Analysis of the Copyright (Amendment) Bill 2012

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There are some welcome provisions in the Copyright (Amendment) Bill 2012, and some worrisome provisions. Pranesh Prakash examines five positive changes, four negative ones, and notes the several missed opportunities.

The Copyright (Amendment) Bill 2012 has been passed by both Houses of Parliament, and will become law as soon as the President gives her assent and it is published in the Gazette of India. While we celebrate the passage of some progressive amendments to the Copyright Act, 1957 — including an excellent exception for persons with disabilities — we must keep in mind that there are some regressive amendments as well. In this blog post, I will try to highlight those provisions of the amendment that have not received much public attention (unlike the issue of lyricists' and composers' 'right to royalty').

Welcome Changes

Provisions for Persons with Disabilities

India now has amongst the most progressive exception for persons with disabilities, alongside countries like Chile. Under the amendments, sections 51(1)(zb) and 31B carve out exceptions and limitations for persons with disabilities. Earlier s.52(1)(zb) dealt only with formats that were "special designed only for the use of persons suffering from visual, aural, or other disabilities". Thanks to a campaign mounted by disability rights groups and public interest groups such as CIS, it now covers "any accessible format". Section 52(1)(zb) allows any person to facilitate access by persons with disabilities to copyrighted works without any payment of compensation to the copyright holder, and any organization working the benefit of persons with disabilities to do so as long as it is done on a non-profit basis and with reasonable steps being taken to prevent entry of reproductions of the copyrighted work into the mainstream. Even for-profit businesses are allowed to do so if they obtain a compulsory licence on a work-by-work basis, and pay the royalties fixed by the Copyright Board. The onerousness of this provision puts its utility into question, and this won't disappear unless the expression "work" in s.31B is read to include a class of works.

Given that the Delhi High Court has — wrongly and per incuriam, since it did not refer to s.14(a)(ii) as it was amended in 1994 — held parallel importation to

be barred by the Copyright Act, it was important for Parliament to clarify that the Copyright Act in fact follows international exhaustion. Without this, even if any person can facilitate access for persons with disabilities to copyrighted works, those works are restricted to those that are circulated in India. Given that not many books are converted into accessible formats in India (not to mention the costs of doing so), and given the much larger budgets for book conversion in the developed world, this is truly restrictive.

Extension of Fair Dealing to All Works

The law earlier dealt with fair dealing rights with regard to "literary, dramatic, musical or artistic works". Now it covers all works (except software), in effect covering sound recordings and video as well. This will help make personal copies of songs and films, to make copies for research, to use film clips in classrooms, etc.

Creative Commons, Open Licensing Get a Boost

The little-known s.21 of the Copyright Act, which deals with the right of authors to relinquish copyright, has been amended. While earlier one could only relinquish parts of one's copyright by submitting a form to the Registrar of Copyrights, now a simple public notice suffices. Additionally, s.30 of the Act, which required licences to be in writing and signed, now only requires it to be in writing. This puts Creative Commons, the GNU Public Licence, and other open licensing models, on a much surer footing in India.

Physical Libraries Should Celebrate, Perhaps Virtual Libraries Too

Everywhere that the word "hire" occurs (except s.51, curiously), the word "commercial rental" has been substituted. This has been done, seemingly, to bring India in conformance with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The welcome side-effect of this is that the legality of lending by non-profit public libraries has been clarified. The amendment states:

"2(1)(fa) "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."

Even after this, the overwhelming majority of the 'video lending libraries' that you see in Indian cities and towns continue to remain illegal.

Another welcome provision is the amended s.52(1)(n), which now allows "non-commercial public libraries" to store an electronic copy of a work if it already has a physical copy of the work. However, given that this provision says that the storage shall be "for preservation", it seems limited. However, libraries might be able to use this — in conjunction with the fact that under s.14 of the Copyright

Act lending rights of authors is limited to “commercial rental” and s.51(b) only covers lending of “infringing copies” — to argue that they can legally scan and lend electronic copies of works in the same manner that they lend physical copies. Whether this argument would succeed is unclear. Thus, India has not boldly gone where the European Commission is treading with talks of a European Digital Library Project, or where scholars in the US are headed with the Digital Public Library of America. But we might have gone there quietly. Thus, this amendment might help foster an Indian Internet Archive, or help spread the idea of the Open Library in India.

