

**SUBMISSIONS TO THE STANDING COMMITTEE ON HRD
RE: THE COPYRIGHT AMENDMENT BILL**

**BY: PROF SHAMNAD BASHEER
MINISTRY OF HRD PROFESSOR OF IP LAW
NATIONAL UNIVERSITY OF JURIDICAL SCIENCES (NUJS), KOLKATA**

AND

PRASHANT REDDY, RESEARCH ASSOCIATE, IP CHAIR, NUJS

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EXECUTIVE SUMMARY

The Copyright (Amendment) Bill, 2010 introduced in Parliament on 30th March, 2010 aims at bringing in wide ranging amendments to the Copyright Act, 1957. Several of these amendments, especially those affecting the rights of the lyricists and musicians in the film and music industry, are extremely laudable and we support them wholeheartedly. Our submission consists of 9 chapters, all of which are briefly summarized in this Executive Summary.

The first chapter concerns amendments in relation to the reciprocal treatment for foreign copyrights. While the present amendments are in the right direction, there is a need to strengthen them. The copyright act endorses the principle of reciprocity; however due to a drafting error, this principle of reciprocity is not applied when it comes to US sound recordings. In other words, while US sound recording copyrights are protected in India, Indian sound recordings do not merit protection in the US. India must rectify this inequity by amending its provision to ensure that US sound recordings are not granted protection in India. We recommend some provisions to rectify this inequitable situation and bring in reciprocity in its true spirit.

The second chapter concerns the amendments affecting the film and music industry. The current amendments are truly revolutionary in that it seeks to redress a highly unjust situation wherein artists routinely contract away their rights to producers owing to their weak bargaining positions. However, we recommend some changes to the existing amendment proposal in order to make the position of such authors stronger. While the freedom of contract requires respect, our Parliament has stepped in time and again to impose some restrictions on this freedom in the interests of social justice, primarily to protect the interests of disadvantaged sections with weak bargaining power. Earlier examples of such legislations are the Minimum Wages Legislations passed by Parliament to protect the working classes from ruthless exploitation at the hands of the industry. We recommend to this Honourable Committee that musicians and lyricists be offered similar protection.

The third chapter covers the amendments related to copyright exceptions for persons with disabilities. The Amendments proposed by the Bill are wholly unacceptable as they limit such exceptions to only certain special formats such as Braille or sign language. This exception automatically excludes from its purview the possibility of using revolutionary new technologies, such as computer software which can read out books to persons with disabilities. To this end, these submissions, provides for the re-wording of the existing amendments.

The fourth chapter commends the Government's effort in increasing transparency in collecting societies and proposes further amendments to achieve this goal. One such suggestion is that such societies be mandated to make available their tariffs etc on their website.

The fifth chapter deals with the amendments to prevent the importation of copyright infringing works. The amendment proposed by the Government are commendable. However the Honourable Committee is cautioned that Clause 33 of the Amendments conflicts to some extent with Section 11 of the Customs Act, 1962 & the 'Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007'. The amendments proposed by the Government in the current Bill are preferred to the existing status quo and it is recommended to this Committee that representatives from the Department of Revenue, Ministry of Finance and the Ministry of Human Resources and Development offer suggestions on how best to resolve the current deadlock.

The sixth chapter deals with the desperate need to reform the Copyright Board, which is, the statutory board, dealing with compulsory licensing applications and disputes regarding assignments.

The Board is overwhelming staffed by bureaucrats such as law secretaries. In a recent Supreme Court judgment in the case of *Union of India v. R. Gandhi, President of the Madras Bar Association* Civil Appeal No. 3067 of 2004, the Hon'ble Court has been pleased to declare that it is unconstitutional for sitting bureaucrats to be staffed on any Tribunal since this goes against the independence of the judiciary. Moreover, given the increase in quantum of work before the Copyright Board, it is strongly recommended that the Board be staffed with full time members qualified in deciding complex issues such as compulsory licensing disputes.

The seventh chapter brings to the Committee's attention the abuse of the special jurisdictional clause in favour of plaintiffs under the existing Copyright Act, 1957. The abuse has been particularly by plaintiffs with deep pockets such as multinational companies who use this provision to harrass financially weak defendants, most of whom are small businessmen. These submissions contain recommendations on redressing existing injustice where a defendant situated in Chennai will have to go all the way to Delhi to defend himself against an *ex-parte* interim injunction which has ground his business to a halt.

The eighth chapter recommends to the Committee that it widen the scope of the amendments proposed to the 'fair use' exceptions. At an academic level, our broad recommendation is that the word 'fair dealing' in Clause 31 be replaced with 'fair use'.

The ninth chapter deals with question of restrospective application of the current amendments. In our opinion, restrospective application of these amendments, would throw open several lawsuits and it is therefore recommended that these amendments operate with resect to only those contracts entered into from the date of notification of the amendments and not those contracts which have already been entered into before the amendments come into effect.

I. RECIPROCAL PROTECTION OF FOREIGN COPYRIGHTS

Key Amendment: Section 40 of the present copyright act ought to be amended in order to provide for “reciprocity” in its true spirit. Since the United States (US) does not protect the public performance of our sound recording copyright holders, we must ensure that we don’t protect any US copyrights in this regard.

A. Introduction: Our copyright Act appears to be modelled on the principle of reciprocity i.e. as long as a foreign country recognizes copyrights over Indian works, India will recognize copyrights of the works originating from that particular foreign country.¹ However, as currently worded, some provisions of our Act provide protection to US copyright owners of sound recordings, even when the US itself does not protect Indian sound recording copyright owners. This needs to change.

The pertinent statutory provisions in this regard are reproduced below:

40. Power to extend copyright to foreign works.

The Central Government may, by order published in the Official Gazette, direct that all or any provisions of this Act shall apply —

(a) to work first published in any class territory outside India to which the order relates in like manner as if they were first published within India;

.....

Provided that —

- (i) before making an order under this section in respect of any foreign country (other than a country with which India has entered into a treaty or which is a party to a convention relating to copyright to which India is also a party), the Central Government shall be satisfied that that foreign country has made, or has undertaken to make, such provisions if any, as it appears to the Central Government expedient to require for the protection in that country of works entitled to copyright under the provisions of this Act;*
- (ii) the order may provide that the provisions of this Act shall apply either generally or in relation to such classes of works or such classes of cases as may be specified in the order;*
- (iii) the order may provide that the term of copyright in India shall not exceed that conferred by the law of the country to which the order relates;*

The government now proposes to amend the above proviso (iii) as below:

- (i) the order may provide that the term of copyright in India shall not exceed that conferred by the law of the country to which the order relates **but such a term of copyright shall not exceed the term of copyright provided under this Act;***

In order to appreciate the ambit of this provision and why the current wording is problematic, one has to turn to the copyright order mentioned in the section above. The order which was issued by the Central Government and titled the “International Copyright Order, 1999”, lists out countries that are recognized by India for reciprocity, as mandated by section 40.

