

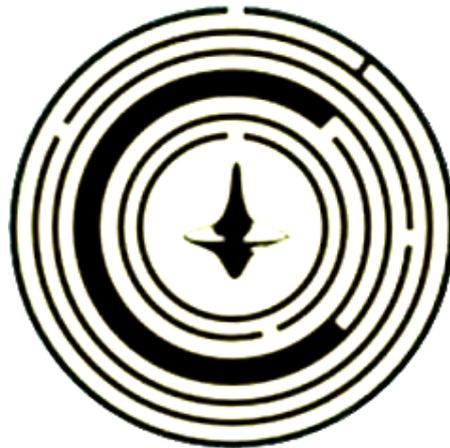


NUJS-CUSAT CONFERENCE



(Supported by the NUJS Law Review & IPTLS)

COPYRIGHT AMENDMENTS, 2012: A FAIR BALANCE?



CONFERENCE REPORT

**November 27-28, 2012
National University of Juridical Sciences, Kolkata**

The conference on '*The Copyright Amendments, 2012: A Fair Balance?*' hosted by the MHRD IP Chairs at the National University of Juridical Sciences (NUJS) and the Cochin University of Science and Technology (CUSAT) in association with NUJS Law Review and Intellectual Property & Technology Law Society (IPTLS) was held in Kolkata on November 27 and 28, 2012.

The conference explored the latest amendments to India's copyright regime, amendments that have far reaching implications for copyright jurisprudence, industry practice and social justice. As with most legal policies, the amendments seek to balance various competing interest groups, ranging from the entertainment industry to disability rights groups. The conference saw the participation of academicians, policy makers, IP practitioners, the industry, civil society organizations and students who brainstormed and reflected on the amendments and their interpretative challenges.

The introductory session undertook an overview of the amendments, including their history, and the various interests at stake. Part I of the conference dealt with amendments pertaining to the entertainment sector. Part II dealt with those amendments pertinent to the technology sector. Part III, the most voluminous part, dealt with the various copyright exceptions and limitations. The last part dealt with copyright governance issues, notably collecting societies and the copyright board.

The conference is just the start

The aim of the conference was to generate papers on the various themes outlined above which will culminate into both:

- i) a journal issue: the Special Issue of the NUJS Law Review
- ii) a book to be published by the publishers of the NUJS Law Review, Eastern Book Company (EBC).

The book will contain expanded versions of the papers in the journal. Edited by Prof. Shamnad Basheer, it will be the first comprehensive book to deal with the copyright amendments. Apart from the value it promises to bring to IP practitioners, policy makers and students, we aim to produce articles that could proffer interpretative assistance to courts confronted with litigation in the immediate aftermath of the amendments.

Acknowledgements

We wish to thank the Ministry of Human Resource Development for its continued support for the activities of the IP Chair in hosting conferences.

We also wish to thank K&S Partners for helping us with additional sponsorship to enable a comprehensive two day conference.

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SPEAKER PROFILES

Abhishek Malhotra

Abhishek Malhotra, currently a partner at TMT Law Practice, is an advocate with over 13 years of practice with IPR as his primary focus. A graduate of NLSIU, Bangalore, he completed his LLM from the Franklin Pierce Law Center, New Hampshire. Mr. Malhotra is also enrolled at the California State Bar Council and is a member of several international organizations including the International Association of Entertainment Lawyers and the International Trademark Association. He has provided his inputs to the government on various issues in the latest copyright amendments. He has presented papers across the globe and is presently a guest lecturer at the Indian Institute of Information Technology.

Achille Forler

Achille Forler has had over three decades of experience in the creative and communication industries. He has served as a public servant (French Ministry of Foreign Affairs) for five years. During this time he was involved in the execution of public policies such as : Arte, DVB Project, High Definition Television Project, harmonization of European copyright laws, etc. In 1995, he created India's first music publishing company, Deep Emotions, which has recently been acquired by Universal Music Publishing. He also, co-organised the first "Euro-Asian Symposium on Intellectual Property Rights in the Cultural Industries in Asia Today" (1995, Goa), sponsored by WIPO and the European Union. He was also a member of the Task Force on "Restructuring Transmission Infrastructure of Prasar Bharati" under the Chairmanship of Prof. P.V. Indiresan (2000). With regard to the copyright amendments, he was the official representative of CISAC before the Parliamentary Commission on the Copyright Amendments Bill (2011).

Amlan Mohanty

Amlan Mohanty has been a contributor to SpicyIP for nearly 4 years. His key interests include copyright, fair use, software patents, innovation in the technology sector and intellectual property issues on the internet and other emerging technologies. He has closely followed the Copyright (Amendment) Act, 2012 and was invited to speak at the 'National Seminar on the 2012 Copyright Amendments' at ILS Pune as well as the IV NLS Union Debate on the current copyright litigation involving Delhi University. He also headed the research team from NLSIU, Bangalore that made submissions to the HRD Ministry on the proposed copyright amendments and has variously contributed to online publications and magazines on issues concerning intellectual property. He is currently the Editor-in-Chief of the Indian Journal of Law and Technology.

Ananth Padmanabhan

Ananth Padmanabhan is a practicing advocate at the Madras High Court. In this capacity, he acts as counsel for various sound recording labels and the Phonographic Performance of India Ltd. (PPL). His recent book on *Intellectual Property Rights: Infringement & Remedies* (LexisNexis Butterworths Wadhwa 2012) is the first treatise on the field in India. Mr. Padmanabhan is an alumnus of NLSIU, Bangalore, where he won the H. M. Seervai Gold

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Medal, the Best Essay in Constitutional Law. He was also an editor of the National Law School of India Review.

Dr. Anirban Mazumdar

Dr. Mazumdar, a graduate from Calcutta University, obtained his LL.B. degree from Burdwan University. He went on to do his LL.M. from NLSIU, Bangalore and M. Phil and Ph.D. from NUJS. He specializes in intellectual property law and information technology law. Dr. Mazumdar, a Fellow of the Max Plank Institute for Intellectual Property, Munich, has been a visiting scholar at the Touro Law School, New York University and Cardiff University. He has also been a Cegla Scholar at the Tel Aviv University, Israel. He is a visiting professor of West Bengal University of Technology, Institute of Pharmaceutical Research & Health Care Management, Institute of Engineering and Management, Calcutta Business School and International Management Institute.

Anjum Rajabali

Anjum Rajabali wrote his first film *Drohkaal* in 1992. He later went on to write scripts for very popular movies such as *Ghulam*, *The Legend of Bhagat Singh* and *Raajneeti*. In 2004, he designed and set up India's first full-fledged screenwriting department at the Film and Television Institute of India, Pune, where he continues to be the honorary head. Since 2006, he has been the head of screenwriting at Whistling Woods International, Mumbai. He regularly conducts screenwriting workshops in India and abroad. An active member of the Film Writers Association, he is also the Convenor of its Committee on Copyright.

Arun C. Mohan

Arun C. Mohan is an advocate at the Madras High Court. He is a graduate of the London School of Economics and has experience in working on intellectual property and commercial matters, both in India and internationally. He has worked on various prominent IP disputes including the *TVS v. Bajaj* patent dispute, *Consim Info v. Google*, and various recent John Doe cases, including the order granted for the Tamil film 3. He regularly appears before the Intellectual Property Appellate Board and has participated in a range of domestic and international arbitrations. He is also a part of the corporate team at Mohan Associates, focusing on agreements, disputes and asset management for technology-centric companies. He has worked with a diverse set of clients ranging from leading industry majors, media and entertainment companies, governmental organizations, academic institutions and several multi-national companies.

Dr. N.S. Gopalakrishnan

Dr. N. S. Gopalakrishnan, is the Professor of HRD Chair on IPR and the Director of Inter University Centre for IPR Studies, Cochin University of Science and Technology (CUSAT). He was the Dean of the Faculty of Law at Kannur University, Kerala and Director of School of Legal Studies CUSAT. Prof. Gopalakrishnan previously worked as an Additional Professor at NLSIU and has extensively published several research articles on IPR. He has also represented India on several occasions before the WIPO and other multilateral diplomatic discussions.

G.R. Raghavender

Mr. Raghavender is the current Registrar of Copyrights and Director, Government of India, Ministry of Human Resource Development. He studied at the Delhi University and has a degree from International Institute of Social Studies (ISS), [Erasmus University], the Hague, the Netherlands.

Dr. Madhukar Sinha

As the Registrar of Copyright and a Director in the Department of Higher Education of the HRD Ministry, Mr. Madhukar Sinha was instrumental in drafting most of the amendments that were passed by the Parliament with regard to the Copyright (Amendment) Act, 2012. He was the negotiator for India at WIPO and has also participated in negotiations on education services at the WTO. He is currently a professor at the Centre for WTO Studies and his areas of research include TRIPS, GATS and GPA. He is also an expert on the panel of the UNESCO and has been consulted by the UNODC and the World Bank. He has been a visiting faculty for a large number of educational and training institutions. He did his Ph.D. on "Economics of Copyright: The Indian Paradigm" in which he focused on piracy of copyright works in India. He also has a post graduate degree in Economics from Delhi School of Economics and an MBA from the Faculty of Management Studies, University of Delhi. Mr. Sinha is an officer of the Government of India and has worked in various capacities over the last 25 years.

Pranesh Prakash

Pranesh Prakash is the Policy Director at Centre for Internet and Society (CIS) and works on policy research and advocacy concerning intersections of technology and law. He focuses on access to knowledge (primarily copyright reforms), promoting openness (including open government data, open standards, open access, and free/open source software), freedom of expression, and privacy and internet governance. In 2012, he was nominated as an Internet Freedom Fellow by the United States government, in recognition of his work in promoting freedom of speech and openness on the Internet. His op-eds and articles have been published in many national newspapers, including the Times of India and the Indian Express. His work has been quoted in the New York Times, the Hindu, Washington Post and numerous other publications.

Pravin Anand

Pravin Anand is the Managing Partner of Anand & Anand. He graduated with a law degree in 1979 (New Delhi) and has been practicing as a patent and trademark attorney ever since. He was counsel in a number of landmark IP cases such as the right of privacy case (Bandit Queen case), the dilution in trademarks case (Glenfiddich case), the recognition of market survey evidence by judiciary (the Time Warner case), the domain name case (Yahoo! Case); punitive and exemplary damages (Time Magazine) and the Phishing (NASSCOM) cases. Mr. Anand is a co-author of the two volumes of *Halsbury's Laws of India on Intellectual Property* and is on the editorial board of several international journals.

Prashant Panday

Prashant Panday is an engineering graduate in Electronics & Communications and has graduated from IIM Bangalore.. Mr. Panday is now the Executive Director and CEO of

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Entertainment Network (India) Limited (ENIL). He has been at ENIL since August 2000 and has played a key role in bringing the radio revolution to India. Over the last 12 years, he has played a significant role in making Radio Mirchi the #1 radio brand in the country in terms of listenership as well as revenues. In 2008, Radio Mirchi was rated the #1 media brand – ahead of The Times of India and Star Plus – in the IMRB- Pitch survey.

Mr. Panday has 22 years of experience in advertising, banking, FMCG and Media. Prior to joining ENIL, he worked with Citibank, Pepsi, HUL, Mudra & Modi Revlon. His areas of strength include marketing & sales, analytics & strategy and people management. Mr. Panday is the chairman of the FICCI Radio committee and the Senior Vice-President of the Association of Radio Operators of India (AROI). He is also a member of the MRUC Governing Board and the FICCI and CII Entertainment Committees. He also served as a member of the Ministry of I&B's committee on fighting piracy. He is a speaker at various industry forums.

Rajendra Kumar

Rajendra Kumar heads the trademark and copyright practice of K&S Partners. In addition to extensive experience in prosecution and enforcement of IPRs, he has expertise in TRIPS related issues, domain name disputes and intellectual property aspects of the entertainment industry and the Internet. He has assisted the Government of India in developing a new law for the protection of geographical indications and has been involved in the protection of some of the country's treasured geographical indications both in India and abroad. He has co-authored a seminal work "*Geographical Indications - A Search for Identity*" and served on the International Trademark Association (INTA) Sub-Committee on Geographical Indications from 2006 to 2008. Mr. Kumar graduated with Honors in English. He earned his Master of Arts in English in 1981. He received his Bachelors' degree in Law in 1984 and has been awarded a Post Graduate Diploma by King's College, London on the topic 'United Kingdom, European and United States Law of Copyright and Related Rights'. Further, he successfully completed a summer course on international copyright law at the University of Amsterdam.

Rajesh Dhupad

Rajesh Dhupad is the Joint Secretary of the South India Music Companies Association as well as the CEO of Symphony Recording Co. A renowned singer in the Tamil industry with more than 30 music albums to his credit, he is also a successful Tamil writer and composer. Apart from his illustrious career as an artist, he has also been on the other side of the table, as a music producer with more than 400 albums to his name. He has also been a director and dabbled in cinematography and editing.

Pulak Bagchi

Pulak Bagchi handles regulatory affairs, policy & advocacy issues, legislation and governance matters besides contracts and litigations. Earlier he has worked with MSM Discovery where he headed the legal & regulatory function. Prior to this, he worked with Vodafone Essar Ltd. He has also been a practicing advocate in Calcutta High Court and a partner at Singhania & Co. LLP. As a lawyer, Mr. Bagchi has a rich, blended experience of legal & regulatory affairs across various sectors. He has completed his LLB from Calcutta University.

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Prof. Sam Taraporevala

Dr. Sam Taraporevala is the Director of the Xavier's Resource Center for the Visually Challenged. He is a Reader and Head of the Department of Sociology, St. Xavier's College, Mumbai with nearly two decades of teaching and research experience. He has been responsible for conceptualizing, setting up and running the XRCVC which will play a pivotal role not only in the lives of the visually challenged students of the college but also the lives of other persons similarly placed across the country.

Prof. Shamnad Basheer

Shamnad Basheer joined NUJS in November 2008 as the first Ministry of Human Resource Development Chair Professor in intellectual property law. Prior to this, he was the Frank H. Marks visiting Associate Professor of intellectual property law at the George Washington University Law School in Washington D.C. Prof. Basheer graduated from NLSIU, Bangalore. He then joined Anand and Anand and worked on a variety of IP matters before he was called to head the firm's Technology and Media law division. Whilst in practice, the IFLR 1000 guide rated him as a leading technology lawyer. Prof. Basheer then went on to do his post-graduate studies at the University of Oxford where he completed the BCL (as a Shell Centenary scholar) and MPhil with distinction.

Souvik Bhadra

Mr. Bhadra is currently a partner at PXV Law Partners, Kolkata. He obtained his law degree from the West Bengal National University of Juridical Sciences. He worked as a Senior Associate at PXV Law Partners and as an Associate at Amarchand Mangaldas.

