

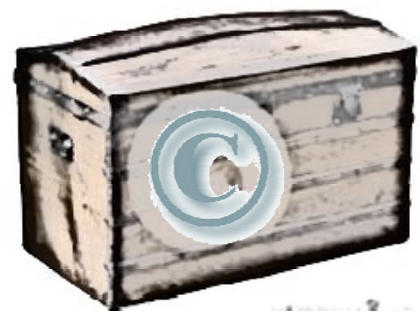


Copyright Amendment Bill 2012 receives Indian Parliament's assent

*The Genie's Lamp or the Pandora's Box-
The debate has just begun!*

Media & Entertainment Practice Group

May 25, 2012



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Introduction

Both the houses of the Indian Parliament, viz. Rajya Sabha (upper house) and Lok Sabha (lower house) on May 17, 2012 and May 22, 2012, respectively passed the Copyright Amendment Bill, 2012 ("**Amendment**") bringing about significant changes to the extant law. The amendments have been extensively debated both inside and outside the Parliament and are likely to have significant impact on the content industry.

Amendments to the Copyright Act, 1957 ("**Act**") were mooted by way of The Copyright (Amendment) Bill, 2010, which was introduced in the Rajya Sabha on April 19, 2010 by Human Resources Development Minister of India and was then referred to the Parliament Committee for the purpose of examination on 23rd April, 2010.

Following this, the Parliament Committee invited comments from the stakeholders. Several stakeholders gave their inputs after considering which the Parliament Committee gave its report. The comments in the report have been taken into consideration and in 2011 a new form of the amendments were proposed and a revised version of the amendments was laid before the two houses and passed. The Amendment will require Presidential assent, post which it will come into effect on such date as the Central Government will notify in the Official Gazette.

The Copyright Amendment Bill, 2012 has been analysed by us below:

A. Rights conferred on Lyricists, Music Composers, Authors, Performers & Broadcasters

a. Lyricists, Music Composers & authors of the script, screenplays etc.

The Amendment seeks to protect rights of authors of literary works like lyrics (lyricists) or scripts (scriptwriters) and musical works (music composers). Section 13 (4) of the Act provided that the copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which (or a substantial part of which), the film or the sound recording is made. Thus, ideally, as per the provisions of this section, if the right to incorporate a musical, lyrical or other literary work in a cinematographic film or sound recording was assigned to the producer, the author (i.e. lyricist, composer or scriptwriter) could technically still retain the other rights conferred by Section 14 of the Act in relation to the work. However, the media industry practice has been that the producers seek to own the entire bundle of rights attached to such works through contractual arrangements with the authors.

Furthermore, the Supreme Court in case of IPRS v/s Eastern Indian Motion Pictures Association and Ors¹ ("**Eastern Indian Motion Pictures Judgment**") held that the producers of a cinematograph film are the first owners of the copyright in the musical and lyrical works and no copyright subsists in the composer of the lyric or music so composed, unless there is a contract to the contrary between the composer of the lyric or music and the producer of the cinematograph film.

By way of the Amendment, the legislature intends to protect the interests of the authors of such works by inserting the following provisions:

- In case of commissioned cinematograph work, the commissioning party and in case of employer – employee relationship, the employer, are considered to be the first owner of the work. The Amendment clarifies that the above provisions will not apply in relation to the rights of the authors of literary, musical, dramatic and artistic works, which have been incorporated in cinematograph film. Thus, the original authors, will continue to be considered as the first owners of the said works.
- Authors of literary or musical works (i) incorporated in films; or (ii) sound recordings (which are not part of films) have the right to receive royalties equal to the royalties received by the assignee of such rights for exploitation of their works (other than communication to public of that film in cinema halls). These rights cannot be assigned or waived by the right holders (except in favor of legal heirs and copyright societies). Any agreement that seeks to assign or waive the above rights shall be void. While the language in the amendment is not very clear from the debates surrounding the Amendment, it seems that scriptwriters/screenplay writers are intended to be covered within the scope of these provisions.
- Further, no assignment of the copyright in any work to make a cinematograph film or sound recording shall affect the right of the author of the work to claim royalties or any other consideration payable in case of utilisation of the work in any form other than as part of the cinematograph film or sound recording.
- The business of issuing or granting license in respect of literary, dramatic, musical and artistic works incorporated in a cinematographic film or sound recordings shall be carried out only through a copyright society duly registered under the Act.

