

Overview of Changes to the Indian Copyright Law

Zakir Thomas†

Open Source Drug Discovery (OSDD) & DG's Technical Cell, Council of Scientific and Industrial Research,
Anusandhan Bhawan, 2 Rafi Marg, New Delhi 110 001, India

Received 24 June 2012

The Copyright Amendment Act, 2012 has been enacted by the Government of India bringing changes to the Copyright Act, 1957. The amendments make Indian copyright law compliant with the Internet Treaties, WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). The amendments grant performers' rights to performers. While introducing technological protection measures, the law ensures that fair use survives in the digital era by providing special fair use provisions. The amendments have gone beyond the limited mandate of WCT and WPPT and made many author friendly amendments to streamline business practices, special provisions for disabled, amendments facilitating access to works and other amendments to streamline copyright administration. The purpose of this paper is to narrate the changes made in the Copyright Amendment Act. Wherever possible a brief rationale for the amendment as culled out from the Notes on Clauses of the Copyright Amendment Bill and from the Report of the Standing Committee of Parliament, is provided.

Keywords: Copyright law, fair use, WCT, WPPT, performers' right, technological protection measure, copyright society

The Copyright Act, 1957 is the oldest extant intellectual property right legislation in India. The Act has been amended five times, prior to 2012, once each in the years 1983, 1984, 1992, 1994 and 1999 to meet with the national and international requirements.

The Act was amended extensively in 1994, wherein it addressed the challenges posed by digitisation of works and the Internet, although partially. The Act required only minor changes to comply with the obligations under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) through the amendment made in the year 1999. The amendments introduced by the Copyright Amendment Act, 2012 (ref. 1), are significant in terms of range as they address the challenges posed by the Internet and go beyond these challenges in their scope.

The 1980s and 1990s saw the digital revolution sweeping the world and the advent of Internet over the world wide web. The global community responded to the challenges posed to the copyright system by the Internet through two treaties framed in 1996, called WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT),

together known as the 'Internet treaties'.² The treaties address the challenges relevant to the dissemination of protected material over digital networks such as the Internet. The WCT deals with the protection for the authors of literary and artistic works. The WPPT extends copyright like protection to performers and producers of phonograms. Many provisions in these treaties like right of communication to the public have been available in the Indian copyright law since the 1994 amendment.

The Copyright (Amendment) Act, 2012 introduced amendments to harmonise the Copyright Act, 1957 with WCT and WPPT. The Amendment Act goes much beyond the Internet treaties and has introduced many changes in the Copyright Act, 1957. The amendments can be categorised into:

I Amendments to rights in artistic works, cinematograph films and sound recordings
II WCT and WPPT related amendments to rights
III Author friendly amendments on mode of assignment and licenses to streamline business practices
IV Amendments to facilitate access to works further sub-classified into:

- (a) Grant of compulsory licences
- (b) Grant of statutory licences
- (c) Administration of copyright societies
- (d) Access to copyrighted works by the disabled
- (e) Relinquishment of copyright

†Email: zthomas@osdd.org

Disclaimer: This article is not an exhaustive statement of law or a commentary on the amendments. It is an overview meant for students of copyright law.

V Strengthening enforcement and protecting against Internet piracy including WCT and WPPT related provisions

VI Reform of Copyright Board and other minor amendments

These changes made by the Copyright Amendment Act are discussed below in the above order. The purpose of this paper is to narrate the changes. Wherever possible a brief rationale for the amendment as culled out from the Notes on Clauses of the Copyright Amendment Bill³ and from the Report of the Standing Committee of Parliament⁴, is provided.

Rights in Artistic Works, Cinematograph Films and Sound Recordings

The amendments have made some changes that clarify the rights in artistic works, cinematograph films and sound recordings. These amendments address technological issues like 'storing' and thus address some of the digital era challenges though not mandated by WCT or WPPT.

Section 14 (c) relates to the exclusive rights of the author of an artistic work. Clause (i) of this sub-section grants the right to reproduce the work in any material form. This clause is amended to provide that the right to reproduce the work in any material form includes 'the storing of it in any medium by electronic or other means'. The clause has been redrafted, numbering as sub-clauses the existing right of depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work. The net effect of the amendment is the addition of the right of storing of the work in any medium by electronic or other means.

