Copyright and Neighbouring Rights—Management and Protection*

Mrs P V Valsala G Kutty

Copyright Office B-2/W-3, Curzon Road Barracks, Kasturba Gandhi Marg, New Delhi 110 001

Paper discusses the Copyright Act, 1957 along with its important provisions. Two new treaties — the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty — are the latest attempts to provide effective protection to the rights of authors/owners of copyright and neighbouring rights in the wake of modernization of technology. A brief summary of the deliberations of the Diplomatic Conference on the issues which evoked lot of intense discussion during the finalization of these Treaties is given.

The concept of protection of intellectual property stems from the desire of the human mind to recognize and encourage creativity. A civilized society always took pride in rewarding ingenuity, calibre and talent. History is replete with the stories of emperors and kings who patronized writers, artists and musicians. In the early days of civilization, the rights of creators of intellectual property were not much of an issue, as means to reproduce a work were very limited. Copyright protection became a necessity when the printing machine was invented and the massive reproduction of works became the order of the day. However, the need for protection of intellectual property rights (IPR) gained momentum in the wake of its potential for being exploited commercially. Harmonization of the national laws for protection of the rights of creative minds resulted in formulation of international norms for effective management and protection of copyright and neighbouring rights. The Berne Convention for the Protection of Literary and Artistic Works (1886) and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) are mile-

*Keynote address delivered at the Symposium on Copyright and Electronic Media organized by the Ranganathan Research Circle in New Delhi on 31 January 1998.
stones in the international efforts to come to terms with the dangers posed to the interest of authors and performers all over the world.

Copyright Act, 1957

Realizing the need for providing an effective legal umbrella for protection of its vast and diverse cultural heritage, India has taken initiative in providing a near foolproof mechanism for protection of the rights of authors and other owners of copyright. The Copyright Act, 1957 was the result of the first initiative of independent India to put in place a legal framework for adequate safeguard of the interests of authors and other owners of copyright. The Act has been amended a number of times since 1957 to address the challenges posed by technology and the need felt by society. The latest amendment carried out in 1994 has been quite comprehensive and the Act is now considered one of the most modern pieces of legislation in the field of copyright.

What is Copyright?

Intellectual property rights cover a wide spectrum of rights with industrial property rights comprising of patent, trademarks, designs, etc, on the one hand and the copyright and neighbouring rights on the other. Copyright and neighbouring rights take care of the rights relating to literary, dramatic, musical and artistic works, cinematograph films, sound recording and the rights of performers and broadcasting organizations. The Copyright Act, 1957 gives a bundle of exclusive rights to authors and other owners of original works to ensure that their works are not unlawfully exploited by others. The law ensures that the author of a literary, dramatic or musical work (other than a computer program) has an exclusive right to:

(i) reproduce the work in any material form including the storing of it in any medium by electronic means;
(ii) issue copies of the work to the public, not being copies already in circulation;
(iii) perform the work in public, or communicate it to the public;
(iv) make any cinematograph film or sound recording of the work;
(v) make any translation of the work; and
(vi) make any adaptation of the work.

These rights are applicable even in respect of translations or adaptations of the original work in question. Similarly, the rights of authors have been clearly defined in respect of artistic work, computer programs, sound recordings and cinematograph films. Any one unlawfully indulging in reproduction of an original work, or in any other acts mentioned above, is infringing the legitimate exclusive rights of the author and is liable for punishment for such violation as per the provisions contained in the Act.

The rights of reproduction and communication to the public are very important components of copyright. Reproduction means the making of one or more copies of a work or of a substantial part of it in any material form, including sound or visual recording. The most common kind of reproduction is printing an edition of the work. Communication to the public means making any work 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 copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available. As per the Copyright Act, communication through satellite or cable or any other means of simultaneous communication to more than one household or place
of residence including residential rooms of any hotel or hostel shall deemed to be communication to the public.

Limitations and Exceptions
There are certain exceptions and limitations prescribed in the Copyright Act generally referred to in common parlance as ‘fair use’ provisions. These provisions are made to ensure that stringent measures for protection of copyright do not hamper the legitimate interests and development of the society and even of the author. The ‘fair use’ provisions in the Indian Copyright Act include reproduction of a literary/musical or artistic work for educational purposes, including research, making a back-up copy of computer program, etc. The making of not more than three copies of a book for the use of a library if such book is not available for sale in India is also permitted. Other exceptions include the reproduction of anonymous and unpublished work kept in a library or museum, reproduction of any matter which has been published in any official gazette (except an Act of a legislature), the report of any committee, commission, council, board or other like body appointed by the government if such report has been laid on the table of the legislature, judgements of courts, etc.