Analysis:

- The above provisions have far reaching consequences on the manner in which the deals will have to be negotiated in the film and broadcasting industry with the authors of works and among producers and various distributors. The above provisions are likely to create practical difficulties and the same will have to be resolved by the industry expeditiously by evolving structures to accommodate the above provisions.

¹ 1977 AIR 1443

- The authors of the underlying works (literary and musical), which are incorporated as a part of the film or sound recording are entitled to the economic right to receive royalty, which cannot be alienated or waived. Thus, while they may assign the complete copyright in the work to the producers, they cannot assign or waive this economic right in favour of the producers. It needs to be explored whether the abovementioned rights may be relinquished by the authors under Section 21 of the Act.
- Royalty is to be paid to the authors in relation to any exploitation of their work in a cinematograph film other than by way of exhibition of the film in a cinema hall. Thus, even if the underlying work is exploited as a part of a cinematograph film (and not independent of it) through any other medium e.g. satellite right, home video, internet right, etc. the authors shall be entitled to royalty. This provision does not appear to be very fair as when the producer distributes the cinematograph film as a whole, no separate amounts are allocated for underlying works. In the Indian film industry, the music is sometimes separately distributed and exploited and in such cases, it may be possible to identify separate royalty but as stated above, not when the film is distributed as a whole.
- The amount of royalty is stated to be 50% of the royalty earned by the assignee of the underlying works. However, there would be a difficulty in calculating royalties when there are back to back multiple assignments and licenses.. Further, when the same film has multiple authors, it is not clear how the the royalty would get distributed is not clear. More often than not, one or two songs of the film album become more popular than the others and therefore, authors of such works should ideally be entitled to more royalties.
- These amendments will have a financial impact on the broadcasting and film industries. The producers will have to either share from their profit margins with the authors of the underlying works (literary and musical) or keep their profit margin constant and pass on the additional financial burden to distributors and broadcasters.
- It is not clear at present how the commercial arrangements would work. For instance,
 - Would producers collect fees from platform owners and then pass it on to music composers and lyricists; or
 - Would copyright societies collect royalties from platform owners; or
 - Would platform owners be required to pay directly to music composers and lyricists (when they are not members of copyright societies).

Depending upon how the industry practice develops, while signing deals with producers for acquisition of rights, the pricing will have to be worked out, keeping in mind the share of the music composers and lyricists.

- In view of the above, the agreements with the authors of such works will have to be carefully drafted to allocate the price for various rights so that the exact amount to be shared with the composers, lyricists and performers can be determined at the first instance. This may prove to be an onerous task for the production houses.
- Another new provision is that, other than the copyright societies registered under the Act, no other organisation can deal with the business of licensing of the rights of authors of literary and musical works. It appears that there are currently certain private organisations which administer the rights of songwriters etc. and such businesses may be affected by this amendment.
- *Pending litigations:*
 - At present, there are a few litigations pending on the issue of payment of royalties to Indian Performing Rights Society (“**IPRS**”) (in relation to underlying works i.e. musical or lyrical works). Recently, the Bombay, Kerala and Delhi High Courts have held that a separate royalty is not payable to IPRS for exploitation of sound recordings. This as such will apply to all mediums of exploitation of sound recording.
 - In our view, the abovementioned Amendment should apply prospectively and in relation to all exploitation prior to the effective date of the Amendment, the court orders mentioned herein above should be applicable.

b. Author’s Moral Rights

Section 57 of the Act recognises special rights of the author of the work, also known as “moral rights” viz. (i) Right to claim authorship of the work; and (ii) Right to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation (“**Right Against Distortion**”). The said section also provided that such moral rights (except the right to claim authorship) could be exercised by legal representatives of the author

Pursuant to the Amendment, the exclusion has been removed and the right to claim authorship can now be exercised by legal representatives of the author as well. Therefore, post death of the author, if he is not given credit for his work, then legal representatives, may take necessary action to remedy such breach.

As per the Amendment, the Right Against Distortion is available even after the expiry of the term of copyright. Earlier, it was available only against distortion, mutilation etc. done during the term of copyright of the work.

c. Performers

At the outset, the Amendment has modified the definition of “Performer” by clarifying that in a cinematograph film a person whose performance is casual or incidental in nature and is not acknowledged in the credits of the film shall not be treated as a performer except for the purpose of attributing moral rights as discussed below.

Introduction of Section 38 A

The Amendment has introduced a new Section 38A, specifically articulating the “performer’s right”. Under erstwhile Section 38 (3) of the Act, the performer’s right was articulated as a negative right which prevented third parties from making use of the performance without due consent of the performer.