Section 14 (d) relates to the exclusive rights in a cinematograph film. The existing sub-clause (i) provides the right to make a copy of the film, including a photograph of any image forming part thereof. This sub-clause has been amended to extend the rights of the author to include the 'storing' of the work in any medium by electronics or other means. Similar amendments have been made to the rights in sound recording [Section 14 (e) (i)] to clarify that right to make copies include 'the storing of the work in any medium by electronic or other means'.

The inclusive language used in the amendments clarify that the right of reproduction extends to storage in the case of artistic works, cinematograph films and sound recordings. In the case of literary, dramatic and

musical works, the existing clause (a) (i) of Section 14 clarifies that the right to reproduce includes 'storing of the work in any medium by electronic means'. The present amendment extends this inclusive language on right of reproduction to artistic works, cinematograph films and sound recordings. The right to store the work is of particular importance in a digital environment due to the special nature of transmission of digitised works over the Internet where transient copies get created at multiple locations, including over the transmitting network and in the user's computer. In a manner of speaking it can be stated that copyright has been extended to the 'right to storing' of works. It also creates liability for the Internet service providers. While adding this clarification to rights, the Act also treats as fair use, the transient or incidental storage and safe harbour provisions to service providers.

The words 'any medium by electronic or other means' have been introduced considering the possibility of evolution of technologies, for example, depiction of a work using laser images (already use of laser technology to depict artistic works is prevalent). While looking at the words 'electronic or other means', one wonders why the drafters did not simply use 'any means' in place of electronic and other means. In the case of literary, dramatic and musical works, the language in Section 14 (a) (i) remains the same, viz., 'storing of the work in any medium by electronic means'. It would have been appropriate if similar language of 'electronic or other means' was introduced in this section as well.

The Act has also amended the definition of cinematograph film (Section 2 (f)). The amended definition reads: 'cinematograph film means any work of visual recording on any medium.' The Act introduces a definition of 'visual recording' in Clause (xxa) to mean 'recording in any medium, by any method including storing of it by electronic means, of moving images or representations thereof, from which they can be perceived, reproduced or communicated by any method'.

Another change introduced in the definition clause is in 'communication to the public' [clause 2 (ff)] to add 'performance' to the work being communicated. This is consequential to the grant of the new rights to performers. The right of 'communication to public' is essential to protect the work on the Internet and such protection hitherto available for 'works' now extends to 'performances'.

WPPT and WCT Related Amendments

The Amendment to Section 14 relating to 'meaning of copyright' provides the right of 'commercial rental' to cinematograph films and sound recordings by amending the word 'hire' to 'commercial rental' in the existing provision relating to cinematograph films [clause (d) (ii)] and sound recording [clause (e) (ii)] with identical language providing for the right 'to sell or give on commercial rental or offer for sale or for such rental, any copy of the' film or sound recording.

The obligation under Article 11 of the TRIPS Agreement, Article 7 of WCT and Article 9 of WPPT is to provide for 'commercial rental' rights for computer programme and cinematograph film. This right was introduced in 1994 in Section 14 using the word 'hire'. However, keeping in view the possibility of interpreting this term to include non-commercial hire and lending by libraries and educational institutions, the term 'hire' in Section 14 (b) for computer programme was replaced with the term 'commercial rental' in the 1999 Amendment. The term 'hire' in Section 14 (d) and (c) with regard to a cinematograph film and sound recording respectively, is now replaced with the term 'commercial rental'.

The current Amendment has introduced a definition of the term 'commercial rental' in Section 2(fa) of the Act as below:

'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 non-profit educational institution' means a library or educational institution which receives grants from the Government or is exempted from payment of tax under the Income Tax Act, 1961.

The term 'commercial rental' is inserted with the objective of expressly clarifying that this right is not applicable to non-commercial activities of giving on 'hire' including the activities of libraries and educational institutions. Thus, in a manner of speaking, this amendment has also facilitated better access to works.

This amendment substitutes the word 'hire' with commercial rental, but has deleted the words 'regardless of whether such copy has been sold or given on hire on earlier occasions'. This deletion in

the case of both cinematograph films and sound recordings brings in the doctrine of first sale exhaustion to these works. It may be recalled that the doctrine of first sale exhaustion was applicable only to the literary, dramatic and artistic works before the amendment.

