REVIEWING *the views*

Is software piracy wrong?

FAYAZUDDIN AHMAD

SOFTWARE is not restricted to programmes but also extends to computer data, programme languages, databases, flow charts and user manuals. To differentiate them from hardware, software programmes have been classified as intangible, abstract ideas and/ or mental processes and this has lead to questions as to whether they can be pirated. Piracy, especially when it comes to information goods which software is classified as one, has been legally termed as the infringement of intellectual property rights through the unauthorized use and distribution of the software. Software piracy includes soft lifting, downloading software programmes on the internet, renting and hard disk loading and software counterfeiting. It is important to note that for an act to be considered as piracy it must be contrary to the software licensing agreement, which is a contract transferring less that all the intellectual property rights in the software. In this context, intellectual property is the broader label for patents, which denotes a temporary right to exclude others from using a novel and useful invention. Thus software patents have been referred to as any patented innovations that can be embodied in software.

There are debates as to what extent can software be said to be an innovation since it is mostly based on mathematical algorithms which are already in the public knowledge and also that most of the software programmes are simply clones of products already in the public domain and this in itself does raises intellect issues and whether indeed software production can be considered as an innovative process. It may be sufficient to say that the debate does raise the question as to whether software patents are being used to make monopolistic proprietary claims over the global commons and whether this in itself is an abuse of Intellectual Property Rights system.

At the same time, information and technology of which software is a major component, has fuelled the process of economic globalization and the propagation of neo-liberal economic policies of trade liberalization, which have contributed to the economic underdevelopment and exclusion of countries in the South. Trade liberalization includes, addressing the problem of non-existent or weak intellectual property systems in countries of the south thus making intellectual property part of the neo-liberal agenda of exclusion and a contributing factor to the 'digital divide'. In this context, the issue of software piracy shifts from just being seen as a matter of simple theft but rather as a complex social-legal issue, which raises the question whether software piracy is a means to a justifiable end.

Just as with economic development, in the world of hegemonic globalization, the existence of the neo-liberal economic consensus which advocates for a free market based approach to trade in goods and services and the concentration of market power in transnational corporations present an obstacle towards the realisation of access to information and technology. It is therefore not surprising that the prediction that with economic globalization, technology will spread to Developing Countries and Least Developing Countries and produce a "digital dividend" failed to materialize, instead it produced a "digital divide". Defined in terms of differences in access to the essential tools of the information society and to the infrastructure of the networked society or economy, the digital divide is recognised as a great impediment to development and thus a critical problem for countries of the global south. Notion of the digital divide is one that ought to be considered in the wider context of social inclusion and as an aspect of the inequalities within forms of globalization. This is in the light of assertions that the digital divide has served as a market ploy in the globalization game used by the big

multi-national corporations based in developed countries. Indeed as observed, the Global Information Infrastructure, which is supposed as a strategy for technological diffusion was designed by the World Trade Organisation based of free market rationale for economic growth; through trade liberalization and addressing the problem of weak or non-existent Intellectual Property Systems in countries of the South.

Economic globalization, through the neo-liberal agenda, serves as a setting for the digital divide, with information technology, because of the intellectual property structure, inducing highly unequal distribution of the gains from globalization. Indeed, Intellectual Property Rights, through patents, have ended up giving monopolistic licensing power to companies in the developed word where most patents are registered thus suppressing of the creative power and technological development of the countries of the South. This in turn has relegated the countries of the south to dependent passive users of technology, relying on handouts of technology from the north, which in most cases is either obsolete or inappropriate for the needs of the south.

Further, the structuring of the intellectual property system has been done in such a way that it requires considerable investment to obtain a license. For most countries in the south, their level of development level of development is such that paying for royalties does impose economic constraints, especially in relation to their balance of payments which impedes their ability of catching up with the countries in the north economically and in terms of overall development. Yet at the same the developing countries do consider free flow of information as essential for economic development, thus to avoid the costs of intellectual property developing countries look for cheaper ways of obtaining technology, which is either through free riding or piracy.

In fact higher levels of piracy have been observed in countries whose economies are underdeveloped or in transition. Such countries view strong intellectual property systems as being against their economic objectives, hence there is no political will to enforce intellectual property rights or recognise patents. Indeed from the perspectives of the South, less piracy could mean more imports and hence higher demands on their balance of payments, higher licensing fees, which are a drain of foreign exchange and a reduction in jobs offered by the piracy industry However, it could have been worthwhile to do a comparative analysis in terms of how much the countries with the highest software piracy rates save in terms of balance of payments and whether that offsets the possible gains from tax revenues. At the same time, it does seem that the more a country develops the lower the piracy rates, which is what is now happening in China.