Under the Amendment, the “Performer’s Right” is stated to be the exclusive right subject to the provisions of the Act, to do or authorize for doing any of the following acts in respect of the performance or any substantial part thereof, namely:

- to make a sound recording or a visual recording of the performance, including-
 - reproduction of it in any material form including the storing of it in any medium by electronic or any other means;
 - issuance of copies of it to the public not being copies already in circulation;
 - communication of it to the public;
 - selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording.
- to broadcast or communicate the performance to the public except where the performance is already broadcast.

The Amendment has retained the erstwhile position regarding incorporation of a performance into a cinematographic film but has included some modifications. Once a performer has, by written agreement, consented to the incorporation of his performance in a cinematograph film he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer’s right in the same film. However, the performer shall be entitled for royalties in case of making of the performances for commercial use.

Analysis:

Like authors, even performers have been granted economic right of claiming royalties. However it is not clear what is meant by “in case of making of the performances for commercial use”. It appears that this right also cannot be alienated and any agreement to alienate such rights would be void.

Right akin to moral right granted to the performer

The Amendment seeks to introduce a new Section 38B, which provides as follows:

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

- to claim to be identified as the performer of his performance except where omission is dictated by the manner of the use of the performance; and
- to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.

Mere removal of any portion of a performance for the purpose of editing, or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the performer's reputation.

Analysis :

- While the Amendment seeks to provide performers similar moral rights as those provided to authors under Section 57, it is not clear why the legal representatives of the performers have not been allowed to exercise the right to claim authorship just like the legal representatives of the authors.
- It is also interesting to note that the new definition of the term “performer” which clarifies that a person whose performance is merely incidental in a film may not be considered to be a “performer” within the meaning of the Act but would be entitled to limited moral rights to restrain or claim damages in respect of any distortion, mutilation or other modification of their performance.

d. Broadcaster's Rights and Performer's Rights

The Amendment seeks to clarify that:

- The broadcast reproduction right or performer's right shall not subsist in any broadcast or performance if that broadcast or performance is an infringement of the copyright in any work;²
- Broadcast reproduction rights or performers' rights shall not affect the separate copyright in any work in respect of which, the broadcast or the performance, as the case may be, is made.³

² 39A(1)

³ Section 39A(2)

Further, where copyright or performer's right subsists in respect of any work or performance that has been broadcast, no license to reproduce such broadcast can be given without the consent of the owner of rights or the performers or as the case may be, by both of them.

B. Compulsory Licenses and Statutory Licenses

Numerous changes have been made to the provisions dealing with Compulsory Licensing ("CL") and new provisions have been added with respect to statutory licensing. The salient points of these provisions have been discussed below:

a. CL to apply to foreign works as well

Under the Act, the CL provisions under Section 31 (in relation to published work) and 31A (in relation to unpublished or anonymous work) were earlier restricted only to Indian works⁴. The Amendment seeks to remove this limitation. The provisions have now been made applicable to all works.

However, it is not clear whether the intention is to apply the CL provisions to all the "foreign work", or to limit it to the works published in India.

b. CL for benefit of disabled

A new provision has been inserted where the work may be made available under CL for the benefit of people suffering from disabilities. An eligible organisation⁵ may file an application for CL with the Copyright Board for the benefit of persons with disabilities.⁶ Such application is required to be disposed of expeditiously and an endeavour is required to be made to dispose it of within 2 months. After conducting an inquiry including inquiry into the credentials and good faith of the applicant and after hearing the owner of rights, the Copyright Board may pass the order for CL, if it is satisfied that a CL needs to be issued to make the work available to the people suffering from disabilities. The CL issued should specify the means and format of publication, the period during which the CL may be exercised and, in the case of issue of copies, the number of copies that may be issued. The Copyright Board may specify the number of copies that may be published without payment of royalty and may fix the rate of royalty for the remaining copies. A further application and consequent order may be made to extend the period of such CL and allow the issue of more copies.

⁴A compulsory license is a license issued for a copyrighted piece of work that the copyright owner has to grant for the use of their rights in the work against payment as established under law.