On a final note, different phrases are used to refer to libraries in the amendment. In s.2(1)(fa), it talks about "non-profit library"; in s.52(1)(n) and (o), it refers to "non-commercial public library"; and in s.52(1)(zb), it talks of "library or archives", but s.52(1)(zb) also requires that the works be made available on a "non-profit basis". The differentiation, if any, that is sought to be drawn between these is unclear.

Limited Protection to Some Internet Intermediaries

There are two new provisions, s.52(1)(b) and 52(1)(c), which provide some degree of protection to 'transient or incidental' storage of a work or performance. Section 52(1)(b) allows for "the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public", hence applying primarily to Internet Service Providers (ISPs), VPN providers, etc. Section 52(1)(c) allows for "transient or 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". This seems to make it applicable primarily to search engines, with other kinds of online services being covered or not covered depending on one’s interpretation of the word 'incidental'.

Compulsory Licensing Now Applies to Foreign Works Also

Sections 31 ("compulsory licence in works withheld from public") and 31A ("compulsory licence in unpublished Indian works") used to apply to Indian works. Now they apply to all works, whether Indian or not (and now s.31A is about "compulsory licence in unpublished or published works", mainly orphan works). This is a welcome amendment, making foreign works capable of being licensed compulsorily in case it is published elsewhere but withheld in India. Given how onerous our compulsory licensing sections are, especially sections 32 and 32A (which deal with translations, and with literary, scientific or artistic works), it is not a surprise that they have not been used even once. However, given the modifications to s.31 and s.31A, we might just see those starting to be used by publishers, and not just radio broadcasters.

Worrisome Changes

Term of Copyright for Photographs Nearly Doubled

The term of copyright for photographs has now gone from sixty years from publication to sixty years from the death of the photographer. This would mean that copyright in a photograph clicked today (2012) by a 20 year old who dies at the 80 will only expire on January 1, 2133. This applies not only to artistic photographs, to all photographs because copyright is an opt-out system, not an opt-in system. Quite obviously, most photoshopping is illegal under copyright law.

This has two problems. First, there was no case made out for why this term needed to be increased. No socio-economic report was commissioned on the effects of such a term increase. This clause was not even examined by the Parliamentary Standing Committee. While the WCT requires a 'life + 50′ years term for photographs, we are not signatories to the WCT, and hence have no obligation to enforce this. We are signatories to the Berne Convention and the TRIPS Agreement, which require a copyright term of 25 years for photographs. Instead, we have gone even above the WCT requirement and provide a life + 60 years term.

The second problem is that it is easier to say when a photograph was published than to say who the photographer was and when that photographer died. Even when you are the subject of a photograph, the copyright in the photograph belongs to the photographer. Unless a photograph was made under commission or the photographer assigned copyright to you, you do not own the copyright in the photographs. (Thanks to Bipin Aspatwar, for pointing out a mistake in an earlier version, with "employment" and "commission" being treated differently.) This will most definitely harm projects like Wikipedia, and other projects that aim at archiving and making historical photographs available publicly, since it is difficult to say whether the copyright in a photograph still persists.

Cover Versions Made More Difficult: Kolaveri Di Singers Remain Criminals

The present amendments have brought about the following changes, which make it more difficult to produce cover versions:

1. Time period after which a cover version can be made has increased from 2 years to 5 years.
2. Requirement of same medium as the original. So if the original is on a cassette, the cover cannot be released on a CD.
3. Payment has to be made in advance, and for a minimum of 50000 copies. This can be lowered by Copyright Board having regard to unpopular dialects.
4. While earlier it was prohibited to mislead the public (i.e., pretend the cover was the original, or endorsed by the original artists), now cover versions are not allowed to "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".

5. All cover versions must state that they are cover versions.
6. No alterations are allowed from the original song, and alteration is qualified as 'alteration in the literary or musical work'. So no imaginative covers in which the lyrics are changed or in which the music is reworked are allowed without the copyright owners' permission. Only note-for-note and word-for-word covers are allowed.
7. Alterations were allowed if they were "reasonably necessary for the adaptation of the work" now they are only allowed if it is "technically necessary for the purpose of making of the sound recording".