Contrary to the popular belief that Intellectual Property rights were going to promote economic growth and transfer technology from the global north to the south, promote innovation, and allow innovators to recover their research and development costs, Intellectual Property rights have also been used as tool for political coercion. The United States using Intellectual Protect rights to preserve its advantage over Japan in the area of technology and pointing out that this was done through an extensive foreign policy. By the end of the day, Intellectual property rights become more or less tools for a government sanctioned monopoly; aiding a few firms in the global north reap higher profits by maintaining, what others have referred to as an 'illegal' monopoly over technology development and advancement. The move to privatize goods that were in the public domain through intellectual property is in itself a form of theft.

The patenting system contributes to the reinforcement of the technical dominance of large corporations and the protection of their import monopoly while preventing technology transfer by the sensational articulation of the term piracy. The patent system is also misused by large powerful patent holders who by coming together and forming patent pools create patent thickets resulting in royalty stacking and causing pollution of the economic environment to the detriment of countries of the South. These thickets not only prevent innovation by other but also ensure that the patent pools continue getting royalties by preventing any future competition. With the domination of the patent system by corporations, the possibility of technological transfer and developing countries catching up economically is either very slim or non-existent as such the prospect of pirating will always remain attractive.

The conceptualization of piracy as theft by the corporations ignores the fact that information is simply too ill-defined and flexible, to allow it to be described as property as the term is presently understood and this begs the question whether one can steal an idea or an innovation, which is what copyright law seeks to protect. This has lead to comments that perhaps the whole rhetoric about piracy being theft is aimed at counterfeiting by organised crime rather than individual cases of piracy while at the same time reinforcing the notion of intellectual property qua property and masking the capture and enclosure of the global commons by the dominant information-rich. Indeed while theft deals with permanently depriving a person of ownership in property, the word has been appropriated by the software industry to protect innovations at the expense of other innovators and for purposes of exclusion of the information-poor. In this context, perhaps software piracy can be viewed as a subaltern struggle against exclusion and the digital divide. This is of course on the assumption that information goods constitute property that can be stolen.

It is also worth pointing out that software is pirated from an original copy, which would in most cases, have been legally purchased and hence it could be argued that the patent holder can no longer control its further use, under the first sale doctrine. This issue is more pertinent for the South, where the concept of copyright goes against the cultural philosophy that knowledge which is in the public domain should be shared. Thus in the cultural context, software piracy has been viewed as being socially acceptable in the South, being part of the culture of sharing what is seen as a public good necessary for their advancement in life. Software piracy should be envisaged, just as bio-prospecting of indigenous knowledge is thought to be, as something that is done for a greater good and hence legitimate. With the reason behind piracy being for the greater good and when the copying is done with an honest belief that what is being done is morally right, it would be difficult to justify the same as theft. Indeed if the owner is not permanently deprived of the goods, in this case the actual idea, which still remains with the owner after the act of piracy, it cannot be argued that there has been theft as the offence is presently framed in most statutes.

The issue of software piracy is one that is too complex and needs to be located in the realm of social justice and not only viewed from the TRIPS point of view. The categorisation of software piracy under TRIPS in terms of theft places the right of patent holders over the rights of the people of the South to access to information and knowledge. Combating software piracy, especially in areas where the authentic product has not penetrated does more harm than good. Here the harm should be seen in terms of perpetuating the digital divide and global inequality, underdevelopment and impoverishment of the south, the consequences of which are deaths, in most cases of children. In this context then perhaps software piracy can qualify as a subaltern struggle against the digital divide as a product of hegemonic globalization. And as with all counter-hegemonic struggles; they do not have to necessarily operate within the law to be considered legitimate. Software piracy, in as far it has been shown to improve the economic status of countries of the South and taking their people out of impoverishment, could not it be viewed as justifiable?

The author is an Advocate and Researcher.

LAW *vision*

Internet access: A fundamental right?

M. JASHIM ALI CHOWDHURY

ARE peoples' fundamental human rights being violated when they don't have access to the internet? This question brings an important opportunity to think afresh on our traditional understanding of human rights. Internet access may be understood as a contemporary form of the right to self-expression. It may also be understood as part of basic access to public services in an increasingly digitized world. Add to it the increased quality of life that comes with the huge jump in access to cultural and logistic information. The Council of Europe is moving decisively towards the 'universal right to internet access.' Finland has become the first, and surely not the last, country to make access to internet a legal right. In Switzerland the law on Universal Service grants every Swiss the right to get a broadband connection of 0.6 Mbps and the provider has to fulfil this obligation even if you're in a hut somewhere in the Alps! Just couples of months ago, the Constitutional Council of France termed access to internet a human right.