Sheetal Chopra

Sheetal Chopra is a registered Patent Agent and co-author of the book on '*Patent Agent Examination: A book for Industry professionals and students*' published by LexisNexis. She has rich experience working with a pharmaceutical MNC as a scientist and thereafter as an IP manager. She is currently heading the activities of the IPR division of FICCI (Federation of Indian Chamber of Commerce and Industry). Her current profile includes preparing research papers on policy issues, providing business solutions to industry and government through research and analysis, liaising with eminent government officials at the national and international level, designing training modules for public awareness and capacity building programmes for enforcement agencies, academicians, legal practitioners, industry professionals and students. She also heads the "Intellectual Property Education Centre" by directing various online and diploma programmes with an aim to generate skilled IP professionals. Further, she currently heads the activities of "FICCI-MHRD National Initiative Against Piracy" and coordinates efforts of both industry and government with an aim to curb the menace of piracy. In addition to this, she heads the activities of the IP Facilitation Centre, which helps SMEs in protecting and commercializing their intellectual property.

Ujwala Uppaluri

Ujwala Uppaluri is a fourth year student at NUJS. Her broad areas of interest lie in technology and civil liberties (particularly the empowerment capacities of new media), internet governance and access to knowledge. She is a founding member of The Free

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Speech Initiative, a blog dedicated to exploring law and policy across communication media and its effect particularly on free speech, privacy and due process rights.

Dr. V.C. Vivekananda

Prof. V. C. Vivekanandan received his PhD from National Law School of India Bangalore in the field of IPR and holds a M.L. Degree in Corporate Law & Securities from Nagarjuna University and B.L. degree from Bangalore University. He worked as faculty with National Law School of India, Bangalore between 1990-92 and again from 1998-2001 prior to joining NALSAR University of Law. During 1992-1998 he served as the Bureau head of Dalal Street Journal and later as Editor and Publisher with Inde Global Communications.

Prof. Vivekanandan specializes in IPR, Cyber Laws and Business Laws and is the Ministry of Human Resources Development (MHRD) IP Chair Professor. He also coordinates the NALSAR Proximate Education offering P.G. Diploma in Patents Law, Cyber Laws, Media Laws and International Humanitarian Laws.

He is an Adjunct Visiting Professor with the Business School of University of Buffalo, New York since 2007 and is currently a research fellow with the law school at Maastricht University, Netherlands under the ICCSR NWO exchange scholar of 2010. He is also an elected member of the Asia Pacific Region of ALAC to ICANN (Internet Corporation of Assigned Names and Numbers). He also serves as an advisory committee member of the Indian Patent Office.

DAY I

Dr. N. S. Gopalakrishnan *Professor, HRD Chair on IPR and Director Inter University Centre for IPR Studies, CUSAT*
Social, Economic and Political Dimensions of Copyright (Amendment) Act, 2012

Dr. Gopalakrishnan's presentation identified the broad themes that laid the foundation for the conference. His presentation shed light on the socio-economic and political background to the latest amendments to the Copyright Act. Dr. Gopalakrishnan examined the gaps and conflicts the amendments were aimed at, the principles followed in balancing interests, the role of the various interest groups, the missed opportunities and most importantly the challenges in the implementation of the amendments.

With regard to the gaps the amendments aimed to address, he highlighted lacunae in the areas of digital technology with respect to updating rights in the digital context, access of works to persons with disabilities, the rights of performers, and provisions relating to enforcement particularly with regard to the infrastructure of the Copyright Board. To fill these gaps, the amendments incorporated provisions that updated the rights of authors, users and performers. Additionally, it provided for the restructuring of the Copyright Board and most importantly sought to address the vacuum in the area of access for the disabled.

Dr. Gopalakrishnan observed that the Copyright Act generated conflicts due to the existing interests of multifarious interest groups. He identified three areas that served as genesis for these conflicts. The first was that of access to works for communication wherein conflicts emerged due to the industrial growth and entry of private broadcasters, particularly in version recordings. The second area of conflict was the relationship between the creator of the work and the print, media and audiovisual industry. In this area admittedly balancing provisions did exist, but the legal system with its distorted interpretations of these provisions had created a fertile ground for conflicts to exist. The third area was that of working of copyright societies. The amendment of 1994 while creating an independent environment for such societies to function in, had simultaneously managed to foster an environment for conflicts in the process.

Guiding principle for achieving fair balance

Dr. Gopalakrishnan in identifying the principles involved in 'balancing interests,' notifying his skepticism for such balance, identified three broad principles: promotion of creativity, facilitation of access and the social dimensions of copyright.

The principle of promoting creativity was given effect through a two pronged approach of addressing the issue of the rights of authors and performers, and promoting access to works. Efforts at protecting the rights of authors in a digital context involved the reworking of the definitions of 'cinematograph film' and 'communication to public', in addition to the introduction of two new definitions; 'commercial rental' and 'visual recording'. Additionally, §38A sought to remedy the imbalance that existed between performers and creators.¹ The balancing act involved the expansion and free use in this digital age. The

¹ § 38A *Exclusive right of performers*

expression 'works' in the Act was broadened to 'all works', thus including multimedia works. In terms of private and personal use, the Act now provides for storing in digital media for private and personal use in §52(1).² Another 'revolutionary provision' that is illustrative of this principle is that of digital of storage in libraries. The underlying objective of creating access to works is the promotion of creativity and enjoyment of the work. The fair use provisions have been expanded to make access affordable, in particular access to persons with disabilities received great appreciation. The amendment has, however, missed out on focusing on access in the sphere of education.

The second principle of facilitating such access has been effectuated through pure industrialization. With the rapid growth of the print and publishing, broadcasting and the internet service industry, copyrighted work is being disseminated to the masses. The dominant philosophy, a questionable one nevertheless, is that rapid industrialization will result in access to works for all at an affordable cost. The amending act provides for broadened provisions with regard to compulsory and statutory licensing.

The third principle of social dimensions is reflected in the nature of the triangular relationship between the users, creators and the industries. The fact is that the users are interested in affordable access, the creators in a reasonable return for the creative labour, and the industry in a reasonable return for the investment in production and dissemination of work. Whether the access is truly affordable and the returns worthy of being deemed reasonable is an open ended question. Admittedly there are some who seek to answer this question with the philosophy that the market will take care of itself and harmonize existing relationships. This notion, however, is based on a twofold fallacious assumption; the first being the existence of freedom of contract and the second with regard to the maintenance of competitions. Unlike the U.S. and European Union, the Indian market does not have the required maturity and stability to deal with conflicting interests. In other words, emerging

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- (1) Without prejudice to the rights conferred on authors, the performer's right which is an exclusive right subject to the provisions of this Act to do or authorise for doing any of the following acts in respect of the performance or any substantial part thereof, namely:-
- (a) to make a sound recording or a visual recording of the performance, including-
 - (i) reproduction of it in any material form including the storing of it in any medium by electronic or any other means;
 - (ii) issuance of copies of it to the public not being copies already in circulation;
 - (iii) communication of it to the public;
 - (iv) selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording;
 - (b) to broadcast or communicate the performance to the public except where the performance is already broadcast.
- (2) Once a performer has, by written agreement, consented to the incorporation of his performance in a cinematograph film he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer's right in the same film:
- Provided that, notwithstanding anything contained in this sub-section, the performer shall be entitled for royalties in case of making of the performances for commercial).

² **§52 Certain acts not to be infringement of copyright**

- (1) The following acts shall not constitute an infringement of copyright, namely:
- (a) a fair dealing with any work, not being a computer programme, for the purposes of-
 - (i) private or personal use, including research;
 - (ii) criticism or review, whether of that work or of any other work;
 - (iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public;

market economies such as those in India have limitations, the most prominent one being that of unequal bargaining power between the creator and the industries. Similarly, maintaining competitions is becoming increasingly difficult with the emergence of new players in the market who are creating more rifts than balance. Such imbalance creates the need for legislative intervention of the kind that is evidenced in areas of facilitating access and regulating relationships.

In elucidating on the role played by various interest groups and the resulting impact on the balancing exercise, Dr. Gopalakrishnan took note of the film and music industry, the broadcasting industry, and the printing and publishing industry. While the entertainment industry were forerunner in seeking expansion of rights and preventing abuse of works, the broadcasting industry became a part of the amendment process to resolve the conflicts arising from the issuance of broadcasting licenses by the broadcasting ministry. With regard to the conflict between the music industry and the broadcasting industry, the solution was the incorporation of provisions for either statutory or compulsory licensing. At the end of the amendment process, however, provisions for both were incorporated. The printing industry was silent until the bill was tabled, after which it stepped in to ensure that national exhaustion of remedies is preserved in the Act as opposed to international remedies. Creators, such as lyricists, composers and authors, also had a critical contribution to make in terms balancing relationships in the sphere of co-existing right, contracts and copyright societies. The role played by public interest groups, particularly those lobbying for providing access of works to person with disabilities was also noteworthy.

Furthermore, in his opinion, the amendments tilted the balance in favour of those groups with more political and economic power. Any issues of clarity or inappropriate use of language in the legislation are a result of the pressure exerted by these groups through their lobbying.

Missed Opportunities

Two key missed opportunities reflect this powerful lobbying. The first is the provisions relating to the directors of a film. §§17(f) & (g) in the draft bill were excluded from the final version.³ The Standing Committee was of the opinion that this provision will affect the interests of the film industry adversely. However, it also stated that if there was an absence of provisions for lyricists and music composers, the bill will not nourish the industry. There is an evident conflict here, since both are players in the film lobbying process. But while the Standing Committee felt that provisions in favour of directors would affect the industry

³ The Copyright (Amendment) Bill 2010, §17 First owner of copyright

- (f) in the case of a cinematograph film produced on or after the commencement of the Copyright (Amendment) Act, 2010, the producer and the principal director shall be treated jointly as the first owner of copyright;
- (g) in the case of a cinematograph film produced before the commencement of the Copyright (Amendment) Act, 2010, the principal director shall enjoy the copyright for a period of ten years after the expiry of the duration of copyright in the cinematograph film subject to the principal director entering into a written agreement with the owner of the copyright in the film during the subsistence of copyright:

Provided that an agreement referred to in this clause shall not be necessary in case where the owner and principal director are the same person:

Provided further that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13.

adversely, it took a contrary position in the case of lyricists and music composers. This was an impact of lobbying by the latter.

The second provision is the one on the exhaustion of rights, which was on the table in the negotiations stage. The relevant proviso to section 2(m) was, however, dropped from the final version of the bill despite Standing Committee's strong support.⁴ This was an impact of lobbying that tilted the provisions in such a manner.

Challenges in the implementation

Dr. Gopalakrishnan noted several perceived challenges in implementing the provisions. *Firstly*, the most critical challenge would be related to the relationship of authors and the industry. The changes introduced in §§ 17, 18 & 19, read with the amendments introduced with regard to copyright societies could potentially give rise to various conflicts. The amendments do not specify which contracts they would be applicable to. Whether the provisions cover new existing works or new works or both is unclear. Furthermore, the validity of existing contracts and their enforceability is also uncertain.

At present, there are a large number of contracts in existence, particularly with reference to the copyright societies and their functioning. These two issues are correlated. There is a lack of clarity in the legislative directions available in this regard. Another major issue is the interpretation of the term 'royalties' and one-time payment being considered as royalty flow. There has been a deliberate legislative intervention in §§ 18 & 19 that makes it very clear that royalty must be paid 'in addition to' the payments you make. Thus, the new meaning of the term 'royalty' must be determined in the context of the amendment—whether it is a periodic return or whether a one-time payment is also a royalty. Moreover, the validity of the ban on the right of assignment of royalties (particularly in case of film and sound recording) might be challenged. There might also be practical issues in the implementation of the mandatory sharing of royalties with regard to film and sound recording between producers and creators. There is also a provision that says that only copyright societies can license works that have gotten incorporated into film and sound recordings. It must be determined how the contracts for these provisions will be drafted. Litigating these anomalies would be an ineffective solution. It would be beneficial instead to bridge the relationship between the two parties and introduce good industrial practice by developing balanced contracts.

Secondly, the challenge to implementation would be in terms of the coexistence of various rights. The rights of copyright, creators and producers are affected by the amendment to sections 18 and 19. This must be interpreted in terms of the decision of the Supreme Court in the *IPRS* decision.⁵ Furthermore, challenges may arise due to the coexistence of copyright, performance right and broadcast reproduction right. It must be ensured that there is no mutual conflict between the newly amended §§13, 14, 17 and the proviso to §§39A(1) & (2).

⁴ **The Copyright (Amendment) Bill, 2010, §2(m) 'infringing copy' means**

Provided that a copy of a work published in any country outside India with the permission of the author of the work and imported from that country into India shall not be deemed to be an infringing copy.

⁵ *Indian Performing Rights Society v. Eastern India Motion Pictures Association*, 1977 SCR (3) 206.

Thirdly, the expansion of the duration of photographs for the purpose of protection might also be an issue.⁶ The issue of identifying the photographer has to be addressed. Earlier, it was only for a 25 year period from the date of publication of the photograph, so it was easier to identify the photographer. However, after the amendment, this duration has been increased to the lifetime of the photographer plus 60 years. There is a problem of identifying photographers as 95% of photographs are without the photographer's name.

Fourthly, there is an interesting situation with respect to statutory licensing. While performance right has been added and strengthened, there is no reference to §§31C and 31D (related to performers' rights) in the provision for statutory licensing (§39A). Thus, there is uncertainty as to whether a statutory license for a copyrighted work can be enjoyed without performance right being acquired.

Fixing of royalties on cover versions in a digital context is another related issue. The phrase 'last medium in which it has been published is the medium from the cover versions can take place' is ambiguous and the Copyright Board must resolve the uncertainty. With regard to coverage of simulcasting and webcasting, the provision does not clearly resolve the conceptual difference between simulcasting, webcasting and broadcasting.

Fifthly, with respect to the protection of Internet Service Providers (ISPs), there has been a failure in addressing the overlap between the Information Technology Rule, 2011 and the Copyright Act. There is an overlap between sections 51(1)(b)⁷ (electronic transmission) and 51(1)(c)⁸ (access) which must be read together to ensure that automatic transmissions are exempted from the ambit of the provision while at the same time the possibility of access through human intervention remains alive. This is because there is no possibility of human intervention in Cl. (b) while C. (c) requires reasonable care from ISPs.

⁶ **§22 Term of copyright in published literary, dramatic, musical and artistic works**

Except as otherwise hereinafter provided, copyright shall subsist in any literary, dramatic, musical or artistic work ~~{other than a photograph}~~ published within the lifetime of the author until sixty years from the beginning of the calendar year next following the year in which the author dies.

Explanation.- In this section the reference to the author shall, in the case of a work of joint authorship, be construed as a reference to the author who dies last.

⁷ **§52 Certain acts not to be infringement of copyright**

- (1) The following acts shall not constitute an infringement of copyright, namely:
 - (b) the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;

⁸ **§52 Certain acts not to be infringement of copyright**

- (1) The following acts shall not constitute an infringement of copyright, namely:
 - (c) transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy:

Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access.