⁵ An organisation, registered under section 12A of the Income-tax Act, 1961 and working primarily for the benefit of persons with disability, and recognized under Chapter X of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

⁶ CL application is not necessary in relation to use falling within Section 52 (1) (zb), discussed below.

c. Statutory License for cover versions

In the Act, Section 52 (1) (j) provided an exception from infringement, in relation to the cover version, if the cover versions were made following the conditions specified in the said Section. The Amendment has deleted the said Section and proposes to add a new Section 31C, which in effect would amount to granting a statutory license to make cover versions. The pertinent provisions of Section 31C are summarised below:

- Cover version may be made only of such literary, dramatic or musical work, in relation to which a sound recordings has already been made by or with the license or consent of the owner of the right in the work;
- Cover version can be made in the same medium as the last recording of the original work, unless the medium of the last recording is no longer in current commercial use;
- Cover version can be made only after the expiration of five calendar years after the end of the year in which the first sound recordings of the original work was made. Under the old Section, the cover versions could be made after expiry of 2 years after the end of the year in which the first sound recordings of the work was made;
- Cover version shall not contain any alteration in the literary, dramatic or musical work, which has not been made previously by or with the consent of the owner of rights, or which is not technically necessary for the purpose of making the sound recordings;
- Cover version shall not be sold or issued in any form of packaging or with any cover or label which is likely to mislead or confuse the public as to their identity, and in particular shall not contain the name or depict in any way any performer of an earlier sound recording of the same work or any cinematograph film in which such sound recording was incorporated;
- Cover version should state on the cover that it is a cover version made under Section 31C;
- The person making the cover version is required to give prior notice of his intention to make the sound recordings in the prescribed manner, and provide in advance copies of all covers or labels with which the sound recordings are to be sold, and pay in advance, to the owner of rights in each work royalties in respect of all copies to be made by him, at the rate fixed by the Copyright Board in this behalf;
- One royalty in respect of cover version shall be paid for a minimum of fifty thousand copies of each work during each calendar year in which copies of it are made. However, the Copyright Board may, by general order, fix a lower minimum in respect

of works in a particular language or dialect having regard to the potential circulation of such works.

- The person making cover version shall maintain registers and books of account in respect thereof, including full details of existing stock, in the prescribed manner, and shall allow the owner of rights or his duly authorized agent or representative to inspect all records and books of account relating to such sound recording;
- The owner of the copyright may file a complaint before the Copyright Board if the owner has not been paid in full for any cover version purporting to be made in pursuance of this section. If the Copyright Board is, *prima facie*, satisfied that the complaint is genuine, it may pass an order *ex parte* directing the person making the cover version to cease from making further copies and, after holding such inquiry as it considers necessary, make such further order as it may deem fit, including an order for payment of royalty.

Analysis:

In view of the grant of statutory license for cover versions, no infringement action may be instituted against the person not complying with the abovementioned terms. However it is to be noted that while the Amendment has generated a legal space for creation of cover versions, there are a numerous steps that have been prescribed in order to ensure that no undue advantage is taken of. As such a suit may be filed against any person making a cover version in breach of these terms.

d. Statutory License for broadcasting

The Amendment has introduced the concept of “statutory license” in relation to published works. Any broadcasting organization, that proposes to communicate the a published work to the public by way of broadcast (including television and radio) or a performance of any published musical/ lyrical work and sound recording, may do so by giving prior notice of its intention to the owners of the rights. Such prior notice has to state the duration and territorial coverage of the broadcast and pay royalties for each work at the rate and manner fixed by the Copyright Board. The rates fixed for television broadcasting shall be different than that fixed for radio broadcasting. In fixing the manner and the rate of royalty, the Copyright Board may require the broadcasting organization to pay an advance to the owners of rights. No fresh alteration to any literary or musical work, which is not technically necessary for the purpose of broadcasting, other than shortening the work for convenience of broadcast, shall be made without the consent of the owners of rights. The names of the author and the principal performer will have to be announced with the broadcast (unless communicated by way of the performance itself). Records and books of accounts will have to be maintained by the Broadcasting Organizations and reports will be required to be given to the owners of the rights. The owners are also granted audit rights against the broadcasting organizations.

Analysis:

It is not clear on what principles the Copyright Board may fix royalties for statutory license; whether the Board will invite suggestions from stakeholders or if separate rates will be fixed for different geographies (e.g. in case of FM licenses royalties may be fixed depending upon the cities) or whether royalty rates will vary depending upon the nature of the work.

- There is no express mechanism to challenge the rate fixed by the Board for statutory licenses.
- It appears that if the royalties fixed by the Copyright Board, are more favourable than the Tariff Scheme issued by the Copyright Societies (as discussed below), the broadcasters may opt for the same. This is likely to reduce lengthy negotiations and/or litigation with the right holders / copyright societies.