Performer's Rights

The Amendment has introduced affirmative performers rights by amending the present Section 38 which had granted only negative rights by prohibiting certain acts in its sub section (3) and (4). These sub sections have been omitted and a new Section 38A has been inserted which provides the performer's right as the exclusive right to do or authorise the doing of any of the acts in respect of the performance, without prejudice to the rights conferred on authors, namely:

- to make a sound recording or a visual recording of the performance or to certain acts in respect of such recording;
- to reproduce it in any material form including the storing of it in any medium by electronic or any other means;
- to issue copies of it to the public not being copies already in circulation;
- to communicate it to the public;
- to sell or give on commercial rental or offer for sale or for commercial rental, any copy of the recording and;
- to broadcast or communicate the performance to the public except where the performance is already a broadcast performance.

The above section providing exclusive rights to performers has been inserted to make it compatible with the Articles from 6 to 10 of WPPT.

The grant of performer's right will enable the performers to earn continued royalty in their performances which they were not entitled hitherto as they only had a negative right to prohibit 'fixation' of their live performances. The negative right has now been converted to the positive rights listed above.

A proviso has been added to the definition of performer in Section 2(qq) which provides that in a cinematograph film, a person whose performance is casual or incidental in nature and, in the normal course of practice of the industry, is not acknowledged anywhere including the credits of the film, shall not be treated as a performer. This provision removes from the definition of performers a category of incidental performers in films, popularly called 'extras' in Indian cinema.

Performers' Right of Communication to Public

The definition of communication to the public has been amended by inserting a new definition, as below, extending the right to performances (the changed portions are in *italics*, the explanation clause remains unchanged):

‘(ff) communication to the public means making any work *or performance* available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing *physical copies of it, whether simultaneously or at places and times chosen individually*, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.’

The amending Act thus amends the definition by adding ‘or performance’ after ‘work’ and extending communication to the public simultaneously or at places and times chosen individually, which has significance for performers.

It may be recalled that the right of ‘communication to public’ was introduced in the 1994 amendment to extend the rights to Internet. These rights hitherto limited to authors have been extended to performers by the present amendment.

Moral Rights to Performers

A new Section 38 B grants performers moral rights on their performances as follows:

The performer of a performance shall, independently of his right after assignment, either wholly or partially of his right, have the right,—

(a) to claim to be identified as the performer of his performance except where omission is dictated by the manner of the use of the performance; and

(b) to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.

The Explanation clause to this provision clarifies that mere removal of any portion of a performance for the purpose of editing, or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the performer’s reputation.

The Copyright Act, 1957 provided for moral rights to authors under Section 57 titled ‘author’s special rights’, though it did not use the term ‘moral rights’ in the Act. The new section provides moral rights to performers and calls these rights ‘moral rights’ in the title. Article 5 of WPPT covers the moral rights of

performers and the amendment is in line with that article. Moral rights have been extended to performers, considering the possibility of digital alteration of performances in a digital environment. However, some amount of alteration will be required for the purposes of editing. The explanation to the section clarifies that editors are free to perform their tasks without the fear of legal consequences.

Term of Copyright of Photographs

The term of copyright in a photograph has been made at par with other artistic works, namely, until sixty years after the death of the author, by deleting ‘other than photographs’ in clause 22 and deleting Section 25 which provided for a special term for photographs (of sixty years from publication). This amendment is consequential to Article 9 of WCT regarding duration of protection of photographic works.

Streamlining Business Practices**Assignment of Rights**

Section 18 (1) provides that the owner of a copyright in any work or prospective owner of a future work may assign the copyright. The proviso to this sub-section clarifies that in the case of future work, assignment will come into force only when the work comes into existence. A second proviso has been inserted in this section by providing that no such assignment shall apply to any mode of exploitation that did not exist or was not known in commercial use when the assignment was made. Another proviso provides that the author of a literary or musical work incorporated in a cinematograph film or sound recording shall not assign the right to receive royalties in any form other than as a part of the film or sound recording.