Owner of Copyright
Generally, the author of the work is the first owner of copyright. However, during the course of the author’s employment in a newspaper or a magazine, the proprietor of the firm employing him becomes the author of the work in the absence of any agreement to the contrary. Similar is the case with the employment under the government or appointment under contract or apprenticeship.

‘Author’ means not merely the ‘writer’ of a book. According to the Copyright Act, ‘author’ means, the author of a literary or dramatic work, the composer of a musical work, the artist, the photographer and the producer of a cinematograph film. The author in relation to any literary, dramatic, musical or artistic work which is computer-generated, is the person who causes the work to be created.

Term of Copyright
As per the Indian law, the term of copyright is the life span of the author plus 60 years after his death. However, in the case of a photograph, the term of copyright is 60 years from the date of publication.

Assignment of Copyright
How can a publisher secure copyright in a work? The author/owner of the work can assign the copyright wholly or partially in favour of any interested party. He can assign the work for the whole term of copyright or for a shorter period. Work can be assigned generally or subject to certain limitations.

While entering into an assignment, the assignor and assignee should keep in mind certain golden principles enshrined in the Act so as to ensure proper operation of the assignment. These are summarized briefly as follows:

(i) Firstly, all the assignments should be in writing, signed by the assignor or his duly authorized agent.

(ii) The assignment should clearly identify the work, the rights assigned, the territorial extent and duration of the assignment. If the period of assignment is not indicated specifically in the assignment, it will be deemed to be 5 years. Similarly, if the territorial extent
is not mentioned, it will be presumed to extend within India only.

(iii) The assignment of copyright should, without fail, indicate the amount of royalty payable, if any, to the author or his legal heirs during the currency of the assignment. He should also provide for revision, extension or termination on terms mutually agreed upon by the parties.

(iv) If the assignee does not exercise the rights assigned to him within a period of one year from the date of assignment, the assignment shall be deemed to have lapsed after the expiry of one year unless otherwise specified in the assignment itself.

Disputes arising out of the assignment of copyright may be brought before the Copyright Board set up under the provisions of the Act.

Licensing of Copyright

Similar to the provisions relating to assignment, the Copyright Act also provides for grant of interest in the right by licensing in writing. The law also provides for compulsory licensing under certain circumstances, for example, in respect of works which are withheld from public or whose authors are not known, traceable or dead. In such cases, the Copyright Board directs the Registrar of Copyrights to grant licences for which royalty as prescribed by the Board are payable. Compulsory licensing is also possible for production and publication of translations of literary or dramatic works after a period of 7 years from the first publication of the work.

Registration of Works

Although Copyright Act provides for registration of works, such registration is voluntary and not obligatory. Registration does not by itself confer copyright, but the particulars entered in the Register of Copyright constitute prima facie evidence of ownership of copyright in cases involving disputes on copyright. The fee for registration of a work is nominal only and the procedure is very simple.

Remedies for Infringement of Copyright

Under the provisions of the Copyright Act, the owner of the copyright can institute civil and criminal proceedings for infringement of his right. Copyright infringement is a cognizable offence. Without warrant, a police officer of the rank of sub-inspector has been empowered to seize infringing copies as well as plates, duplicating equipments used for infringing copies. Infringement or abetment of infringement of copyright in a work is punishable with imprisonment for a term extending up to 3 years and with fine up to Rs 2.00 lakhs.

Other Important Provisions in the Copyright Act

Performers' Rights

As mentioned earlier, with the latest amendment in 1994, the Copyright Act of India is rated as one of the most modern pieces of legislation. Apart from the provisions mentioned in preceding paragraphs, the Act has provided for the rights of performers. A performer includes an actor, singer, musician, dancer, acrobat, juggler, snake-charmer, etc. Without the consent of the performer, his work should not be fixed on a sound recording or visual recording. Communicating the performance to the public or broadcasting the performance will amount to infringement of the performer's rights if undertaken without the consent of the performer. However, once a performer has
KUTTY: COPYRIGHTS AND NEIGHBOURING RIGHTS....

