

Civil society submission on Copyright (Amendment) Bill, 2010

Centre for Internet and Society | 2010-10-20

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Shri Sundriyal,

Subject: Civil Society Submission on Copyright (Amendment) Bill, 2010

We wish to submit the following document on behalf the signatories mentioned below. This review of the proposed Copyright (Amendment) Bill, 2010, is guided by the spirit of public interest and the need to strongly secure access to knowledge, especially in a developing country like ours. The link between greater access to knowledge and greater economic and social development has been accepted even by the World Intellectual Property Organization (WIPO), which adopted the 'Development Agenda' as its touchstone a few years ago, to India's credit as it played an important role (and continues to do so) in presenting developmental concerns of education, access to knowledge, inclusiveness of growth (especially to include persons with disabilities), etc., at such international fora. In a speech in support of the Development Agenda at WIPO, India's representative Debabrata Saha noted:

Intellectual property rights have to be viewed not as a self-contained and distinct domain, but rather as an effective policy instrument for wide ranging socio-economic and technological development. The primary objective of this instrument is to maximize public welfare.

Given that guiding spirit, this review does not go into some of the minutiae of the Bill when those are not concerned with public interest, but rather interests *inter se* some parties.

It first looks at the positive provisions in the Bill, the negative provisions, and then at the provisions that have been suggested in past reviews by civil society and should be incorporated to maintain the balance that copyright law ought to, and to safeguard public interest.

Three issues will be dealt with separately, as they deserve more detailed analysis than the other provisions: a) technological protection measures, b) exceptions for persons with disabilities, and c) version recordings. Unless indicated otherwise, the numbering of sections and clauses are done as per the revised numbering of the 2010 amendments.

On behalf of the signatories

Pranesh Prakash
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1. List of Signatories

1. All India People's Science Network
2. Alternative Law Forum
3. Centre for Internet and Society
4. Centre for Studies in Social Sciences
5. Centre for Study of Culture and Society
6. Citizen consumer and civic Action Group
7. Comet Media Foundation
8. Consumer Education and Research Center
9. Consumer Rights Education and Awareness Trust
10. Consumers Association of India
11. Consumer Unity & Trust Society
12. Delhi Science Forum
13. Inclusive Planet Foundation
14. IT for Change
15. Janastu
16. Knowledge Commons
17. Mahiti
18. Majlis
19. Mazdoor Kisan Shakti Sangathan
20. National Campaign for People's Right to Information

21. Pad.ma (Public Access Digital Media Archive)
22. Voluntary Organization in Interest of Consumer Education

Complete details about the signatories are present in Annexure I.

2. Executive Brief

2.1. Existing Copyright Act

The Indian Copyright Act, 1957 has been designed from the perspective of a developing country. It has always attempted a balance between various kinds of interests. It has always sought to ensure that rights of authors of creative works is carefully promoted alongside the public interest served by wide availability and usability of that material. For instance, our Copyright Act has provisions for:

- compulsory and statutory licensing: recognizing its importance in making works available, especially making them available at an affordable rate.
- cover versions: recognizing that more players lead to a more vibrant music industry.
- widely-worded right of fair dealing for private use: recognizing that individual use and large-scale commercial misuse are different.

These provisions of our Act have been lauded,¹ and India has been rated as the most balanced copyright system in a global survey² conducted of over 34 countries by Consumers International³.

The Indian Parliament has always sought to be responsive to changing technologies by paying heed to both the democratisation of access as well as the securing of the interests of copyright holders. This approach needs to be lauded, and importantly, needs to be maintained.

2.2. Proposed amendments

2.2.1. Some positive amendments

- **Fair Dealings, Parallel Importation, Non-commercial Rental:** All works (including sound recordings and cinematograph films) are now covered the fair dealings clause (except computer programmes), and a few other exceptions; parallel importation is now clearly allowed; and non-commercial rental has become a limitation in some cases.
- **Persons with disabilities:** There is finally an attempt at addressing the concerns of persons with disabilities. But the provisions are completely useless the way they are currently worded.

