

Problems Remain with Standing Committee's Report on Copyright Amendments

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The Rajya Sabha Standing Committee on Human Resource Development (under which ministry copyright falls) recently tabled their report on the Copyright (Amendment) Bill, 2010 before Parliament. There is much to be applauded in the report, including the progressive stand that the Committee has taken on the issue of providing access by persons with disabilities.

Fair Dealings and Intermediary Liability

The amendments make a number of changes to s.52(1) of the Act, including to the fair dealing provisions under s.52(1)(a), and introduction of two new sub-sections (s.52(1)(b) and (c)) with s.52(1)(c) introducing a modicum of protection for intermediaries involved in "transient and incidental storage for the purpose of providing electronic links, access or integration" (but only if the copyright holder has not expressed any objections, and if the intermediary believes it to be non-infringing). The provision allows the intermediary to ask the person complaining against it to provide a court order within 14 days, since the intermediary is in no position to determine the judicial question of whether the copyright holder holds copyright and if the third party has violated that copyright. However this provision was opposed tooth and nail by the copyright holders' associations that dominated the representations, while intermediaries and consumers remained woefully under-represented before the Standing Committee.

Predictably, the Standing Committee dealt a blow against intermediaries and consumers by asking the government to review the "viability of the duration of 14 days... by way of balancing the views of the stakeholders as well as the legal requirement in the matter". They recommended a relatively minor change of changing the phrase "transient and incidental" to "transient or incidental". By doing this, they failed to address the concerns raised by Yahoo India, Google India, and also failed to acknowledge the submissions made by 22 civil society organizations (available here: <http://cis-india.org/advocacy/ipr/upload/copyright-bill-submission>).

Technological Protection Measures and Rights Management Information Provision

The amendments aim to bring about two new criminal provisions, and seek to make circumvention of technological protection measures (digital locks) and alteration of rights management information (which are embedded into digital files and signals) illegal.

The Standing Committee heard a number of organizations on technological protection measures, which we had argued are harmful as they a) cannot distinguish between fair dealing and infringement, and b) are harmful even if a legal right to circumvent for fair dealings is provided because the technological means to circumvent doesn't necessarily exist. (Imagine a law that says that breaking a lock using lock-breaking implements isn't a crime if it is done to enter into your own house. Such a law doesn't help you if you can't get your hands on the lock-breaking implements in the first place.) The Indian Broadcasting Federation, the Business Software Alliance, and the Motion Picture Association (which represents six studios, all American), the Indian Music Industry, and the Indian Performing Right Society Limited all felt that this provision did not go far enough. The Motion Picture Association, for instance, wants not just controls over that which copyright covers

Yahoo India and Google India on the other hand thought that provision went too far. Google made it clear that they thought having criminal repercussions for circumvention was clearly disproportionate. Thus, a clearer split is established between old media companies; the old media companies clutching on to straws that they feel will save them from adapting their business practices to the digital environment, and online companies that understand the digital environment better having a markedly different idea.

Currently section 65B (read with the definition of "Rights Management Information" in section 2(xa)) of the proposed amendments ensures that Rights Management Information cannot be used to spy on users. The Indian Reprographic Rights Organization however believes that this is wrong: it believes that copyright owners should have the ability to track users without their consent. Yahoo India, on the other hand, believes that this is a harmful provision, and state that "the imposition of criminal and monetary liability could adversely affect consumers", and cites the instance of difficulties that would be faced by "entities engaged in creating copies of any copyright material into a format specially designed for persons suffering from disability" because of the language of the provision that requires knowledge instead of intention. The committee responds to this by summing up with a tautology, stating:

The Committee is of the view that the parties responsible for distribution or broadcasting or communication to the public through authorized licence from the author or rights holder and who do not remove any rights

management information deliberately for making unauthorized copies need not worry about this provision as long as their act is as per the framework of this provision.

Implications of Standing Committee's Report Unclear

Many of the comments made by the Standing Committee are unclear. On compulsory licensing, the committee states:

The Committee also takes note of the proposed amendments in section 31 A relating to compulsory licence in unpublished Indian works. The provision of compulsory licence for orphaned works available under this section is proposed to be extended to published works as well. Like in the case of section 31, extension of applicability to all foreign works (including film, DVDs, etc.) could be violative of Berne Convention and TRIPS Agreement and seem to fall short of the minimum obligations imposed by such instruments. The Committee is of the view that future implication of proposed amendment in Section 31A vis-à-vis India's commitment to international agreement needs to be free from any ambiguity so as to prevent any negative fallout.

However, the usage of the phrase "could be violative" leaves it unclear whether the Standing Committee believes the proposed amendments to be violative of the TRIPS Agreement or not. All that the Standing Committee says is that the provision needs to be unambiguous, and that TRIPS compliance must be ensured. That word of caution does not directly rebut the government's contention that the proposed amendment is TRIPS-compliant.

Similarly, the Committee's views on increase of copyright term for cinematograph films is unclear. While commenting on the clause that introduces the term increase (as part of the proposal to include the principal director as an author of the film along with the producer), the Committee states:

It, therefore, recommends that the proposal to include principal director as author of the film along with producer may be dropped altogether.

While this presumably means that the proposal to increase term is also being rejected, that is not made clear by the Committee's comments.

Increased Copyright Duration, Expansive Moral Rights and Other Negative Changes

In the submission of CIS and twenty-one other civil society organizations to the Standing Committee, we highlighted all of the below concerns. However, our submission was not tabled before the Standing Committee for reasons unknown to us.

- **WCT and WPPT compliance:** India has not signed either of these two treaties, which impose TRIPS-plus copyright protection, but without any corresponding increase in fair dealing / fair use rights. Given that the Standing Committee has recommended against some aspects of WCT compliance (such as the move to change "hire" to "commercial rental") and that without such changes India cannot be a signatory to the WCT, it is unclear why other forms of WCT compliance (such as TPMs) should be implemented.
- **Increase in duration of copyright:** The duration of copyright of photographs and video recordings is sought to be increased. The term of copyright for photographs is being increased from sixty years from creation to sixty years from death of the photographer. This will significantly reduce the public domain, which India has been arguing for internationally, especially through its push for the Development Agenda at the World Intellectual Property Organization.
- **Moral rights:** Changes have been made to author's moral rights (and performer's moral rights have been introduced) but these have been made without requisite safeguards.
- **Version recordings:** The amendments make cover version much more difficult to produce, and while the Standing Committee has addressed the concerns of some in the music industry, it hasn't addressed the concerns of artists and consumers.

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 hasn't 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.

- **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 would except "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.
- **Fair dealing and fair use:** 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.