Copyright Societies

Another important feature of the Indian Copyright Act is that it provides for collective administration societies for administration and protection of copyright. It is very difficult for individual authors/owners of copyright to manage and safeguard their rights individually. The Act, therefore, provides for formation of collective administration societies. Such societies are a boon only to the owners of copyright but also to the legitimate users, especially in a vast country like India with rich and varied cultural heritage. Copyright societies have already been set up for exploitation of musical works and cinematograph films.

Latest International Trends

The means for protection of copyright and neighbouring rights have always responded to the technological development taking place in the field of reproduction of work and its dissemination. Technology paves the way for creation of new types of works and also for myriad forms of their reproduction and usage. International community through the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations Organization, has been focussing attention on the requirement of modernizing the law for safeguarding the interests of owners of copyright and neighbouring rights. The Berne Convention, the basic international convention for the protection of literary and artistic works, has been amended a number of times. Two new treaties—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty—concluded in 1996 are the latest attempts to provide effective protection to the rights of authors/owners of copyright and neighbouring rights in the wake of modernization of technology. India played a vital role in finalization of the two treaties and ensured that the concerns of the developing nations are clearly reflected in the new pieces of legislations.

The issues which evoked lot of intense discussion in the run up to the finalization of the two treaties are the rights of reproduction, right of communication to the public, technological measures and the rights management information. This was because of the tremendous impact of the digital technologies on these rights. The following paragraphs give a brief summary of the deliberations of the Diplomatic Conferences on these issues.

Right of Reproduction

The basic proposal that was discussed contained a clause under the right of reproduction to include in its ambit all types of reproduction—temporary or permanent, direct or indirect in any manner or form. Limitations were also proposed to exclude temporary reproduction which has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature provided that such reproduction takes place in the course of legitimate use of the work. These provisions were very vital for the on-line and on-demand transmissions of work. Content-providers in on-line, interactive transmission system could confidently provide access to their works using new technologies without jeopardizing their economic interest, under the proposed clause. Those who defended the article argued that it will not cause any serious setback to any temporary copying that takes place along a telephone network or is...
browsing Internet as the temporary copying is already covered by the Berne Convention and all domestic laws. They further argued that the exceptions and limitations permitted under the proposal will serve the purpose of excluding acts that were not economically relevant. However, many delegations had serious doubts on the intentions of the provisions proposed regarding the right of reproduction. They felt that these provisions ignored the basic reality of how the Internet worked and could automatically impose strict liability on the participants in Internet communications, including Internet-providers and users. They referred to temporary copying known as 'caching' as an essential part of the transmission process through Internet, without which message could not travel through a network and reach the public screen. Creation of an additional liability on the part of Internet participants was seen as a fundamental flaw in the basic proposal. In view of the strong opposition from various groups and the inability to resolve amicably the interests of content providers and service-providers in digital system, the issue of the right of reproduction got deferred for consideration in future. The general consensus was that the issues relating to reproduction may be appropriately handled on the basis of the existing international norms on the right or reproduction and the possible exceptions to it particularly under Article 9 of the Berne Convention and its well-established and flexible principles.

Right of Communication

The rights of communication under the Berne Convention provides for an exclusive right of communication to authors of dramatic or dramatico-musical and musical works when their works including translation—are performed in public or communica-
cated through cinematography. In respect of literary work, this is limited to recitations. The proposal considered by the Diplomatic Conference addressed advances in the digital transmission technology through modified right of communication. The text prepared by the Chairman of the Expert Committee provided the authors the exclusive right of authorizing any communication to the public of their works, including making available to the public of their works by wire or wireless means, in such a way that the members of public may access these works from a place and at a time individually chose by them. These proposals widened the traditional notion of ‘public’ to take care of interactive transmission, not making it mandatory that a group of individuals actually access it. The clause covers all types of works like computer programs and other literary works that were excluded from the traditional communication to public right in Berne Convention.

Although the proposal was meant for protecting copyrighted work in the digital media, many communication industry organizations did not find favour with it. They felt that Internet providers do not have proper control over the routes or passages of information traversing across their network. Their contention was that it was not always practically possible to translate each package to determine the contents. The technological companies were not ready to take the burden of ensuring that only legitimate work got delivered through their systems.