Sixthly, in the functioning of Copyright Societies, conflict between the rights of the authors and owners of right (industry) needs to be addressed. The functioning of copyright will have to be restructured to accommodate the provisions for the control, management and sharing of royalty. The re-registration and settlement of disputes on royalty payments based on existing agreements will be another challenge because the law lays down clearly that for re-registration it is mandatory that a 'clean-chit' is given by the members of the society stating that there is no dispute existing. There is also a conflict between the freedom to license on the one side and the legislative mandate that the issuing of licenses for literary, dramatic, musical and artistic work included in film or sound recording must be based on a copyright society. There is also a need to ensure transparency in the functioning of societies and to prevent monopolistic practices by these societies to ensure access.

Next, conflicts may also arise between the provisions of the act and customs rules with regard to intellectual property and border security measures. An express statutory provision talks about what security measures are to be taken when infringing pieces of work under our copyright act are bought within our borders. At the end of the day, it is the customs officers who are going to have to enforce it.

Lastly, on the Technological Protection Measures (TPMs), the meaning of 'effective technological measures applied for the purpose of protecting the rights' in §65A⁹ is unclear. The proper meaning of 'proof of circumvents with the intention of infringing such rights' must also be determined. Further, the implementation of the exception to this provision, that allows for third-party intervention for facilitating circumvention (under §52) might pose a practical concern.

Concluding thoughts

Challenges may arise due to the 'balancing of interests' in a fast growing economy. Due to imbalance in this lobbying power, one may witness challenges as a result of immaturity of the parties or the growing needs of the industry. There is a resistance on the part of the owners of the copyright to hold on to the maximum extent possible is in direct conflict with the need for competition that would facilitate the growth of the industry, especially middle level and lower level industrial growth, which is the strength of the economy and is

⁹ §65A Protection of technological measures

- (1) Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.
- (2) Nothing in sub-section (1) shall prevent any person from,
 - (a) doing anything referred to therein for a purpose not expressly prohibited by this Act:
Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated; or
 - (b) doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; or
 - (c) conducting any lawful investigation; or
 - (d) doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorisation of its owner; or
 - (e) operator; or
 - (f) doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or
 - (g) taking measures necessary in the interest of national security.

responsible for generating employment. The issue of cover versions is a classic example of this. There is an assumption that strengthening the copyrights will automatically increase access to works. However, there needs to be a deliberate legislative intervention to refocus copyright law in such a way as to increase access to information.

The challenge lies in promoting industrial growth without sacrificing social interest. The industry is facing huge challenges from powerful industry groups. There is a terrific social interest in terms of access to information, promoting creativity and encouraging talent. These challenges are being faced in many industries: printing, broadcasting and internet.

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SESSION I
Copyright & Entertainment

The entertainment industry has been at the forefront over the years for instituting changes to the copyright regime. This session focused on evaluating the impact of the amendments to the entertainment industry. Informative and comprehensive presentations were made by Mr. Prashant Pandey (CEO, Radio Mirchi) and Mr. Arun Mohan (Advocate, Madras High Court). These presentations focused on the emergence of statutory licenses, the provisions regarding royalty sharing between producers, composers and lyricists and performers' rights. These presentations were followed by an in depth round table discussion on the on the future of entertainment in India. The panelists of this round table discussion were Phulak Bagchi (Vice-President, Legal & Regulatory Affairs, Star India), Anjum Rajabali (Film Writers' Association, Mumbai) and Rajesh Dhupad (Jt. Secretary, South India Music Companies Association). The presentations and the round table was moderated by Dr Madhukar Sinha (Professor, Centre for WTO Studies).

Prashant Panday CEO, Radio Mirchi

The emergence of the statutory license and how it is the key to convergence and new media flourishing

Mr. Panday welcomed the insertion of statutory licensing provisions from a radio broadcasters' perspective and believed that the provisions benefit copyright owners and facilitate access to music. To provide the relevant context, Mr. Panday highlighted the necessity for introducing statutory licenses. Until 1999, private broadcasters operated shows on AIR frequency for two to four hours per day. Music licenses were problematic even at that point but fortunately, negotiations ensued and tariffs were set at Rs. 160 per needle hour. In such a scenario, a 24-hour radio broadcaster would incur Rs. 10-12 lakhs of expenditure towards tariff annually per station.

The first private radio station was launched in July 2001. The royalty rates skyrocketed all of a sudden and Phonographic Performance Ltd. (PPL) demanded higher than Rs. 1,500 per needle hour or 20% of revenues. In addition, the Indian Performing Rights Society (IPRS) demanded a further Rs. 1,000 per needle hour or 10% of revenues at the beginning of 2001. IPRS, however, negotiated a 10-year long agreement starting 2001 for a rate between Rs. 65 and Rs. 250 per needle hour (average around Rs. 125 per needle hour); further the reference to revenues was dropped. In 2005 however, IPRS sued radio broadcasters with an intent to cancel the agreement (the legality of which is questionable in the absence of a provision to do so) and reverted back to their demand of Rs. 1,000 per needle hour or 10% of revenues, whichever was higher. This demand continues even today.

Such a situation arose because the music industry enjoys a natural monopoly over s radio consumers and therefore broadcasters had to shell out close to a crore rupees every year as royalties. Mr. Pandey added that the music industry was unwilling to negotiate the royalties. Furthermore, the exorbitant rates were across cities, whether small or big. In Jabalpur, for instance, the total royalties exceeded the total market value. In 2006, the royalty rates went up to Rs. 2,400 per needle hour. Later, PPL and IPRS demanded 20% and 10% share in revenues respectively, in addition to royalties.

In India, royalties amount to 30% of the total revenue. This is very high in comparison to radio industries worldwide where radio broadcasters pay 0-4% of revenues towards royalties. The UK is one of the few countries where expenditure on royalty comes close to 10%. The music industry, however, grants web and mobile license free of cost. In 2002, Indian radio broadcasters approached the Copyright Board, which had fixed royalties at Rs. 661 per needle hour across cities. Moreover, the music industry adopted several discriminatory practices including sidestepping of individual broadcasters and even cried foul against radio broadcasters for their losses. At the same time, however, Mr. Pandey noted instances where music labels requesting radio channels to play their songs prior to their release. The abuse of dominance by music labels is now adversely affecting new age media as well.

The dominance of music labels made the radio industry unprofitable. With the insertion of §31D,¹⁰ the radio broadcasters pay royalties set by the Copyright Board if the copyright societies fail to set reasonable rates. Mr. Pandey further emphasized that the provision covers an array of broadcasters, including web-based music services. Furthermore, he dismissed any ambiguity over the usage of *television* and *radio* broadcasting for the purpose of fixing royalties in §31D(3) stating that it was necessitated owing to pressure from television lobby.¹¹ The nature of this statutory license, according to Mr. Pandey, facilitates increased access to music.

Mr. Pandey asserted the need for cooperation of societies and adherence to best business practices for the good of the market and for the benefit of creators of work. In the absence of such cooperation, however, statutory licensing would be invoked.

Feedback

Mr. Rajesh Dhupad highlighted the disparity in the royalty rates paid to copyright societies (2%) and commission (10-15%) paid to ad agencies per advertisement. Mr. Pandey in response stated that the broadcaster incur enormous costs in labour, marketing and brand building. For instance, he noted that Entertainment Network (India) Ltd. (ENIL) spends Rs. 15 crores on electricity alone. Therefore, multiplicity of factors determines the commission rates on music royalties. On a different note, to a query posed by a student on royalties applicable to web markets, Mr. Pandey stated that there is an arrangement for royalties if the source is in India.

Arun Mohan Advocate, Madras High Court

Bollywood Calling: Does the Copyright Amendment Act answer?

Mr. Mohan started by highlighting the fact that the Indian Film Industry (IFI) is the largest movie industry in the world with the box office exceeding the Rs. 100 crore figure. He brought to the notice of the participants that of late, even foreign corporations such as

¹⁰ **§31D Statutory license for broadcasting of literary and musical works and sound recording**

(2) The broadcasting organisation shall give prior notice, in such manner as may be prescribed, of its intention to broadcast the work stating the duration and territorial coverage of the broadcast, and shall pay to the owner of rights in each work royalties in the manner and at the rate fixed by the Copyright Board.

¹¹ **§31D Statutory license for broadcasting of literary and musical works and sound recording**

(3) The rates of royalty for radio broadcasting shall be different from television broadcasting and the copyright Board shall fix separate rates for radio broadcasting and television broadcasting.

Warner Bros. have entered the market. To provide the relevant context, Mr. Mohan briefly discussed the background to the amendments. The amendments attracted mixed reactions from various stakeholders. Artists welcomed the amendments for relieving them from the clutches of bonded labour. Labels and broadcasters were supportive of the changes. Producers, however, are dissatisfied and have lamented that the amendments increase costs and ignore industry practices.

Mr. Mohan went on to state that the pre-amendment provisions were equivalent to §90 of the UK Copyright, Designs and Patents Act, 1988 and §204 of the United States Code, Title 17. Despite similarities, artists in foreign jurisdictions are paid higher and are assured greater benefits than Indian counterparts. Therefore, it was felt that the amendments were brought in without examining industry practices and provisions in foreign jurisdictions.

With regard to §§18(1) provisos¹² & 19(9)¹³, Mr. Mohan noted that an artist cannot assign his share of royalties in musical works, whether cinematographic films or otherwise. Artists are entitled to royalties for use of works, except in cases of theatrical screening for public. This exclusion of synchronization rights is, however, only partial. The Standing Committee has not pointed out any reasons for such a limitation. Moreover, Mr. Mohan emphasized on the fact that the provision leaves unanswered the question of royalties in instances of private screening and other scenarios such as DVDs, VCDs, BlueRay and TV Broadcast.

Mr. Mohan perused international experience on the point which showed that three basic types of rights exist in a piece of work: performing, mechanical and synchronization. Royalty on synchronization rights is not industry practice in the US. He informed the participants on the existence of a pending proposal for 'uni-license' rights leaving rates to free market. With respect to performance rights, the Standing Committee noted, 'if producer enjoys synchronization right, authors/composers should enjoy performing rights.' The ambit of performance rights, however, is very wide and includes royalties from web, advertisements, ringtones etc. He brought to light the fact that the cost to producers has not been considered. There is also some confusion about the regulation of societies, leaving the possibility of multiple societies. The demands of regional industries to have societies of their own could make it difficult for broadcasters to obtain licenses.

¹² **§18 Assignment of copyright**

(1) ...

Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copy right society for collection and distribution and any agreement to contrary shall be void:

Provided also that the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilization of such work except to the legal heirs of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void.

¹³ **§ 19 Mode of assignment**

(9) No assignment of copyright in any work to make a cinematograph film shall affect the right of the author of the work to claim an equal share of royalties and consideration payable in case of utilization of the work in any form other than for the communication to the public of the work, along with the cinematograph film in a cinema hall.

Mr. Mohan went on to show how this amendment has had a direct effect on the payment model. The one-time payment model, he said is now outdated. This was because producers would churn out only commercially viable music and contrary to what the amendments envisage, producers can get composers to work for free. Furthermore, the law creates a direct conflict between the principal director who is not concerned with the commercial viability and music composers who benefit from royalties.

He then went on to discuss piracy related issues. He highlighted that the amendments ratified the John Doe suits in order to deal with piracy. He went on to expose the defect in this move as he said that there was, no increased protection for ISPs and intermediaries. And with the amendments, there will be a definite rise in litigations to combat online piracy.

He urged that at this stage, the real problems with the film industry must be discussed. He observed that despite having almost identical statutory provisions, the major reason for the difference in the experience in the US and India is the role of unions. While in the US, unions have effectively negotiated standard form contracts and provide contractual advice and provisions for the recovery of unpaid fee and health cover to its members, Indian unions have proved ineffective in this respect.

Feedback

Anjum Rajabali representing the voice of scriptwriters, addressing the issue of why this intervention was necessary in India and not in the US, drew parallels with the necessity for the prevention of dowry and sati Acts in India. He opined that disempowerment, weak unions, the lack of norms for good business practices and self-regulation significantly distinguishes the scenario in India from that of the US. The inadequate representation of artists even while the negotiations for the amendments were taking place is according to him a reflection of lack weak bargaining power. According to Mr. Rajabali there are historical reasons for this inequity, which makes contracts difficult to negotiate. That being said, a minimum basic contract is being worked on by the industry.

Roundtable discussion on the impact of the amendments on the future of entertainment in India

OPENING STATEMENT by *Dr. Madhukar Sinha* (Moderator)

Mr. Sinha introduced the discussion by throwing light on the importance of all contributors in the film industry. In this regard, he noted that the story is just as important as the direction. Star-power is no longer the driving force in the success of a movie. He felt it was time that other contributors got their due share and the latest amendments are intended in that direction. The moot question he highlights, remains whether the changes brought about facilitates access to works, which is fundamental to cultural rights under the Indian Constitution. Mr. Sinha explained that this exercise was an attempt to solicit responses on this issue and enquire whether the amendments strike a balance amongst various lobby groups. Dr. Sinha opened the discussion with the following questions to the panelists:

1. What measures are in place to improve access to entertainment to public at affordable rate?
2. Were you able to lobby successfully in bringing the changes?

Anjum Rajabli

Mr. Rajabli responding to these questions said that access to entertainment is no more a concern especially with mushrooming number of theatres and multiplexes, television and the internet through piracy. Mr. Rajabli added that piracy is a fact in India and unfortunately, the economics of distribution trade would not allow us to access to movies.

The situation in the film industry necessitated legislative intervention and the incorporation of clauses on non-assignment of sharing of royalties is a sign of successful lobbying. A similar provision is available only in Germany. This shock to the Indian Copyright system was essential to get various groups to collectively bargain for determining contractual arrangements in the industry. The fact that producers are now willing to negotiate with scriptwriters and lyricists, Mr. Rajabli stated that to be the most constructive impact of the amendments.

Mr. Rajabli emphasized the need for negotiations between the authors and distributors are necessary to achieve a fair balance. In the context of scriptwriters in particular, he adds, that negotiations were necessary to determine royalty sharing considering the fact that movies involve efforts of multiple scriptwriters. The legislation cannot provide solution in this regard.

Pulak Bagchi

Much of the focus legislatively has been on public access and disappointingly right to access to content for free is legislated in India. To illustrate, India has The Sports Broadcasting Signals (Mandatory Sharing With Prasar Bharati) Act, 2007 which makes it mandatory for broadcasters to share feed of specified sporting events with Doordarshan and that too for free. Any viewer can watch these events in Doordarshan practically free of cost thereby distorting the business case for pay television. Also the Telecom Regulatory Authority of India (TRAI) mandates that the television industry should provide signals to cable or DTH providers on a 'must provide' basis without however ensuring that broadcasters get paid for all the subscribers being served by such operators. This has complicated the business of television as there is no way for a broadcaster to ascertain the actual recipient of such transmission of signals unlike telecom or broadband where the service provider has full knowledge of its subscriber base. Therefore, Mr. Bagchi believes that access is not an issue of importance. However, the excessive focus on access appears to have had a disparaging effect on quality. Today all channels are trying to emulate the same content across the board as the existing regime gives primacy to access rather than innovation.

