

Protection of Copyright and Its Challenges in this Digital Age

Abstract

Over the past two centuries, copyright regime has again and again been challenged by ever- growing technology and as a legal response to such challenges the law of copyright itself has developed. Similarly, the emergence of digital and information technologies towards the concluding decades of the twentieth century have raised a whole new set of challenges to the copyright regime.

Keywords: Copyright Law, Treaty, Technology, Internet.

Introduction

Copyright Law has a history of development that can be explained by reference to the parallel technological and digital advancements. Over the past two centuries, copyright regime has again and again been challenged by ever- growing technology and as a legal response to such challenges the law of copyright itself has developed. Examples of the advances in the field of science and technology that have in the past been addressed by copyright law include photography, sound, recordings, films and broadcasting. Similarly, the emergence of digital and information technologies towards the concluding decades of the twentieth century have raised a whole new set of challenges to the copyright regime.

Since the advancement in the field of technologies in the concluding decade of the twentieth century, copyright law has struggled to reach a balance between persons wishing to tape copyright material for their own personal use and owner of copyright material, who claim that this is a breach of copyright.

Some characteristics of digital technologies, which are posing a number of challenges are ease of replication, ease of transmission and multiple use, plasticity of digital media, equivalence of work in digital form, compactness work in digital form, new search and link capability and no human author (sometimes).¹

All works can now be digitalized whether they comprise the texts, images, sound, animation, photograph and once digitalized the various elements are all 'equals' and can be merged, transformed, manipulated or mixed to create an endless variety of new works. In the light of these challenges, therefore the need of the hour is to adjust the legal system to respond to the new technological environment in an effective and appropriate way.

However, the interrelationship between law and technologies can be focused on one single aspect emerging technologies are challenging the existing legal regime, creating a need for legal reform. The interrelationship between the law and technology is, however, dialectic. The law doesn't merely responds to new technologies. It also shapes them and may affect their design. A dialectical approach to law and technology would enquire whether some rule may affect the emergence of new technology and how they are likely to shape, design and architect.

It is also very clear that intellectual property both affects and is affected by technological advancements in a multiplicity of way. On the one hand, these new technologies have brought with them many benefits; simultaneously these technologies have created many detrimental impacts also. New technologies have increased affordable access to intellectual property recourses; it has increased business, political and society awareness of the growing importance of all types of intellectual property and has widened the markets for IP owners. Notwithstanding these positive and beneficial impacts, the same technologies have sounded a threat to the copyright owner with a loss of control over his own property and it is becoming difficult for the copyright owner to detect and prevent the copyright infringement in borderless cyberspace.²

At present, the law of copyright is confronted with three main issues: First, how to determine the scope of protection in the digital



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environment i.e. how rights should be defined and what exceptions and limitations should be permitted? Second, how rights should be enforced and administered in this environment i.e. who should be held legally responsible for copyright infringement in the digital world? Third, how the question of jurisdiction and applicable law should be resolved?

Under existing treaties and national legislations, the owner of copyright and related rights are granted a range of different rights. Generally, these rights include the right of authorship, reproduction, distribution, communication to the public, broadcasting, adaptation and translation. The development of digital technologies, permitting transmission of works over networks, has raised the question about how these rights apply in digital environment. In particular, when multiple copies are made as work is transmitted through networks, is the reproduction right implicated by each copy? Is there a communication to the public when a work is not broadcast, but simply made available to the individual members of the public if and when they wish to see or hear it? Does a public performance take place when a work is viewed at different times by different individuals on the monitor of their personal computers or other digital devices?

Similar questions are raised about exceptions and limitations to rights. Are existing exceptions and limitations, if applied in digital environment, too broad or too narrow? How the standard of 'three- step- test'³ should apply in the digital environment.

Second issue of enforcement and administration of rights in digital environment is related to 'anti- circumvention provisions' and 'right management information' provisions. In order for legal protection to remain meaningful, the right holder must be able to detect and stop the infringement. Copyright owner should also be clear as to who should be prosecuted for infringement, whether, ISPs or consumers?

Third issue, though, not directly dealing with copyright is about the question of jurisdiction and applicable law in borderless cyberspace.