The above amendments strengthen the position of the author if new modes of exploitation of the work come to exist. It may be recalled that in the eighties, there were mostly video cassette recorders which were played in closed environments, but with the advent of the Internet, new models of exploitation of the works came into existence. It is possible that with the advent of high speed bandwidths and Internet telephony, new modes of exploitation of the work not contemplated at the time of assigning of works, may yet arise.

Section 19 of the Act relates to the mode of assignment. The sub-section (3) has been amended to

provide that the assignment shall specify the 'other considerations', besides royalty, if any, payable. Therefore, it is not necessary that only monetary compensation by way of royalty could lead to assignment. The amendment has inserted a new sub-section (8) to provide that any assignment of copyright in any work contrary to that of the terms and conditions of the rights already assigned to a copyright society in which the author of the work is a member, shall be deemed to be void. A new sub-section (9) provides that no assignment of copyright in any work to make a cinematograph film or sound recording shall affect the right of the author of the work to claim royalties in case of utilization of the work in any form other than as part of cinematograph film or sound recording.

Section 19A relates to disputes with respect to assignment of copyright. This section provides that on receipt of a complaint from an aggrieved party, the Copyright Board may hold inquiry and pass orders as it may deem fit, including an order for the recovery of any royalty payable. Second proviso is amended to provide that pending disposal of an application for revocation of assignment, the Copyright Board may pass any order as it deems fit regarding implementation of the terms and conditions of assignment.

Mode of Licences by Owners of Copyright

Section 30 relating to licences by owners of copyright provides that the owner of copyright in any existing work or prospective owner of copyright in any future work may grant any interest in the right by licence in writing signed by him or his duly authorised agent. This section is amended by deleting the term 'signed'.

Facilitating Access to Works

Compulsory Licences

Section 31 of the Act deals with compulsory licences of works withheld from public. This section provides that if the owner of copyright in any 'Indian work' has refused to republish or allow the republication or has refused the performance in public of the work and withheld the work from the public or has refused to allow communication to the public by broadcast of the work recorded in sound recording, the Copyright Board may, on the basis of a complaint received and after such inquiry as it may deem necessary, direct the Registrar of Copyrights to grant to the complainant, a licence.

Applicability of this section is amplified from 'Indian work' to 'any work'. 'Explanation' relating to the definition of 'Indian work' is also omitted. The word 'complainant' is replaced with the words 'such person or persons who, in the opinion of the Copyright Board, is or are qualified to do so'. Sub-section (2) is omitted so as to enable the Copyright Board to grant compulsory licence to more than one person.

By virtue of the above amendment, compulsory licences can be obtained for 'any work' withheld from the public and not just 'Indian works' and the licence can be granted to such persons as the Board may decide.

Section 31A relates to compulsory licences in unpublished 'Indian works'. The section has been amended to allow compulsory licences to any unpublished work or any work published or communicated to the public where the work is withheld from the public in India and in cases where the author is dead or unknown or the owner cannot be traced.

Special provisions have been provided for compulsory licensing of the works for the disabled by inserting Section 31B.

Statutory Licences

For Cover Versions

A new Section 31C provides for statutory licence to any person desiring to make a cover version of a sound recording in respect of any literary, dramatic or musical work. This is not totally a new provision for statutory licence for cover version as it is, but a replacement of Section 52 (1) (j) as it stood before the amendment.

The person making the sound recording shall give to the owner prior notice of his intention in the prescribed manner, provide the copies of all covers or labels with which the version is supposed to be sold, and pay in advance the royalty at the rate fixed by the Copyright Board. Such sound recordings can be made only after the expiration of 5 years after publication of the original sound recording. There is a requirement of payment of a minimum royalty for 50,000 copies of the work during each calendar year.

For Broadcasters

A new Section 31 D provides for statutory licence for broadcasting of literary and musical works and sound recordings. It provides that any broadcasting organization desiring to broadcast a work including

sound recording may do so. The broadcasting organization shall give prior notice to the right holders, pay royalty as fixed by the Copyright Board in advance. The names of the authors and principal performers shall be announced during the broadcast. The broadcasting organization shall maintain records of the broadcast, books of account and render to the owner such records and books of account.