¹ Section 40 of the Copyright Act, 1957.

As it stands currently, the International Copyright Order, 1999 extends copyright protection to all works originating in the U.S.A. This includes sound-recordings and their underlying works such as the music and lyrics. In fact, section 3(e) specifically extends to sound recordings. We reproduce the entire provision below:

“Subject to the provisions of paragraphs 4,5 and 6, all the provisions of the Copyright Act (14 of 1957), (hereafter referred to as the Act), except those in Chapter VIII, and those other provisions which apply exclusively to Indian works, shall apply :-

(a)... to any work first made or published in a country mentioned in Part I, II, III, IV or VI of the Schedule, in like manner as if it was first published in India;

(b).....

(c)

(d)

(e) to a sound recording first made, the producer of which was, at the date of such production, a national of a country mentioned in Part V or Part VI of the Schedule or a body corporate incorporated under a law in force in such a country, in like manner as if the producer was the citizen of India or a body corporate incorporated under a law in force in India, as the case may be, at that point of time.

All clauses above would apply to sound recordings that were created by US owners. Consequently, India will have to pay royalties for the public performance of US sound recordings. Unfortunately however, what has been largely missed is that Indian sound recordings do not get similar protection in the U.S.A.²

As per Section 114(a) of the U.S. Copyright Act, 1976 sound recordings in the U.S.A. do not enjoy any public performance rights. This would mean that if a sound recording is publicly performed in the US via a radio station or in a restaurant, there is no requirement to pay the owner of the sound recording any royalty for the same. It was only in the year 1995 that the U.S. Congress passed the Digital Millennium Copyright Act, 1995, which provided sound recordings a limited right to protect performances through digital transmissions, as distinguished from radio diffusions. In such a backdrop, a radio station or a restaurant in the U.S. would have been liable to pay royalties for only underlying works i.e. the music and lyrics. However, U.S. law exempts royalty payments for even underlying works in certain specific circumstances.³

It is pertinent to note that countries like Australia, Canada etc. do not extend reciprocal protection to U.S. sound recordings. India ought to take immediate steps to amend its law to deny protection to US sound recordings. The copyright order above can be changed by the government, without the need for Parliamentary intervention via an amendment. However, we would still request this Hon’ble Committee to please recommend that the government modify this order

Be that as it may, the international order itself is subject to the parental provision which is section

² Nikhil Krishnamurthy, ‘Indian Copyright Collecting Societies and Foreign Royalties – Whither Transparency?’, (available at: <http://spicyipindia.blogspot.com/2008/11/indian-copyright-collecting-societies.html>)

³ Section 110 5(a) & (b) of the U.S. Copyright Act, 1976.

40. We therefore recommend an amendment to section 40 to provide for true reciprocity principles. Should such an amendment come through, the government will automatically have to amend the copyright order to ensure its compliance with section 40. Such proposal for a statutory amendment to section 40 is perfectly within the scope of competence of this Committee and we recommend as below:

C. Recommendations:

As per the first proviso to section 40, the Indian government is not under an obligation to independently verify the existence of “reciprocity” in so far as a TRIPS member is concerned. Rather it can simply provide for the protection of works from such country through the order despite a lack of reciprocity.

This proviso is marked (in bold) in the provision reproduced below

40. Power to extend copyright to foreign works.

The Central Government may, by order published in the Official Gazette, direct that all or any provisions of this Act shall apply —

(a) to work first published in any class territory outside India to which the order relates in like manner as if they were first published within India;

.....

Provided that —

(i) before making an order under this section in respect of any foreign country (other than a country with which India has entered into a treaty or which is a party to a convention relating to copyright to which India is also a party), the Central Government shall be satisfied that that foreign country has made, or has undertaken to make, such provisions if any, as it appears to the Central Government expedient to require for the protection in that country of works entitled to copyright under the provisions of this Act;

As mentioned earlier, owing to this provision, the Indian government is not under an obligation to independently verify the existence of “reciprocity” in so far as a TRIPS member is concerned. This is clearly an unsatisfactory state of affairs and needs to be addressed. We therefore propose that section 40 itself be amended. However, we also have a problem in terms of section 5 as below:

Section 5: As per this section, any work published in India within 30 days of it being first published in a foreign country will be deemed to be an “Indian work” for the purposes of Indian law. If the work qualifies as an Indian work, then the provisions of reciprocity outlined in section 40 does not apply—and the work merits protection in the same way and to the same extent as any other Indian work. In this day and age, a work can be simulatenously published in multiple countries via the internet, and may therefore qualify as an Indian work, althoguh the owner is a citizen of a foreign country. In other words, US sound recordings that have been released via the internet could technically qualify as being “first published” in India and therefore subject to the same protections as any other Indian sound recording.

From the point of view of reciprocity, this is not a conducive provision. However, since this deeming provision under section 5 may serve other purposes and be important for other provisions in this Act, we do not recommend tampering with this section.

Rather, one could simply state that notwithstanding anything contained in Section 5, “Indian work” is defined for the purpose of section 40 purely based on “nationality” of the author at the time of creation of the work.

We propose that section 40 (along with its corresponding proviso) be amended as below:

40. Power to extend copyright to foreign works.

The Central Government may, by order published in the Official Gazette, direct that all or any provisions of this Act shall apply —

(a) to foreign works;

.....

Provided that —

(i) Before making an order under this section in respect of any foreign work, the Central Government shall be satisfied that the foreign work would, if it were an Indian work have merited protection in the country of origin of such foreign work.

(ii) Foreign works shall be protected under this section to the same extent as corresponding Indian works are protected in the country of origin of the foreign work. However, in no case shall the said foreign work enjoy greater protection (in terms of duration, scope etc) than what a corresponding Indian work enjoys in India.

For the purposes of this section:

i) a work shall be deemed to be an Indian work, if the author of the work or in the case a work of joint authorship, at least half of the total number of authors were citizens of India at the time of creation of the work.

ii) a work shall be deemed to be a foreign work, if the author of the work or in the case a work of joint authorship, at least half of the total number of authors were not citizens of India at the time of creation of the work.

Provided however that in case the author is not a natural entity, the place of registration or incorporation of such entity at the time of creation of the work shall determine whether it is an Indian or a foreign work.

Provided further that if a foreign work has multiple authors, resident or registered in different countries at the time of creation of the work, any country that is most favourable to all the authors from the point of view of reciprocal protection of the work in India under this section shall be treated as the country of origin of the foreign work.

In particular, the above amended provision does away with the bracketed portions in the first proviso to Section 40 (“other than a country with which India has entered into a treaty or which is a party to a convention relating to copyright to which India is also a party”). It also covers within its wide ambit the proposed amendment to proviso (iii) sought to be made by the government, as explained at the start of this note.