¹See India Report of the Consumers International IP Watchlist, <http://a2knetwork.org/watchlist/report/india>

²<http://a2knetwork.org/summary-report-2010>

³<http://www.consumersinternational.org/>

- **Public Libraries:** They can now make electronic copies of works they own, and some other beneficial changes relating to public libraries.
- **Education:** Some exceptions related to education have been broadened (scope of works, & scope of use).
- **Statutory and compulsory licensing:** Some new statutory licensing provisions (including for radio broadcasting) and some streamlining of existing compulsory licensing provisions.
- **Copyright societies:** These are now responsible to authors and not owners of works.
- **Open licences:** Free and Open Source Software and Open Content licensing is now simpler.
- **Partial exemption of online intermediaries:** Transient and incidental storage of copyrighted works has been excepted, mostly for the benefit of online intermediaries.
- **Performer's rights:** The general, and confusing, exclusive right that performers had to communicate their performance to the public has been removed, and instead only the exclusive right to communicate sound/video recordings remains.
- **Enforcement:** Provisions on border measures have been made better, and less prone to abuse and prevention of legitimate trade.

2.2.2. Some negative amendments

- **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.
- **Increase in duration of copyright:** This will significantly reduce the public domain, which India has been arguing for internationally.
- **Technological Protection Measures:** TPMs, which have been shown to be anti-consumer in all countries in which they have been introduced, are sought to be brought into Indian law.
- **Version recordings:** The amendments make cover version much more difficult to produce.
- **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.

2.2.3. Missed opportunities

- **Government-funded 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.
- **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.
- **Criminal provisions:** Our law still criminalises individual, non-commercial copyright infringement.

- **Libraries and archives:** The exceptions for ‘public libraries’ are still too narrow in what they perceive as ‘public libraries’.
- **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.

3. Analysis of the Amendments

3.1. Positive Amendments

3.1.1. General

- Many exceptions now apply to all works, including sound recordings and cinematograph films. These include exceptions for:
 - Fair dealing for private use, research, criticism, etc. (s.52(1)(a)) (computer programmes exempted);
 - Judicial proceedings and their reportage (s.52(1)(d));
 - Use of legislatures (s.52(1)(e));
 - Certified copies (s.52(1)(f));
 - Instructional use, by teachers and pupils, and in examinations (s.52(1)(i));
- The Bill notes that parallel imported copies are not to be regarded as infringing copies, and that India will follow the principle of ‘international exhaustion’ (s.1(m)(iv) proviso). This change makes abundantly clear that parallel importation (that is, importing a work that has been legally sold in a foreign country into India) is permissible under the Copyright Act, instead of leaving that question open for judicial interpretation. This will mainly affect the interpretation of ss.51(b), 53, 55, 58, and 64. The new provision on incidental importation of labels, company logos, etc. (s.52(1)(zc)) will also be read with this. This will also have a positive impact on persons with disabilities, as cross-border trade in accessible versions of copyrighted works may be conducted legally.
- A new provision defining commercial rental to distinguish that from non-profit lending (s.1(fa)). This allows for non-commercial rental to be allowed under ss.14(b), (d), (e), and 38A(1)(a).

- Now resale rights for cinematograph films and sound recordings are no longer exclusively with the author, bringing them on par with literary and dramatic works (s.14(d)(ii), (e)(ii)).

3.1.2. Persons with disabilities

(Detailed analysis in the next section)

3.1.3. Libraries

- Public libraries can now make electronic copies of works they already own (s.52(1)(n)). This is positive because this provides public libraries much more leeway in preservation of their collections.
- The shortcomings of this provision are discussed in the ‘Missed Opportunities’ section.

3.1.4. Education

- The phrase ‘use of educational institutions’ in s.52(1)(h) has been changed to ‘instructional use’, thus broadening its scope in recognition of the fact that not all instructional use happens within the confines of educational institutions (but also through distance education, e-education, etc.).
- The exception in s.52(1)(i) has been expanded to cover ‘any work’ instead of being limited to literary, dramatic, musical or artistic works, thus expanding the exception to cover sound recordings and cinematograph films as well.
- However, there are many shortcomings in this provision and in s.52(1)(i) which are discussed in the ‘Missed Opportunities’ section.

3.1.5. Statutory and compulsory licences

- Compulsory licensing under ss.31 and 31A have being expanded from just Indian works to all works.
- The Registrar of Copyrights now has the power to grant licences under s.31 not just to the complainant, but also ‘any person or persons who ... is or are qualified’.
- The restriction under s.31(2) forcing the Registrar of Copyright to grant exclusive licences has been removed.
- A new provision for statutory licensing for radio broadcasting of literary and musical works and sound recordings has been introduced. Currently, cases have been filed due to the uncertainty on licensing terms caused by the lack of such a provision.
- The shortcomings in these provisions are discussed in the ‘Missed Opportunities’ section.

