open for Software Exports", *Survey of Indian Industry — The Hindu*, 1993:133.

2. Programmes fall in the category of software and include the documents operating manuals and the papers relating to programming.

3. Aroon Sankar, 'Crashing Big Brother's Party', *Business India*, 12-25, April, 1993:90.

4. Massive Parallel Processor.

5. *Supra*, n. 3.

not uniformly extended to all programmes. Prevention of disclosure in such cases becomes difficult as the conditions vary from case to case.

Protection under copyright law was first envisaged in 1984. When the 1957 Act underwent major changes, computer programmes were introduced within the purview of literary work. The definition of literary work was amended to include tables, compilations and computer programmes, that is to say, programmes recorded on any disk, tape, perforated media or other information storage device which if fed into or located in a computer or computer based equipment is capable of reproducing any information.⁶ Hence, a wide range of questions in this field remained unanswered. The controversial areas were:

- i. Computer programme was not defined,
- ii. Protection for database was not envisaged,
- iii. Computer generated work was not protected and the author of such a work was not classified,
- iv. The protection provided to the author was inadequate.

The 1992 Bill seeks to plug these loopholes.

Major Changes in the 1992 Bill

The Bill defines 'Computer Programme' under Section 2(ffc).⁷ This definition is similar to the definition given by the report of the Second Committee of Government experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works — convened by WIPO and UNESCO in Paris in June 1982. This also caters to the requirements of the Berne Convention. The Bill introduced an inclusive definition for computers.⁸

The second change relates to literary, dramatic, musical or artistic works which are computer generated. It relates to the creation of artificial intelligence. When a programme operates so as to substantially produce a different effect in the output, the work is 'computer generated' and the improvement is attributed to the artificial intelligence created. The identification of the author of such works had been a problem. This is because the output was attributable exclusively to the artificial intelligence of the computer. By the amendment to Section 2(iv), the author of the computer generated work is the person who causes it to be created.

The Bill by its definition of literary works protects the database which is fed into the computer by including computer data base within the purview of literary work.

According to section 14 of the Bill, the term 'copyright' with reference to computer programmes will mean the exclusive right to do or authorise reproduction of the work including storing in electric media, issuing copies to the public, performing, communicating, translating, adapting, making a movie, selling or hiring the copies to be sold. Thus, a person who purchases a computer programme cannot sell, hire or let to hire

6. Satyawrat Ponshe, *The Management of Intellectual Property*, (Pune : Barte & Ponshe Publication, 1991), 268.

7. A set of instructions expressed in words, codes, schemes or in any other form in a machine readable medium in causing a computer to perform a particular task or achieve a particular result.

8. S. 2(ffc) states that 'computer' includes any electronic or similar device having information processing capabilities.

the programme.⁹ The object of this is to protect the author of the programme in whom the above mentioned rights will now vest.

A new clause has been introduced in Section 52 to identify the acts that shall not constitute infringement of computer programmes. This provision is similar to the 'fair use' doctrine in the USA. 'Fair Use' is the right to make limited use of another's copyright as against an unlimited right.¹⁰

According to the provisions,¹¹ a lawful possessor of a programme can use it only for the limited purpose of:

1. Fulfilling the purpose for which the programme was supplied.
2. Protection against its loss and destruction. Any intentional infringement of the same amounts to the commission of the offence under Section 63B.

The advantage of this provision is that a competitor cannot make use of the programme to make illicit copies while a member of the public can productively only use it to enhance his knowledge.

Analysis

Amongst all the changes that have been incorporated, the most controversial change in the Bill concerns the possessor's lack of right to sell, hire or let to hire. Drawing an analogy with books, once the author sells his material in the case of a book, he loses his right over the book. On the other hand, the buyer acquires the right to sell and hire, so long as he does not infringe the copyright over the material. In the case of computer software, the owner/possessor of the programme is deprived of these rights. This goes against the concept of property according to which the owner retains the right over his property which includes the right to sell or hire. The consequence of this is that the programmer can create an artificial demand for the software created by him by restricting its sale.

Another difficulty that will have to be faced is the enforcement of the above provision. Considering the fact that software can be received even on telephones and satellites, prevention of transfer of software in the form of sale or hire by the possessor of the programme will be very difficult to achieve. In effect, the Bill will only encourage backhand dealings in computer software. The Bill could have instead regulated sale and hire to benefit both the author and the possessor. The present situation will encourage software piracy of a different kind. Moreover, a potential buyer who is not sure if the programme will benefit him should contact the author to hire it, even if the possessor of the programme is present in the vicinity.

In India, copying of computer programmes is rampant and the resultant loss to revenue is as large an amount as rupees three hundred crores. The Bill is considered as a weapon to combat copyright software piracy. There is no point in encouraging one kind of piracy to prevent another kind.

There is enormous potential in the Indian software industry. It is upto the lawmakers to see to it that this potential is channelled in the right direction. The 1992 Bill serves as the first step in the right direction.

9. This includes the right to sell or give on hire, or offer for sale or hire and right to resale.

10. L. Ray Patterson, 'Understanding Fair Use', *Law and Contemporary Problems*, 15, 2 (Spring 1992): 250.

11. S. 52 (2) (aa).