D. Conclusions: Under Indian law, i.e. the first proviso to Section 40 of the Copyright Act, 1957, the Indian Government is meant to fashion the International Copyright Order, 1999 on the principles of reciprocity. It is therefore suggested that since the U.S.A. does not recognize the rights of Indian sound recordings in certain contexts, India too must retaliate by amending section 40 to insist that any government order framed in pursuance of section 40 clearly derecognise protection to US sound recording copyrght owners.

Such denial of protection to US sound recording copyrights does not violate TRIPS, since Articles 3 and 4 make it clear that “national treatment” and MFN (most favoured nation) principles do not apply to sound recording copyrights. It is pertinent to note that countries such as Australia, Canada etc. do not extend reciprocal protection to U.S. sound recordings.

II. AMENDMENTS AFFECTING THE MUSIC AND FILM INDUSTRY

A. Cinematographic Films and the Right to Equitable Remuneration:

The present amendment introduces a laudable, revolutionary provision in favour of music composers and lyricists whose works are incorporated into cinematographic films. It states that notwithstanding any assignment of copyrights in works such as music compositions and lyrics that have been incorporated into a film or sound recording, the authors of such underlying works shall continue to have a right to remuneration from any exploitation of the underlying works.

While the freedom of contract requires respect, our Parliament has stepped in time and again to impose some restrictions on this freedom in the interests of social justice, primarily to protect the interests of disadvantaged sections with weak bargaining power. Earlier examples of such legislations are the Minimum Wages Legislations passed by Parliament to protect the working classes from ruthless exploitation at the hands of the industry. We recommend to this Honourable Committee that musicians and lyricists be offered similar protection.

To this extent, the government amendment proposal is very welcome. However, we propose that this amendment be strengthened further in order to provide more optimal protection for authors and composers.

The pertinent section (proposed section 19 (9)) reads as below:

“No assignment of the copyright in any work to make a cinematograph film or sound recording shall affect the right of the author of the work to claim royalties or any other consideration payable in case of utilisation of the work in any form other than as part of the cinematograph film or sound recording.”

Though a very welcome provision, it is subject to some ambiguity. We recommend that it be amended to remove such ambiguity and to strengthen the principle of equitable remuneration embodied therein. Our key recommendations are as below:

- i) In the light of the fact that there is rampant contractual exploitation of Bollywood artists (composers and lyricists), there be an overall ban on assignment of any rights by such artists to any third party, save to legal heirs.
- ii) The ban would not only cover assignments, but also exclusive licenses. Therefore, authors have the freedom to license their works non exclusively as much as they wish and claim royalties for every usage of the work. However, here again, authors can only exclusively license to collecting societies.
- iii) In order to help author composers track usage of their works and claim royalties from a stronger negotiating position, provision must be made for collecting societies. The current scheme of the Act already recognises collecting societies and there are two of them in operation i.e. IPRS and PPL. However, it is not necessary that such authors assign their rights to such collecting societies. Rather, they can merely license (exclusively or non exclusively) such societies to administer their works on their behalf. However, in order to enable collecting societies to sue on behalf of authors (despite not being assignees or exclusive licensees), an amendment would be required clarifying this.

- iv) Lastly, it must be expressly stated that any contracts contrary to the above scheme would be null and void. And that the freedom of authors to license out their works or even to exclusively license the same to collecting societies cannot be taken away.

We explain as below:

Most authors of underlying works (that have been incorporated into Bollywood films⁴ and sound recordings) routinely assign their rights away to the producers for a low lumpsum of money paid upfront. A typical clause in a contract⁵, assigning all rights to the producer, reads as follows:

RIGHTS AND ASSIGNMENT:

*The Lyricist hereby agree that the **Lyrics shall constitute a work specially ordered by the Producer, and accordingly the Lyricist expressly acknowledges and agrees that the Producer shall be considered the first author and owner of the Lyrics for all purposes and the owner of all Lyrics Rights, without condition, restriction or limitation of any kind, and free and clear of any and all claims for royalty or other compensation, except as specifically set forth herein. Accordingly, and without limitation of the foregoing, the Producer shall be entitled to copyright the Lyrics in its own name, and, as proprietor of such copyright, to renew said copyright in its own name. The Lyricist irrevocably and unconditionally waive all rights in respect of the Lyrics to which he is now or in the future be entitled to under the Copyright Act, 1957 (“Act”).***

Owing to such assignments of copyrights, all profits made on the movie are enjoyed primarily by the producer, and creators of underlying works are to be satisfied with low lumpsums paid at the time of commissioning. It is a well known fact that one of India’s greatest lyricist Majrooh Sultanpuri died in penury and his family lives in a single room now. Had he had a continuing right to royalties in his work, this would have never happened. However, the bulk of proceeds from commercial exploitation went to the record companies and producers and the “creative” artist who delighted the public with a rich tapestry of words got nothing.

It was in order to redress this social injustice that the government sought to introduce section 19(9), a provision referenced at the start of this note and reproduced again for ease of convenience:

“No assignment of the copyright in any work to make a cinematograph film or sound recording shall affect the right of the author of the work to claim royalties or any other consideration payable in case of utilisation of the work in any form other than as part of the cinematograph film or sound recording.”

As noted earlier, if the intention is to protect authors against contractual exploitation brought about by unequal bargaining power, this clause needs to be strengthened. As presently worded, it is too mild and could lead to problems.

Firstly, in cases where the film producer is also the producer of the sound recording (and therefore the first owner of the sound recording that is incorporated into the movie), he/she will simply claim that he/she is entitled to exploit even the sound recording separately, without any remuneration due

⁴ Although we’ve referred to this in shorthand as the Bollywood amendments, it must be noted that it impacts all the different film segments in India (including Tollywood) and more importantly, the sound recording business.

⁵ Nikhil Krishnamurthy, Waxing Lyrical on Royalties – An update, (available at: <http://spicyipindia.blogspot.com/2010/05/guest-post-waxing-lyrical-on-royalties.html>)

to authors.⁶

Secondly, and more importantly, if the real mischief that the government seeks to remedy is to prevent contractual exploitation owing to weak bargaining power of Bollywood author composers, it should simply ban any divestiture by them of their ownership over underlying works through assignments or exclusive licenses. The concept of a separate right to royalty does not exist under the present copyright act and this could lead to conceptual problems.

The current provision appears to provide for a right to remuneration only when the underlying work is exploited separately from the film or sound recording. We propose that a right to remuneration accrue on every exploitation of the underlying work, whether as part of the film or sound recording or separately or even when such underlying works are adapted or combined to form altogether new works. This is best done by simply prohibiting any assignment or exclusive licensing by the authors of such works in favour of any third party, save their legal heirs. In other words, the author would continue to have ownership of underlying works and can claim continuing royalties for its exploitation by a third party, whether by way of incorporation into another work or as a standalone exploitation.