The Council of Europe efforts

In Council of Europe the 'Telecoms Reform Package' was presented to the European Parliament in November 2007. The debates on the Telecoms Package led to an extremely strong recognition of the access to internet as a fundamental right. In the first reading of the Package during September 2008 a number of amendments (known as Amendment 138) were carried (573 votes for and 74 against). It upheld the user's rights by making a judicial authority, in preference of an adminsitrative authority, the highest instance deciding on sanctions against him. But as the French representatives demanded the withdrawal of Amendment 138, the renumbered Amendment 46 was propsoed on the basis of an offered compromise. In the second reading, on 5 May 2009, a clear majority (407 votes for and 57 against) adopted the Amendment 46 again making it illegal to disconnect the internet users on the ground of suspected copyright violations until they are proven guilty in court. It recognised, notably in accordance with Article 11 of the Charter of Fundamental Rights of the European Union on Freedom of Expression and Information, that internet access is part of fundamental rights such as the freedom of expression and access to information. The Telecoms Package is now waiting its third reading and pressure is mounting upon the European Parliament to guarantee a free, open and innovative Internet.

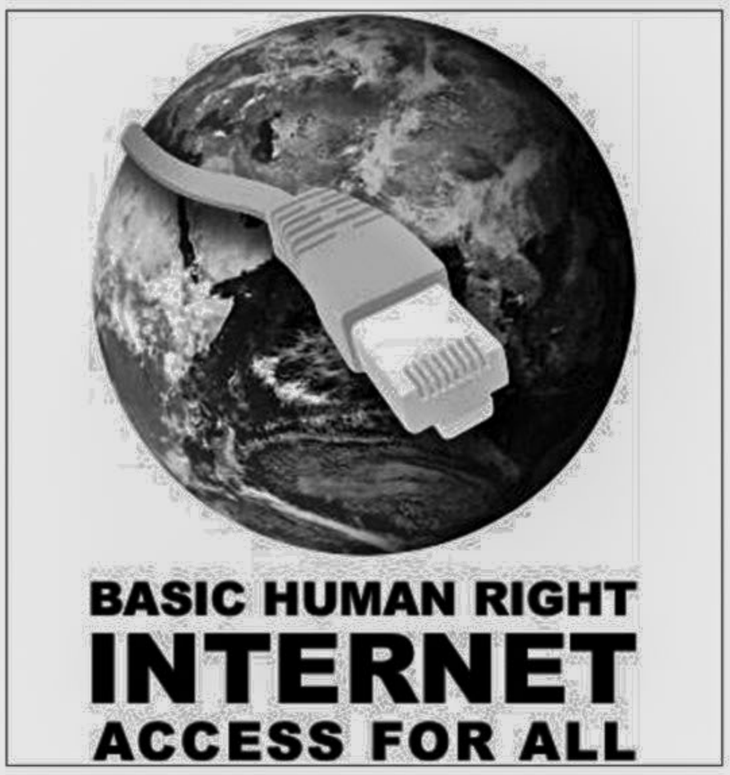
The French Constituional Conucil bolsters the move

On 13 May, 2009 the French National Assembly passed the Creation and Internet Law, also called the Three-Strikes Law, as a key plank to deal with illegal file-sharing over internet. Section 5 of the Statute introduced the HADOPI (High Authority for the Diffusion of works and the Protection of copyright on the Internet) within the framework of the Intellectual Property Code which would act as intermediary between rights holder organizations and ISPs (Internet Service Providers) and would pass on the allegations from the right holders with a request to the ISPs to warn or sanction their users. Section 10 empowers the HADOPI to order the taking of all measures necessary to prevent or put an end to such infringement of copyright or a related right. Section 11 inserts into the Intellectual Property Code provisions which define the duty to monitor access to the internet to determine the cases in which internet access has been used in a manner infringing copyright of another. Under the law, pirates would be given three emailed warnings (Three Strikes) before having their access to the net cancelled or suspended. Suspension may be for a period of two months to one year accompanied by the impossibility for the subscriber to enter into any other contract with any other operator for access to internet.

There had been considerable public debate about the status of the HADOPI - whether it was a court with a legal authority to sanction internet subscribers. It was alleged that the law created an internet Big Brother who would hit innocent people whose web connections were being used by others, such as children, employees or people illegally hooking into their wi-fi. In June 2009, a reference was made to the Conseil Constitutionel to review the law. The parties making the referral contended that by giving an administrative authority the power to impose penalties in the form of withholding access to the internet, Parliament infringed the fundamental right of freedom of expression and communication (Para 11 of the Council's Judgment, Available Online: www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf).