Commenting on the fragmentation of rights resulting from the amendments, Mr. Bagchi asks if the amendments effectively address the concerns of authors or does it set more questions than answers and how would the industry rework and realign within the amended legislative framework to find resolutions to long-pending issues? For the time being however what he sees is that the amendments have

resulted in creating multiple points of negotiations which are impeding the search for the fair balance.

Rajesh Dhupad

Mr. Dhupad responded by saying that although piracy has increased access to music manifold, it has certainly dented the music industry which has gone bankrupt. When there is public access to creative works, there should be an inflow of money which is sadly not the case. Majority of music accessed through phone is through piracy.

On behalf of SIMCA, he welcomed the amendments in giving rights to composers and authors. Mr. Dhupad, however, stressed on the need for the industry to negotiate with authors and composers in working out modalities for sharing of royalties.

Anjum Rajabli

Mr. Rajabali raised an interjection to Mr. Dhupad on the reason for the absence of negotiations prior to the amendments.

Rajesh Dhupad

In response, Mr. Dhupad gave instances where composers and writers asked for remuneration upfront without considering an offer for payment of royalties.

Anjum Rajabli

In response, Mr. Rajabali stated that the mindset to let go of royalties is an outcome of 'bonded labour', not out of free will. In a bizarre instance, Mr. Rajabali cited contractual terms between the screenwriter and studios which forced the former to relinquish claims on the script to cover situations where the same script could be used to make movies in the future.

Rajesh Dhupad

Mr. Dhupad stated that one forgets to realize that the producer bears all the risks. He also stated that the cost of production is factored in and therefore cannot be ignored.

Mr. Sinha agreed with Mr. Rajabali on the need for the change in the mindset of music labels and studios. Furthermore, Mr. Sinha narrated an instance where an eminent personality from a music company brazenly demanded names of those who deposed before the Government representing the artists before enacting the amendments. Mr. Sinha added that the artists felt threatened about revealing their identities to music producers.

Mr. Sinha solicited closing remarks from the panelists on their overall assessment of the amendments.

Pulak Bagchi

Commenting, Mr. Bagchi said it was too early to commit as there are lots of questions yet to be answered. Mr. Bagchi further expressed his unwillingness to take sides before witnessing the amendments in operation.

Mr. Bagchi applauded Mr. Sinha for his efforts in bringing about the amendments in a fair and transparent manner. With respect to efficacy of the amendments, Mr. Bagchi stated that it was premature to draw any conclusions.

Rajesh Dhupad

Mr. Dhupad expressed his apprehension on the practicalities of the

amendments. Furthermore, Mr. Dhupad hoped that the welcome changes would pave way for the music and film industry to churn out solutions for sharing of revenues in the future.

Anjum Rajabali Mr. Rajabali was pleased with the balance brought by the amendments and hailed the changes as 'historic.' The amendments gives the artists due acknowledgement for their efforts and has certainly brought labels and studios to the negotiating table.

Mr. Rajabali believes that the changes provide motivation for artists in the future. What's left to be done is ironing out the implications in an equitable and reasonable manner.

Mr. Gautam from Khaitan & Co shared the predominant sentiment of gross misuse of dominant position by producers. Supporting the amendments, Mr. Gautam adds that it is a general tendency for dominant entities (producers) to act in the interest of others (lyricists and composers) unless compelled to.

Mr. Sumeet Malik asked the panel if the music labels and producers would be willing to encourage new talent in light of the new sharing structure.

Mr Ananth Padmanabhan, a practicing lawyer in the Madras High Court stated that there are numerous limitations and constraints in making bringing out the desired objectives of the amendments. The unequal bargaining power stems from the practices in the Indian industry where the movie stars and composers charge exorbitant fees unlike other countries. Therefore, to offshoot the cost of acquisition, labels and studios shift the burden on broadcasters for instance. Therefore, the amendments fail in this aspect. Mr. Rajabali in response stated that the amendments would bring about restructuring of economies in filmmaking which would address the concern.

CONCLUDING REMARKS

Mr. Sinha stated that it was still early and suggested that the amendments be viewed with optimism. He hoped that the long drawn process in passing the amendments is less cumbersome in the future.

SESSION II
Copyright and Technology

The session focused primarily on the comprehending the scope of Technological Protection Measures (TPMs) and Intermediary Liability provisions inserted in the Copyright Act. This session commenced with two presentations, one made by Mr. Pranesh Prakash (Policy Director, Centre for Internet and Society) speaking on TPMS and the other by Mr. Rajendra Kumar (Partner, K&S Partners) who discussed Intermediary Liability. A detailed account of the position before and after the 2012 amendment was provided by both the speakers. Comprehensive comparative analysis on the both the issues were also made. This was followed by a round table discussion on the impact of the 2012 amendment on the technology sector in India. The panelists for the round table discussion were Dr. V. C. Vivekanandan (MHRD Chair of IP Law, NALSAR University of Law) and Shouvik Badru (Partner, PXV Law Partners). The session and the round table discussion were moderated by Prof. Shamnad Basheer (MHRD Chair of IP Law, NUJS).

Pranesh Prakash Policy Director, Centre for Internet and Society
Introduction to TPMs

Mr. Prakash started by explaining what Technological Protection Measures (TPMs) were. He stated that they are essentially digital locks also known as Digital Rights Management (DRMs). Though India is not a signatory to either the WIPO Copyright Treaty (WCT) or the WIPO Performances and Phonograms Treaty (WPPT), the reasons for incorporating the treaty requirements is unclear, he added. Another unfortunate insertion, he highlighted was the extension of term copyright protection for photograph from 60 years to life plus 60 years.¹⁴

Mr. Prakash, however, stated that the current scheme of TPMs are by far the best anywhere in the world. *Firstly*, it has been tailored to narrowly fit the copyright regime. One, subject matter of TPMs is only restricted to acts covered under copyrights. Two, all exceptions to copyright are applicable to TPMs as well. India has definitely learnt from the United States digital copyright laws which extended to non-copyright subject matter. *Secondly*, manufacture, advertising and other such aspects are not disallowed in India, that is to say that facilitating circumvention is not outright illegal. Furthermore, the provision prohibits the acts of circumvention and not the tools per se.

Mr. Prakash then highlighted the downside to the provision. This he said is the lack of duty on the copyright owner to extend facilities for circumvention when the user is unable to circumvent on his/her own. Though the user has legitimate right to circumvent, lack of tools makes the right redundant. Moreover, he stated that the acts of circumvention have been deemed as a criminal wrong as opposed to civil wrong which is the requirement under WCT. A bright side to this, however, is the additional requirement of *mens rea* for criminal offences. Lastly, the phrase 'facilitating circumvention' is unclear. Mr. Prakash suggested that the phrase be construed narrowly to make it practicable.

¹⁴ **§22 Term of copyright in published literary, dramatic, musical and artistic works**

Except as otherwise hereinafter provided, copyright shall subsist in any literary, dramatic, musical or artistic work ~~other than a photograph~~ published within the lifetime of the author until sixty years from the beginning of the calendar year next following the year in which the author dies.

Explanation.- In this section the reference to the author shall, in the case of a work of joint authorship, be construed as a reference to the author who dies last.

Rajendra Kumar *Partner, K&S Partners*

How safe are the safe harbours under the Copyright Act, 1957 and the IT Act, 2000?

Mr. Kumar first traced the evolution of the internet from Web 1.0, which was a static space providing a passive experience to its users, to Web 2.0 wherein it is possible to collaborate and interact. Therefore, today the Bulletin Board System (BBS) is a reflection of the real world, where an individual is both the creator and the recipient of content. This in turn has facilitated greater e-commerce and has provided a wider social stage. Transactions on the internet are facilitated by variety of intermediaries by providing access to, host and index third party content. This third party content, at times are fraught with legal liabilities.

Mr. Kumar then went on to throw light on the position prior to the Digital Millennium Copyright Act (DMCA) and the WCT. A US court in *Religious Technology Centre v. Netcom On-line Communication Services Inc.* (1995) decided the liability of an internet access provider for a BBS.¹⁵ The plaintiff argued that the defendant Netcom was directly and vicariously liable for copyright infringement. The court, however, absolved the intermediary from liability for reasons; that intermediaries may have no effective control; that it is almost impossible for them to check for the liability of content that passes through them and spared them from liability with respect to content created by others.

He then went on to state that the intermediaries' case for immunity from content liability is primarily on account of three reasons: first, the lack of effective legal or actual control; second, inequity of imposing liability on a mere messenger and third, consequences for public interest. The other side of the debate, however, argues that ISPs are the only effective gate-keepers. This led to the birth of the notice and take down regime. Here, the internet service provider is not liable for third party infringement as long as they have no knowledge of the same. As soon as they become aware of such infringement, however, they are to take down the material.

He noted that in the US, the DMCA creates a safe harbour for online service providers, for transitory, caching, storing and information location platforms, against liability from copyright infringement. These intermediaries must block access to alleged infringing material (or remove such material from their systems) when they receive notification of an infringement claim from a copyright holder or the copyright holder's agent. Further, §230 of the Communications Decency Act provides absolute immunity to intermediaries from defamation, false information, pornographic material, threats etc.¹⁶

In Europe, the E-Commerce Directive 2000/31/EC provides for safe harbours for conduits, caching and hosting services.¹⁷ Mere conduits are provided an absolute safe harbour and include telecommunication carriers, internet access providers etc. Caching services are also subject to similar terms as conduits. The Directive, however, requires that the intermediary first, had no knowledge of the illegal activity; second, had no way of knowing the same and third, acts expeditiously to remove such content if aware. The directive does not specifically extend the safe harbour to search engines and online marketplaces. In Google

¹⁵ *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

¹⁶ Communications Decency Act, 1996 (CDA), § 230.

¹⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000.

Inc. v. Louis Vuitton, however, the Court of Justice of the EU (CJEU) held that it was applicable to an AdWord referencing service.¹⁸ The CJEU, in *L'oreal v. Ebay*, further held that the Directive is applicable to an operator of an online marketplace where the service provider has no active role in knowledge or control.¹⁹ In the *Newzbin case (20th Century Fox v. BT)*, however, a UK court held that even if safe harbour is applicable to British Telecom, it would be subject to the long arm of the court.²⁰ In this context, *Scarlet v. SABAM* was also discussed by Mr. Kumar, wherein clients of an ISP were downloading from SABAM without paying royalty.²¹ Here it was said that national courts are precluded from issuing injunction against an ISP requiring it to install a filtering system. In *SABAM v. Netlog*, it was further held that National Courts are precluded from issuing injunction against hosting service providers requiring them to install a filtering system.²²

Mr. Kumar then went on to highlight the Indian position. In India, the Information Technology Act (IT Act) was enacted in 2000 to provide a legal framework for promotion of e-commerce and e-transactions. §79 of the Act provides that intermediaries are not liable in certain cases. Prior to the amendment in 2008, the onus was on the intermediaries to prove that they had no knowledge. The Kerala High Court in *Firoz v. State of Kerala* held that notifications under §70 of the IT Act were subject to the Copyright Act, as the latter is a special act and cannot be bartered away.²³ Therefore, the protection to a computer resource is restricted to government work. This decision is currently on appeal. Further, in *Google India v. Vishaka Industries Ltd.* (2011), the court held that safe harbour under §79 cannot be used if the article is not removed even after being aware of the content, in accordance with the notice and take down regime.²⁴

Mr. Kumar stated that there were no specific provisions for ISP standards prior to the 2012 amendments to the Copyright Act. Primary infringement was, however, dealt with under §§13²⁵ and 51(i)(a)²⁶ and secondary infringement under §51(i)(b). The Delhi High Court in *SCIL v. MySpace* (2011) provided the framework of the law on intermediary liability.²⁷

¹⁸ *Google France SARL v. Louis Vuitton Malletier SA*, 3 Joined Cases C-236/08, C-237/08 & C-238/08, 2010 ECJ EUR-Lex LEXIS 119 (Mar. 23, 2010).

¹⁹ *L'oreal v. Ebay*, C-324/09, Judgment of the Court (Grand Chamber) of 12 July 2011.

²⁰ *Twentieth Century Fox v British Telecommunications plc* [2011] EWHC 1981 (Ch).

²¹ *Scarlet v. SABAM*, Case C-70/10, Judgment of the Court (Third Chamber) of 24 November 2011.

²² *SABAM v. Netlog*, CJEU C-360/10.

²³ *Firoz v. The State Of Kerala*, Bail Appl. No. 233 of 2010.

²⁴ *Google India v. Vishaka Industries Ltd*, Crl.P.No. 7207 of 2009.

²⁵ **§13 Works in which copyright subsists**

- (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,-
- (a) original literary, dramatic, musical and artistic works;
 - (b) cinematograph films; and
 - (c) sound recordings;
- (2) Copyright shall not subsist in any work specified in sub-section (1), other than a work to which the provisions of section 40 or section 41 apply, unless,-

Referring to the position post the 2012 amendment, he noted that §52(1)(b) provides absolute immunity, akin to conduit safe harbors in EU Directive, to intermediaries providing incidental or transient storage of third party content.²⁸ The text of the provision appears to provide complete exemption to intermediaries from infringement. §52(1)(c) deals with transient or incidental storage for the purpose of providing electronic link or access or integration.²⁹ This provision, on the other hand, as he points out, is not absolute

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- (i) in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India;
 - (ii) in the case of an unpublished work other than a [work of architecture] the author is at the date of the making of the work a citizen of India or domiciled in India; and
 - (iii) in the case of [work of architecture] the work is located in India.

Explanation.- in the case of a work of joint authorship, the conditions conferring copyright specified in this sub-section shall be satisfied by all the authors of the work.

- (3) Copyright shall not subsist-
 - (a) in any cinematograph film a substantial part of the film is an infringement of the copyright in any other work;
 - (b) in any sound recording made in respect of a literary, dramatic or musical work, if in making the sound recording, copyright in such work has been infringed.
- (4) The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the sound recording is made.
- (5) In the case of a [work of architecture] copyright shall subsist only in the artistic character and design and shall not extend to processes or methods of construction)

²⁶ **§51 When copyright infringed**

Copyright in a work shall be deemed to be infringed

- (a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act:
 - (i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or
 - (ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright;

²⁷ *SCIL v. MySpace*, CS (OS) No. 2682/2008.

²⁸ **§52(1)(b) Certain acts not to be infringement of copyright**

- (1) The following acts shall not constitute an infringement of copyright, namely:
 - (b) the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;

²⁹ **§52(1)(c) Certain acts not to be infringement of copyright**

- (1) The following acts shall not constitute an infringement of copyright, namely:
 - (c) transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy:

Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till

and lays down a procedure for notice and take down. The Report of the Standing Committee provides that the purpose of §§52(1)(b) and (c), per the Department of Information Technology, was to immunize intermediaries subject to notice and take down regime. The 21 day period for notice and take down was felt sufficient. Mr. Kumar argued that §52(1)(c) is unclear on host of intermediaries under its ambit.