Thirdly, as it stands now, the right to equitable remuneration appears to apply only to lyrics and musical compositions. It should extend to all underlying works that are incorporated into a film, including the script, which may be treated as literary/dramatic work. In other words, the bar against assignment or exclusive licensing of underlying works that are incorporated into sound recordings or cinematograph films should apply to all underlying works and not just music compositions and lyrics.

Fourthly, in order to help such authors track such usage and claim royalties without much difficulty and from a position of stronger negotiating power, they must be encouraged to form collecting societies. Fortunately, such societies already exist in the form of PPL and IPRS.

The second proviso to section 18 stating that:

Provided also that the author of the literary or musical work included in a cinematograph film or sound recording shall not assign the right to receive royalties from the utilisation of such work in any form other than as part of the cinematograph film or sound recording except to the legal heirs or to a copyright society for collection and distribution and any agreement to the contrary shall be void.

As stated earlier, there ought to be a blanket ban on assignments and exclusive licensing, saving to legal heirs and to collecting societies respectively. Secondly, there is no need for an author to assign away his/her rights to the collecting society. A mere license (exclusive or non exclusive) to administer such rights would suffice.

With all of the above in mind, we propose the following amendment:

“Notwithstanding anything contained in this act or any contract to the contrary:

⁶ Nikhil Krishnamurthy, *Waxing Lyrical on Royalties – An analysis of the Author-Centric Amendments proposed to the Indian Copyright Act, 1957* - <http://spicyipindia.blogspot.com/2010/03/guest-post-waxing-lyrical-on-royalties.html>

- i) ***All authors of underlying works including interalia lyrics and musical compositions that have been incorporated into cinematographic films and sound recordings shall be treated as the first owners of copyrights of such underlying works.***
- ii) ***Authors above cannot waive their rights, or assign or exclusively license any of their rights.***
- iii) ***Provided however that they may may assign any or all of their rights in favour of their legal heirs and exclusively license any or all their rights in favour of collecting societies. Any legal heir who becomes an assignee may not in turn assign these rights save in favour of their heirs or exclusively license rights save in favour of collecting societies.***

The first portion of the above clause ensures that the authors of underlying works are clearly treated as the first owners of copyrights in such works. This is absolutely essential in the light of a Supreme Court judgement⁷ which held that musical compositions and lyrics that have been created for the purpose of a film have no independent copyright, but are subsumed within the film as a whole. Therefore, the court reasoned that the first copyright in the film along with all its constituent elements (such as music, lyrics and script) vests with the movie producer.

This court ruling permitted sound recording companies and film producers to exploit artists for a very long time. Further, even despite this court ruling, producers routinely divested authors' of their rights through express contracts.

Therefore the optimal solution is to bar assignments by authors. Although such a bar would impact the freedom of contract, such a legal restraint on the freedom of contract is essential in the interests of social justice. In order to further the principles of social justice enshrined in our constitution, our Parliament has time and again, enacted laws that curb the freedom of contract, when such freedom ended up being a thorn for the very party in whose favour it vested. In other words, this very freedom reinforced the subjugation of such parties at the hands of their contracting counterparts who possessed superior bargaining power. An excellent example is the minimum wages legislation, where even if a labourer wishes (due to dire economic circumstances and pressure from potential employers with superior bargaining power), he/she cannot contract to perform the labour at any amount less than what is statutorily guaranteed through the minimum wages act. Therefore, in the interests of social justice, the Committee ought to recommend that here too, authors' be divested of their right to assign their copyrights, save to their legal heirs.

At this juncture, it must be stated at the outset that the term "right to royalties" as used in the current amendment is conceptually flawed. There is no separate right to royalty mentioned in our copyright scheme. Rather the rights under the copyright act are the rights to do all or any of the exclusive rights guaranteed to the owner such as the right to reproduce, distribute, communicate to the public etc. The provision may have intended to import the concept of "equitable remuneration" from continental Europe; however the concept of equitable remuneration is significantly different and merely entails a share in the proceeds that come out of commercialisation of the copyrighted work in question. The concept of a right to royalty however is not clear and may envisage entire royalties from the exploitation of the work; in which case, it appears flawed, since there is no "sharing" envisaged as is the case with equitable remuneration. Therefore, in order to make for conceptual clarity, our proposal is that all assignments of their rights be barred, save to legal heirs. Further, in order to strengthen the negotiating power of music composers and lyricists, their rights be permitted to be exclusively licensed to collecting societies, which may administer rights on their behalf and negotiate good royalty rates.

⁷ *Indian Performing Right Society v. Eastern India Motion Picture Assn.* AIR 1977 SC 1443.

In terms of collecting societies and their value in helping author composers administer their rights and collect royalties on their behalf, the present set of amendments introduces a problematic provision. Clause 18 of the Amendment Bill proposes that in section 33, the word “author” shall substitute for the word “owner”

The *Notes on Clauses*, accompanying the Statement of Objects and Reasons, explains this proposed amendment in the following manner:

This clause seeks to amend section 33 of the Act relating to registration of copyright society by providing that registration of copyright society shall only be done by authors and they would re-register in accordance with the provisions of this section within a period of one year from the date of commencement of the Copyright (Amendment) Act, 2010.

In other words, the amendments seek to change the existing arrangement wherein copyright owners are members of collecting societies. The intention of the government appears to be to ensure that the collecting societies are not hijacked by sound recording companies who take decisions to the detriment of author composers. In order to appreciate this point, it is important to delve into the current structure of collecting societies in India:

The concept of copyright societies was introduced into the Copyright Act through the Amendments passed by Parliament in the year 1994. As per Section 33(3) of the Copyright Act, introduced via the 1994 amendments, “*the Central Government may, having regard to the interests of the authors and other owners of rights under this Act, the interest and convenience of the public and in particular of the groups of persons who are most likely to seek licences in respect of the applicants, register such association of persons as a copyright society subject to such conditions as may be prescribed: Provided that the Central Government shall not ordinarily register more than one copyright society to do business in respect of the same class of works.*”

The two Copyright Societies that currently operate in the music industry are as follows:

(i) Public Performance Limited (PPL) – PPL administers all rights with respect to sound recordings. As per the Copyright Act the '**author**' of a sound recording is the producer of the recording and it is he who owns the Copyright. The '**owner**' of the sound recording however can be different from the '**author**', if the author decides to assign his copyright in the sound recording through an assignment deed or through an exclusive licencing agreement.

(ii) Indian Performing Rights Society (IPRS) – IPRS administers all rights with respect to the underlying works in a sound recording such as the lyrics, the music itself etc. As per the Copyright Act, the '**author**' of the lyrics is the person who has penned them. The '**author**' of a musical work is the composer. Again, in both these cases, as discussed earlier, the '**owner**' can be different from the '**author**', if the author decides to sell his copyright in the lyrics or the musical work through an assignment deed or alternatively through an exclusive licencing agreement.