The above amendment has been brought in to facilitate access to the works for the growing broadcasting industry. At present, the access to copyright works by broadcasters was dependent on voluntary licensing. As a result unreasonable terms and conditions were being set by the copyright societies and owners. There are divergent views by the courts in interpreting the existing compulsory licensing provisions under Section 31. There were litigations pending before various High Courts as well as the Copyright Board regarding the nature of licence and the rate of royalties to be paid when works particularly songs were used for broadcasting. Automatic licence or non-voluntary licence such as the proposed statutory licence ensuring adequate return to the owner of works was the best solution to make access easy for broadcasting industry.

Administration of Copyright

Copyright Societies

Registration

Sections 33, 34 and 35 of the Act relate to the registration and functioning of a copyright society. Amendments have been carried out in these sections to streamline the functioning of the copyright societies. All copyright societies will have to register afresh under these provisions.

Every copyright society already registered before the coming into force of the Copyright (Amendment) Act, 2012 shall get itself registered under the new provisions within a period of one year from the date of commencement of the Copyright (Amendment) Act, 2012. The registration granted to a copyright society under Section 33 (3) shall be for a period of five years and may be renewed from time to time. The renewal of the registration of a copyright society shall be subject to the continued collective control of the copyright society being shared with the authors of works in their capacity as owners of copyright or of the right to receive royalty.

There are specific amendments to protect the interests of the authors. In Section 35, the phrase

‘owners of rights’ has been substituted with ‘authors and other owners of right’. The section has been amended to provide that every copyright society shall have a governing body with such number of persons elected from among the members of the society consisting of equal number of authors and owners of work for the purpose of the administration of the society. Section 35 (4) provides that all members of a copyright society shall enjoy equal membership rights and there shall be no discrimination between authors and owners of rights in the distribution of royalties.

Tariff Scheme of Copyright Societies

A new Section 33A has been inserted in the Act providing for tariff schemes by copyright societies. The section mandates that every copyright society shall publish its tariff scheme in such manner as may be laid down by rules. Any aggrieved person may appeal against the tariff scheme to the Copyright Board which may, after holding enquiry, make orders to remove any unreasonable element, anomaly or inconsistency therein. The aggrieved person shall continue to pay such fee that was due before making the appeal until the appeal is decided and the Board shall not stay the collection of such fee pending disposal of the appeal. However, the Board may, after hearing the parties, fix interim tariff to be paid by the aggrieved party.

The objective of this provision is to introduce a system of transparent formulation of a tariff scheme by the copyright societies, which would be subject to scrutiny by the Copyright Board. Previously, there was no provision to govern or regulate fixation, collection and distribution of royalties under Section 33 of the Act. As a result, the tariff scheme of the copyright societies was often a matter of controversy between owner of rights and users. In the absence of a transparent tariff scheme, copyright societies were often found indulging in arm-twisting negotiations, resulting into different agreements with different companies. Therefore, a system for formulation of tariff scheme by the copyright societies has been introduced.

Fair Use Provisions

Section 52 of the Act enumerates the acts that will not be infringement of copyright. These are popularly known as fair use clauses. Certain amendments have been made to extend these provisions in the general context. The existing clause (1) (a) of this section provides fair use to ‘literary, dramatic, musical or

artistic works' only. This clause has been amended to provide fair dealing with any work, not being a computer programme, for the purposes of private and personal use. With this amendment, the fair use provision has been extended to cinematograph and musical works. Fair use on the above lines has been extended by amendment to bring in the word 'any work' to reproduction in the course of judicial proceedings (d); reproduction or publication of any work prepared by secretariat of a legislature (e); in certified copies supplied as per law (f).

A new clause 52 (1) (w) provides that the making of a three dimensional object from a two dimensional work, such as a technical drawing, for industrial application of any purely functional part of a useful device shall not constitute infringement. This provision should help reverse engineering of mechanical devices.

A new clause 52 (zc) has been introduced to provide that importation of literary or artistic works such as labels, company logos or promotional or explanatory material that is incidental to products or goods being imported shall not constitute infringement. This clause supports the parallel import provisions embedded in the Trade Marks Act, 1999.

Clauses (zb) and (zc) provide for fair dealing in the use of disabled persons. This is discussed separately later.