3.1.6. Copyright societies

- Shifting of control from owners of copyrights to authors. This should help solve some of the complaints that have been frequently raised of copyright owners shortchanging authors and their heirs.

- All copyright societies now have to declare a tariff scheme. This will make pricing less arbitrary, and provides for aggrieved parties to take it up with the Copyright Board.

3.1.7. Open source and open content licences

- Small changes to assignment requirements and public domain declarations (ss. 21(1), 30). Now, any public notice suffices to relinquish any or all of the rights held by the copyright owner, and a notice specially to the Registrar of Copyrights is not required. Further, licences can be in writing without necessarily be signed. Both these changes support free and open source licences like the GNU GPL and open-content licences such as Creative Commons.

3.1.8. Online intermediary liability

- Two new provisions (s.52(1)(b) and (c)) make it clear that transient and incidental storage are not to be counted as infringement. This is very important for cases such as storage by online intermediaries.

3.1.9. Performer's rights

- The general right of communication of the performance to the public has been removed, and has been limited to communication of a sound or visual recording of the performance to the public.

3.1.10. Border measures

- The shifting of the authority from the Registrar of Copyright to the Commissioner of Customs.
- More stringent requirements of proof of ownership of copyright are now required. This will help in preventing harassment.
- There is now greater flexibility in disposal of infringing goods.

3.2. Negative Amendments

3.2.1. Term increase

- Instead of reducing copyright terms to the minimum required by the TRIPS Agreement, the government has proposed to actually increase terms:
 - Of cinematograph films for principal directors (and of the producer, if there is an agreement with the principal director) to 20 years in excess of the TRIPS Agreement, to 70 years.
 - Of photographs to life-term + 35 years in excess of the TRIPS Agreement without citing any reasons for the proposed changes. All copyright terms should be fixed at the minimum prescribed by the TRIPS Agreement. In case of cinematograph film, that is 50 years from the release of the film, and in case of photographs, 25 years from the date of publication.
- Increase in copyright term would also affect existing works that are set to lapse into the public domain – automatically in case of photographs, and by a specific agreement between the principal director and the producer in case of cinematograph films.

- A recent scoping study conducted by WIPO on the ‘Public Domain’⁴ quoted an extract from Lord Macaulay’s speech in the House of Lords in 1841 pointing out the need for a vibrant public domain, and to curtail copyright term: > “It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good”⁵

3.2.2. Technological protection measures

(Detailed analysis in the next section)

3.2.3. Version recordings

(Detailed analysis in the next section)

3.2.4. Moral rights

- In India, moral rights (“author’s special rights” in s.57) consist of the right of attribution (to claim a work as yours) and the right of integrity (to ensure that changes distortion/mutilation/modification, etc., that is prejudicial to your reputation is not carried out).
- The term of the right to integrity used to be that of copyright. Now that has been extended to be without a term limit. This allows heirs to claim that the work of the deceased author is being mutilated or distorted or modified, etc., in a manner prejudicial to the author’s honour or reputation. This opens up the provision for misuse, as discussed below.
- Moral rights have been introduced for performers as it is one of the requirements of the WPPT (which India has not signed).
- The wide-wording of the moral rights may lend itself to misuse if safeguards are not prescribed. It is necessary to ensure that moral rights do not affect the provisions for criticism, review, and the other exceptions specified in s.52(1) It would be preferable to change the language of s.52(1) or of s.57 to reflect that moral rights are subject to certain limitations as well. Importantly, uncharitable forms of modification to a work, such as a parody, or even remixes of popular songs, should not be curtailed on the basis of moral rights of the author/performer.

3.3. Missed Opportunities

3.3.1. Government-funded works

- Remove government copyright and copyright of public undertakings, and make such works public domain. There is no reason that taxpayer-sponsored works (which all government works are) should not rightfully belong to the taxpayers, i.e., in the public domain. Worries, such as incorrect reproductions

⁴http://www.wipo.int/ip-development/en/agenda/pdf/scoping_study_cr.pdf

⁵T.B. Macaulay, *Macaulay Speeches and Poems*, 1874, p. 285.

of laws, etc., have other laws to meant to tackle them, and need not be tackled under copyright law. Importantly, provisions for government copyright are not appropriate in the Right to Information age, especially when a number of countries are following the ‘open data’ and ‘open access’ principles to allow citizens to make use of government-funded materials.