A typical scenario between a hotel owner and a collecting society, interested in negotiating a licence to broadcast or perform a sound recording would involve 2 rounds of negotiation: The *first* round would be with PPL for a right to broadcast the sound recording. However since the owner of the sound recording is different from an owner of the underlying works i.e the lyrics and the music, the *second* round of negotiations would be with IPRS for permission to broadcast the underlying

lyrics and musical works. In short, the hotel owner would need to negotiate with both PPL and IPRS. However if the scenario involved a hotel owner who wishes to hire a band to render a live performance of a musical work, then, in that case, he/she needs to negotiate only with IPRS, and not PPL since it is only IPRS that is assigned the copyright in the lyrics and the musical work which will be performed by the live band. The separate copyright over the “sound recording” is not impacted.

Once IPRS and PPL collect royalties through licences, the same is distributed to all its members as per the membership agreement. The members may then further distribute the same to authors or musicians as per the terms of the contract between both parties. IPRS and PPL also actively enforce the rights of their members by filing suits for copyright infringement and securing injunctions on their behalf.

One would have typically expected IPRS to be dominated by authors of underlying works (composers and lyricists). However, since film producers and sound recording companies divested such authors of all their rights through contracts, such authors had no effective claim to be active members of IPRS. In other words, IPRS membership came to be dominated by sound recording companies. And IPRS slowly began to whittle away the interests of music composers and authors.

This historical tragedy may have prompted the government to act the way it did. However, under the scheme that we recommend, this is not likely to happen.

In other words, were our amendments to be accepted, we would effectively have the following scheme:

- i) Authors would continue to own their copyrights in underlying works. All assignments, exclusive licenses and waivers in favour of third parties, save to legal heirs and collecting societies would be prohibited.
- ii) Authors would be encouraged to participate in collecting societies such as IPRS. However, they need merely license the said society to administer their rights; they need not assign such societies.

From the above, it is clear that even if IPRS were to continue in its present form, the majority of IPRS members would be music composers and lyricists, since they would now be the owners of copyright. And their rights cannot be assigned to sound recording companies or any third parties.

Therefore, the proposed amendment by the government mandating that such societies can only comprise of authors is not needed. In fact, such an amendment may be counterproductive, since it would negatively impact other spheres (such as book publishing), where the copyright ownership in written works is transferred routinely to publishing houses. Such publishing houses will not be able to constitute collecting societies to administer works: and this could impact transaction costs by users and others who wish to license such works.

III. THE "DISABILITY" EXCEPTION

(A) The section as proposed in the Amendment Bill reads as below:

Section 52 (1) (zb): The adaptation, reproduction, issue of copies or communication to the public of any work in a format, including sign language, specially designed only for the use of persons suffering from a visual, aural or other disability that prevents their enjoyment of such work in their normal format.

Section 31B (1): An organization, registered under section 12A of the income tax act, 1961 and working primarily for the benefit of persons with disability, and recognized under chapter X of the persons with disabilities (equal opportunities, protection of rights and full participation) act, 1995, may apply to the Copyright Board, in such form and manner and accompanied by such fee as may be prescribed, for a compulsory license to publish any work in which copyright subsists for the benefit of such persons, in a case to which clause (zb) of subsection (1) of section 52 does not apply, and the Copyright Board shall dispose of such application as expeditiously as possible and endeavor shall be made to dispose off such application within a period of two months from the date of receipt of the application..

(2) The Copyright Board may, upon receiving an application under subsection (1) inquire, or direct such inquiry as it considers necessary, to establish the credentials of the applicant and satisfy itself that the application has been made in good faith.

(3) If the Copyright Board is satisfied, after giving to the owners of rights in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, that a compulsory license needs to be issued to make the work available to the disabled, it may direct the Registrar of Copyrights to grant to the applicant such a license to publish the work.

(4) Every compulsory license issued under this section shall specify the means and format of publication, the period during which the compulsory license may be exercised and, in the case of issue of copies, the number of copies that may be issued.

Provided that where the Board has issued such a compulsory license, it may on further application and after giving reasonable opportunity to the owner of the rights, extend the period of such compulsory license and allow the issue of more copies as it may deem fit.

(5) The Copyright Board may specify the number of copies that may be published without payment of royalty and the fix the rate of royalty for the remaining copies.

The above provision can be summarised as below:

1. Only formats that are specially created to cater to the needs of the disabled (such as Braille) will fall within the section 52 exception.
2. For any other format, one requires a compulsory licence. However, such a licence cannot be applied for by the intended beneficiary, but only by a narrow group of organisations that comply with stringent criteria.

The problems with the above framework may be obvious to anyone sensitive to the present societal structure that disadvantages the disabled at every turn. For one, "special formats" such as Braille

cater to a minuscule portion of the total community of those that we chose to label as the "disabled" or the "differently-abled". Even amongst the visually impaired, not every one is familiar with Braille.

Given that we now live in the so called "digital" era, what works best for most of the visually impaired are electronic versions of text that can be read out using a screen reader software (such as Jaws or Orca). Unfortunately, "electronic" versions that are created by scanning printed text will not necessarily qualify as "special formats"..for such electronic versions can be accessed by one and all. Indeed, that precisely is why offerings such as Kindle and Google books are a big commercial hit...for their major market comprises the not so differently-abled.

(B) Article 14 (and 21) of the Indian Constitution and Discrimination

There must be a meaningful copyright exception in favour of the "disabled", a category not necessarily limited to those that are visually impaired, but includes any person unable to enjoy copyrighted works in their "normal" format. Illustratively, legendary scientist Stephen Hawking who suffers from ALP (Amyotrophic Lateral Sclerosis) is unable to read a printed book, but has to have this book digitized and then filtered through special software which reads it out to him.

An exception in favour of "special formats" will not help him or those that are similarly situated to him in India. Article 14 of our Constitution mandates that the State shall not "discriminate". Isn't this discrimination of the highest order?

Further, the State must appreciate that it has a constitutional duty to provide a decent standard of living to all its citizens; indeed Article 21 has been interpreted several times to include a meaningful right to life. Such a right to life would also include the right to read (particularly re: educational materials) and participate more meaningfully in society. Indeed, Article 21A has now been specifically inserted into the Constitution to provide explicitly for such a constitutional right to education upto the age of 14.

If an Article 21 action were brought against the State, a progressive court would rule that the State is under a positive mandate to provide "accessible" reading material for the disabled. The State must appreciate that providing a copyright exception to enable the disabled to create accessible works, on their own, will not necessarily comply with the Article 21 mandate. And yet, this is all that the disabled community is asking for now. Viewed in this light, the State's failure to provide for a meaningful copyright exception is an egregious transgression of their constitutional mandate.