Fair Use in Digital Works

Fair use provisions have been extended to the digital environment. Any transient and incidental storage of any work through the process of 'caching' has been provided exceptions as per the international practice. Any deliberate storing of such works and unauthorized reproduction and distribution of such works is an infringement under Section 51 of the Act attracting civil and criminal liability. Exceptions under this section have been extended to education and research purposes as works are available in digital formats and in the Internet. The scope of these provisions ensures that introduction of new technology will also be covered under this new section.

An explanation has been inserted to clause (1) (a) of Section 52 to clarify that storing of any work in any electronic medium for the specified purposes, including the incidental storage of a computer programme which in itself is not an infringing copy, shall not be an infringement.

A new clause (b) in Section 52 seeks to provide that transient and incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public shall not constitute an infringement of copyright. Similarly, clause (c) provides that transient and incidental storage of a work or performance for the purposes of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, shall not constitute infringement.

To facilitate digitisation of libraries, a new clause (n) has been introduced to enable the storage of a digital copy of a work if the library possesses a non digital version of it.

Notice and Take Down Procedures

The unauthorised use of copyright work over the Internet leads to suspension of the service provider's activity. The new clause (c) of Section 52 while providing for fair use exemption for transient or incidental storage of works, also provides for the Internet service provider's liability when read with the addition of rights of storage and definition of infringement. A proviso has been added to this clause to provide a safe harbour as per international norms to Internet service providers, as they are merely carriers of information provided by others. This is generally referred to as 'notice and take down procedure'. If the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, that the 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. 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.

Special Provisions for Access to the Disabled

A two pronged approach has been adopted to facilitate access to the disabled. A fair use provision has been added in Section 52 to provide exemption from copyright for preparation of work in special formats such as Braille. A compulsory licence has been provided for creation of work in such formats by business entities to whom the exemption under Section 52 may not apply.

Compulsory Licence for the Disabled

A new Section 31 B has been introduced to provide compulsory licence in works for the benefit of the disabled. Any person working for the benefit of persons with disability on a profit basis or for business may apply to the Copyright Board for a compulsory licence to publish any work in which copyright subsists for the benefit of such persons. The section further clarifies that the licence is available only in a case to which clause (zb) of sub-section (1) of Section 52 does not apply and the Copyright Board shall dispose of such application within a period of two months from the date of receipt of the application. Every compulsory licence issued under this section shall specify the means and format of publication, the period during which the compulsory licence may be exercised and the number of copies that may be issued including the rate or royalty.

Fair Use Rights for the Disabled

A new clause (zb) has been added to Section 52 (1) providing for fair use of the work for the benefit of the disabled. The clause provides for the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format, to facilitate persons with disability to access works including sharing with any person with disability, for private or personal use, educational purpose or research. These rights are available to any person or organization working for the benefit of the persons with disabilities. The proviso to the clause mandates that the copies of the works in such accessible format are made available to the persons with disabilities on a non-profit basis and only the cost of production could be recovered from them. Such organization shall ensure that the copies of works in such accessible format are used only by persons with disabilities and should take reasonable steps to prevent their entry into ordinary channels of business.

Easier Relinquishment of Copyright

Section 21 deals with the right of author to relinquish copyright. The author of the work may relinquish all or any of the rights comprised in the copyright in the work by giving notice in the prescribed form to the Registrar of Copyrights. The sub-section (2) mandated that the Registrar shall cause the notice to be published in the

Official Gazette. This procedure is arguably cumbersome.

Sub-section 1 has been amended to facilitate relinquishment of copyright either by giving notice to the Registrar of Copyrights or by way of public notice. With this amendment, authors have the right to relinquish copyright through public notice. Sub-section 2 has also been amended to provide that in cases where Registrar receives such a notice, he shall, within 14 days of publication of the notice in the official gazette, post the notice on the official website of the Copyright Office so as to remain in the public domain for a period of not less than three years.

Strengthening Enforcement and Protecting Against Internet Piracy**Strengthening of Border Measures**

Section 53 of the Act dealing with importation of infringing copies has been substituted with a new section providing detailed border measures to strengthen enforcement of rights by making provision to control import of infringing copies by the Customs Department, disposal of infringing copies and presumption of authorship under civil remedies.