Aim of the Study

1. The object of the study is to make a critical analysis of the existing judicial machinery in evaluating the copyright protection in Digital Environment and protection of copyright works transmitted to the public via all forms of communication technology.
2. Suggest suitable remedies and applicable laws for the Internet issues and jurisdictional issues.

Copyright Law and Internet

International Copyright Treaties

At international level, there have been continuous efforts to develop international uniform rule for safeguarding the rights of the owners of intellectual property including copyright. Thus, the first multilateral international convention at large scales on intellectual property — "Paris convention" was adopted in 1883.⁴ The convention, however, was not, related to copyright. In 1886, the "Berne convention"⁵ was adopted to recognize and regulate the rights of

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copyright owners. This was the first international convention on copyright which was revised several 'times' — at Berlin in 1908; at Rome in '1928; at Brussels in 1948; 'at Stockholm in 1967; and at Paris in 1971, to meet the various challenges' posed by the technological developments.⁶ In 1952, Universal copyright Convention was adopted which revised at Paris in 1971.⁷

In 1967, the convention establishing the World Intellectual Property Organization was adopted by which WIPO was established. In 1996, WIPO adopted two treaties — WIPO Copyright Treaty⁸ and WIPO Performance and Phonograms Treaty.⁹ The provisions of these treaties are fully applicable in digital environment.

In addition to these treaties, three more treaties were also adopted in the field of neighboring rights.¹⁰ These are — the Rome Convention,¹¹ Geneva Convention,¹² and Brussels Convention.¹³ Apart from this, in 1994 "TRIPs Agreement"¹⁴ was adopted as part of the final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations. The Objectives of TRIPs agreement are inter alia to reduce distortions and impediments to international trade, to promote adequate and effective protection Of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.

New technologies and 'guided development'

In the 1970s and 1980s, a great number of important new technological development took place (e.g. reprography, video technology, compact cassette system facilitating 'home taping', satellite broadcasting, cable television, the increase of the importance of computer programs, computer generated works and electronic databases). For a while, the international copyright community followed the strategy of 'guided development',¹⁵ rather than trying to establish new international norms.

The recommendations, guided principles and model provisions worked out by the various WIPO bodies (at the beginning, frequently in cooperation with UNESCO) offered guidance to governments on how to respond to the challenges of new technologies. They were based, in general, on the interpretation of the existing international norms but they also included some new standards.

The guidance thus offered in this 'guided development' period — although not of a binding nature — had quite an important impact on national legislation and contributed to the development of copyright all over the world.

However, at the end of the 1980s, it was realized that mere guidelines were no longer adequate for harmonious development, and there was a danger that national legislators will choose different solutions to new problems.

The official titles of these instruments are the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms' Treaty (WPPT), but they are simply referred to as 'Interest Treaties'. They are rightly referred to so because these treaties were intended to give adequate responses to the

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challenges raised for copyright and related rights by digital technologies and, in particular, by the global network the Internet.

The WIPO Copyright Treaty 1996

The contracting parties, desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible, recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works, explaining the outstanding significance of copyright protection as an incentive for literary artistic creation, recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information as reflected in the Berne Convention. Subject to certain limitations, a right to authorize commercial rental is recognized in favour of authors of computer programs, cinematographic works, embodied in phonograms.¹⁶ The explanatory statement explains that contracting parties are not required under this Article to provide an exclusive right of commercial rental to authors who, under the domestic law of that country, are not granted such rights with respect to sound recordings and that the obligation is consistent with Art 14(4) of the TRIPs Agreement. As regards computer programs, the right is excluded where the program itself is not the essential object of the rental. As for films, the right only applies where commercial rental has led to wide spread copying which has materially impaired the exclusive right of reproduction. However, contracting parties, which on April 15, 1994, had and continue to have a system of equitable remuneration of authors for rental may maintain that system unless the reproduction right is being materially impaired.¹⁷

Article 8 of WCT is of special importance for Internet issue. Art 8 provides authors with the exclusive right to authorize any communication, to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place: at a time individually chosen by them, i.e. online transmission over interactive services. Thus authors have obtained a valuable right to authorize on-demand transmissions. The accompanying statement explain that it is understood that the mere provision of physical facilities for enabling or making a communication doesn't in itself amount to communication within the meaning of the Treaty or the Berne Convention.