Feedback

Mr. Ananth Padmanabhan commented that the *MySpace* decision took a narrow stance on the expression ‘person responsible is aware or reasonably grounds for believing’ that a copy is infringing. §52(1)(c) retains the language in the decision. In light of this, Mr. Padmanabhan indicated that the *MySpace* decision was bad law and should be reconsidered in the appeal.

Prof. N.S. Gopalakrishnan clarified that even though the same language has been used, §51 has to be read in light of §52. As the *MySpace* judgment did not rule on the exemption under §52, it does not hold as good law after the amendment. Further, he said that the judgment was *prima facie* inconsistent, as it relied on legislative intention to construe one part and followed a strictly textual interpretation for the other half.

Mr. Pranesh Prakash also expressed the view that as per the Intermediaries Guidelines Rules under §79 of the IT Act, copyright notices were seemingly permitted. §81 of the IT Act, however, excludes the Copyright Act and therefore rules are inconsistent with the IT Act.³⁰ He further opined that §52(1)(b) is applicable to ISPs, VPNs, CDNs etc. by providing for transient or incidental storage, §52(1)(c) would be applicable to search engines. The applicability with respect to other storage services such as Youtube and MySpace would depend on interpretation of the word ‘incidental.’

Roundtable discussion on the impact of the amendment on the technology sector in India

V. C. Vivekanandan Mr. Vivekanandan started the discussion by referring to the main theme of the conference. He said the context of present discussion is about the *balance* between three players; consumers, creators and distributor or decimators. He further stated that there is no precise formula for achieving this balance, however, utilitarian principles is one guiding principle to start with.

Mr. Vivekanandan led the discussion to ascertain the real reason why DRMs and similar measures have been inserted at all in India even without any treaty obligation or demands from stakeholders. The inclusion of such provisions was further questioned on account of the advanced nature of DRMs, the problems faced by DRMs in other jurisdictions and the problematic nature of the very

be receives an order from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, be may continue to provide the facility of such access.

³⁰ **Information Technology Act, 2000, § 81 Act to have overriding effect**

The provisions of this Act shall have effect notwithstanding anything consistent therewith contained in any other law for the time being in force.

concept of DRMs. Examples from the US such as the recall of e-Books following a copyright violation by Kindle and the controversy surrounding the use cartridges in Lexmark printers not manufactured by Lexmark, further emphasized whether a needless complication had been introduced of DRMs. He speculated as to whether we had jumped the gun on DRMs.

Shouvik Badru

Mr. Badru was of the opinion that through this exercise, India was attempting to play catch up with the technological advancements and open new avenues in the field. The provisions, however, are ambiguous in places and this needs further amendments.

Prof. N.S. Gopalakrishnan, on this point, said that the core group constituted in 1997 essentially had a threefold mandate, i.e., to make necessary amendments to make the Copyright Act TRIPS compliant, WCT and WPPT compliant and to deal the practical problems of working with the Copyright Act. Only compliance with TRIPS was addressed through computer software and reverse engineering provisions. In 2000, the committee was re-set up to look at WCT and WPPT compliance and practical problems in implementing the Copyright Act. Even in 2009, there was definite pressure to follow DMCA and incorporate provisions with respect to DRM. The Committee was fully conscious of the problems faced in other jurisdictions after having examined the models followed in Australia, Japan, USA and Europe. Thus, there was definite pressure to include provisions, irrespective of whether this demand stemmed from India companies or Indian companies represented through foreign entities.

Shamnad Basheer

Prof. Basheer was of the view that the provisions are a very skillfully drafted piece of legislation. On the one hand, it shows to the world that India is indeed technologically savvy and up to date with global developments in copyright law with respect to technology, while at the same time, does not do anything specific.

Pranesh Prakash

Mr. Prakash, referring to *Lexmark* incident, stated that even if there was a right to break the digital lock, there was no way the same could be enforced or exercised. Even the Consumer Protection Act does not offer such protection.

Dr. Madhukar Sinha, conceding that India might have acted because of a foreign push in this regard and touting the DRM provisions as a 'flag bearer of modernity' in a 2006 draft, stated that the provisions must be looked from multiple perspectives, primarily whether the ends are even required and whether the means to acquire it shall be fair.

V. C. Vivekanandan

Dr. V. C. Vivekanandan opined that it was debatable whether the provisions strike a fair balance from the viewpoint of consumers. The provisions appear to have been inserted to placate the US in some sense.

Prof. Basheer on the overlap between Cl. (b) and (c) of §§ 52(1), asked the panelists if the word 'access' in Cl. (c), given a broader meaning, takes away the exceptions in cl. (b). Furthermore, the Moderator opened the floor for comments on the flippant notice and take down mechanism which appears to be harmful to consumer interest.

Rajendra Kumar

Mr. Kumar observed that courts could interpret these provisions in

light of legislative history, international debate etc. He, however, said that there was room for arbitrary interpretation.

Pranesh Prakash Mr. Prakash was of the opinion that since both the clauses can be harmoniously constructed, by providing different spaces to the two clauses, there may not be any actual problem. § 52(1)(c), however, was apprehensive of the phrase ‘unless expressly prohibited by the right holder.’ Citing the practices of Dozier Internet Law Firm in US and the National Informatics Centre (NIC), he stated that a narrow construction of the phrase could limit hyperlinking, which is founding feature of HTTP.

Prof. Basheer observed that the scope of ‘access’ in Cl. (c) has an effect of limiting the scope of Cl. (b) and expressed his skepticism on harmonious construction of the provisions by courts in India.

Prof. Gopalakrishnan argued that the difference between both clauses rests on the ‘technical processes’ involved in the transient or incidental storage. If the incidental or transient storage is for longer duration, there is a need for checks and balances and Cl. (c) addresses these concerns.

In concluding the discussion, the Prof. Basheer asked the panelists if there are any privacy concerns slinking in as a result of the amendments.

Pranesh Prakash Mr. Prakash noted that §52(1)(zb) and §65A gives rise to privacy concerns as the TPM mechanism permits tracking of content. While a sighted person need not provide any proof of identity, persons with disabilities have to prove their disability in order to avail rights granted in the Copyright Act.

DAY II

Mr. G R Raghavender *Director & Registrar of Copyrights MHRD,*
History of the amendment

Mr. Raghavender began by elucidating the requirement of striking a balance between private rights and public interest in the sphere of copyrights. This balance can be sourced to the Berne Convention, Art. 7 of the TRIPS and also to the preamble of all the WIPO Treaties, the latest being the Beijing Treaty. These treaties recognize the need for balancing interests in order to create access to knowledge for the purposes of research, education, libraries and the disabled without harming the moral rights of the owner of the copyright. In pursuance of this goal of balancing interests, India sent a five member delegation to the 1996 WIPO internet treaty and diplomatic conference, to enable harmonization of the domestic copyright laws to the TRIPS level. Thereafter, the delegation recommended that the Government sign the WPTC. This was, however, deferred by the Government until national consultations with the different stakeholders had been completed.

From the year 1998 to 2006 consultations with the various stakeholders continued, pursuant to which the final draft was made public in order to enable comments on the same. In addition, region wide consultations were also undertaken by the copyright office. Thereafter, final demands were made by the film industry for a term extension in the cinematographic field.

In order to evaluate this demand, the Sub-Committee under Dr. N. S. Gopalakrishnan drew comparative links from the US and the EU specifically the UK. In this regard, the UK provided for a term of life plus 70 years, which was later perceived by EU courts as illogical. In India, however, due to the pressure sustained by filmmakers, the government thought that the principal director should also be accorded some benefit in light of his contribution to creativity and a contract existing between the director and producer to that effect. This argument was not accepted by the Parliamentary Standing Committee.

Furthermore, the amendment sought to recognize the contribution artists, composers and lyricists for their work and hence performer rights were granted. This was necessary pursuant to ruling in the *IPRS v. Eastern Motion Company* (1997) wherein the Supreme Court though recognized rights of performer's, held that rights to royalties were transferred to producers and music labels as per §17(b).

In 1993, authors and composers and music companies came to an understanding according to which royalties on performance rights were agreed to be shared equally between them as per international norms. This continued till 2004, however, problems arose when few authors objected to the arrangement. Therefore, a need was felt to recognize rights of performers distinct from cinematographic film or sound recording. This amendment sought to illuminate what in J. Krishna Iyer's words was a 'penumbral' area in law (*IPRS v. Eastern Motion Company*). Underlying the idea behind this amendment is the principle of equitable remuneration, which can be traced to Art. 13 of the Berne Convention and the patent law of Germany. The phrase 'right to receive royalties' by authors and music composers was inspired from German copyright law. Art. 12 of Rome Convention also empowers states to protect rights of performers when business models fails to respect equitable remuneration.

Thereafter, Mr. Raghavender moved on to speak about the history of the Copyright (Amendment) Act 2012 with regard to the proviso of §18. This proviso provides that assignment can only be in a medium existing at that time. This concept was borrowed from jurisdictions of Germany, Italy, France and many EU court decisions.

The next aspect that was discussed was the chapter on licenses, which underwent a radical change. After having given a brief and concise overview of the chapter, Mr. Raghavender went on to illuminate the challenges with regard to implementing the provision of statutory licensing for cover version broadcasting. The differential pricing for radio and television broadcasters in §31D was inspired from resale rights under §52.

Mr. Raghavender expressed dissatisfaction on the Copyright Act previously for lack of recognition of rights of disabled. His reference was with regard to special provisions for the disabled introduced in the latest amendments. As acknowledged by the Parliamentary Standing Committee, the limitation and exceptions existing prior to the amendment were insufficient. After informal consultations with experts, the Indian law has been aligned to the Chilean Model. Therefore, currently the Copyright Act recognizes any accessible format being shared for non-profitable purposes as opposed to special formats in the previous proposal. If such sharing is for profit purposes, a provision for compulsory license was provided.

Though India has recognized and incorporated these exceptions into the Copyright Act, the inadequacy in limitations is still mirrored in the international framework and many international jurisdictions. The 25th SCCR is trying to finalize a legal text for the adoption of a treaty for the visually impaired and print disabled. Garnering support from the reluctant US and EU will, however, be critical for the realization of this treaty which is going to be presented in the General Assembly in the special SCCR.

Feedback

In answering a question posed by Mr. Pranesh Prakash with regard to extension of term for photographs, Mr. Raghavender stated that the issue was intensively discussed by the core committee and a unanimous decision was made to harmonize this provision with WCT. This was in light of the need to protect the commercial interests of the photographers in this digital age. However, he agreed with concern on the difficulty in identifying the right holder.

A distinguished participant sought clarification on the reason behind the proviso to §17(e) of the Copyright Act which deals with Cls. b & c of §17. Mr. Raghavender clarified that though the proviso was placed at the end of §17 owing to a drafting technicality.

SESSION III
Copyright Limitations and Exceptions

The discussions under the rubric of limitations and exceptions, was centered around parallel imports, involuntary licenses, educational exceptions, and exceptions relating to disability. Against the backdrop of the conference's theme of fair balance, the speakers examined whether such balance had actually been achieved by the amendment in the aforementioned fields. The underlying idea was to examine the ramifications the amendment would have on the rights of the owner, users/consumers of the copyrighted works. Presentations were made by Mr. Pranesh Prakash (Policy Director, Center for Internet and Society) and Mr. Abhishek Malhotra (Partner, TMT Law Practice). The panelists for the round table discussion were Mr. Sam Taraporewala (Director, Xavier's Resource Center for the Visually Challenged), Mr Amlan Mohanty (Student, National Law School Bangalore) and Ms. Ujjwala Uppaludi (Student, National University of Juridical Sciences, Kolkata). Mr. G. R. Raghavender (Director and Registrar of Copyrights, MHRD) moderated the session.

Mr. Pranesh Prakash Policy Director, Center for Internet and Society
Parallel Imports

Mr. Prakash argued that the international exhaustion of copyrights is desirable for developing nations such as India and best suited in the digital age. Mr. Prakash, examining the legality of first sale doctrine under the Copyright Act, amply demonstrated the flaws in the reasoning of Indian courts on the issue. He further went on to examine the ingenuity displayed by a court in prohibiting export of low-priced editions from India.

The doctrine of first sale is based on the fact that once a book is sold, the buyer gets ownership right over the book, which means it is his property and he can use, throw, or destroy it as he wishes. What he cannot do, however, is to reproduce given that the intellectual property rights in the book have not been transferred. The concept of ownership, therefore, entitles the owner to sell his copy of the book to anyone without any conditions attached. International exhaustion is in line with the concept of ownership.

Mr. Pranesh then went on to discuss various provisions in the Copyright Act, which relate to the principle of exhaustion. He observed that there was no provision of the Copyright Act by which the owner or licensee of copyright is given the exclusive right to import a copyrighted work into India.

Mr. Prakash argues that the Copyright Act nowhere prohibits or grants the owner or licensee an exclusive right to importation of copyrighted works into India. §51(b)(iv) prohibits import of 'infringing' copies of a work. As per §2(m), a reproduction of a literary work is deemed to be an 'infringing copy' 'if such reproduction 'is made or imported in contravention of the provisions of this Act.'³¹ Neither §2(m) nor §51(b)(iv) clarify whether

³¹ **§2(m) 'infringing copy' means**

- (i) in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;
- (ii) in relation to a cinematographic film, a copy of the film made on any medium by any means;
- (iii) in relation to a sound recording, any other recording embodying the same sound recording, made by any means;
- (iv) in relation to a programme or performance in which such a broadcast reproduction right or a performer's right subsists under the provisions of this Act, the sound recording or a

importation of works contravenes the Copyright Act. Therefore, one has to look into §14 (*meaning of copyright*) and §51 (*when copyright infringed*) to ascertain whether parallel imports affect any of the exclusive rights of authors. §14 nowhere grants an exclusive right to import to a copyright owner. The provision, however, clearly lays down that insofar as literary, dramatic or musical works are concerned, the owner has exclusive right 'to issue copies of the work to the public not being copies already in circulation.' Furthermore, the explanation to this provision clarifies that 'a copy which has been sold once shall be deemed to be a copy already in circulation.' What does this 'circulation' mean? Is it limited to circulation in India or does it include circulation of the work abroad as well? It was noted that the wording of the provision was amended in 1994 order to undo a series of erroneous interpretations given by courts on exhaustion.