Under Section 31, the Copyright Board while considering the application for CL, is required to form an opinion whether the applicant for CL is qualified to do so. It has not been clarified as to what is meant by “qualified to do so”. Further, similar provision is not incorporated in Section 31A in relation to the unpublished and anonymous works

C. Copyright Societies

a. Constitution of Societies

- The Copyright Act envisaged the forming of copyright societies of the ‘owners of the work’. The Amendment also permits authors of the work to be members of the Copyright Societies. This is primarily in view of the special economic rights provided to the authors as discussed above.
- The registration of Copyright Societies will be granted for a term of five years and shall be renewed every five years.
- The Copyright Societies would need to re-register within a period of one year from the date of commencement of the Copyright (Amendment) Act, 2012.
- Copyright Societies are required to have governing bodies consisting of equal number of authors and owners of work for the purpose of administration of the society. All members of the Copyright Society shall enjoy equal membership rights and there shall be no discrimination between authors and owners in the distribution of royalties.

b. Societies of performers and broadcasters

The Amendment also envisages the Copyright Societies registered under the Act to administer the rights of the performers and broadcasters. The provisions applicable to the authors’ societies including the new tariff related provision specified below, are applicable in relation to such societies.

c. Tariff

The Amendment proposes to insert a new Section 33A providing for the following:

- Every copyright society is required to publish its Tariff Scheme in a prescribed manner;
- Any person who is aggrieved by the tariff scheme may appeal to the Copyright Board and the Board may, if satisfied after holding such inquiry as it may consider necessary, make such orders as may be required to remove any unreasonable element, anomaly or inconsistency therein;
- However, the aggrieved person is required to pay to the copyright society any fee as may be prescribed that has fallen due before making an appeal to the Copyright Board and shall continue to pay such fee until the appeal is decided. The Board has no authority to issue any order staying the collection of such fee pending disposal of the appeal:
- The Copyright Board may after hearing the parties fix an interim tariff and direct the aggrieved parties to make the payment accordingly pending disposal of the appeal.

Analysis:

- The broadcasters are required to deposit the tariff that is published by the societies before appealing against their rates and will be required to continue to pay the royalties till the conclusion of the appeal.
- Though the Copyright Board has the power to fix interim tariffs, the copyright board is not a regular court and only sits once in two months, that too for a couple of days. Therefore, the decisions on the rates may take some time. Thus, the broadcasters may have to pay the tariffs decided by the copyright societies till the Copyright Board decides the interim rates.
- There is need for a full-time Copyright Board for handling licensing and tariff related issues.

D. Enforcement

a. What is not an infringement

Section 52 of the Act, enlists certain acts, which do not constitute infringement. The Amendment has introduced the following changes:

- Some of the exceptions (such as fair dealing, use for education purpose) which were earlier applicable only in relation to certain types of work (e.g. literary, dramatic and musical works), have been made applicable to all types of work;
- a fair dealing exception has been extended to the reporting of current events, including the reporting of a lecture delivered in public. Earlier, fair dealing exception was limited for (i) private or personal use, including research, and (ii) criticism or review, whether of that work or of any other work. Further, it has been clarified that the storing of any work in any electronic medium for the purposes mentioned in this clause, including the incidental storage of any computer programme which is not itself an infringing copy, does not constitute infringement.
- Following new exceptions have been added in Section 52:
 - the transient and incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;
 - the transient and incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy: Provided that if the person responsible for the storage of a copy, on a complaint from which any person has been prevented, he may require such person to produce an order within fourteen days from the competent court for the continued prevention of such storage;
 - the storing of a work in any medium by electronic means by a non-commercial public library, for preservation if the library already possesses a non-digital copy of the work;
 - the making of a three-dimensional object from a two-dimensional artistic work, such as a technical drawing, for the purposes of industrial application of any purely functional part of a useful device;
 - the adaptation, reproduction, issue of copies or communication to the public of any work in a format, including sign language, specially designed only for the use of persons suffering from a visual, aural or other disability that prevents their enjoyment of such works in their normal format;
 - the importation of copies of any literary or artistic work, such as labels, company logos or promotional or explanatory material, that is purely incidental to other goods or products being imported lawfully.
- Section 52 (1) (j), which deals with the provision relating to version recording has been deleted and a separate Section 31C has been incorporated, which is discussed in this hotline.