The section provides that the owner of copyright of any work or any performance embodied in such work, or his duly authorised agent, may give notice in writing to the Commissioner of Customs, or to any other officer authorised in this behalf by the Central Board of Excise and Customs requesting the Commissioner for a period specified in the notice, not exceeding one year, to treat infringing copies of the work as prohibited goods, and that infringing copies of the work are expected to arrive in India at a time and a place specified in the notice. After examination of evidence so furnished, the Commissioner may pass an order treating the infringing goods as prohibited goods. When any such goods are detained, the Customs officer shall inform the importer as well as the person who gave notice of the detention of such goods within forty-eight hours of their detention. The Customs officer shall release the goods, and they shall no longer be treated as prohibited goods, if the person who gave notice does not produce any order from a court having jurisdiction as to the temporary or permanent disposal of such goods within fourteen days from the date of their detention.

Protection of Technological Measures

A new Section 65A has been introduced to provide for protection of technological measures used by a copyright owner to protect his rights on the work. Any person who circumvents an effective technological measure applied for the protecting any of the rights, 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.

Sub-section 2 provides for some exceptions. The prohibition shall not prevent doing anything for a purpose not expressly prohibited by the Act (thus enabling enjoyment of fair use provisions). However, 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. Exception is available for doing anything necessary to conduct encryption research or conducting any lawful investigation; or doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner or operator; or doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or taking measures necessary in the interest of national security.

The above provision emanates from Article 11 of WCT and Article 18 of WPPT. The rationale is to prevent the possibility of high rate of infringement (digital piracy) in the digital media. Digital locks (technological protection measures - popularly known as TPMs) were invented to prevent infringement of works. At the same time, circumvention technologies to overcome the TPMs were also developed to unlock the digital locks used by owners of copyright to prevent infringement. Sub-section (1) makes such circumvention a criminal offence punishable with imprisonment. The use of TPM had a significant impact on users since the freedom to use the work (fair use of works) permitted by law was considerably regulated through these measures. In the absence of the owner of the works providing the key to enjoy fair use, the only option was to circumvent the technology to enjoy fair use of works. The major problem of use of law in preventing circumvention was the impact on public interest on access to work facilitated by the

copyright laws. This is the logic of sub-section (2) permitting circumvention for the specified uses. The Standing Committee of the Parliament which examined the legislation in its report stated that many terms in this section have been consciously left undefined, given the complexities faced in defining these terms in the laws of developed countries. It also stated that the approach enshrined in Section 65 A is to give limited legislative guidelines and allow the judiciary to evolve the law based on practical situations, keeping in mind the larger public interest of facilitating access to work by the public.

Digital Rights Management Information

A new Section 65B has been introduced to provide protection of rights management information. Sub-section (1) provides, 'Any person, who knowingly (i) removes or alters any rights management information without authority, or (ii) distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine. The proviso to the clause states that if the rights management information has been tampered with in any work, the owner of copyright in such work may also avail of civil remedies against the persons indulging in such acts.

This amendment conforms to Article 12 of WCT and Article 19 of the WPPT relating to rights management information. The rationale of the protection emanates from the practice in the digital world to manage the rights through online contracts governing the terms and conditions of use. However, these can be removed. The amendment is intended to prevent the removal of the rights management information without authority and distributing any work, fixed performance or phonogram, after removal of rights management information. It provides for punishment for such acts.

The protection of technological measures and rights management information were introduced in WCT and WPPT as effective measures to prevent infringement of copyright in digital environment. The introduction of Sections 65 A and 65 B is expected to help the film, music and publishing industry in fighting piracy.

Administrative and Other Amendments

Copyright Board

Section 11 relating to the constitution of the Copyright Board has been amended to make it a body consisting of a Chairman and two members. Earlier, the Board had strength of upto 14 members. A provision has also been introduced for payment of salaries and allowances to the members of the Board. This is a welcome change. The current practice has been to appoint the Law Secretaries from State Governments, some Directors of National Law Schools on a rotation basis. This practice does not lead to development of specialization.