In a pre-1994 decision, the Delhi High Court in *Penguin* decision³² (1983) interpreted importation to affect owner's 'right to publish' and therefore it is illegal to import copies of the work without the consent of the author. This interpretation is baseless and undermines the notion of privity of contract and the first sale doctrine elaborated by in the *Bob Merrill* decision³³ (1908) in the US. The 1994 amendment was brought out to overturn the erroneous interpretation in the *Penguin* decision.³⁴ The 1994 amendment additionally incorporated a legal fiction wherein books published internationally are deemed to have been first published within India. Unfortunately, the Bombay High Court in the *Euro Kids* decision³⁵ (2005) relied on the *Penguin* decision without referring to the 1994 amendments. The decision of the Bombay High Court is *per incuriam* as it fails to refer to the applicable law. Similarly, *Warner Brother v. Santosh*³⁶, which dealt with importation of DVDs applied the flawed reasoning in prohibiting parallel imports under the Copyright Act.

Mr. Pranesh then highlighted the problem of restriction on exports. No country regulates exports through the copyright law. The US and few Latin American countries, however, impose restriction export of works manufactured without the permission of the author. On the other hand, the decision of the Delhi High Court in *John Wiley v. Prabhat Chandra Kumar Jain*³⁷ (2010) recognized right of owners to export under the Copyright Act. John Wiley & Sons Inc., based in New York, exclusively licensed the rights over certain books to Wiley India Pvt. Ltd. These books were sold at a reduced cost in the Indian market and were clearly labeled as being 'Wiley Student Edition restricted for sale only in Bangladesh, Myanmar, India, Indonesia, Nepal, Pakistan, Philippines, Sri Lanka and Vietnam.' Another label on the same book read: 'The book for sale only in the country to which first consigned

cinematographic film of such programme or performance, if such reproduction, copy or sound recording is made or imported in contravention of the provisions of this Act.

³² *Penguin Books Ltd. v. India Book Distributors & Ors*, AIR 1985 Del 29.

³³ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

³⁴ **The Copyright (Amendment) Act 1994, §14 Meaning of copyright**

Explanation.- For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.

³⁵ *Eurokids International Pvt. Ltd. v. India Book Distributors Egmont*, 2005 (6) BomCR 198.

³⁶ *Warner Bros. Entertainment Inc. vs Mr. Santosh V.G*, CS (OS) No.1682/2006.

³⁷ *John Wiley & Sons Inc. v. Prabhat Chander Kumar Jain*, IA No.11331/2008 in CS (OS) No.1960/2008.

by Wiley India Pvt. Ltd and may not be re-exported.’ The notice restricts Wiley India Pvt. Ltd to publish and sell reprint editions only in the territories mentioned above. Furthermore, John Wiley & Sons Inc., imposes restrictions on buyers by attaching a conditionality for preventing export of books to the US.

Justice Manmohan Singh held the actions of resale to be invalid, however, on the grounds of copyright instead of the contract law. The reasoning adopted by the court was three fold: (a) rights of the owner and licensee and distinct; (b) the licensee cannot pass on a better title to the buyer than what he has (*nemo dat quod non habet*); and (c) sale or offer for sale constitutes issuance. Mr. Pranesh demonstrates that the principle *nemo dat quod non habet* is irrelevant as there is no sub-license taking place between the licensee and the buyer instead there is a *sale* of the book. This judgment disregards the logic applied in *Bob Merrill* by conflating license and sale into copyright law. This decision is fatally flawed and shows a lack of understanding of copyright law. Mr. Pranesh then went on to show how this reasoning does not apply to foreign works even though they are subject to the same limitations and exceptions imposed by the Copyright Act.

Feedback

The presentation elicited a comment from Mr. Raghavender who opined that empirical studies in New Zealand had shown that with parallel imports the economy flourished, thus showing the international exhaustion is conducive to developing nations. He also said that the National Commission of Applied Economic Research was collecting data that would show how parallel imports could benefit India, thus re-introducing the proviso to §2(m).³⁸

Abhishek Malhotra *Partner, TMT Law Practice, Involuntary Licensing: Music to Us-ears*

Mr. Malhotra emphasized on the dual objective of intellectual property rights, reward for the author for his work by granting a limited monopoly and the ultimate goal of maximum outreach of the work to general public. Mr. Malhotra notes instances when the limited monopoly of authors impedes the goal e.g. authors refusing to license work to the public or exercising control to limit dissemination of work or imposing excessive or unreasonable rates of royalty or of the like. In order to remedy the situation and restore the goal of intellectual property, copyright law provides for non-voluntary or involuntary licensing. Involuntary licenses are of two kinds; namely, compulsory and statutory licenses. The underlying principle of such licenses is to eliminate restriction on use of intellectual property.

The basis for involuntary licensing can be traced back to the UK Act of 1842 where the provision was introduced to prevent misuse of rights by owners. The need for the provision was felt as the term of monopoly was sought to be extended, to permit works of authors who no longer exist but access is being restricted by owners and importation of copyrighted works. Prior to the amendments, the Copyright Act limited this situation to

³⁸ **The Copyright (Amendment) Bill 2010, §2(m) ‘infringing copy’ means**

Provided that a copy of a work published in any country outside India with the permission of the author of the work and imported from that country into India shall not be deemed to be an infringing copy.

§52(1)(j) with a view to encourage the recording industry. The basis for the erstwhile §52(1)(j), which has now transcended into §31C, is Art. 13 of the TRIPS.³⁹

The justification for granting involuntary licenses is a compromise on the unrestricted monopoly granted on intellectual property. *Firstly*, refusal to license any work could impede the flow of information, which could affect the growth of any industry. *Secondly*, failure to avail the facilities for production and distribution can reduce dissemination of works to general public. *Thirdly*, impose onerous conditions to license works, which is contrary to goals of copyright law. *Fourthly*, when the negotiated price is very high and there is felt need to subsidize works to any particular group or institution. The provisions have attracted heightened importance following the complaint against Super Cassettes for abuse of monopoly having adverse impact on competition before the Competition Commission of India.

³⁹ **§31C Statutory license for cover versions**

- (1) Any person desirous of making a cover version, being a sound recording in respect of any literary, dramatic or musical work, where sound recordings of that work have been made by or with the licence or consent of the owner of the right in the work, may do so subject to the provisions of this section: Provided that such sound recordings shall be in the same medium as the last recording, unless the medium of the last recording is no longer in current commercial use.
- (2) The person making the sound recordings shall give prior notice of his intention to make the sound recordings in the manner as may be prescribed, and provide in advance copies of all covers or labels with which the sound recordings are to be sold, and pay in advance, to the owner of rights in each work royalties in respect of all copies to be made by him, at the rate fixed by the Copyright Board in this behalf: Provided that such sound recordings shall not be sold or issued in any form of packaging or with any cover or label which is likely to mislead or confuse the public as to their identity, and in particular shall not contain the name or depict in any way any performer of an earlier sound recording of the same work or any cinematograph film in which such sound recording was incorporated and, further, shall state on the cover that it is a cover version made under this section.
- (3) The person making such sound recordings shall not make any alteration in the literary or musical work which has not been made previously by or with the consent of the owner of rights, or which is not technically necessary for the purpose of making the sound recordings: Provided that such sound recordings shall not be made until the expiration of five calendar years after the end of the year in which the first sound recordings of the work was made.
- (4) One royalty in respect of such sound recordings shall be paid for a minimum of fifty thousand copies of each work during each calendar year in which copies of it are made: Provided that the Copyright Board may, by general order, fix a lower minimum in respect of works in a particular language or dialect having regard to the potential circulation of such works.
- (5) The person making such sound recordings shall maintain such registers and books of account in respect thereof, including full details of existing stock as may be prescribed and shall allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to such sound recording:

Provided that if on a complaint brought before the Copyright Board to the effect that the owner of rights has not been paid in full for any sound recordings purporting to be made in pursuance of this section, the Copyright Board is, prima facie, satisfied that the complaint is genuine, it may pass an order ex parte directing the person making the sound recording to cease from making further copies and, after holding such inquiry as it considers necessary, make such further order as it may deem fit, including an order for payment of royalty.

Explanation.—For the purposes of this section ‘cover version’ means a sound recording made in accordance with this section.

Mr. Malhotra identified four grounds for opposing non-voluntary licensing regime. *Firstly*, a non-voluntary license scheme is contrary to the basic philosophy of copyright law, which permits free market to determine the price of a work. *Secondly*, fair compensation can be better arrived at by negotiations with the owner rather than an imposition through a court mandated process. *Thirdly*, from an economic standpoint, it is administratively cumbersome and time consuming to obtain licenses through non-voluntary licensing regime. *Fourthly*, it gives adequate scope for abuse by vested individuals.

Notwithstanding the opposition, the latest amendments introduced involuntary licensing to the Copyright Act, with a special focus on the music industry by virtue of §§31, 31C, 31D and 33A(2). The underlying need for this was demand for unreasonable royalty rates and the withholding of work from the general public.

§31 provides compulsory licenses under two circumstances: (a) when the owner withholds work from the public affecting reproduction and performance of the work and (b) when the owner imposes unreasonable terms for broadcasting of the work. The Copyright Board has earlier clarified that an unreasonable royalty rate does not amount to withholding of the work from the public. Post the decision of the Supreme Court in *Entertainment Network (India) Limited v. Super Cassettes*⁴⁰ (2008), it is clear that §§31(a) and (b) are to be read disjunctively and that unreasonable rate could amount to 'withholding from public.' Does the provision provide a *right* for broadcasters to obtain compulsory license? Mr. Malhotra noted that the question was left unanswered by the Supreme Court. He, however, added that the restriction on compulsory license herein is not on the grant but on the determination of royalty rate.

§31C, previously in §52(2)(1)(j), increased moratorium to 5 years, and further the proviso to §31C(1) laid down that the cover version be made in the same medium as that of the original sound recording. The basis for this limitation is to encourage the recording industry and to encourage new performers as it removed the initial handicap and permits performance of popular songs. The proviso, however, does not appear to serve the intended purpose. Mr. Malhotra additionally noted that the impact of amendment is unclear considering the advance of technology and dissemination of works.

§31D dealing with statutory license⁴¹ for broadcasting of literary and musical works and sound recordings is ambiguous and has adequate scope for challenging its validity in the

⁴⁰ *Entertainment Network v. Super Cassette Industries*, C. Appl. Nos. 5178-5180 of 2005.

⁴¹ **§31D Statutory license for broadcasting of literary and musical works and sound recording**

- (1) Any broadcasting organisation desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so subject to the provisions of this section.
- (2) The broadcasting organisation shall give prior notice, in such manner as may be prescribed, of its intention to broadcast the work stating the duration and territorial coverage of the broadcast, and shall pay to the owner of rights in each work royalties in the manner and at the rate fixed by the Copyright Board.
- (3) The rates of royalty for radio broadcasting shall be different from television broadcasting and the copyright Board shall fix separate rates for radio broadcasting and television broadcasting.
- (4) In fixing the manner and the rate of royalty under sub-section (2), the Copyright Board may require the broadcasting organisation to pay an advance to the owners of rights.

future. Mr. Malhotra stated that the provision camouflaged as statutory license is more akin to a compulsory license. *Firstly*, the royalty rates are not fixed by the statute instead left to be determined by the Copyright Board. *Secondly*, in a statutory license scheme operates immediately once the work is published and whereas the provision requires prior notice of the broadcasting organization to broadcast the work. Additionally, §31D(3) prescribes separate tariff rates for radio and television broadcasting industry, raising doubts on whether the differential pricing extends to other forms of broadcast. The issue is complicated in the case of webcast and online streaming, as the definition for broadcast under the Copyright Act recognizes no such distinction.

The §33A(2) reverted to 1994 situation, which permits one to challenge the tariff scheme determined by copyright societies.⁴²

Feedback

In response to the query on the limitations under the Competition Act, 2002 in entertaining disputes pertaining to monopoly granted under any of the intellectual property laws, Mr. Malhotra clarified that the limitation is limited as long as the monopoly does not adversely impact competition in India.

Pranesh Prakash noted that there is an apparent tension in the statutory licensing provisions pertaining to cover versions. In particular, he highlighted §31C(3) encourages reproduction of the original version without any alteration in literary or musical work and at the same time it requires cover versions to be different from the original in terms of

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- (5) The names of the authors and the principal performers of the work shall, except in case of the broadcasting organisation communicating such work by way of performance, be announced with the broadcast.
 - (6) No fresh alteration to any literary or musical work, which is not technically necessary for the purpose of broadcasting, other than shortening the work for convenience of broadcast, shall be made without the consent of the owners of rights.
 - (7) The broadcasting organisation shall —
 - (a) maintain such records and books of account, and render to the owners of rights such reports and accounts; and
 - (b) allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to such broadcast, in such manner as may be prescribed.
 - (8) Nothing in this section shall affect the operation of any licence issued or any agreement entered into before the commencement of the Copyright (Amendment) Act, 2012.

⁴² **§33A Compulsory license in unpublished or published works**

- (1) Every copyright society shall publish its Tariff Scheme in such manner as may be prescribed.
- (2) Any person who is aggrieved by the tariff scheme may appeal to the Copyright Board and the Board may, if satisfied after holding such inquiry as it may consider necessary, make such orders as may be required to remove any unreasonable element, anomaly or inconsistency therein:

Provided that the aggrieved person shall pay to the copyright society any fee as may be prescribed that has fallen due before making an appeal to the Copyright Board and shall continue to pay such fee until the appeal is decided, and the Board shall not issue any order staying the collection of such fee pending disposal of the appeal:

Provided further that the Copyright Board may after hearing the parties fix an interim tariff and direct the aggrieved parties to make the payment accordingly pending disposal of the appeal.

artwork. Mr. Malhotra observed the provision is a limitation to copyright infringement and therefore needs to be interpreted strictly. The intended purpose of the provision is to encourage cover recording and that is served by permitting copying of literary or musical work.

Amlan Mohanty *5th year student, NLSIU*
Copyrighting education: Whither access? – An overview of educational exceptions within the Copyright regime

Amlan explored the educational exceptions made in the latest amendments in the backdrop of copyright aggression by publishers over photocopying outlets at the Delhi University. The dispute involves the legality of ‘course packs’ prepared for instructional purpose extracted from various sources. Primarily, the issues before the court concern the legality of course packs and quantitative limits on photocopying work.

§52(1)(a)⁴³ and (i)⁴⁴ provide exceptions to copyrights for educational purposes. In few jurisdictions, copyrights laws specifically prohibit reprography. India, on the other hand, has no such limitation and moreover there is no valid case for reading in such limitations. In fact, the word ‘reproduction’ in Cl. (i) could arguably include copying, duplicating or making reproductions. Further, the phrase ‘course of instruction’ must be construed widely to include all forms and the end user test must be applied. We must examine the underlying rationale for such an exception, which is to promote access to knowledge. §52(1)(a) provides for ‘fair dealing for private use.’ The words ‘private use’ ought not to be constructed in isolation. It was also argued that a provision of a quantitative limit is antithetical to the fair dealing provision, especially if books are unavailable. Reading down §52(1)(a) can detrimentally affect scholastic activity.