(C) An Onerous Compulsory Licensing Provision

The State may of course argue that in respect of "non special" formats, they have doled out a largesse in the form of a compulsory licensing provision. However, a compulsory licensing provision is not as advantageous as a blanket exception in favour of "special formats"..and therefore is no answer to a charge of discrimination. In other words, those that wish to avail of "non special" formats are still disadvantaged compared to their "special format" peers, in that they will have to apply for a compulsory licence, wait for the copyright board to decide and pay royalties as well.

They cannot apply for the licence themselves! Rather, only organisations that comply with the following can:

- i) *An organization, registered under section 12A of the income tax act, 1961 (act 43 of 1961);*
- ii) *Working primarily for the benefit of persons with disability; and*
- iii) *Recognized under chapter X of the persons with disabilities (equal opportunities, protection of rights and full participation) act, 1995 (act 1 of 1996)*

Perhaps the total number of Indian organisations that comply with all of the above criteria can be counted at ones finger tips! Indeed many universities (such as Xavier's center for visually impaired in Mumbai) and other informal networks that help with conversions to accessible formats are not covered by this provision.

Further, the body vested with the right to issue compulsory licenses is the Copyright Board, a board that has not done much to merit the confidence of any copyright stakeholder, ever since it began functioning. In fact, it has been dodged with controversy time and again, and most recently with the compulsory licensing wars between radio stations and sound recording majors over royalty rates to be payed by the radio stations.

(D) Potential Abuse and Suggested Provision:

The government may perhaps be concerned at the potential abuse of any "disability" related copyright exception, and may have therefore stipulated strict safeguards. But doesn't our law leave the monitoring of infringement to the copyright owner? In much the same way, shouldn't the law also leave the monitoring of any use that allegedly falls outside the scope of the copyright exceptions to the copyright owner? A second best option would be to insist that the service provider who creates "accessible versions" and makes available any copyrighted work for the benefit of the disabled has to take "reasonable measures" to ensure that the intended beneficiary does indeed belong to the disabled community. In any case, even with slip ups and the non detection of uses by folks other than the disabled, how much of a revenue loss to publishers are we really speaking about here?

We therefore recommend the clause below:⁸

Section 52 (1) (za) (i): The making of an accessible version of a copyrighted work or the doing of any other act including reproducing, adapting and making available the copyrighted work or accessible version thereof, with the primary objective of enabling persons with visual, aural or other disabilities to access copyrighted works as flexibly and comfortably as persons without such disabilities.

Provided that if any person wishes to undertake any of the above activities on a for profit basis, it shall pay such remuneration to copyright owners as may be prescribed by the Copyright Board from time to time. For the purpose of determining remuneration, the Copyright Board shall take into consideration the need to ensure that works are accessible and available at prices that are affordable, taking into account disparities of incomes for persons who are disabled.

Provided further that a person doing any of the acts under this section shall take reasonable measures to ensure that the end beneficiary is a person with a disability.

Section 52 (1) (za) (ii): For the purpose of Section 52 (1) (za) (i) "accessible version" means any

⁸ This clause has been proposed by the National Access Alliance, of which Prof Basheer is a member. In his capacity as legal advisor to the alliance, he was one of the primary authors of this clause.

version or form which gives a disabled person access to the work as flexibly and comfortably as a person without a disability, and shall include, but not be limited to, large print, with different typefaces and sizes all being permitted according to need, Braille, audio recordings, digital copies compatible with screen readers or refreshable Braille and audiovisual works with audio and or text description.

IV. AMENDMENTS WITH RESPECT TO COPYRIGHT SOCIETIES

We've already dealt with copyright societies to some extent in our submissions relating to the protection of music composers and lyricists.

We now recommend that the government establish stricter transparency norms for collecting societies. One of the collecting societies, Phonographic Performance Limited (PPL) has been heavily criticized for their extortionist dealings in the past. In fact, PPL does not even publish its tariffs for usage on its website.⁹ Only strong transparency and accountability measures can change this.

In an unfortunate turn of events, the government has, instead of increasing transparency and ensuring stricter regulation of Copyright Societies, has chosen to delete the existing statutory safe guards in this respect. This safeguard can be found in Section 34A which the Government seeks to delete via the proposed Amendments.

(a) Section 34A of the Copyright Act, 1957 – Payment of remunerations by copyright society:

As per Section 34A(2) of the existing Act, *“The Copyright Society shall, subject to such rules as may be made in this behalf, frame a scheme for determining the quantum of remuneration payable to individual copyright owners having regard to the number of copies of the work in circulation: Provided that such scheme shall restrict payment to the owners of rights whose works have attained a level of circulation which the copyright society considers reasonable”*.

This provision needs to be retained, perhaps with some amendments to adequately protect interests of authors.

(b) Section 33A: Further, the governments move to mandate Copyright Societies to publish their Tariff Schemes (an amendment to section 33A via clause 19 of the Amendment Bill, 2010) is laudable. This clause will greatly increase transparency in Copyright Societies and therefore needs to be therefore retained, albeit in stronger terms. We however recommend that this provision be amended as below:

Section 33A (1) Every Copyright Society shall publish its tariff scheme, its list of members and details of its disbursements of royalties on its website. It shall also include details of foreign societies and artists with which it has reciprocal arrangements and disbursements to them. It shall include such details in its annual report which shall be made publicly available on its website within a month of its issue.

⁹ Nikhil Krishnamurthy, *Indian Copyright Collecting Societies & Foreign Royalties: Whither Transparency?*, (available at: <http://spicyipindia.blogspot.com/2008/11/indian-copyright-collecting-societies.html>)

V. IMPORTATION OF COPYRIGHT INFRINGING WORKS INTO INDIA

Clause 33 of the Copyright Amendment Bill, 2010 proposes replacing the erstwhile Section 53 of the Copyright Act, 1957 with a wholly new Section 53. The amendment, proposed by the Bill, lays out a sufficiently credible mechanism for the Central Board of Excise and Customs (CBEC) to intercept and detain copyright infringing works until the Copyright Owner, who has requested such detention, can secure an Order from a Court of competent jurisdiction in regards the final disposal of the infringing works. The CBEC can order the detention of the goods for only a maximum period of 14 days.

In particular, we commend the proposal to exclude goods, transiting Indian seaports or airports, from being detained by the CBEC. Such an amendment is aimed at over-riding the decision of the Supreme Court in the case of *Gramophone. Co. v. Birendra Pandey*, AIR 1984 SC 66 wherein the Supreme Court had held that the word 'importing' would cover even 'transiting' goods. The current Amendment is in consonance with India's international policy statement, especially the seizures of in-transit pharmaceutical consignments from India to Brazil.