This ignores present-day realities. Kolaveri Di was covered numerous times without permission, and each one of those illegal acts helped spread its popularity. The singers and producers of those unlicensed versions could be jailed under the current India Copyright Act, which allows even non-commercial copyright infringers to be put behind bars. Film producers and music companies want both the audience reach that comes from less stringent copyright laws (and things like cover versions), as well as the ability to prosecute that same behaviour at will. It is indeed ironic that T-Series, the company that broke HMV's stranglehold over the Indian recording market thanks to cover versions, is itself one of the main movers behind ever-more stringent copyright laws.

Digital Locks Now Provided Legal Protection Without Accountability

As I have covered the issue of Technological Protection Measures (TPM) and Rights Management Information (RMI), which are 'digital locks' also known as Digital Rights Management (DRM), in great detail earlier, I won't repeat the arguments at length. Very briefly:

1. It is unclear that anyone has been demanding the grant of legal protection to DRMs in India, and We have no obligation under any international treaties to do so. It is not clear how DRM will help authors and artists, but it is clear how it will harm users.
2. While the TPM and RMI provisions are much more balanced than the equivalent provisions in laws like the US's Digital Millennium Copyright Act (DMC), that isn't saying much. Importantly, while users are given certain rights to break the digital locks, they are helpless if they aren't also provided the technological means of doing so. Simply put: music and movie companies have rights to place digital locks, and under some limited circumstances users have the right to break them. But if the locks are difficult to break, the users have no choice but to live with the lock, despite having a legal right.

Removal of Parallel Importation

In past blog posts I have covered why allowing parallel imports makes sense in India. And as explained above, the Delhi High Court acted per incuriam

when holding that the Copyright Act does not allow parallel importation. The Copyright Act only prohibits import of infringing copies of a work, and a copy of a book that has been legally sold in a foreign country is not an "infringing copy". The government was set to introduce a provision making it clear that parallel importation was allowed. The Parliamentary Standing Committee heard objections to this proposal from a foreign publishers' association, but decided to recommend the retention of the clause. Still, due to pressure from a few publishing companies whose business relies on monopolies over importation of works into India, the government has decided to delete the provision. However, thankfully, the HRD Minister, Kapil Sibal, has assured both houses of Parliament that he will move a further amendment if an NCAER report he has commissioned (which will be out by August or September) recommends the introduction of parallel imports.

Expansion of Moral Rights Without Safeguards

Changes have been made to author's moral rights (and performer's moral rights have been introduced) but these have been made without adequate safeguards. The changes might allow the legal heir of an author, artist, etc., to object to 'distortion, mutilation, modification, or other act' of her ancestors work even when the ancestor might not have. By this amendment, this right continues in perpetuity, even after the original creator dies and even after the work enters into the public domain. It seems Indian policymakers had not heard of Stephen Joyce, the grandson of James Joyce, who has "brought numerous lawsuits or threats of legal action against scholars, biographers and artists attempting to quote from Joyce's literary work or personal correspondence". Quoting from his Wikipedia page:

In 2004, Stephen threatened legal action against the Irish government when the Rejoyce Dublin 2004 festival proposed public reading of excerpts of Ulysses on Bloomsday. In 1988 Stephen Joyce burnt a collection of letters written by Lucia Joyce, his aunt. In 1989 he forced Brenda Maddox to delete a postscript concerning Lucia from her biography Nora: The Real Life of Molly Bloom. After 1995 Stephen announced no permissions would be granted to quote from his grandfather's work. Libraries holding letters by Joyce were unable to show them without permission. Versions of his work online were disallowed. Stephen claimed to be protecting his grandfather's and families reputation, but would sometimes grant permission to use material in exchange for fees that were often "extortionate".

Because in countries like the UK and Canada the works of James Joyce are now in the public domain, Stephen Joyce can no longer restrict apply such conditions. However now, in India, despite James Joyce's works being in the public domain, Stephen Joyce's indefensible demands may well carry legal weight.