During the last few decades, the nature of activities handled by the Copyright Board has changed significantly. Many issues dealt with by the Copyright Board go beyond mere registration of copyright. It extends to compulsory licences and assignments in complex areas such as broadcasting requiring sufficient knowledge and skill. The Standing Committee of the Parliament which discussed the Copyright (Amendment) Bill, 2010 as it was tabled in the Rajya Sabha, also suggested changes in the Copyright Board considering the multifarious responsibilities it is now called upon to discharge. This reformist approach is timely.

Other Amendments

Section 15 of the Act relating to copyright in designs has been amended to accommodate the Designs Act, 2000, consequent to introduction of the new Act to protect industrial designs. Similarly, amendments have been carried out in Section 45 to make changes consequential to the Trade Marks Act, 1999.

Section 66 relates to disposal of infringing copies by a court of law. The existing provision mandates the courts to deliver the infringing copies to the owner of copyright. A welcome amendment has been made in this section enabling the courts to make order regarding disposal of such copies. The reason is that in many cases owners of copyrights lose interest in obtaining the copies and in such situations courts will have to make appropriate orders relating to disposal of the infringing copies.

Conclusion

Broadly the amendments strengthen the rights of the authors, streamline the process of assignment and grant of licences, facilitate better access to works, and extend fair use provisions, in general and in particular

to the Internet. The changes made in the provisions of assignment and licensing and in copyright societies are expected to streamline business practices but has an underlying concern about protecting authors' interests. There are also welcome reforms to administration of copyright societies and the Copyright Board. Overall the amendments have the signature of a reformist approach.

One issue which was much discussed but was left unresolved is the issue of parallel imports. The Amendment Bill as originally introduced had a provision of international exhaustion which enabled parallel imports. The Standing Committee in its report recommended this provision. The Human Resources Minister who piloted the Bill made a statement in the Parliament that he has commissioned a study on the impact of parallel imports by the National Council for Applied Economic Research and that he shall get back to the house after studying its report. This is one pending issue in the copyright law. However, a fair use provision has been introduced to facilitate the parallel import provisions contained in the Patent Act, 1970 and the Trademarks Act, 1999.

Though WCT and WPPT were concluded in 1996, the adoption of these treaties as national legislation had taken some time. Each treaty had to be ratified by 30 countries before their entry into force. The WCT entered into force on 6 March 2002, and the WPPT, on 20 May 2002 (ref. 5). The United States had implemented these provisions through Digital Millennium Copyright Act in 2000 and European Union Directive adopted its provisions in Europe. There was intense debate on the impact of extending digital protection on fair use. Many, including this author⁶ had advocated a cautious approach in implementing these provisions. With the present amendments, India is one of the few countries which have extended fair use rights to the digital era, through legislation.

Overall the amendments introduced by The Copyright (Amendment) Act, 2012 are forward looking, which will enable Copyright Act, 1957 to retain its claim to be one of the best copyright legislations in the world.

Notice of Copyright

The author relinquishes his copyright in this article by way of this public notice under Section 21 of the Copyright Act, 1957; author's moral rights remain.

References

- 1 http://copyright.gov.in/Documents/CRACKT_AMNDMNT_2012.pdf (1 June 2012).
- 2 India has been a party to the negotiations concluding the Treaties. For a detailed analysis of the Treaties, Ayyar R V V, The process and politics of a diplomatic conference on copyright, *Journal of World Intellectual Property*, 1 (1) (1998) 3-35.
- 3 The Bill was originally introduced as Copyright Amendment Bill, 2010 in Rajya Sabha. Many clauses of the Bill underwent changes during the legislative process. Therefore the Notes on Clauses of the Bill as it introduced has limited value, although it gives the rationale behind many clauses of the Act as it has been passed since the Notes on Clauses of the Bill as enacted is not available, <http://copyright.gov.in/Documents/CopyrightAmendmentBill2010.pdf> (2 June 2012).
- 4 <http://copyright.gov.in/Documents/227-Copyrightamendment.pdf> (2 June 2012). It is interesting to note that the Act has a number of variations from the recommendations of the Standing Committee.
- 5 The advantages of adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), http://www.wipo.int/copyright/en/activities/wct_wppt/pdf/advantages_wct_wppt.pdf (1 June 2012).
- 6 Thomas Zakir, Digital technologies and emerging copyright scenario, *Journal of Intellectual Property Rights*, 8 (4) (2003) 276-301.