However, in order to provide more fairness in the enforcement machinery, we recommend that this provision be amended as below:

(a) The copyright owner should be able to notify customs authorities of their ownership of works and potentially infringing imports. Upon such notice, the customs office shall ask the importer to post a bond to secure the interests of the copyright owner. Upon the bond being rendered, the goods shall be released for free circulation in the market. Should the copyright owner get a restraining order from the court, the bond shall be transferred in the name of the copyright owner. And this amount shall be set off against any damages that the importer might have to pay to the copyright owner under a court order.

(b) **The 'Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007':** These Rules were notified by the CBEC via No. 47/2007-CUSTOMS (N.T.) as per the procedure prescribed in Section 11 of the Customs Act, 1962. These Rules cover the procedure to be followed by the CBEC authorities while detaining imported works that infringe any of the intellectual property laws in India. These rules define 'Intellectual Property' to include a 'copyright as defined in the Copyright Act, 1957'. The problem however is that the procedure laid down by these rules is different from the procedure laid down in the proposed Amendments. The most stark difference is that while the proposed amendments recommend that the final decision of copyright infringement is left to a civil court, the rules require the CBEC itself to decide the question of infringement. This anomaly between the proposed Amendments and the existing Rules needs to be resolved. The problem however is that while the Amendments are being proposed by the Ministry of Human Resources and Development, the IPR Enforcement Rules, 2007 are prescribed by the Department of Revenue, Ministry of Finance. The Honourable Committee may recommend that representatives from both Ministries forward suggestions on resolving this issue. In any case, it should be made clear the copyright section shall have precedence over the CBEC rules.

VI. THE NEED TO REFORM THE COPYRIGHT BOARD

A. The workings of the Copyright Board and the need for reform:

The Copyright Board is a statutory body constituted under Section 11 of the Copyright Act, 1957. The Act vests the Board with several important roles such as deciding compulsory licencing disputes under Chapter VI, as also disputes with respect to assignment of copyright under Section 19A. The compulsory licensing dispute between radio stations and copyright societies, involving hundreds of crores of rupees was initially decided by the Copyright Board. After consecutive appeals, they were admitted to the Supreme Court.¹⁰ While disposing the appeal the Supreme Court made the following observation¹¹ about the workings of the Copyright Board:

However, we do not approve the manner in which the Board has dealt with the matter. It has refused to examine the witnesses. It took up the matter on a day for hearing which was fixed for production of witnesses. We, therefore, are of the opinion that the order of the Board should be set aside and the matter be remitted to the Board again for the consideration of the matter afresh on merit.

As of now, the Copyright Act specifies the criteria for appointing only the Chairperson of the Copyright Board. Both the Act and the Rules are however silent on the appointment of the rest of the Board, which can extend upto 14 members. This means that the Act has vested with the Central Government unbridled discretion in determining the membership of the Copyright Board. The current composition of the Copyright Board, as notified by the Ministry of Human Resources and Development in the notification - No.F.7-4/2005-CO/CRB are as follows:

1. Dr. Raghbir Singh,..... Chairman
2. Joint Secretary to the.....Member
Government of India,
in charges Copyrights,
Ministry of Human Resources Development,
Department of Secondary and
Higher Education, Shastri Bhavan,
New Delhi-110001.
3. Joint Secretary and Legislative Counsel,..... Member
Ministry of Law & Justice,
(Department of Legal Affairs),
Shastri Bhavan, New Delhi-110001
4. Law Secretary to the..... Member
Government of Haryana
5. Law Secretary to the..... Member
Government of Gujarat

¹⁰ Phonographic Performance Ltd. vs Music Broadcast (P) Ltd. 2004 (29) PTC 282 Bom, Super Cassette Industries Ltd. vs Entertainment Network (India) AIR 2004 Delhi 326.

¹¹ M/s Entertainment Network (India) Ltd v. M/s Super Cassette Industries Ltd 2008 (9) SCALE 69.

6. Law Secretary to the..... Member
Government of Maharashtra
7. Law Secretary to the..... Member
Government of Goa
8. Law Secretary to the..... Member
Government of Kerala
9. Law Secretary to the..... Member
Government of Bihar
10. Law Secretary to the..... Member
Government of Uttaranchal
11. Director,..... Member
National Law School of India University,
Banglore, Karnataka
12. Director,..... Member
National University of Juridical Sciences,
Kolkata, West Bengal.
13. Director,..... Member
National Law Institute University,
Jodhpur, Rajasthan.
14. Director,..... Member
National Law Institute University,
Bhopal, Madhya Pradesh.
15. Director,..... Member
National Academy of Legal Studies and
Research University, Hyderabad.
Andhra Pradesh.

B. The Unconstitutional Appointments to the Copyright Board

Our objections to the composition of the Copyright Board are two fold:

- (i) The Scheme of the Copyright Board is unconstitutional in light of the recent Supreme Court Judgment in the case of *Union of India v. R. Gandhi, President of the Madras Bar Association* Civil Appeal No. 3067 of 2004, judgment of which was rendered on May 11th, 2010.

We elaborate on these objections below:

- i) The Scheme of the Copyright Board is unconstitutional in light of the recent Supreme Court Judgment in the case of *Union of India v. R. Gandhi, President of the Madras Bar Association***

Civil Appeal No. 3067 of 2004, judgment of which was rendered on May 11th, 2010.

As will be observed from the list of members of the Copyright Board, as notified by the Government, there are 6 Law Secretaries to various state governments, 2 Joint Secretaries to the Central Government and 5 Directors of various National Law Schools. The current Panel hearing the compulsory licensing dispute however does not employ any of the directors of the National Law Schools. Instead the Secretary to Union Law Ministry and the Law Secretary of the Bihar Government are hearing the dispute along with the Chairman, Dr. Raghbir Singh. In other words, the composition of the board consists predominantly of members of the “executive”.

As per the Supreme Court judgment cited above, sitting bureaucrats cannot be members of any tribunal or court. The logic for this being that, the independence of the judiciary, is a basic feature of the Indian Constitution and the same cannot be compromised by appointing members of the Executive to tribunals or courts. Although the name does not suggest so the Copyright Board is deemed to be a Civil Court as per Section 12 of the Copyright Board.