Backdoor Censorship

As noted above, the provision that safeguard Internet intermediaries (like search engines) is very limited. However, that provision has an extensive removal provision:

Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court refraining from facilitating access and 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;

There are two things to be noted here. First, that without proof (or negative consequences for false complaints) the service provider is mandated to prevent access to the copy for 21 day. Second, after the elapsing of 21 days, the service provider may 'put back' the content, but is not mandated to do so. This would allow people to file multiple frivolous complaints against any kind of material, even falsely (since there is no penalty for false compalaints), and keep some material permanently censored.

Missed Opportunities

Fair Dealing Guidelines, Criminal Provisions, Government Works, and Other Missed Opportunities

The following important changes should have been made by the government, but haven't. While on some issues the Standing Committee has gone beyond the proposed amendments, it has not touched upon any of the following, which we believe are very important changes that are required to be made.

- Criminal provisions: Our law still criminalises individual, non-commercial copyright infringement. This has now been extended to the proposal for circumvention of Technological Protection Measures and removal of Rights Management Information also.
- Fair dealing guidelines: We would benefit greatly if, apart from the specific exceptions provided for in the Act, more general guidelines were also provided as to what do not constitute infringement. This would not take away from the existing exceptions, but would act as a more general framework for those cases which are not covered by the specific exceptions.
- Government works: Taxpayers are still not free to use works that were paid for by them. This goes against the direction that India has elected to march towards with the Right to Information Act. A simple amendment of s.52(1)(q) would suffice. The amended subsection could simply allow for "the reproduction, communication to the public, or publication of any government work" as being non-infringing uses.

- Copyright terms: The duration of all copyrights are above the minimum required by our international obligations, thus decreasing the public domain which is crucial for all scientific and cultural progress.
- Educational exceptions: The exceptions for education still do not fully embrace distance and digital education.
- Communication to the public: No clear definition is given of what constitute a 'public', and no distinction is drawn between commercial and non-commercial 'public' communication.
- Internet intermediaries: More protections are required to be granted to Internet intermediaries to ensure that non-market based peer-production projects such as Wikipedia, and other forms of social media and grassroots innovation are not stifled. Importantly, after the terrible judgment passed by Justice Manmohan Singh of the Delhi High Court in the Super Cassettes v. Myspace case, any website hosting user-generated content is vulnerable to payment of hefty damages even if it removes content speedily on the basis of complaints.

Amendments Not Examined

For the sake of brevity, I have not examined the major changes that have been made with regard to copyright societies, lyricists and composers, and statutory licensing for broadcasters, all of which have received considerable attention by copyright experts elsewhere, nor have I examined many minor amendments.

A Note on the Parliamentary Process

Much of the discussions around the Copyright Act have been around the rights of composers and lyricists vis-à-vis producers. As this has been covered elsewhere, I won't comment much on it, other than to say that it is quite unfortunate that the trees are lost for the forest. It is indeed a good thing that lyricists and composers are being provided additional protection against producers who are usually in a more advantageous bargaining position. This fact came out well in both houses of Parliament during the debate on the Copyright Bill.

However, the mechanism of providing this protection — by preventing assignment of "the right to receive royalties", though the "right to receive royalties" is never mentioned as a separate right anywhere else in the Copyright Act — was not critically examined by any of the MPs who spoke. What about the unintended consequences of such an amendment? Might this not lead to new contracts where instead of lump-sums, lyricists and music composers might instead be asked to bear the risk of not earning anything at all unless the film is profitable? What about a situation where a producer asks a lyricist to first assign all rights (including royalty rights) to her heirs and then enters into a contract with those heirs? The law, unfortunately at times, revolves around words used by the legislature and not just the intent of the legislature. While one cannot predict which way the amendment will go, one would have expected better discussions around this in Parliament.

Much of the discussion (in both the Rajya Sabha and the Lok Sabha) was rhetoric about the wonders of famous Indian songwriters and music composers and the abject penury in which some not-so-famous ones live, and there was very little discussion about the actual merits of the content of the Bill in terms of how this problem will be overcome. A few MPs did deal with issues of substance. Some asked the HRD Minister tough questions about the Statement of Objects and Reasons noting that amendments have been brought about to comply with the WCT and WPPT which were "adopted … by consensus", even though this is false as India is not a signatory to the WCT and WPPT. MP P. Rajeeve further raised the issue of parallel imports and that of there being no public demand for including TPM in the Act, but that being a reaction to the US's flawed Special 301 reports. Many, however, spoke about issues such as the non-award of the Bharat Ratna to Bhupen Hazarika, about the need to tackle plagiarism, and how the real wealth of a country is not material wealth but intellectual wealth.