The broad interpretation of educational exception is necessary to address access related issues in India. Textbooks are often prohibitively expensive. Consequently, not only is it unaffordable for students to purchase these books for themselves but even the libraries have limited number of copies. Furthermore, the availability of these books is often limited as they are either foreign publications, which have no equivalent low priced edition in India, or they are out of print.

A proposed alternative was the grant of compulsory licenses, which would mean that one would seek licenses from publishers by paying a one-time fee to photocopy the material. Whether there is any value in compulsory licenses over fair dealing must, however, be examined. First of all, Compulsory licenses will only apply to a very narrow ambit of books or some sections of works. Additionally, they might put in place arbitrary limits of 10% of the book or one chapter etc. This in turn can facilitate the third problem of creating a

⁴³ **§52 Certain acts not to be infringement of copyright**

- (1) The following acts shall not constitute an infringement of copyright, namely:
- (a) a fair dealing with a literary, dramatic, musical or artistic work, not being a computer programme, for the purposes of-
 - (i) private or personal use, including research;

⁴⁴ **§52 Certain acts not to be infringement of copyright**

- (1) The following acts shall not constitute an infringement of copyright, namely:
- (i) the reproduction of any work –
 - (i) by a teacher or a pupil in the course of instruction; or

potential for monopolistic practices. Finally, while this might protect the interest of the publisher, there cannot be any case-to-case determination. With a fair dealing clause, however, there is no maximum limit on reproduction and even cover to cover photocopying is permissible. Second, publishers will not be able to dictate the terms and conditions of use. Third, students and scholars will be seen as end users, an idea that compulsory licenses cannot factor in. Finally, the economic burden on universities and students would be far lesser with fair dealing provisions. This is further reinforced by the fact that in other countries that shifted to a compulsory licensing scheme, there was almost a 100% increase in prices. The international experience with compulsory licenses provides quite a bleak picture with the system being discontinued, as Canadian universities could not afford the licenses.

At this juncture, it is unfortunate that the Delhi High Court passed an order against Delhi University and Rameshwary Photocopy.⁴⁵ The Indian Reprographic Rights Organization could coerce educational institutions to obtain licenses and further, all universities without licenses could be prosecuted for copyright infringement. In this context, Amlan argued for a liberal reading of the provisions to strike a fair balance. Although, the 2012 amendments did not focus on education, he argued that the fair dealing provision must be expanded both in scope and to protect the interest of authors.

Feedback

Mr. Madhukar Sinha opined the views on copyright aggression as 'one-sided'. He argued that these did not account for the reality, where majority of students in Delhi University have financial means to pay for licenses. Further, it was suggested that the exceptions be looked on a large scheme where there is need to incentivize publishers to meet the increasing enrollments in universities. On the same note, Mr. Sumeet Malik noted that 900 page text is sold at Rs. 420. Further, if the exceptions were read in an expansive manner, publishing would not be viable. Sheetal Chopra highlighted the loss of royalties to authors in permitting photocopying of books.

Professor Basheer in response observed that large sections of the population are not in a position to afford these books at the rate at which they were being sold. In fact, a majority of academic scholars preferred enhanced readership of their works that would facilitate greater dissemination of knowledge instead of paltry economic benefits through royalties. Further, he noted that many of authors are unconcerned about royalties they are entitled to. He further opined that this restrictive access in the field of education calls for a relook at the entire ecosystem of educational publishing.

Ujwala Uppaluri *4th year student, WBNUJS*

The libraries exception: What the amended Copyright Act does (and should do) for sharing and preserving knowledge in the digital era

Ujwala explored the intermediary link to the supply of knowledge and public libraries, with a view to evaluate the impact of the latest amendments in furthering the societal function of these institutions. The access to knowledge movement views knowledge as a public good, which is non-excludable and wishes to maximize exchange and creation of content. There is a host of legislation at state level governing public libraries, however, most of them merely institute government run public libraries. There are also laws governing

⁴⁵ *Oxford University Press v Delhi University*, Del HC, CS(OS) 2439 of 2012.

depositories. Depositories receive copies of every book published within its jurisdiction. There are four depositories in India located in Delhi, Mumbai, Kolkata and Chennai.

§14(c)(i)(A) provides that the reproduction rights include storing of the work in any medium by electronic means.⁴⁶ §52(1)(n) provides for storage in electronic means by 'non-commercial public libraries' provided such libraries have an analog copy in their possession.⁴⁷ This is a positive step in the recognition of preservation function of libraries. §2(fa) provides a negative definition for 'commercial rental' excluding renting of works by non-profit libraries or educational institutions.⁴⁸ The amendment has also replaced the term 'hire' with 'commercial rental' in all provisions except in §51. This exclusion in §51 seems to be deliberate in order to retain the broader scope of infringement provision. That said, the word 'libraries' has been used with different qualifiers and there are different standards with respect to different institutions. Thus within the Copyright Act, there are provisions with respect to non-profit libraries, non-commercial libraries and libraries without any qualifications. This lack of clarity is potentially problematic and there may not be consensus on the ambit of the term when used in a particular context.

Today, there are various plans across the globe for digitising libraries. The US is slated to launch the Digital Public Library of America by April 2013 and a similar project is already underway in Europe. This recognises that preservation is best achieved digitally. Therefore, laws must account for digital preservation of works. This can include provisions for fair use, scanning and holding, orphan use, length of copyright etc.

Though §52 refers to digital copies, there is a requirement of physical copies being purchase before e-copies are made. In this era of digitisation, we must examine whether this is an inhibitory concern and ensure clarity on the use of libraries and whether it can include entirely virtual libraries.

Feedback

Mr. Raghavender applauding Ujwala for the addressing the issues concerning public libraries comprehensively, expressed disappointment on lack of express provision for inter-library loan, especially in the context of digital copies. It is unfortunate that only 6 countries all over have made this exception so far. He clarified that any library funded by the government including panchayats comes within the ambit of public libraries.

⁴⁶ **§14 Meaning of copyright**

- (c) in case of an artistic work,-
 - (i) to reproduce the work in any material form including:
 - (A) the storing of it in any medium by electronic or other means.

⁴⁷ **§52 Certain acts not to be infringement of copyright**

- (1) The following acts shall not constitute an infringement of copyright, namely:
 - (n) the storing of a work in any medium by electronic means by a noncommercial public library, for preservation if the library already possesses a non-digital copy of the work.

⁴⁸ **§2(fa) 'commercial rental'** does not include the rental, lease or lending of a lawfully acquired copy of a computer programme, sound recording, visual recording or cinematograph film for non-profit purposes by a non-profit library or non-profit educational institution.;

Explanation.—For the purposes of this clause, a "non-profit library or nonprofit educational institution" means a library or educational institution which receives grants from the Government or exempted from payment of tax under the Income-Tax Act, 1961.

Professor N. S. Gopalakrishnan commented that the scheme of the amendment was only an initial step to allow replication of hard copies in soft copy format and not to lay down the legal background for virtual libraries as significantly different rules are applicable to digital libraries. He did, however, foresee virtual libraries becoming reality few years down the line which necessitates a fresh look at the libraries exception. He further pointed out that the amendment does not provide for a rental right for books, which is in line with TRIPS which makes it compulsory for this right to be provided for computer programs, music and films but not for books.

Professor Sam Taraporevala *Director, Xavier's Resource Center for the Visually Challenged*

Disability Amendment: Far Sighted? - The disability exception and the triumph of collaborative democracy

Professor Taraporevala narrated the 'unique Indian story' in inserting the historic exceptions in the Copyright Act for the benefit of people with disabilities. The reach of the provisions extends not only to people suffering from visual impairment, but also for the benefit of those with orthopedic and other learning disabilities. Although, technological solutions in the form of braille, computer readers, Optical Character Recognition systems (OCR) and many other devices are available which enable those with disabilities to make use of the work, unfortunately, only a minuscule 0.5% of books are available in such accessible formats. These technology were beyond sight in 1957 when the Copyright Act was enacted and hence not in tune with the advancements.

The legal story

The efforts to introduce a disability exception began in the 1990s by Professor Vinod Sena. These took concrete shape only when pursued by an informal coalition known as the Publication Access Coordination Committee (PACC) in 2006 and the Alternate Law Forum as also Inclusive Planet and the Centre for Internet and Society (CIS). Following several representations from various groups, the Government around 2002-03 proposed the insertion of an exception to the Copyright Act which permitted reproduction of works 'specially designed' for use of persons with disabilities. The draft proposal, however, was not format neutral and provided for a 'special format', which restricted the applicability of the provision. Furthermore, it was protested that it would discriminate between different disabled users for being sensitive to the needs of the visually disabled only. Thus, it prevented the end-user approach to be adopted.

Ground Zero Efforts

Following the failed attempt at securing a disability friendly exception, Professor Taraporevala and others relaunched the campaign through the National Access Alliance (NAA) and the global right to read campaign to sensitize authors on needs of the disabled. Furthermore, an aggressive campaign buoyed through the support of the DAISY Forum of India (DFI) and a large number of publishers, amendments eventually incorporated a format neutral clause, which also provides for sharing of resources between individuals and institutions, with reasonable precautions to protect the interests of publishers. The latest amendments have rewarded the efforts of all and has accounted for concerns raised with the previous proposal.



Where are we today?

There is still a need to ensure that accessible books are available in real time for print for the disabled children and efforts in this regard are currently underway to amend the Deliveries of Book and Periodicals Act suitably for depositing of accessible format. Professor Taraporewala further proposed setting up of a National Library for Accessible Content arguing that such an effort is in consonance with the UN Convention on the Rights of Persons with Disabilities (UNCRPD) to which India is a signatory. At the global level too, there is talk of a treaty for facilitating access for the print disabled and negotiations are currently underway before the WIPO.

Feedback

Mr. Raghavender observed that the inclusion of the provision was a proud moment and complimented Dr. Taraporewala for his efforts. Dr. Madhukar Sinha opined that the inclusion of the disability clause in its present form in the Copyright Amendment Act is a classic moment and congratulated Dr. Taraporewala for his efforts.

SESSION 4
COPYRIGHT ENFORCEMENT, ADJUDICATION & GOVERNANCE
ISSUES

This session was devoted to the issues related to the enforcement of copyright claims, their adjudication and issues of governance. The amendments were examined in this session, to ascertain whether they would be rendered effective on implementation, and whether suitable institutional mechanisms existed to ensure their enforcement. The session was moderated by Dr. Madhukar Sinha (Professor, Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi). The panelists for the session were Pravin Anand (Managing Partner, Anand and Anand), Sheetal Chopra (Joint Director, FICCI), Ananth Padmanabhan (Advocate, Madras High Court) and Achille Forler (Managing Director, Deep Emotions).

Pravin Anand *Managing Partner, Anand & Anand*

Copyright Enforcement: Will the amendments make a difference?

Mr. Pravin Anand, before analysing the amendments, discussed the significance of enforcing a law protecting the work of an artist. He opined that it would be no good if a law is not able to enforce rights of authors. He pointed out that the usual time taken by a law suit for determination in courts throughout the country is pathetic barring the Delhi High Court. Even a conservative estimate of proceedings at the Bombay High Court for instance takes no less than 2 years for obtaining an injunction or a notice of motion and the suit can go up to 5 to 10 years. In contrast, the Delhi High Court introduced two major changes to overhaul the laborious procedure.

Time Revolution

First, the court relegated the collection of evidence to a local commissioner such as a retired judge. As a result, evidence is now collected at a faster rate and in a business friendly informal environment. This is convenient even for overseas parties to file affidavits. This process is usually completed in 6 weeks and within a few months the suit is ready for final arguments before the judge. These came to be known as the '4 month orders'. This brought about a time revolution in the enforcement of copyright and other IP claims. It is puzzling why the rest of the country does not follow such procedure.

Remedies Revolution

Second, the Delhi High Court revolutionized remedial reliefs granted to authors. Authors currently can obtain reliefs such as Anton Pillar orders and Mareva injunctions. Since 2005, the Delhi High Court started a new trend by granting punitive and exemplary damages. Punitive damages, or exemplary damages, are meant to deter a person from indulging in infringing activities. Using these orders as deterrent, the court attempts to set example for others to become aware of the consequences. Civil remedies need to more attractive to ease burden on our criminal justice system.

In this backdrop, Mr. Anand argued for insertion of statutory damages in the Copyright Act and the latest amendment is this missed opportunity. A model of statutory damages is statistically sound and followed in some key jurisdictions.

Changes in the New Amendment Act

Mr. Anand welcoming the insertion of circumvention and RMI provisions in the Act, drew attention to the recent *Sony Playstation* case decided by the Delhi High Court few months

before the amendments.⁴⁹ The matter involved ‘jailbreak’ of Sony’s PS3 device. This inspirational order of the High Court took guidance from the amendments in deciding the matter.

With respect to changes on importation of goods under §53, Mr. Anand disappointingly noted that the amendments were not in *pari materia* with the Imported Goods Enforcement Rules, 2007. Under the Rules, the Customs Officers are conferred with powers of adjudication to decide on their own. With the changes this instantaneous procedure is replaced with a 14 day period for obtaining orders from competent court.

Mr. Anand also referred to §31D, which provides for the statutory licence for broadcasting of literary and musical works and sound recording., The conditions for compulsory licensing are, however, absent from this provision.

Lastly, Mr. Anand highlighted the legislative flip-flop relating to infringement of three-dimensional works. It is a settled position that unauthorized creating of three-dimensional objects based on two-dimensional artistic works amounts to infringement. Majority of disputes were decided in favour of plaintiffs as the 1994 amendment omitted §52(1)(w) which granted a defence for converting two-dimensional artistic works to three-dimensional object. The latest amendments got back the provision but with few modifications.⁵⁰ The copyright in drawing and artistic works, however, is unaffected by the provision and this is in accordance with decisions of the Delhi High Court in *Mattel* and *Microfibers* cases. Thus, reproduction of two-dimensional work into three-dimensional object for more than 50 times, the copyright in design is destroyed, not in the artistic work. To illustrate, if an aesthetically appealing bottle reproduced more than 50 times based on a drawing, only the copyright in the bottle design is destroyed and not the drawing. If the drawing is used to design another object, that would constitute infringement. §52(1)(w) too, limits exemption to only ‘purely functional part’. Therefore, this provision would be inapplicable if the object is merely aesthetic or partly functional and partly aesthetic or non-functional.

Feedback

Jaimini Vyas, a student of NUJS, queried whether the *Sony Playstation* decision would curtail access considering the recent circuit court decisions in the US which held jailbreking to be legal under the free right provision of the DCMA. Mr. Anand stated that the current position of law must, however, be decided in terms of the current statute. Sympathetic to right holders, stated that Sony deserved monetization for its work and that it is not desirable to provide access without payment.