In pertinent part the Supreme Court in its judgment held the following:

The issue is not whether judicial functions can be transferred from courts to Tribunals. The issue is whether judicial functions can be transferred to Tribunals manned by persons who are not suitable or qualified or competent to discharge such judicial powers or whose independence is suspect. We have already held that the Legislature has the competence to transfer any particular jurisdiction from courts to Tribunals provided it is understood that the Tribunals exercise judicial power and the persons who are appointed as President/Chairperson/Members are of a standard which is reasonably approximate to the standards of main stream Judicial functioning. On the other hand, if a Tribunal is packed with members who are drawn from the civil services and who continue to be employees of different Ministries or Government Departments by maintaining lien over their respective posts, it would amount to transferring judicial functions to the executive which would go against the doctrine of separation of power and independence of judiciary. (para 45)

A lifetime of experience in administration may make a member of the civil services a good and able administrator, but not a necessarily good, able and impartial adjudicator with a judicial temperament capable of rendering decisions which have to (i) inform the parties about the reasons for the decision; (ii) demonstrate fairness and correctness of the decision and absence of arbitrariness; and (iii) ensure that justice is not only done, but also seem to be done. (para 47)

We hasten to add that our intention is not to say that the persons of Joint Secretary level are not competent. Even persons of Under Secretary level may be competent to discharge the functions. There may be brilliant and competent people even working as Section Officers or Upper Division Clerks but that does not mean that they can be appointed as Members. Competence is different from experience, maturity and status required for the post. (para 48)

C. Conclusions: In light of the above Supreme Court ruling we strongly recommend that the constitution of the Board be immediately changed so that there is more of an infusion of “judicial” competence and the “executive” influence on the Board is refused. Further, the Honourable Committee recommend that the Copyright Act be amended to provide for minimum statutory requirements in order to qualify as a member of the Copyright Board. Our other recommendations are as below:

- (i) The Copyright Board must have a permanent location and must be in operation throughout

the year subject to vacations and breaks. It should also have the ability to sit in government offices of other cities, if the majority of the parties hail from a city that is different from its permanent locus. Currently the Copyright Board does not have a permanent seat and instead holds its hearings at the Indian Law Institute in Delhi. The lack of continuous hearings is adversely affecting the radio business which has the most number of compulsory licensing applications pending with the Board. Some of these stations cannot carry out business unless and until the Board begins to operate in a more professional and streamlined manner.

- (ii) The strength of the Board may be increased to ensure faster disposal of applications.
- (iii) Compulsory licensing disputes often involve substantial questions of law, economics and competition. We would therefore propose that provision be made for the inclusion of a competition law/policy expert (perhaps a member of the Competition Commission) within the copyright board.

VII. RECOMMENDATIONS ON AMENDING THE SPECIAL JURISDICTION CLAUSES IN THE COPYRIGHT ACT, 1957:

A. Introduction: Although the Amendment Bill, under consideration of this Honourable Committee, does not propose any amendments to the special jurisdictional clauses of Section 62 of the existing Copyright Act, 1957, it is recommended that this Honourable Committee propose in its report to Parliament that the same be amended in order to ensure justice for financially weaker defendants.

B. Section 62 of the Copyright Act, 1957: This provision of the Copyright Act, 1957 states that the owner of copyright may institute a suit of copyright infringement in a district court “*within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain.*”

To briefly summarize, this provision allows the copyright owner to sue for copyright infringement in any location wherein he is resident or is carrying out business or personally works for gain. The logic for this provision was that since a copyright could be infringed in multiple locations, it should be made convenient for the copyright owner to enforce his rights in one location instead of chasing multiple infringers around the country.

Unfortunately however, several Indian and foreign companies seeking to enforce their copyrights in India appear to be misusing this provision to unduly harass defendants, many of whom are small businesses. For example, multinational companies with an office in Delhi, often choose to sue defendants from other locations (such as Bangalore) before the Delhi high court, despite the fact that such multinational company may have a branch office in Bangalore. The reasons for making this choice stem from the fact that the courts in Delhi are perceived as being more IP friendly. Most importantly, suing a defendant in a location far away from his/her hometown is likely to harass the defendant to an extent sufficient to force them to settle on terms favourable to such multinational plaintiffs.

C. Section 20 of the Code of Civil Procedure, 1908: As mentioned earlier Section 62 of the Copyright Act, 1957 is a special jurisdictional rule. All other civil actions are subject to Section 20 of the Code of Civil Procedure, 1908 which basically bestows jurisdiction upon only that Civil Court within whose jurisdiction the cause of action arises or where the defendant resides. It is recommended that this Honourable Committee seeks to balance Section 62 with Section 20 in order to ensure that defendants are not harassed while plaintiffs are enforcing their rights. The Honourable Committee may do so by recommending the following proviso to Section 62:

Provided that sub-section (2) can be availed only when the plaintiff does not have any office or residence in the place where the defendant resides/does business.

VIII. THE FAIR DEALING EXCEPTION FOR PERSONAL USE

The Indian copyright act 1957 provided for a fair dealing exception for the purpose of private use/ research. The amendment now seeks to make this a tad broader by providing as below:

The following acts shall not constitute an infringement of copyright, namely —

(a) a fair dealing with a literary, dramatic, musical or artistic any work not being a computer programme for the purposes of —

(i) private and personal use, including research;

However, one must note an important qualification: not every use of a work for the purpose of research or private use qualify. Rather, the “dealing” with the copyrighted work has to be a “fair” one. Some common law jurisdictions (which share a similar legal system with India) such as the US have held that a fair dealing often cannot be taken up when the entirety of the work is copied. And yet from a policy perspective, it is critical to provide such an exemption in favour of the making of an entire copy of a work for research purposes. In particular, this would particularly aid education throughout a country, which now recognizes the right to education as a fundamental right.¹²

“The right to life enshrined in Article 21...means something much more than just physical survival. Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiori, this would include the faculties of thinking and feeling. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms...”

We therefore recommend that India have a general provision permitting the making of private personal copies of any work. Illustratively, the Dutch Copyright Act provides in Article 16 (B) for such personal copies (both physical and electronic copies).¹³

¹² The newly enacted Article 21A makes the ' Right to Education' a fundamental right. Even before the enactment of this provision the Supreme Court had already interpreted Article 21 to hold the Right to Life to include the Right to Read and a Right to an Adequate Education. See Francis Coralie Mullin v. The Administrator, Union Territory of Delhi & Ors. [1981] AIR 746. Also see Lawrence Liang, *Exceptions & Limitations in Indian Copyright Law for Education: An Assessment*, THE LAW & DEVELOPMENT REVIEW 3(2) at p.17. (2010)

¹³ Netherlands: Copyright Act, 1912 (last amended – October 27th, 1972). We thank Mr. Nikhil Krishnamurthy for pointing us to this provision.

**IX. THE RESTROSPECTIVE APPLICATION OF THE COPYRIGHT AMENDMENT
BILL, 2010?**

One of the principle issues that the present Amendment Bill misses out on is whether or not the proposed amendments should have restrospective effect. In our opinion, restrospective application of these amendments, would throw open several lawsuits and it is therefore recommended that these amendments operate with respect to only those contracts entered into from the date of notification of the amendments and not those contracts which have already been entered into before the amendments come into effect.

All existing law-suits will therefore proceed under the Copyright Act, 1957, as it existed before the amendments. To this end we propose that Clause 1(2) be amended in the following manner:

Clause 1(2): It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, provided that in no case shall the provisions of this Bill/Act apply with retrospective effect.