In respect o photographic works, the contracting 'parties shall not apply the provisions of Article 7(4) of the Berne convention.¹⁸

Limitations and Exceptions

Art 10 of the WIPO WCT provides that contracting parties may provide for limitations of or exceptions to the authors rights in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonable prejudice the legitimate interests of the authors. Thus, WCT extends the 'Three-Step-Test' of Berne Conventions

regarding exceptions and limitations in case of digital rights also. Agreed statement concerning this provision provides that these provisions (Art 10 of WCT) should be understood to permit contracting parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Art 10 (2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

Technological Measures

Art 11, WCT provides protection to technological measures adopted by copyright owners. It provides that contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures used by authors to prevent unauthorized use of their works.

Right Management Information

Contracting parties must provide adequate and effective legal remedies against any act of removing, altering any electronic right management information; distributing, importing for distribution, broadcasting or communicating to public the works or copies of works knowing that electronic right management information has been removed without authority with a view to induce, enable, facilitate or conceal an infringement of any right.

"Right management information" is defined as information that "identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any number or the codes that represent such information, when any of these items of information is attached to a copy of work."¹⁹ Agreed statement concerning Art 12 makes it clear that contracting parties may not rely on this provision (Article 12) to devise or implement rights management systems that would have the effect of imposing formalities, which are not permitted under the Berne Convention or the Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under the Treaty.²⁰

WIPO Performances and Phonograms Treaty 1996

The reasons which led to the emergence of need for a new instrument on the rights of Performers and Producers of Phonograms were the technological advancement and discovery of new means for creating, storing, performing and disseminating phonograms and performances. Though Rome Convention and Geneva Convention already existed to deal with these neighbouring rights But need was realized to bring the protection provided under these two treaties in line with the contemporary technology. A separate committee of Experts on a possible instrument for the protection of the Rights of Performers and Producers of Phonograms was established to discuss all questions concerning the effective international protection of the rights of performance and Producers of phonograms.²¹

In the Preamble to the WPPT, contracting parties express their desire to develop and maintain the protection of the rights of Performers and Producers of phonograms in a manner as effective and uniform as possible, recognize the need to

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introduce new international rules to respond to new challenges and recognize the impact of development and communication technologies on the production and use of performances and phonograms.

WPPT provides definitions of 'performers', which is different from that of the Rome convention. The definition of 'performers' read as "performers' are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore."²² Thus, those who perform expression of folklore have also been included in the definition of 'performers'. The definition of 'Producers of phonograms' reads: "producers of phonograms' mean the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds or the representation of sounds."²³

Rights of Performers

WPPT recognizes the moral rights of performers to claim to be identified as the performer of his performances, and to object to any distortion, mutation or other modification of his performances that would be prejudicial to his reputation. If the legislation of the contracting party permits, such rights may also be maintained after the performer's death.²⁴

Performers have also been granted certain Economic Rights in their unfixed performances. These are the exclusive right of authorizing:

1. The broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance and the fixation of their unfixed performances.²⁵
2. The direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.²⁶
3. The making available to the public of the original and copies of their performances fixed in phonograms fixed in phonograms through sale or other transfer of ownership subject to national rules relating to exhaustion of rights;²⁷
4. The commercial rental to the public of the original and copies of their performances fixed in phonograms, except that a contracting party that has a system of equitable remuneration of performers for the rental of copies their performances may maintain such a system, provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers.²⁸
5. The making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.²⁹

Rights of Producers of Phonograms

Under WPPT, producers of phonograms enjoy the exclusive right of authorizing:

1. The direct or indirect reproduction of their phonograms, in any manner or form,³⁰
2. The making available to public of the original and copies of their phonograms through sale or other

transfer of ownership subject to the national rules of exhaustion of rights³¹

3. The commercial rental to the 'public of the original and copies of their phonograms subject to the national rules of exhaustion of rights;³²
4. The making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.³³

An agreed statement provide "The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted there under through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these articles.³⁴

Both Performers and Producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.³⁵ However, reservations may be made with regard to these provisions, in respect of certain uses or other limitations, and the provisions may be excluded altogether, as in the Rome convention. The term "published for commercial purposes" include phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them.³⁶ An agreed statement concerning Art 15 reads, as "It is understood that Art 15 doesn't represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by Performers and Phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore lift the issue to future resolutions." A further agreed statement states that rights to equitable remuneration may also be granted to Performers of folklore and Producers of phonograms recording folklore where such phonograms have not been published for commercial gain.³⁷