Analysis:

The amendments to Section 52 (1) and its sub-sections appear to be in consonance with recent and on-going technological advancements. The additional exceptions tie in with the recent amendments to the Information Technology Act, 2000, that are designed to

protect intermediaries from activities that are not monitored by them (unless required by law).

b. Provisions to curb Piracy

World over, the owners of copyright are faced with the problem of piracy. The problem of piracy has increased with rapid advances in technology. New technological solutions have emerged, making it easy for the pirates to carry on their illegal activities. The film and music industries in India are inextricably linked with each other and piracy in one has an adverse effect on the other. Music piracy refers to counterfeiting storage devices, illegal downloads and the illegal import/sale of music. Film piracy includes piracy of film DVDs/VCDs, illegal transmission of films by cable operators and peer-to-peer transfers over the internet. Given that in urban India, it is cheaper to purchase a DVD of a movie than pay for a theatre ticket for the same, it is imperative to control piracy in order to ensure growth in the revenues of the film and music industries. According to the US India Business Council - Ernst & Young 2008 report on 'The Effects of Counterfeiting and Piracy on India's Entertainment Industry,' the Indian film industry lost USD 959 million and 571,896 jobs due to piracy.

To curb piracy, the Amendment has introduced the following provisions, which are applicable in relation to copyright, performer's rights and broadcaster's right granted under the Copyright Act:

Provision against circumvention of technology (Section 65A)

Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by the Copyright Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine. However, following are the exceptions:

- doing anything referred to above, for a purpose not expressly prohibited by this Act: Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated; or
- doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; or
- conducting any lawful investigation; or
- doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner or operator; or
- doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or
- taking measures necessary in the interest of national security.

Analysis:

- There is ambiguity with reference to the term 'facilitating' in the proviso to Section 65A (2) (a), as it is unclear who this may cover.
- The act of abetting or aiding the circumvention of technology may also be an offence under this section.
- This section does not punish persons who circumvent technology for the purpose of doing anything which is necessary for testing the security of a computer system or a computer network with the authorisation of its owner or operator. The scope of the exemption under this section should be restricted to owners or operators who are specially authorized by the owners to perform the task and should not be so wide so as to cover any operator in general. The time period for which the record should be retained under the proviso to Section 65 A (2) (a) has not been specified. It appears that retention of records till the expiry of limitation period should be sufficient.
- Lastly, while the owner of copyright may avail of civil remedies in addition to criminal remedies against persons indulging in acts punishable under Section 65B, the civil remedy has not been extended in case of offences under Section 65A, which should have been extended as well.

Right management information

New provisions have been inserted in relation to right management information (RMI). RMI is defined to mean

- a. the title or other information identifying the work or performance;
 - b. the name of the author or performer;
 - c. the name and address of the owner of rights;
 - d. terms and conditions regarding the use of the rights; and
 - e. any number or code that represents the information referred to in sub-clauses (a) to (d),
- but does not include any device or procedure intended to identify the user.

Following acts are considered as offences and shall be punishable with imprisonment which may extend to two years as well as fine:

- a. knowingly removing or altering any RMI without authority, or
- b. knowingly distributing, importing for distribution, broadcasting or communicating to the public, without authority, copies of any work, or performance knowing that electronic RMI has been removed or altered without authority.

Further, the owner of copyright may also avail of civil remedies provided under Chapter XII against the persons indulging in such acts.

Analysis:

It is not clear as to why the second prohibited activity as specified above, is only limited to 'electronic' RMI. Given that a distinction has generally been made between 'electronic' and 'digital' throughout the Act. Insertion of this word here may lead to narrow interpretation.

When comparing this section with the Digital Millennium Copyright Act (as applicable in the USA) (the "**DMCA**"), we find that there are numerous differences. For instance, there is ambiguity as to how the term 'authority' is construed under the amended section. Furthermore, the DMCA makes exceptions for such activities by law enforcement, intelligence or other authorized government personnel, which is not the case in Section 65B. The exemptions as provided under Section 65A (2), should have also been made applicable in relation to Section 65B.

c. Custom Commissioner authorized to stop import of infringing copies

The Amendment has introduced a new Section 53 which provides a detailed procedure where the owner of the copyright can make an application to the Commissioner of Customs (or any other authorized officer) for seizing of infringing copies of works that are imported into India. This amendment seems to be in line with the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007. Under the old Act, Section 53 provided that an owner of the copyright can make an application to the Registrar of Copyrights for procuring an order that infringing copies shall not be imported into India. The Amendment seeks to vest the power directly with the Customs office.

The provision provides the following:

- The owner of the copyright or his duly authorized agent may give notice in writing to the Commissioner of Customs or to any other officer authorized in this behalf by the Central Board of Excise and Customs stating that he is the owner of the copyright in the work and (with proof thereof) and requesting the Commissioner, for a period specified in the notice (not exceeding one year), to treat infringing copies of the work as prohibited goods.
- The notice should also state the time and place the infringing copies of the work are expected to arrive in India.
- The owner of the work must deposit such amount with the Commissioner as security having regard to the likely expenses on demurrage, cost of storage and compensation to the importer in case it is found that the works are not infringing copies.
- After scrutiny of the evidence furnished by the owner of the right and on being satisfied, the Commissioner may treat infringing copies of the work as prohibited goods that have been imported into India, excluding goods in transit.

- When any goods treated as prohibited under the above provision have been detained, the Customs Officer detaining them shall inform the importer as well as the person who gave notice, of the detention of such goods within forty-eight hours of their detention. The Customs Officer shall release the goods, and they shall no longer be treated as prohibited goods, if the person who gave notice does not produce any order from a court having jurisdiction as to the temporary or permanent disposal of such goods within fourteen days from the date of their detention.

Analysis:

The present provision appears to be an aid to the copyright owner to prevent import of infringing copies into India. However, the Customs authorities have limited right to detain the goods till the copyright owner obtains court order.

The owner of the copyright needs to give proof of ownership of his rights with the application. Copyright does not require registration for being protected in India. The right holders will face difficulties to convince the authorities about their ownership of unregistered copyright and therefore, there is a need for guidelines to be issued in respect of unregistered copyright for better implementation of the object of this provision.

Further, in the case of the *Gramophone Co. of India Ltd. v. BB Pandey*,⁷ the Supreme Court of India concluded that the word 'import' in Sections 51 and 53 of the Act means 'bringing into India from outside India' and is not limited to importation for commerce only but includes importation for transit across the country. The moment goods enter India, even if it is on transit it is prone to violation of copyright. However, the Amendment has carved out "good in transit" from the "prohibited goods" for the purpose of this Section.

E. Other salient amendments

a. Visual Recording

The definition of this term has been added to read as "visual recording" means the 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". This term while used in the Act had not been previously defined.

⁷ 1984 (2) SCC 534. SC

b. Communication to Public

The definition of this term has been amended. The erstwhile definition was applicable only to “works”. The definition has been made applicable to the “performance” of the performer as well. Also, if the work or performance is made available, whether simultaneously or at places and times chosen individually, this would also be considered as communication to ‘public’. Thus, on demand services (video on demand, music on demand), will clearly be considered as “communication to public”.

c. Meaning of Copyright

Section 14 of the Act, details in relation to each work, the meaning of the term copyright i.e. the rights granted in relation to that work under the Act. In relation to an ‘artistic work’, ‘cinematograph film’ and ‘sound recording, a new right has been expressed viz. ‘right to store the work in any medium by electronic or other means’. Thus, violation of this right e.g. online storage of work, would amount to infringement of copyright.

d. Term of Copyright in photograph

The term of copyright subsisting in a photograph published within the lifetime of the author has been extended until sixty years from the beginning of the calendar year next following the year in which the author dies. Earlier, the term subsisted for 60 years from the beginning of the calendar year next following the year in which the photograph is published.

It is not clear whether this provision applies to all the photographs in relation to which the copyright is subsisting as on the coming into effect of the Amendment or will also apply to the photographs in relation to which the copyright has expired, as per the earlier provision.

e. Term of foreign copyright

It has been clarified in Section 40 (dealing with foreign work) that the term of copyright granted to foreign work shall not exceed the term of copyright provided under the Copyright Act. Therefore, even if in any country from which the work originates, grants longer term than the one available under the Copyright Act, in India protection will continue only as per the term under the Copyright Act.

f. Commercial Rental

The provisions of the Act relating to hiring of work have been made applicable only to commercial rental. It is proposed to clarify that commercial rental does not include the rental, lease or lending of a lawfully acquired copy of a computer programme, sound recording, visual recording or cinematograph film for non-profit purposes by a non-profit library or non-profit educational institution.

By the amendment, the exclusive right of the owner of the work to give a copy of the work on rental is limited to “commercial rental”. Similarly, the exclusive right of the broadcaster to give a copy of the broadcasting on rental is limited to “commercial rental”.

By replacing the word commercial rental in the place of rental, the Amendment seems to be aiming at distinguishing between rental of copyrighted works with profit motive and non-profit motive thereby facilitating free flow of knowledge and art for social and educational purposes. “Non-profit library or non-profit educational institution” is defined to mean a library or educational institution which receives grants from the Government or which is exempted from payment of tax under the Income-Tax Act, 1961.

g. Assignment

It has been sought to be clarified in Section 18 (which deals with assignment of copyright) that no assignment shall be applied to any medium or mode of exploitation of the work, **which did not exist or was not in commercial use** at the time when the assignment was made, unless the assignment specifically referred to such medium or mode of exploitation of the work.

Generally, when the assignment is intended to be complete of all rights, assignment agreement clarifies that the assignment is intended to operate for all media and modes of exploitation, whether existing now or in future. The introduction of the above provision would make it necessary to even specify that the assignment will apply in relation to a mode ‘whether in commercial use or not’, if that is the intention of the parties. Further, the agreements will have to be carefully drafted taking into account possible technological advances.

It is not clear whether this provision would also apply retrospectively, i.e. to the assignments made prior to the Amendment. If it is held that it does so apply, then all earlier assignments may have limited application and if the intention of parties was to grant complete assignments, the parties may have to explore entering into amendment agreements.

h. Digital Signature

Section 30 of the Act has been amended such that the owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by license in writing by him or by his duly authorized agent.

Analysis:

As per Section 30 of the Act, one of the conditions for the grant of a valid license was that the license was required to be made in “**writing**” and “**signed**” by the licensor. However, there was an evolution of various e-commerce online license agreements in relation to

copyrightable works which were being undertaken (*Eg: Click Wrap Software Licenses*), although there was an anomaly to its validity. The reason for the anomaly being that though such licenses were in writing, they did not fulfill the requisite of being signed by the licensor. Further, the nature and uniqueness of these online licenses usually did not provide the licensor to affix his electronic signature, as required under the Information Technology Act, 2000. The introduction of this amendment which provides that **signature** is no more a requisite for the grant of a valid license will resolve the anomaly and provide sanctity to online license agreements, provided the other conditions as specified under this Section 30 are fulfilled.

Further, as per Section 18 of the Act, one of the conditions for the grant of a valid assignment is that the assignment is required to be made in “**writing**” and “**signed**” by the assignor. The amendment proposes no changes to the same and thus all assignments not only require to be in writing but they also need to be signed by the assignor.

i. Interim Order to be passed by Copyright Board

As per the provisions of Section 19A of the Act, the parties to assignment of copyright may approach the Copyright Board for (i) revocation of the assignment, when assignee fails to make sufficient exercise of the rights assigned to him, and such failure is not attributable to any act or omission of the assignor (this application is filed by the assignor); (ii) any dispute with respect to assignment of copyright.

Now, the Copyright Board may pass an order, as it deems fit, pending the disposal of an application for revocation of assignment under this sub-section, regarding implementation of the terms and conditions of assignment, including any consideration to be paid for the enjoyment of the rights assigned. The right to pass such order at present is limited in relation to revocation applications, and could have been extended to application related to other disputes as well.

Now the Copyright Board is required grant an order on the application under this Section within 6 months. This will assist speedy redressal or disputes.

Earlier, Section 19A was applicable to disputes in relation to copyright licenses as well. However, post Amendment, disputes in relation to copyright license agreement cannot be adjudicated by the Copyright Board.

j. Disposal of infringing copies

Section 66, inter alia, provides that the court trying any offence under the Act may order that all the copies of the work or plates of infringing copies be delivered to the owner of the copyright. After the amendment, the court is now empowered to make such other order as it may deem fit regarding the disposal of such infringing copies or plates.

k. **Rules**

The government has been *inter alia* granted the power to make Rules in relation to the following:

- the form and manner in which an organization may apply to the Copyright Board for compulsory license for the disabled and the fee which may accompany such application under sub-section (1) of section 31B;
- the manner in which a person making sound recording may give prior notice of his intention to make version recording under Section 31C (2);
- the manner in which prior notice may be given by a broadcasting organization for statutory license under Section 31D (2);
- the manner in which a copyright society may publish its Tariff Scheme under Section 33A (1).

Conclusion

The Amendments were much awaited and now that they are almost a reality, it will be interesting to see how the industries will deal with the impact of the changes. The Amendments have certainly given room for using creative lawyering skills to develop and structure innovative business models to help the industries effectively deal with the changes.

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