Referring to Article 11 of the Declaration of the Rights of Man and the Citizen of 1789 the Council opined that the free communication of ideas and opinions protected by the founding fathers of the French Republic continues to serve a purpose in today's Information Society. Given the generalized development of public online communication services and 'the importance of these for participation in democracy', the Council held that the right to free coomunication of ideas and opinions implies freedom to access internet (Para 12).

As to the question whether HADOPI was a court, the Council made it clear that it would be merely a public administrative authority and would not have the legal powers of a court. Considering the importance of 'the right of any person to exercise his right to express himself and communicate freely' the Council held that only a court had the authority to switch off a person's web connection and the Parliament was not at liberty to vest an administrative authority with such powers (Para 16). In the name of fighting the infringement of copyright grossly disproportionate restriction on the right of free communication and freedom to speak, write and publish may not be imposed (Para 15).



Finland makes a big push to the internet access 'right'

Finland is one of the most wired countries in the world. About 95 percent of the population has some sort of Internet acces. On October 14, 2009 the Finnish Ministry of Transport and Communications announced a Decree on the Minimum Rate of a Functional Internet Access as a Universal Service (732/2009). As per the law, the minimum rate of downstream traffic of a functional internet access is 1 Mbps (Section 1(1) of the Decree). However, the average minimum rate of 750 Kbps in a measuring period of 24 hours and 500 Kbps in any 4-hour measuring period shall do (Section 1(2)). Every Finn shall have this right guaranteed by 1 July 2010 (Section 2(2)). The legal implication of this 'legal right' is that specific operators are enforced to provide specific level of service for all consumers at a reasonable price. The move by Finland is aimed at bringing web access to rural areas, where geographic challenges have limited access until now. The 1 Mbps mandate, however, is simply an intermediary step, the country is aiming for speeds of 100 Mbps for all by 2015.

Right to internet access: Possible objections and a reply

Though the notion of internet as a basic right is gaining momentum, forcefully advocating it in an overhelmingly capitalist world still runs every risk of being termed 'asinine' and 'UN-believable'. The Scandinavian-style welfare decision of Finland sounds 'Obamish' to many. They doubt whether internet access is a 'right' or a 'nice-to-have'. Some fear more governmental intruision through such 'Robin Hood' socialism whereby the government steals from the rich (internet service providers) and gives to the poor (under-privileged users). Some other even recall Jefferson: 'A government big enough to give you anything you want is big enough to take everything you have.' However, if you look from a developing county's point of view it will not be too tough to locate the 'concern' of the cynics. A large number of 'e-citizens' arround the West have asked the question: Who is going to pay for the 'right to internet access'? A serious question indeed.

Well, there may be some interpretational side effects of the primary goal of universal right to internet access. Firstly, government guarantees that no one can deny you access to broadband service as long as you're willing to pay for it. Second, those who want broadband and can pay for it must do so while those who want it but demonstrates inability to pay will have it provided to them. This would be more akin to everyone having a right to defense counsel if charged with a crime. If you can afford it, you hire your own attorney. If you can't the government provides an attorney for you. And third, government provides the service to everyone and taxes the people through some means (direct tax, fees on services, etc).

I think no one shall dislike the first option. As to the second and third, it may be argued whether it makes sense for the government to subsidize access to broadband. So let us ask some questions and answer them ourselves. How much were and are spent on rural electrification to get power to the farmers so that we reach the targeted food production? A 'knowledge economy' requires Internet access in the same way the agricultural economy requires electricity. How much were and are spent in those government-funded fire services or police protection or public education and a hundreds other services that we enjoy? So why not a little bit in technology? Isn't it far cheaper for the government to provide basic broadband access to everyone than to provide printed versions of every form to all its citizens? Isn't it far better to spend on the universal access to internet than to spend in bailing out the purveyors of the capital market? The point to emphasize is offering information access to all citizens to bridge the gap between the have's and the have not's. Those who have it are at an advantage to those who do not. There are so many things you are excluded from without Internet access.

Conclusion

The Finnish government or the French Constituional Council is simply laying down examples that should be followed by every country that wants to participate in a 21st Century 'knowledge economy'. Yes someone has to pay and it will cost a lot of money but the benefits are huge. Adding the idea fundamental right to low-cost internet service is the only next logical step for modern, enlightened societies. While surfing through the net, I've noticed one Cory Doctorow predicting: 'In five years, a UN convention will enshrine network access as a human right. In ten years, we won't understand how anyone thought it wasn't a human right!'

The writer is Senior Lecturer, Department of Law, Northern University Bangladesh (NUB), Dhaka.x