After debating on the proposal on behalf of the content providers and the service providers, the Diplomatic Conference arrived at a consensus for a right of communication to the public more or less on the lines of the basic proposal with the understanding that
there would be an agreed statement to make it clear that the provisions of physical facility for enabling or making a communication did not in itself amount to communication within the meaning of the new treaty or the Berne Convention.

Technological Measures

The draft considered by the Diplomatic Conference made unlawful the importation, manufacture or distribution of protection-defeating devices. It was contended that this clause will help in eliminating devices such as unauthorized pay TV decoders, hardware locks used to protect unauthorized copying of computer program, etc. Meant for safeguarding the author’s exclusive rights to control the reproduction and distribution of his work by providing physical protection, the proposal was objected to by many industry groups on the ground that many innocent manufacturers and distributors would be subjected to liability in cases where their products are used to circumvent copyright protection devices. They felt that such a clause would force many companies to abandon or slow down production of new products fearing liability.

After considerable amount of arguments what was approved by the global community was that the contracting parties may provide adequate legal protection against circumvention of effective technological measures used for exercise of the rights of authors and owners of copyright and neighbouring rights. The finally accepted version in the two treaties put to rest many of the apprehensions in the minds of industry regarding over-legislation and the restrictions that would have been imposed on fair use provisions by library system, educational institutions and research organizations, etc. and at the same time making it mandatory for contracting parties to check effectively the use of devices meant for circumvention of technological measures.

Rights Management Information

The works when exploited through digital means can be easily copied and modified into various forms. With the expansion of markets for works that have been derived in myriad forms from the original works, it becomes necessary to provide for a mechanism for ensuring accessibility to copyright information so that licensing and other authorized forms of exploitation of works become easier. The copyright information management system has been thought of for providing easy access to information regarding the copyright holder, term of protection, licence conditions, etc., especially in situations where the collective administration societies are not fully developed or not developed enough to handle the higher demands of digitalized works.

The issues involved were discussed threadbare by various interest groups. At the end of the day, the Conference adopted a clause whereby the contracting parties were bound to provide adequate and effective legal remedy against any knowing tampering of electronic rights management information and distribution, import, broadcast or communication to public of works from which electronic right management information has been removed or altered without authority. The Rights Management Information has been clarified as information, which identifies the work, the performer, author/owner, the terms and conditions of use of the work, etc.

A very significant factor that emerged during the Diplomatic Conference is the realization on the part of the world community about the ever increasing need for striking a
balance between the rights of the authors/owners of copyright and neighbouring rights on the one hand and the interests of the society on the other, in the context of framing new legislations whether nationally or internationally. The attempts to offer a foolproof system of protection of copyright and neighbouring right in the digital era, thus culminated in the evolution of two treaties which address the solutions to the threats posed by digital technologies to creative efforts, in a limited way. The hesitation in the minds of large nations all over to legislate on matters which are relatively uncertain, the strong position taken by various interest groups and, to top it all, the unwillingness to compromise on vital issues, did pose a setback to finding a long-lasting solution to problems. The deletion of the original provisions relating to the right of reproduction is a price which the Conference paid for its inability to resolve issues in an atmosphere of mutual understanding and trust. At the same time, the solution offered for checking for protection-defeating devices and tampering of copyright management systems have, beyond doubt, proved that it is possible for nations to think alike and come to plausible solution to the problems that threaten human ingenuity and creative spirits. It is certain that a dialogue has been set in, a dialogue that has stirred up innumerable issues which the nations all over the world will hopefully keep alive and rake up more frequently than ever before.

Public Lending Rights

An issue which had generated considerable heat in the preliminary discussions, and in which India has sufficient stakes, was that of public lending rights. Public lending right would mean payment of royalty by public libraries to the copyright owners for the books being read by the public. India had opposed this right. Developing countries like India cannot take the burden of the public-lending rights, which will affect the nation’s programme for universalizing elementary education very severely. Moreover, in countries like India, the libraries are the major markets for books and the authors’ interest are not affected in the absence of public lending rights. In fact, any further burden on the already week library system will only reduce the intake of books and publications in the public library system thereby affecting the interests of authors adversely. The strong stand taken by India and other developing countries finally led to the dropping of the proposal.

India and the New Treaties

The Indian Copyright Act requires only very minor facial amendments to make it conform to the new treaties. India, however, has not yet acceded to the new treaties. This is because the process of consultation with all stakeholders is still going on. The government intends to take the decision about acceding to the new treaties in a participatory way.