Limitations and Exceptions

Contracting parties may provide for the same kinds of limitations and exceptions with regard to the protection of Performers and Producers of phonograms, as they provide for, in connection with the literary and artistic works. Such limitations shall be subject to the principle of the three-step-test of the Bern Convention and are, therefore, confined to certain special cases, which do not conflict with a normal exploitation of the performances or phonograms and do not unreasonably prejudice the legitimate interests of the Performers or of the Producer of the phonogram.³⁸ An agreed statement concerning Article 16 provides that the agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is

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applicable mutatis mutandis also to Article 16 (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty.³⁹

Technological Measures

Article 18, WPPT provides protection to technological measures adopted by Performers and Producers of phonograms. It provides that contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures used by Performers and Producers of phonograms in connection with the exercise of their rights under this treaty.

Right Management Information

Contracting parties must provide adequate and effective legal remedies against any act of removing, or altering any 'electronic right management' information; distributing, importing for distribution, broadcasting, communicating or making available to the public performances, copies of fixed performances or phonograms knowing that electronic 'rights management information' has been removed or altered without authority. Legal remedies against above mentioned acts shall be available if these acts have been done with the knowledge that it will induce, enable, facilitate or conceal an infringement of any right covered by this treaty.⁴⁰

Agreed statement concerning Article 19 provides that the agreed statement concerning Article 12 (on obligation concerning Rights Management Information of the WIPO Copyright Treaty in applicable mutatis mutandis also to Article 19 or obligations concerning Right Management Information of the WIPO Performances and Phonograms Treaty.⁴¹

Indian Law

After Independence in 1947 and adoption of Constitution of India in 1950, a need was felt to consolidate the law on copyright keeping in mind the technological development and international conventions and therefore, the Indian Copyright Act, 1957 was enacted. However, it is not so that Copyright law in India before 1957 enactment was not compatible with the International Treaties. In India, before independence, copyright issues were governed by copyright laws enacted during the Britain rule in India and this was advantageous in respect of the fact that its laws were always compatible with International Conventions on copyright and technological development Krishna Iyer J in *Indian Performing Rights Society Limited v East India Motion Pictures' Association*⁴² held that:

"The creative intelligence of man in displayed in multiform ways of aesthetic expression but it often happens that the economic system so operate that the priceless divinity, which we call artistic Or literary creativity in man is exploited and masters, whose works are invaluable are victims of piffling payments. World opinion led to International conventions calculated to protect work of art. India responded to this Universal need by enacting the copyright Act of 1857."

The copyright Act, 1857 was in harmony with the Berne Convention 1886 and the Universal Copyright Convention 1952. India was a member to

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both the conventions.⁴³ The Act of 1857 was divided into 15 chapters containing 79 sections.

Under the Act, a copyright office was established under the control of a registrar of copyright who was to act under the superintendence and direction of central government.⁴⁴ The principal function of this office was to maintain a register of copyright containing the names or titles of work, the names and addresses of authors etc.⁴⁵ The registrar had certain powers like entertaining and disposing of applications for compulsory licenses and to inquire into complaints of importations of infringing copies. The definition of copyright was enlarged so as to include the exclusive right to communicate works by radio diffusion; the cinematograph film was given a separate copyright; the term of copyright protection was extended from 23 to 50 years which was again extended to 60 years in 1992.⁴⁶

In order to adapt the Indian Copyright law so as to face and deal with the challenges of technological advancements, necessary amendments have been carried out in Copyright Act 1957. The Government of India amended the 1957 Act in 1983, 1984, 1994 and 1999. The salient features of these amendments are discussed as under:

The Amendments of 1983

The important changes introduced by the 1983 amendments were:

Introduction of two new provisions i.e. section 31 A and 32A.⁴⁷ The 1983 amendment was carried out to take care of broadcasting technology, reprographic technologies and so on.

The Amendment of 1984

In order to tackle the menace of increased piracy of copyrighted works due to the introduction of new technologies of printing, recording and fixation of broadcast program, amendments were made in the Act in 1984. The amendment made punishment for offence under copyright Act more stringent.⁴⁸ The amendment took note of technological advances, for example, 'video film' was added to the definition of 'cinematograph film'⁴⁹ and 'Computer Programs' to the definition of 'literary works'⁵⁰ and a new definition of 'duplicating equipment'⁵¹ was also inserted.

The Amendment of 1994

This amendment was made after the introduction of TRIPs Agreement. For the first time, it provided the Performers with a right to reproduce their live performances by way of sound or visual recordings, etc.⁵²

The Amendments of 1999

Rental right⁵³ was introduced in case of Computer Programs to strengthen the rights of reproduction of authors of computer programs in accordance with WCT 1996.⁵⁴ A new provision⁵⁵ was inserted which gave power to the Central government to apply chapter VIII of the Act (dealing with the rights of Broadcasting Organizations and of Performers) to Broadcasting Organizations and Performers in certain other countries. Section 42A was added whereby power was given to the Central Government to restrict the rights of foreign Broadcasting Organizations and Performers if it appears to the government that such a foreign country does not give or has not undertaken to

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give adequate protection to the rights to Broadcasting Organization or Performer of our country.

The Amendments of 2012

The amendments introduced through Copyright (Amendment) Act 2012 can be categorized into:

Rights in Artistic Works, Cinematographic Films and Sound Recordings

Section 14 relating to the exclusive rights in respect of a work has been amended. The amendments clarify the rights in artistic works, cinematograph films and sound recordings, by providing that the right to reproduce an artistic work, to make a copy of a cinematograph film or embodying a sound recording now includes 'storing' of it in any medium by electronic or other means.

In the case of literary, dramatic and musical works, the right to reproduce already includes 'storing of the work in any medium by electronic means'. The present amendment in effect only extends this inclusive language 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 digitized 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 of storing' of works.

It also creates liability for the Internet service providers. While adding this right, the Act also treats as fair use the transient or incidental storage and safe harbour provisions to service providers.

The definition of the Cinematograph Film⁵⁶ has also been amended. The amended definition reads: "Cinematograph Film means any work of visual recording and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films".

The Amendment Act also introduces a definition of 'visual recording' (Clause xxa) to mean 'recording in any medium, by any method including the storing of it by any electronic means, of moving images or of the representations thereof, from which they can be perceived, reproduced or communicated by any method.'

The amendments address technical issues like 'storing', and therefore address some of the digital era challenges.

WPPT and WCT related Amendment to Rights Commercial Rental

The obligation under Article 11 of the TRIPS Agreement, Article 7 of WCT and Article 9 of WPPT is to provide for 'commercial rental'⁵⁷ rights for computer programmes and cinematograph films. This right was introduced⁵⁸ by using the word 'hire'.

The term 'hire'⁵⁹ with regard to cinematograph film and sound recording, respectively, is replaced with the term 'commercial rental'. The primary reason behind the replacement is to curtail the possibility of interpreting the term 'hire' to include

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non-commercial hire and also to keep in sync with the replacement (1999 amendment) of the term 'hire' to 'commercial rental' with respect to computer programme⁶⁰.

This amendment substitutes the word 'hire' with 'commercial rental'⁶¹ 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.

The Amendment Act 2012 has also introduced a definition of the term 'commercial rental'⁶² with the objective of expressly clarifying that the right is not applicable to non-commercial activities of giving on 'hire' including the activities of libraries and educational institutions.

Performers' Rights

The Amendment Act 2012 has introduced affirmative performers' rights. Subsections 3&4 of the present section 38 have been omitted and a new section 38A has been inserted in compliance with Articles from 6 to 10 of WPPT.

Section 38A provides for performer's right as an exclusive right to do or authorize the doing of any of the acts in respect of the performance without prejudice to the rights conferred on authors. The proviso to the section enables performers to be entitled for royalties in case their performances are subjected to commercial use.

This is a welcome development as earlier the performers were not entitled to royalties because they only had a negative right to prohibit 'fixation' of their live performances. The negative right has now been converted to the positive rights.

Along with the above, the Amendment Act 2012 has also sought to amend the definition of 'Communication to Public'⁶³ extending the right to performances. The rights under this head hitherto limited to authors have been extended to performers by the present amendment.

This is consequential to the grant of 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'.

A new section 38B grants moral rights to performers in line with Article 5 of WPPT. Moral rights have been extended to performers, considering the possibility of digital alteration of performances in a digital environment. The 'explanation' to the section clarifies that editors are free to perform their tasks without the fear of legal consequences.

Another significant amendment in line with Article 9 of WCT is regarding the duration of protection of photographic works. 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.

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Author friendly Amendments on mode of Assignment and Licenses

Under Section 18(1) a second proviso has been inserted. It provides that no such assignments shall apply to any mode of exploitation that did not exist or was not known in commercial use when the assignment was made.

This amendment strengthens the position of the author if new modes of exploitation of the work come to exist.

Section 18(1) provides that the owner of a copyright in any work or prospective owner of a future work may assign the copyright, and 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.

Another proviso under S. 18(1), inserted through Amendment Act 2012, 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.

Section 19 relates to the mode of assignment. Sub-section (3) has been amended to provide that the assignment shall specify the 'other considerations' besides royalty, if any, payable to the Assignor. Therefore, it is not necessary that only monetary compensation by way of royalty could lead to assignment.

A new sub-section (8) has been inserted making the assignment of copyright void if contrary to the terms and conditions of the earlier assignment to a copyright society in which the author of the work is a member. This amendment is an attempt to streamline the business practices. Another amendment, insertion of sub-section(9), by providing claim to royalties from the utilization of the work used to make a cinematograph or sound recording irrespective of any assignment of the copyright in the same, is an attempt to rationalize the business practices prevalent in the film industry.

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. The 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.

Amendments to Facilitate Access to Works

Compulsory Licenses

Section 31 deals with compulsory licenses of works withheld from public. The amendment amplifies the applicability of this section from 'Indian work' to 'any work'. The word 'complainant' is also replaced with the words 'such person or persons who, in the opinion of the Copyright Board is or are qualified to do so'. In continuum, sub-section (2) is omitted so as to enable the Copyright Board to grant compulsory license to more than one person.

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

Section 31A relates to compulsory licenses in unpublished 'Indian works'. This has been amended to allow compulsory licenses 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 Licenses

A new Section 31C provides for statutory license to any person desiring to make a cover version of a sound recording in respect of any literary, dramatic or musical work. The amendment provides that 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.

This is not totally a new provision for statutory license for cover version as it is, but a replacement of Section 52(1) (j) as it stood before the amendment.

A new section 31D providing for statutory license for broadcasters has been brought to facilitate access to the works for the broadcasting industry. At present the access to copyrighted works was dependent upon voluntary licensing. The amendment provides that any broadcasting organization desiring to broadcast a work including sound recording may do so by giving prior notice to the right holders and 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.

Administration of Copyright Societies

Sections 33, 34 and 35 relate to the registration and functioning of a copyright society. These have been amended to streamline the functioning of the copyright societies.

All copyright societies will have to register afresh with the registration granted for a period of five years. Renewal is 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

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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.

Fair Use Provisions

Section 52 enumerates fair use clauses, acts that will not be infringement of copyright. Certain amendments have been made to extend these provisions in the general context.

The existing clause (1)(a) 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 in the above lines has been extended by amendment to bring in the word 'any work' to reproduction in the course of judicial proceedings; reproduction or publication of any work prepared by secretariat of a legislature; in certified copies supplied as per law.

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 provision embedded in the Trade Marks Act, 1999.

The new clause (zb) added to section 52(1) providing for fair use of the work for the benefit of the disabled, facilitates adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format, for persons with disability to access works including sharing with any person with disability for private or personal use, educational purposes or research. These rights are available to any person or organization working for the benefit of the persons with disabilities.

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 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 the right holder has not expressly prohibited such links, access or integration, shall not constitute infringement.

To facilitate digitization 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.

The unauthorized 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 additions 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 persons 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.

Strengthening Enforcement and Protecting against Internet Piracy

Strengthening of Broader Measures

Section 53, 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.

Protection of Technological Measures

The new section 65A, introduced for protection of technological protection measures (TPM) used by a copyright owner to protect his rights on the work, makes circumvention of it a criminal offence punishable with imprisonment.

As a result, any person who circumvents an effective technological measure applied for the

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protection of 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. The rationale is to prevent the possibility of high rate infringement (digital piracy) in the digital media.

This amendment also clarifies the problem of circumvention impacting the public interest on access to work facilitated by the copyright laws. Sub-section (2) permits circumvention for specified uses.

Digital Rights Management Information

Section 65B has been introduced to provide protection of rights management information, which has been defined under clause (xa) of section 2.

This 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. As a result, any unauthorized and intentional removal or alteration of any rights management information is a criminal offence punishable with imprisonment, which may extend to two years and fine. The rationale of the protection emanates from the practice in the digital world of managing the rights through online contracts governing the terms and conditions of use.

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 65A and 65B is expected to help the film, music and publishing industry in fighting piracy.

Reform of Copyright Board Copyright Board

The Copyright Board during the last decade has changed significantly. Considering the diverse nature of issues being dealt with by the 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. A provision has also been introduced for payment of salaries and allowances to the members of the Board. This reformist approach is timely, looking at the multifarious responsibilities the Copyright Board is now called upon to discharge.

Overall the amendments introduced are forward looking. This will enable the Copyright Act 1957 to become as one of the best copyright legislations in the world.

Conclusion

In India, Copyright Act 1957 specifically covers two types of creations, widely considered as original and derivative works. The first group is formed by literary, dramatic, musical and artistic works; the second covers sound recordings, cinematograph film, broadcasts and performers' work.⁶⁴ It is important to notice that Computer programs are included specifically as literary work.⁶⁵ Authors have several rights over their works. They have the right to copy, rent, adapt, perform; broadcast and issue copies of the work to the public.⁶⁶ The author can also provide a limited right to allow the public copy the work, as in licensing. If any person

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other than the owner of the work gets involved in such activities, then they will be incurring in infringement.⁶⁷ Where copyright in any work has been infringed, the owner of the copyright shall be entitled to all such remedies by way of injunction, damages and accounts otherwise as are or may be conferred by law for the infringement of a right.⁶⁸ Copyright infringement also carries criminal liability, which can be of up to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees.⁶⁹

In this age of globalization and digital age the protection of Copyrights are essential but due to various problem including Global limitations, provisions of fair use differs from country to country and Jurisdictional issues makes protection of Copyrights difficult. The laws relating to Copyrights are different in the world because of so many reasons. The World communities trying to settle this problem but it is still they are not in position to make the law of Copyrights universal in the World.

The primary questions relating to the Copyright and Internet are yet to be settled in India. Parliament is yet to react to the various issues regarding copyright and the Internet, which creates the very difficult task of interpreting the existing laws to accommodate all the works available in cyber space.

Footnotes

1. Simon Stokes, *Digital Copyright: Law and Practice* 9 (2005).
2. Rodney D. Ryder, *Intellectual Property and the internet* 4-7 (2002), also see Uma Suthersanan, "Copyright on the Internet: Risks and Opportunity for Authors and Composers" WIPO Document WIPO/CCM/MCT/03/1; Daniel J. Gervais, "The Internationalization of Intellectual Property: New Challenges from the Very Old and Very New" 12 *Fordham Intel. Prop. Media & Ent. L.J.* 929.(2002).
3. *Berne Convention, Article 9 (2); TRIPs Agreement, Article 13.*
4. ¹*Paris Convention for the protection of intellectual property, 1883.*
5. *Berne Convention for the protection of Literary and Artistic Works (1886)*, <http://www.wipo.int/eng/general/copyright/bern.htm> (23 March 2008).
6. *For example, the following questions were dealt with at the various revision conferences: in 1896, mechanical reproduction; in 1908, photographic works; cinematography; in 1928, cinematography, radio fusion; in 1948, cinematography, radio diffusion, mechanical reproduction; in 1967, television.*
7. *Universal Copyright Convention, Paris Text 1971.*
8. *The WIPO Copyright Treaty (WCT) 1996*, <http://www.wipo.int/eng/general/copyright/wct.htm>.
9. *The WIPO Performance and Phonograms Treaty (WPPT), 1996*, <http://www.wipo.int/eng/general/copyright/wppt.htm>. (23 March 2008).
10. *The expression 'neighbouring rights' and 'related rights' are used alternatively in legal literature.*

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11. *International convention for the protection of Performers, Producers of Phonograms and Broadcasting Organization, Rome 1961.*
12. *Convention for the protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, Geneva 1971.*
13. *Convention relating to Distribution of Programmes Carrying Signals Transmitted by Satellite, Brussels 1974.*
14. *Agreement on Trade Related Aspects of Intellectual Property Rights including Trade in Counterfeit Goods (1994).*
15. *S.Ricketson referred to this form of development in 1986 as follows: In essence, "guided development" appear to be the present policy of WIPO, whose activities in promoting study and discussions on problem areas have been of fundamental importance to international copyright protection in recent years. See Sam Ricketson, The Berne Convention for the protection of Literary and Artistic works: 1886-1986 (1987).*
16. *WCT, Art. 7.*
17. *WCT, Art. 7(3), Art. 11 of the TRIPs Agreement, which has a parallel provision.*
18. *Art 7(4) of the Berne Convention reads as: "It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of period of twenty-five years from the making of such a work."*
19. *WCT, Art. 12.*
20. *Agreed statement concerning Art. 12.*
21. *WIPO memorandum, (1993) Copyright 142.*
22. *WPPT, Art. 2(a).*
23. *WPPT, Art. 2(d).*
24. *WPPT, Art. 5.*
25. *WPPT, Art. 6.*
26. *WPPT, Art. 7.*
27. *WPPT, Art. 7.*
28. *WPPT, Art. 9.*
29. *WPPT, Art. 10.*
30. *WPPT, Art. 11.*
31. *WPPT, Art. 12.*
32. *WPPT, Art. 13.*
33. *WPPT, Art. 14.*
34. *Agreed statement concerning Articles 7, 11 and 16 of the WPPT.*
35. *WPPT, Art. 15.*
36. *WPPT, Art. 15(4).*
37. *Ibid.*
38. *WPPT, Art. 16.*
39. *For agreed statement concerning art. 10, WCT, see the heading 'Technological measures' under WCT in previous part.*
40. *WPPT, Art. 19.*
41. *Agreed statement concerning art. 19.*
42. *AIR 1977 1433, quoted from Alka Chawla, Copyright and Related Rights: National and International Perspectives 29 (2007).*
43. *For India, Berne Convention came into force on 1 April 1928 and Universal Copyright Convention on 21 January 1958; S.M. Stewart, International Copyright and Neighbouring Rights 143 & 183 (1989).*
44. *Section 9, Copyright Act, 1957.*
45. *Section 44 and 45, Copyright Act, 1957.*
46. *Section 22, Copyright Act, 1957.*
47. *Section 31A provided that in case of unpublished work where the author is dead or unknown, or owner of copyright cannot be traced, any person wishing to publish material or translation thereof may advertise his proposal and apply to the Copyright Board for permission which would grant such permission and fix an appropriate royalty. The royalty could be deposited in public account for specific period so as to enable the owner of copyright or his heirs, executors or the legal representatives to claim such royalty at any time. Section 32A provided for issuing compulsory licenses for reproductions of an edition of literary, scientific or artistic work, whether or not the work is Indian for the purposes of systematic instructional activities where copies are not made available in India or have not been put on sale in India for a period of six months after the expiration of certain prescribed periods from the date of the first publication.*
48. *Section 63 to 70, Copyright Act deals with offences.*
49. *Section 2 (f), Copyright Act, 1957.*
50. *Section 2 (o), Copyright Act, 1957.*
51. *Section 2 (h), Copyright Act, 1957.*
52. *Section 2 (h), Copyright Act, 1957.*
53. *Section 14 (i) (b), Copyright Act, 1957.*
54. *Article 7, WCT, 1996.*
55. *Section 40A, copyright Act, 1957.*
56. *Section 2(f), Copyright Act, 1957*
57. *Section 14(b), Copyright Act, 1957*
58. *Section 14(b), Copyright Act, 1957*
59. *Sections 14(d) & (e), Copyright Act, 1957*
60. *Section 14(b), Copyright Act, 1957*
61. *Sections 14 (b) & (c), Copyright Act, 1957*
62. *Section 2(fa), Copyright Act, 1957*
63. *Section 2 (ff), Copyright Act, 1957*
64. *See section 13, 37 and 38, Copyright Act, 1957.*
65. *Section 2 (o), Copyright Act, 1957.*
66. *See section 14 and 37, 38, Copyright Act, 1957.*
67. *Section 51, Copyright Act, 1957.*
68. *Section 55, Copyright Act, 1957.*
69. *Section 63, Copyright Act, 1957.*