This preponderance of rhetoric over content is not new when it comes to copyright policy in India. In 1991, when an amendment was presented to increase term of copyright in all works by ten years (from expiring 50 years from the author's death to 60 years post-mortem), the vast majority of the Parliamentarians who stood up to speak on the issue waxed eloquent about the greatness of Rabindranath Tagore (whose works were about to lapse into the public domain), and how we must protect his works. Little did they reflect that extending copyright — for all works, whether by Tagore or not — will not help 'protect' the great Bengali artist, but would only make his (and all) works costlier for 10 additional years. Good-quality and cheaper editions of Tagore's works are more easily available post-2001 (when his copyright finally lapsed) than before, since companies like Rupa could produce cheap editions without seeking a licence from Visva Bharati. And last I checked Tagore's works have not been sullied by them having passed into the public domain in 2001.

Further, one could find outright mistakes in the assertions of Parliamentarians. In both Houses, DMK MPs raised objections with regard to parallel importation being allowed in the Bill — only in the version of the Bill they were debating, parallel importation was not being allowed. One MP stated that "statutory licensing provisions like these are not found anywhere else in the world". This is incorrect, given that there are extensive statutory licensing provision in countries like the United States, covering a variety of situations, from transmission of sound recordings over Internet radio to secondary transmission of the over-the-air programming.

Unfortunately, though that MP did not raise this issue, there is a larger problem that underlies copyright policymaking in India, and that is the fact that there is no impartial evidence gathered and no proper studies that are done before making of policies. We have no equivalent of the Hargreaves Report or the Gowers Report, or the studies by the Productivity Council in Australia or the New Zealand government study of parallel importation.

There was no economic analysis conducted of the effect of the increase in copyright term for photographs. We have evidence from elsewhere that copyright terms are already too long, and all increases in term are what economists refer to as deadweight losses. There is no justification whatsoever for increasing term of copyright for photographs, since India is not even a signatory to the WCT (which requires this term increase). In fact, we have lost precious negotiation space internationally since in bilateral trade agreements we have been asked to bring our laws in compliance with the WCT, and we have asked for other conditions in return. By unilaterally bringing ourselves in compliance with WCT, we have lost important bargaining power.

Users and Smaller Creators Left Out of Discussions

Thankfully, the Parliamentary Standing Committee went into these minutiae in greater detail. Though, as I have noted elsewhere, the Parliamentary Standing Committee did not invite any non-industry groups for deposition before it, other than the disability rights groups which had campaigned really hard. So while changes that would affect libraries were included, not a single librarian was called by the Standing Committee. Despite comments having been submitted to the Standing Committee on behalf of 22 civil society organizations, none of those organizations were asked to depose. Importantly, non-industry users of copyrighted materials — consumers, historians, teachers, students, documentary film-makers, RTI activists, independent publishers, and people like you and I — are not seen as legitimate interested parties in the copyright debate. This is amply clear from the the fact that only one MP each in the two houses of Parliament raised the issue of users' rights at all.

Concluding Thoughts

What stands out most from this process of amendment of the copyright law, which has been going on since 2006, is how out-of-touch the law is with current cultural practices. Most instances of photoshopping are illegal. Goodbye Lolcats. Cover versions (for which payments have to be made) have to wait for five years. Goodbye Kolaveri Di. Do you own the jokes you e-mail to others, and have you taken licences for quoting older e-mails in your replies? Goodbye e-mail. The strict laws of copyright, with a limited set of exceptions, just do not fit the digital era where everything digital transaction results in a bytes being copied. We need to take a much more thoughtful approach to rationalizing copyright: introduction of general fair dealing guidelines, reduction of copyright term, decriminalization of non-commercial infringement, and other such measures. If we don't take such measures soon, we will all have to be prepared to be treated as criminals for all our lives. Breaking copyright law shouldn't be as easy as breathing, yet thanks to outdated laws, it is.

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