Sooraj Abraham, a student from NUALS, agreeing with Mr. Anand on access concerns suggested that the law penalize uploaders and downloader for circumvention and not conduits. Mr. Anand responded that in software anti-piracy cases, initially action was taken against the retailer, but now-a- days the focus is on end users who are illegally making

⁴⁹ *Sony Corporation Entertainment Europe Limited v Mr. Harmeet Singh*, Del HC, CS(OS) No. 1725 of 2012

⁵⁰ **§ 52 Certain acts not to be infringement of copyright**

(1) The following acts shall not constitute an infringement of copyright, namely:

(w) the making of a three-dimensional object from a two-dimensional artistic work, such as a technical drawing, for the purposes of industrial application of any purely functional part of a useful device.

multiple copies of software. Copyright owners have now undertaken an End User Campaign against companies who as a result are willing to settle to guard against loss of reputation. Furthermore, Mr. Anand noted that watching a pirated movie is not punishable but use of use of pirated software is an offense. Therefore, where software is involved end users can be penalized if the work is an anti-circumvention measure is tampered with.

Pranesh Prakash then asked Mr. Anand for his comments on the use of 'Anton Piller' orders which has been borrowed from England. Mr. Prakash noted Hugh Laddie, the originator of the order who later regretted and stated it be 'a Frankenstein's monster order that went far beyond my original brief.' Mr. Anand opined that the situation of England and India could not be compared. In England, this order was diluted since there may have been a misuse of it, but the same situation cannot be applied in India as well. In England, judges were upset with how they were carried out, and in one such instance women and children were completely restrained for 17 hours. The situation in India, however, is porous and there are many ways information leaks out. Safeguards have been introduced in our orders to ensure that a balance is maintained. It is probably the only way to catch infringers.

Sheetal Chopra *Joint Director, FICCI*

Copyright Theft through multiplexes: Copyright Amendments needs a Revisit

Ms. Chopra, representing the voice on the entertaining industry, stated that cam-cording from theatres is the major root cause of piracy. Piracy causes a loss to the government exchequer and production companies. The current amendments fail to come to the rescue of IP owners and in fact there is huge possibility of interpretation of some provisions in such a way that it rather would allow piracy to be practiced legally by cam cording through multiplexes. The contribution of entertainment industry to the GDP is around Rs. 100 billion crores and hence, piracy needs immediate attention.

Ms. Chopra noted that pirates are technologically sophisticated and hi-tech gadgets are carried into theatres in beverages and shirt pockets. In a recent incident, a 19-year old from in Andhra Pradesh was caught recording in a theatre and consequently confessed to illegal recording of 370 movies and sells the same further at the consideration of money. In certain sting operations carried out in South side it revealed that in certain cases even Cinema owners were themselves involved in abetting the cause of piracy. The illegal copies are later sold to illegal websites. Ms. Sheetal referred to a survey based on forensic matches revealed that 53% of piracy has roots in India which can be easily traced through watermarking embedded in digital copies of films.

§52(1)(a), contrary to interests of the industry, entitle one to copy a work for personal or private use. In one of the interactive debate that FICCI organized witnessed the presence of film fraternity and the multiplex association of India. An important revelation was made during the interaction that aforesaid provision encourages piracy. Today, if someone goes to cinema hall and camcords copy of the film and if he is asked by cinema operators to stop doing it, he can very much take plea under §52(1)(a) and say that he is recording it for his personal or private use and hence it is completely legal. Once is out from cinema hall it would take him no time to send it to release groups and upload it on web for public viewing. In such case it would be completely difficult for the IP owner to catch hold of this guy at all. Even the police enforcement agencies are clueless on the illegality of use of cam-cording devices. During the interaction at FICCI, Andhra Pradesh film Chamber of commerce representative mentioned that in 100% cases, Police says no to take any cognizance against camcording. Since it is very difficult to track people lower down in the

piracy pyramid, therefore multiplex owners can be held liable as they are stakeholders in the process as well.

Ms. Sheetal then cited the example of USA where a huge amount of loss was said to have been reported because of cam-cording. Ms. Chopra demanded for anti-camcording legislation similar to Philippines. Alternatively, appropriate changes may be made in the Cinematographic Bill to effectively address this issue. In the alternative, a provision in the Cinematograph Bill would suffice to tackle the menace. Ms. Sheetal, concluding her presentation, expressed dissatisfaction over TPMs as they fail to penalize those who manufacture devices with the primary objective of circumvention.

She also highlighted the need for change in Guidelines for Internet service providers under IT Act who have to act within 36 hours once the complaint is made to them to take down the contentious pirated content. Industry urges that this time period should be substantially lowered so as to effectively address the issue of piracy.

She also highlighted that besides adequate changes in that needs to be brought at legislative level, it is equally important to take measures in changing the mindset of young population who find it appropriate to download the entertainment content free of cost. Besides, continuous training of enforcement officials and introducing IP related course curriculum in Schools and colleges can go long way in addressing the peril of piracy.

She also highlighted that since India stands today 3rd in the world in terms of internet connectivity and due to technological advancement that is taking place it is important that the issue of piracy is tackled from various angles and hence need for adoption of multipronged approach to overcome this issue.

Feedback

On being confronted by a question on the morality of the industry in plagiarizing scripts versus the morality of consumer in indulging in piracy from Anjum Rajabali, Ms. Chopra agreed and stated that if the industry requests consumers or an individual not to pirate, the industry also should refrain from 'stealing.'

Mr. Pranesh Prakash highlighted the dearth of empirical studies on the efficacy of anti-piracy measures. He opined that most of the measures were ineffective and affordable pricing is the most effective solution. Mr. Madhukar Sinha, supplemented this with an earlier survey that he conducted. Unfortunately, producers did not respond to his questionnaire. Nonetheless, the access related concerns of consumers when tested with mindset of consumers in disobeying rules reveals mere casual behavior rather than disobedience. Moreover, barrier to access of work is mainly for two reasons: (a) the price of entertainment is unaffordable to many and (b) the barriers created by location, availability and physical access is intimidating to those in lower economic strata. The fact that no production companies have shut down as result of piracy shows that it does not affect them substantially.

Ananth Padmanabhan *Lawyer, Madras High Court* ***The Copyright Amendment and Adjudication by the Board: A Failed Opportunity***

Mr. Padmanabhan, in his presentation, focused on the constitution of the Copyright Board, its functions and problems therein. The Copyright Board and the Intellectual Property

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Appellate Board are the two primary bodies that govern the IP adjudication in the country. In a recent petition, these organs have been challenged on the grounds of constitutional infirmity and non-compliance with the May 2010 judgment of the Supreme Court of in *Union of India v. R. Gandhi*.⁵¹ In this case, Supreme Court recognised the right of a person to get his right adjudicated by a forum, which exercises judicial power in an impartial manner. The main feature of the Board is the power to grant Compulsory Licenses. One of the grounds of the petition is that through the use of their compulsory licensing powers, many unreasonable conditions have been imposed by these organs which have restricted access to many works. Furthermore, the Board has failed to balance the competing interests of two industries. §31 requires that a complaint be made showing that one has tried their best to access any particular work. This access should either have been denied or granted on very unreasonable terms. Only then can an appeal be made to the Board.

Prior to 1985, the law relating to how judicial bodies should be constituted was not very clearly laid down. With the 42nd Amendment, however, the scheme of tribunals was laid down. As per the judgment in *Sampath Kumar*⁵² (1986), the Supreme Court could strike down tribunals (this could only be done through the courts). Due to practical concerns, rather than on any legal merits, the constitutionality of these tribunals was upheld by the court. It was, however, held that when they substitute High Courts, these tribunals must be constituted in an effective and constitutional manner.

Even after all these years, however, no specialised justice has been provided by these tribunals and the problem of pendency still persists. In spite of this, the Court refused to strike down §§323A and 323B thus holding that tribunals, discharging the functions of a court, cannot work merely with a technical member. A proposal was also made to vest the entire company law jurisdiction of the courts to the National Company Law Tribunal (NCLT).

The Supreme Court, however, affirmed constitutional principles in its decision in *Union of India v. R. Gandhi*, holding that NCLT and its appellate body did not satisfy the requirements for judicial independence. It laid down the conditions that must be satisfied while constituting such tribunals. As per the decision, technical members of the Board must not be below the level of secretaries and sub-secretaries. They must be headed by an ex-judge. Moreover, the board cannot be a mix of just legal personnel such as legal officers and judges. A minimum tenure must be assured to ensure independence of these tribunals. There must also be a chance of re-appointment.

More recently, the manner of adjudication by the Copyright Board came to be questioned.

In 2010, the Board passed an *en masse* order against all music providers in the country. Most of them, however, were not heard at all and thus violating the principles of natural justice. In light of these developments, the constitutional validity of these tribunals was challenged before the courts. The amendment was a missed opportunity to provide for a Copyright Board that was competent to address issues that would be placed in its jurisdiction by the amendment itself. It failed to address compliance with the directives given by the court in *R Gandhi* decision. Moreover, the amendment adds 'any person qualified to be a High Court judge' to be eligible to head the Copyright Board. The speaker

⁵¹ *Union of India v. R. Gandhi, President, Madras Bar Association*, 2010 (5) SC 514.

⁵² *S. P. Sampath Kumar v. Union Of India*, AIR 1987 SC 386.

was of the opinion that such a person would not have the requisite experience and expertise to function as the Chairperson.

The Copyright Act also does not talk about the qualification and appointment of the rest of the members of the Board. Guidance could be sought from the Supreme Court, which distinguished between judicial and technical members of these Boards. The latter could be comprised of the former Registrar of Copyrights, Chartered Accountants etc.

The implications of §31D also need to be fully examined and understood and competing interests must be kept in mind while determining rights. Ananth emphasized on the importance of introducing stability in the functioning of the Copyright Board. He recounted an incident where a retired High Court judge on the Copyright Board failed to turn up on the day of a scheduled hearing due to other commitments.

Feedback

Mr. G. R Raghevendera opined that if an advocate who had been practising for five years was deemed fit to be a high court judge, then why cannot a lawyer be appointed as the Chairperson of the Copyright Board. Mr. Padhmanabhan, while accepting this analogy, qualified it with the observation that since the post of Chairperson was analogous to that of the Chief Justice of a High Court. Thus while a lawyer could undoubtedly qualify as a judge of a court or member of the Board, he would not be qualified enough to be appointed Chair. Dr. Madhukar Sinha supplementing Mr. Padmanabhan's line of argument, added that the process of appointment of members of these Boards was not transparent and that was a major issue that must be addressed.

Achille Forler *Managing Director, Deep Emotions* *The Amendments and the collective administration of musical and literary works*

While the concept of property dates back several centuries, authors started asserting their rights only in the eighteenth century. Mr. Forler narrated an incident when Voltaire's mistress Marquise du Chatelet said to him 'I recognize you are a philosopher not because you are famous but you are rich.' This marks a beginning of rise of individualism. Culture is now shaped by the expression of individual identity. He noted that the rights and role of authors in society goes beyond economics. Like the life of humans, copyright is limited in time and all works will become common property of public. Therefore, one must always remember that the subject matter of intellectual property is an individual's creation. Moreover, its protection may be sought as a human right, recognized by international conventions.

Mr. Forler stated that the amendments were received with much enthusiasm all over and expressed confidence that the changes would transform the industry. In particular, he analysed the provision which bars assignment of royalties and mandates for collection of royalties through societies. Until now, the licensing process was fairly straightforward as royalties accrued to music labels completely. Post the amendments, record for every use of song (both digital and physical) will necessarily have to be maintained in order to be compliant with the law and pay royalties for lyricists and composers. The sharing of royalties in this framework is complicated and new to the industry. For instance, the song 'Don't phunk with my heart' by Blacked Eyed Peas has 23 owners. To ease the revenue distribution, the amendment mandates licensing of underlying literary works and

compositions *only* through collecting society. This is advantageous for users, as they have to simply approach the society, in this context - the IPRS, to use music. The reason for this insertion was due to the explosion of digital consumption. Online music streaming service Spotify in 2011 reported 3 billion lines. Irrespective of the length of the song streamed, publishers are entitled to earn revenues and this could range from 11 to 23 paise. In such situations, only collecting societies are in a position to administer royalties effectively given the complexity and volume of data.

Mr. Forler stated that due to the insertion of non-assignment of royalty provision, accounting is mandatory. This accounting process is, however, very complex. Fortunately, advancements in technology now enable societies to record any consumption thereby entitling small composers to obtain royalties who previously never received any. These technological appliances will be rolled out soon by copyright societies and this would make monetization possible in digital music.

Feedback

Prof. Basheer observed that there is an increasing 'atomization' of content and as a result there is increase in transaction cost. He sought Mr. Forler's policy suggestions for resolving this transaction cost. Mr. Forler responded that in such a situation, the role of copyright societies becomes very important and they must ensure that all literary works and compositions are licensed through IPRS. The IPRS in its present state, however, needs to be reformed. Mr. Forler added that India should play a bigger role in the future.

Anirban Mazumdar *Assistant Professor, NUJS, Kolkata*

Mr. Mazumdar focuses on the administrative, adjudicatory and logistical complexities in the latest amendments. Below are few such complexities:

The 'non-profit purpose' in the definition of 'commercial rental' is ambiguous. Will it be the composition of audience or collection of fees or revenues earned by the entity that is relevant for qualifying non-profit purpose is unclear.

The definition of 'performer' in the proviso to the §2(qq) is vague.⁵³ The meaning of the phrase 'normal course of practice of the industry' within the meaning of the above mentioned clause is also unclear. Mr. Mazumdar questioned how a normal industry practice could to be determined? §19(3)⁵⁴ of the Act provides for the royalty to be payable to the author or his legal heirs. The Amendment Bill substituted the words 'royalty payable, if any' with the words 'royalty and any other consideration payable.' In this regard, Mr. Mazumdar added that the phrase leaves doubt on how the royalty should be divided.

⁵³ **§2(qq)** Provided that in a cinematograph film a person whose performance is casual or incidental in nature and, in the normal course of the practice of the industry, is not acknowledged anywhere including in the credits of the film shall not be treated as a performer except for the purpose of clause (b) of section 38B;

⁵⁴ **§19 Mode of assignment**

(3) The assignment of copyright in any work shall also specify the amount of [royalty payable, ~~if any~~ and any other consideration payable], to the author or his legal heirs during the currency of the assignment and the assignment shall be subject to revision, extension or termination on terms mutually agreed upon by the parties.

§57⁵⁵ of the Copyright Act provides right to an author, independent of rights under §55, whereby an author can restrain or claim damages if act, such as distortion, before the expiration of copyright term would be prejudicial to the honour and respect of the author. Through the amendment, the words 'which is done before the expiration of the term of copyright' are sought to be omitted. Mr. Mazumdar stated that it was unclear whether there was any need for omission.

§38 of the Copyright Act provides that a performer, who engages in any performance, can claim special rights for a period of 50 years. Whether such a right of a performer be claimed by a legal representative or not, is still a doubtful question opined Mr. Mazumdar.

⁵⁵ **§57 Author's special rights**

- (1) Independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right-
- (a) to claim authorship of the work; and
 - (b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work ~~[which is done before the expiration of the term of copyright]~~ if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation