

Indian Copyright Amendment Bill 2010 in Ref to It's Impact on American Industries

Background

1. The 1st Indian Copyright Act was passed in 1914 (an extension of the British Copyright Act, 1911 to India) based on English Copyright law. The Indian Copyright Act, 1957 was amended in 1983, 1984, 1992, 1994, 1999 and the current amendment Bill 2010 is pending ¹.
2. The moral basis of Indian copyright law comes from the 8th commandment – “Thou shall not steal”.
 - 2.1. In ancient and medieval India, the creators of creative works were offered higher place and respect in society by not in strict terms rewarded commercially.
3. *Copyright Act, 1957* protects original literary, dramatic, musical and artistic works and cinematograph films and sound recordings from unauthorized use. As we know, ‘patent protects the ideas’, ‘copyright protects the expressions’ ².
 - 3.1. Copyright Act protects throughout India the rights of author for their creative expression. So creativity is the key for the protection under Indian copyright law.
 - 3.2. The amendment in 1999 added the protection the *software programs* - right to sell or offer to sale or commercial rental for any copy of the software programs.
 - 3.3. Amendments made in 1994 and 1999 to protect over digital network proved to be in sufficient. Specifically the Information Technology Act, 2000 was enacted to deal with the digital age.

Features of Indian Copyright Act, 1957 in terms of Proposed Amendment ³

4. *Exemptions* are
 - 4.1. Use for the purpose of research or private study
 - 4.2. Use for the criticism and or review
 - 4.3. For judicial proceedings
 - 4.4. To report current events
 - 4.5. Performed by amateurs for non commercial audience
 - 4.6. For making of sound recording of dramatic, literary or musical works under certain conditions
5. *Terms of protection*

- 5.1. Literary, dramatic, musical and artistic works – 60 years from the death of the author.
- 5.2. Photographs, cinematograph films and sound recording – 60 years from the beginning of the calendar year next following year in which it is published/released.

6. *Authorship and Ownership*

- 6.1. Ownership of the copyright of any work is different of the ownership of the physical good. For example, ownership of ‘The fortune at the bottom of pyramid’ might be with late management guru Prof C K Prahalad but ownership of a copy of the book will be with the buyer.
- 6.2. Author of any work is the first owner of the copyright – section 17
- 6.3. Work done in return for consideration, results in ownership of person giving consideration. For example, an article by an employee in course of his/her employment means ownership of the employer not employee - section 17
- 6.4. Indian Copyright act recognizes ‘*Joint Authorship*’ which means that the work is produced in collaboration of two or more authors where contribution of one is not distinct from the other.
- 6.5. Right holders in a musical sound recording – lyricist who wrote, composer of the music, singer, musicians who performed background and person or company who produced the sound recording.

7. *Registration*

- 7.1. Ownership establishes with the creation of the work so registration is not needed for subsistence and enforcement.

8. *Assignment of rights*

- 8.1. Assignment of rights must be in writing by the owner or the authorized agent – section 19.
- 8.2. Copyright has multiple rights which can be assigned separately to different entities by the owner or authorized agent.
- 8.3. Assignment lapses automatically if not exercised after one year of assignment. If period is not mentioned in the contract then it is considered to be of 5 years from the date of assignment.
- 8.4. If territory of assignment is not mentioned in the contract then it is considered to be whole of India.

8.5. Author if want can relinquish all rights by informing the registrar of copyright.

9. Infringement

9.1. Common infringement are:

9.1.1. Selling infringing copies or giving on hire or making copies for sale or hire.

9.1.2. Allowing space or place for the performance of making infringement copies.

9.1.3. Distributing infringement copies for trade.

9.1.4. Public display of infringing copies for trade.

9.1.5. Importation of infringing copies in India

10. Remedies

10.1. Civil remedies – The Copyright Act offers injunction, return of infringing copies, damages and account of profits to aggrieved parties.

10.1.1. District court has the jurisdiction of the of civil suits.

10.2. Criminal remedies – sections 63 to 70 offer criminal remedies against infringers for seizure of copies without warrant and should be produced before a magistrate as soon as possible practically.

10.2.1. The punishment for 1st offence is imprisonment of 6 months and fine of INR 50,000 (exchange rate – INR 47=\$ 1) and 2nd or subsequent offences imprisonment of 1 year and fine of INR 1,00,000.

10.2.2. Copyright infringement is a cognizable offence.

10.3. Infringement by a company – every person who at the offence was committed was in-charge of , was responsible for the conduct of business of the company, as well as the company shall be deemed to be guilty and shall be liable to be proceeded against.

11. Trade Related Intellectual Property Rights (TRIP) & Berne Convention

11.1. Articles 9-14 of Trade Related Intellectual Property Rights deal with copyright.

11.2. Member countries of the Berne Convention are needed to be compliant with articles 1-21.

11.3. The amendment of 1999, made India compliant to all the articles.

12. Foreign Works

12.1. India extends protection to foreign works because it is member of Berne Convention for the protection of literary and Artistic works, Universal Copyright

Convention, Convention for the protection of phonograms, Multilateral Convention for the avoidance of double taxation of copyright royalties and TRIPS agreement.

12.2. The section 40 of Indian Copyright Act provides protection to foreign works after the federal government passed the Universal Copyright Order in 1991.

13. Copyright Societies

13.1. Copyright owners form society to collectively administer. Generally there is one society for one kind of products. The primary function of such societies are to issue license, collect fee against the licenses, and distributes fees among owners of course after deducting a portion for administrative cost.

13.2. The registered societies for example related to film industries are

13.2.1. Society for copyright regulation of Indian producers for film and television (SCRIPT)

13.2.2. The Indian performing right society limited (IPRS)

13.2.3. Phonographic performance limited (PPL)

Indian States have Laws to Check Piracy and Counterfeit to Protect Local Industries

14. To protect local industries, multiple state governments brought stricter laws to curb piracy and counterfeits.

14.1. The Tamil Nadu was the 1st to pass the ‘Goonda Act’ in 2005 to curb piracy to protect creative industries in state. It has satisfactory result.

14.2. The Maharashtra amended and enforced ‘The Maharashtra Prevention of Dangerous Activities (MPDA) act in 2009.

14.3. Karnataka followed soon and brought film and video piracy under the purview of ‘Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum-Grabbers’ – version of Goonda Act.

14.4. Delhi state government is working on Anti Piracy Bill 2010 to pass.

15. **Proposed Amendments in the Copyright Bill 2010:** The bill seeks to make the provisions of the law in conformity with the WIPO’s copyright treaty and performance and phonograms treaty.

The proposed amendment in ref to the Film and Sound recording industries ⁴

16. Exhaustion of Rights: The 1st sale doctrine says that when 1st copy of the work is sold by the owner or with his/her consent then he/she can't control subsequent sale.

16.1. Relevant CR sections for exhaustion are 14 (d)(ii) and 14 (e)(ii) and parallel imports is 2 (m). These sections are pertaining to the film and sound recording.

16.2. The literary works, films and sound recordings have been treated in exceptional manner for exhaustion of rights and parallel importation.

16.3. So the 14 (d)(ii) and 14 (e)(ii) maintained the rights of the copyright owner when legal copy of film and sound recording are sold. 14(d)(ii) says that to sell or give on hire, or offer for sale or hire, *any* copy of the film, *regardless of whether such copy has been sold or given on hire on earlier occasion*'. So is section 14(e)(ii) for sound recording.

Issue: The amendment of the copyright bill proposes to make the 1st doctrine applicable to films and sound recordings. It suggests deleting from both the sections 'regardless of whether such copy has been sold or given on hire on earlier occasion'.

16.4. One school interprets that word 'any' would take care of the CR owner's right.

16.5. The exhaustion of rights makes the second hand book market to exist. Can it be true to the film in future too?

Impact: Regardless of how one interprets, the international exhaustion would apply. Not allowing CR owner to control sales after the 1st sale of the copy of the film – the period of exploitation will be low, revenue generation capacity will be reduced of sales of DVD/VCD, piracy may increase, can there be emergence of second hand market etc. Will there be lower revenue generation for distributor and their willingness to pay lesser amount to producer?

17. Ownership: Section 2 (d) of the copyright says that the producer of the film or sound recording is considered to be the author and owner of the copyright. All other people contributing intellectually to the film are put in a subsidiary position. So the producers of the film need not to get into contractual agreement separately.

17.1. The amendment seeks to make both producer and principal director of a film joint owner of the copyright 2(d)(v). The amendment also seeks to redefine the section 2(z) – joint ownership.

Issue: It raises few Qs like, who is a principal director? what if principal director is employed by the producer? can they buy out each other's rights? And more.

17.2. The amendment raises the two important concept to be resolved for the smooth progress i.e. *authorship* and *ownership*. The common law practice in India is that the author is the owner of copyright.

17.3. May be well documented ‘the pathetic condition of writers has triggered this change’.

Impact: Lack of clarity would severely affect the possible collaboration between American and Indian industry.

18. Term Extension: Proposed changes affects film industry

18.1. In case of films, the copyright shall subsist until 60 years from the beginning of the calendar following year in which the film is released – section 26. Years are calculated from the release because generally companies not authors produce the film.

18.2. The principal director will have for term for 70 years after the released and for producer it is 60 years so 10 more years for principal director after the expiry of copyright term for producer. Companies produced films will get extended by 10 more years if it enters in agreement with principal director.

18.3. Whether the extended term benefit anyone is debatable but may create issues.

Impact: I don’t think it should have major impact on American business currently but will deter deeper collaboration with Indian directors in future.

19. Future technologies and exploitation/distribution of films: The right in copyright is not indivisible because it comprises of bundle of rights.

Issue: The proposed amendment precludes authors of underlying works in film from assigning their copyrights so as to exploit their works through undiscovered, unspecified and non-existent media.

Impact: The general practice in film industry is that the authors say that the rights assigned *may be exploited using any technology currently known or developed in future*. If the proposed amendment accepted as it is then such clause will be impossible.

20. Authors of works like lyrics, music and song: Authors are not able to get the share in revenue from the exploitation of their works. The amendment is an attempt to undo this anomaly. The background

- 20.1. In IPRS case in 1977, Supreme court held that the copyright in music composition and lyrics in film doesn't belong to the author who write them but to the author of the film i.e. producers. So they don't have rights.
- 20.2. The amendment in CR in 1994 tried to change the legal position. So it meant that music and lyrics could no longer treated as an integral and undifferentiated part of the film itself, the underlying works were work of the respect author and not of the producers. So in absence of any contract, producer can only use and exploit works in conjunction with the film.
- 20.3. Since there were no case to interpret the amendment of 1994 and Supreme court judgment is binding on all courts in Indian jurisdiction so it went the way of prior to 1994. Producers and record companies denied the due rights of the authors of such works.
- 20.4. The proposed amendment would not only benefit the above authors but also of scriptwriter etc.
- 20.5. The amendment states that if the authors of an underlying work assigns the CR in their works, they still can claim the royalties for the exploitation of works otherwise than in conjunction with the film. These authors may not assign the right to receive such royalties to anyone BUT their legal heirs or a copyright society.
- 20.6. So the use of a ringtone of a popular song by a telecom company may mean that the lyricist and music composer could claim the royalties even if they had assigned the copyright in their works.
- 20.7. Their ability to allow someone else to receive such royalties would be restricted to their heirs and society.

Impact: Not sure how it will play out for American businesses in India.

21. Copyright Society: The amendment completely revamps the membership of CR societies in film like SCRIPT, IPRS, PPL etc.

Issue: Only authors will be member and they will manage it. This should improve the financial situation of the authors. Also the amendment bill section 19(9) says that the assignment of copyright in any work contrary to 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 void.

Impact: US studios and producers will not be able to use the Indian CR societies. Will they be able to make authors members of such societies contrary to their present set up, not sure?

22. Compulsory licenses:

Issue: Any recognized organization working for the disabled may apply to the copyright board for compulsory license of any copyright work for the benefit of the disabled. The CR board may direct the Registrar of Copyrights to grant the license for a prescribed time.

Impact: The main concern here is the misuse of the provision due to corrupt practices, weak enforcement and easy distribution mechanism in India.

Copyright amendment in ref to Software and Multimedia Industries:

23. **Issues:** Redefining/clarifying “Commercial Rental” of the section of 14(b) (ii) and clause 3(ii)(b) in the proposed amendment section 2(fa). The amendment permits to allow the rental and lease of legal copies software for non-commercial purposes by a non-profit institution.

Impact: The misuse of the non-commercial usage can be very high in India even in case of large users by declaring/registering (under Society Act) as non-profit. This will be major source of problem for multinational and nascent India product software companies.

24. **Issues:** The amendment suggests adding in section 2(m) for “Infringing Copy”. If work is published outside India with the permission of the author and imported in the country shall not be deemed to be an infringing copy (*Similar concern is for the publishing industry too).

Impact: With great effort, IP owners in India successfully lobbied to control import of counterfeit products at the ports and borders by the custom authorities under the ‘*IPRs Enforcement Rule 2007*’. Subsequently, they invested heavily in educating the custom authorities on nearly as sophisticated technology of counterfeiters as original. If amendment goes through then it is complete waste of the time and effort.

Keeping in mind the practice by software companies of releasing products under schemes for charitable organization, academic institutions etc at lower rates in different markets. The proposed amendment will lead to major operational issues. The license agreement terms are generally conditional and specific to licensees in different geographic region. If the proposed amendment goes through then copyright enforcement will be very difficult and complex without any benefit.

25. **Issues:** The sections are 31(1) and 31 A(1) of the amendments 2010, brings foreign works under the Compulsory License. This is clearly an extension from the current position of only Indian works to be under the CL.

Impact: Interestingly this provision was not part of the amendment during the consultation process of 2006. Nevertheless, extension of the compulsory license provision is violation of international agreement. The inclusion of foreign works are not authorized the ‘*three-step test*’ of the Berne convention and TRIPS agreement [It imposes on signatories to the treaties constraints on the possible limitations and exceptions to exclusive rights under national copyright laws. It was first applied to the exclusive right of reproduction by Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works in 1967. Since then, it has been transplanted and extended into the TRIPs Agreement, the WIPO Copyright Treaty, the EU Copyright Directive and the WIPO Performances and Phonograms Treaty (Source: Wikipedia)].

Foreign works whose authors are dead, unknown and non traceable doesn’t get the protection required from the ‘three-step test’ under the section 31A(1).

26. **Issues:** Old demand to change Indian CR Act (section 52 (1) is not part of amendment.

52(1)(aa) *the making copies or adaptation of a computer program by the lawful possessor of a copy of such computer program, from such copy.....*

52(ii) *to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilize the computer program for the purpose for which it is supplied.....*

52 (ad) *the making of copies or adaptation of the computer program from a personally legally obtained copy for non-commercial personal use;....*

Impact: The reason of the provision is to have a back-up in case of loss/destruction/damage of original s/w CD for installation. The ‘*making copies*’ is not qualified on quantity of copies, who can and usage. The produced s/w companies willingly support the making of back-up copy (1 or 2) strictly for self use but the open ended sections may result in misuse. For example, buyer of one legitimate copy can install s/w on more computers from the back-up copies.

The terms “*personally*” and “*person*” can be interpreted as artificial and juristic person. The section doesn’t specific who can make copy. These leaves gaps to be misused by wrong

doers. Berne convention and Article 13 of TRIP permit the reproduction in special cases but that should not conflict with the normal exploitation of the work and doesn't hamper the legitimate interest of the copyright owners.

So the demand of defining '*reasonable number*', defining '*who can make copies*' and '*its usage*' are logical expectation but still not addressed in this amendment.

Issue (Controversial): India is not a signatory of the WIPO treaties like WCT and WPPT. But the amendment seeks to make India compliant of the WCT and WPPT through the proposed *sections 2(xa) - Rights Management Information, 65A – Protection of Technological Measures and 65B – Protection of the Rights Management Information.*

Impact: I expect software, media, entertainment, multimedia companies will be divided on these sections. DRM empowers to impose a spectrum of restrictions on end-users to protect copyrighted works. For example, it could do such things as prevent an end user from changing the format of a copyrighted work such as a song from, say, .mp3 to .wav both version sound files. The restrictions imposed by DRM may go far beyond those imposed by copyright law, and can be against the industry ask of '*seamless mobility*', '*Inter-operability*' and '*consumer experience*'. For example, by preventing a format change, DRM may require consumers to buy different copies of a work in different formats as different devices may require works to be in specific formats. An mp3 player may require a copy of a song to be in .mp3 format so if a consumer has bought the song on a CD to be played on a CD player in .wav format, he may be required to buy a second copy in .mp3 format if DRM were used to prevent a format change. This would, quite obviously and justifiably, seem ridiculous to the average consumer. And in addition to this, DRM tools could be used to limit the number of copies made for use on different devices so a consumer may not be able to buy one copy of a song on a CD and make enough copies of the song so as to be able to listen to it on a CD player, his home and office computers, and an mp3 player.

If this were to happen with reference to legal copies of a work (protected by DRM tools), the consumer would in all probability turn to a pirated copy of a work which would not be protected by DRM simply so that he would be able to engage in activities such as changing the format of a song or making enough copies to play on various different devices.

Pirated copies without restrictions would undoubtedly be considered suitable substitutes for the legal copies of copyrighted works such as electronic books and films in circumstances

where legal copies were protected by a slew of DRM mechanisms which greatly disadvantaged the consumer. As such, while it is clear that DRM are not in consumer interests, it is also true that DRM may not be especially beneficial for business interests. DRM may be attractive in the short-term for businesses, but the imposition of DRM could well turn consumers towards pirated copies, and therefore, in the long-term, it is entirely possible that DRM would not be beneficial to business interests either.

I expect that Indian government will delete the provision in final document tabled for parliament to pass unless high international pressure.

Copyright Amendment in ref to Publishing Industry:

India is a big market for American publishing industry. It publishes 20,000 titles annually which is the 3rd largest after US and UK. The additional attractiveness is due to the lower cost of production, fairly good quality so the printing works are out sourced.

Some of the major publishing houses in India are Cambridge University Press, Oxford University Press, Cengage Learning India Pvt. Ltd., Macmillan, Tata McGraw-Hill Education India Pvt. Ltd., Reed Elsevier India Pvt. Ltd., Pearson Education, Dorling Kindersley, Penguin, Harper Collins, and Random House, and Springer India amongst others.

English language publication market is dominated by the British and American publishers. Recent trend is that the international Publishers wish to designate India contractually as an exclusive territory and to invest in the authors due to low cost of production and world class writers. It is complementing strength of Indian and developed markets.

27. Issues: There will be negative impact of the Amendments on Territoriality and the Legal Framework in India (insertion of a Proviso to Section 2(m) of the Copyright Act, 1957).

The section 19 of the Copyright Act, 1957 currently recognizes, in subsection (2), that an agreement assigning copyright may specify the territorial extent of the assignment, and section 30A stipulates that the provisions in Section 19 are also applicable to the copyright licenses. These provisions are vitally important to specify in which territories a book may be made available for sale and under what condition. The section 19(6) of the Copyright Act, 1957 stipulates that with no specific territory in the agreement, India alone shall be presumed to be the

applicable territory. The legislative intention to thus respect the territoriality of division of rights is enshrined in the existing law.

Furthermore, it is pertinent to note that Section 51 of the Copyright Act 1957 which deals with infringement does not use the word ‘export’. It only envisages ‘import’ of infringing copies. For enforcement agencies and courts in India to be empowered to stop leakage/export of books to territories not contemplated by the copyright owner, a publisher would need to demonstrate that the books in question are ‘infringing’ copies. Thus far, courts and enforcement agencies including the customs department were inclined to stop exports on the ground that there is an attempt to send to a country/region not envisaged or permitted by the copyright owner.

Impact: There would be a dramatic reduction in the low priced editions because the international publishers could no longer be sure that these editions would not be exported to other territories to spoil the existing market.

The amendment would force publishers to either increase prices in line with other markets or not release in India because the investment will counter-productive. These would greatly disadvantageous to students and others who rely on the low-priced editions to access high quality and latest content. *This argument will be effective in building opinion against the proposed amendment.*

28. **Issues:** Discussed earlier too – sections 33, 34 and 35 propose to delete the words ‘owners of copyrights’ and substitute them with ‘authors of works’. It has also been proposed to amend the definition of authors in Section 2(d)

Impact: The Copyright Amendment Bill, 2010 contains proposal to allow only authors, and not publishers (as owners of copyright), to establish and manage the Copyright Collecting Societies.

Generally, the author of a book is the person who writes it and not the person/legal entity who publishes it. The two terms i.e. “author” and “publisher” are not synonymous. So the "author" and “publisher” cannot be used interchangeably with reference to the Copyright Act, 1957. If the aforesaid proposed amendments to Sections 33, 34 and 35 of the Copyright Act, 1957 were to become law, publishers who are copyright owners would not be eligible to become members of the Collecting Societies.

The amendment will be against the international standard and membership requirement of IFFRO (International Federation of Reprographic Rights Organizations). It says that copyright

societies should be represented and mandated by an appropriate representation of authors and publishers; jointly are set up, run and governed.

The proposed CR Amendment in ref to Internet and Telecom industries:

Worldwide, copyright owners faces tough challenge to protect its right because of the digital technologies particularly to the dissemination of protected copyrighted material over networks such as the Internet and mobile devices. Clearly, the amendments made in 1994 and 1999 in this regard have been found to be inadequate. Indian Copyright Act doesn't take into account the latest technologies like Digital Rights Management and Fair Use in terms of Safe Harbor.

29. Issues: Statutory limitation of liability for Internet intermediaries (Internet SPs, Network SPs and Online SPs).

Globally, it is accepted that Internet intermediaries should not be responsible for 3rd party's actions. The *Digital Millennium Copyright Act, 1998* ("DMCA") of United States absolves Internet intermediaries of any monetary liability and restricts the circumstances where injunctive relief could be claimed against them⁵. Similarly, the European Union has its *E-Commerce Directive 2000/31/EC* (Article 17), (Article 18) (Article 19)⁶. *Safe harbor legislation* in Chile, Brazil, Canada and many other jurisdictions protects intermediaries in same line. The future of the Internet depends on recognizing it and limiting liability in a way which respects the concerns of content owners.

Impact: The Bill, attempts to create a safe harbour for intermediaries in Indian copyright law through amendments proposed to be made with respect to Sections Section 51(a)(ii), 52(1)(b) and 52(1)(c) of the Indian Copyright Act, 1957.

These provisions are inadequate as these do not truly protect intermediaries from exposure to allegations of copyright infringement or, possibly, determinations that they have in fact committed copyright infringement.

¹ Copyright Office www.copyright.gov.in

² Copyright Office <http://copyright.gov.in/Documents/CopyrightRules1957.pdf>

³ Indian Bare Acts (extensively quoted the sections throughout the article)

<http://www.vakilno1.com/bareacts.htm>

⁴ PRS Legislative Research (extensively quoted the sections throughout the article)

<http://prsindia.org/uploads/media/Copyright%20Act/The%20Copyright%20Bill%202010.pdf>

⁵ U.S. Copyright Office <http://www.copyright.gov/legislation/dmca.pdf>

⁶ European Commission http://ec.europa.eu/internal_market/e-commerce/index_en.htm