- The few exceptional cases that may arise (possibly, for instance, treatises by scholars not in the employ of public undertakings but first published by such public undertaking, such as Ph.D. candidates) can be resolved through careful wording of the clause and, if required, through contractual terms, and thus should not prove to be roadblocks for the adoption of such a provision.

3.3.2. Copyright terms

- Decrease all copyright terms to the minimum required by TRIPS. While copyright scholars and economists have argued that the current minimum terms set in the TRIPS Agreement are all too long, until the international position reflected in the TRIPS Agreement changes, we should conform to the minimum term required by it. Indeed, WIPO has adopted the Development Agenda which was strongly backed by India, which specifically highlights the need for “preservation and access to the public domain”.⁶ In keeping with that recognition, we ask that:
 - Literary, dramatic, artistic, and musical works should have a term of 50 years from the death of the author (s.22).
 - Anonymous and pseudonymous works should have a term of 50 years from publication, or from the death of the author (if the author is known) (s.23).
 - Posthumous works should have a term of 50 years from publication (s.24).
 - Photographs should have a term of 25 years from publication (unamended s.25)
 - Cinematograph films should have a term of 50 years from publication, with no exception for the principal director (s.26).
 - Sound recordings should have a terms of 50 years from publication (s.27).
 - Government works should not have any copyright term, and should be in the public domain (s.28).
 - Works by public undertakings should not have any copyright term, and should be in the public domain (s.28A).
 - Works of international organizations (so recognized under s.41) should have a copyright term of 50 years (s.29).

3.3.3. Criminal provisions

- TRIPS only requires criminal procedures for copyright infringement in case of “piracy on a commercial scale”.⁷ There is no justification for making infringement on a non-commercial scale a criminal offence as sections 63 and 63B currently do and as sections 65A and 65B propose to do. Sections 63B,

⁶WIPO Development Agenda, para 16 (2007), available at <http://www.wipo.int/ip-development/en/agenda/recommendations.html>.

⁷Art. 61, TRIPS Agreement.

65A and 65B should be removed and section 63 should be amended to be limited to cases of copyright infringement on a commercial scale. Criminality is judged based on the harm to society as a whole, to distinguish it from civil wrongs. This general requirement of harm to society is not satisfied by instances of non-commercial-scale infringement by individuals.

3.3.4. Libraries and archives

- Currently it is not clear whether all ‘public’ libraries are covered, or only libraries that fall under that definition as per the Delivery of Books and Newspapers (Public Libraries) Act, 1954. Many countries including Australia, France, Indonesia, and the United States have no requirement of the library being part of a restrictive list of prescribed libraries.
- Instead, all libraries, museums, archives, and educational and research institutes should be allowed to derive benefits under the exceptions under s.52(1)(n) and (o).
- The exception under s.52(1)(o) should be widened to include all works, and preservation under s.52(1)(n) as well as (o) should be made format-neutral (since the statute should not second-guess archivists and experts as to whether silver nitrate film is better for preservation purposes or whether magnetic tapes are better or whether digital storage is better).
- All these suggestions will still allow Indian law to comply with the TRIPS three-step test.

3.3.5. Educational exceptions

The exceptions for education have been amended for the better, but are still limited in some ways.

- Section 52(1)(i), for instance does not cover distance education or online education. It should be amended to include not only reproduction but also communication to the public.
- It would be better to make the provision purposive (“for educational purposes”) rather than require the exception to be utilized only by a ‘teacher’ and a ‘pupil’. This would solve the problem of non-teaching support staff conducting the reproduction (such as those who handle photocopiers and those who upload materials online for a course, on behalf of a teacher) not being covered by this provision.

3.3.6. Communication to the public

- The current definition of “communication to the public” (s.1(ff)) is too broad, and is inclusive of all spaces, regardless of whether any public has received that communication, and regardless of any commercial transactions that are attached to the communication.
- ‘Communication to the public’ should be limited by separating commercial and non-commercial communication, and providing only the former as an exclusive right. This would not prejudice the normal exploitation of the work by the author, and individual countries have the power to define ‘communi-

cation to public’ as per their understanding of the TRIPS requirements. This right could, in its definition itself

3.3.7. Compulsory and statutory licensing

- Currently, availability of a work at a reasonable cost is a factor only in s.32A, which deals with literary, scientific or artistic work. There is no reason it should not be a factor in ss.31(1) as well (in addition to refusal to allow republication and refusal to allow communication to the public on reasonable terms). That such a provision is required has consistently been the Government of India’s stand internationally from 1960.⁸
- While the new statutory licensing mechanism for radio broadcasts (s.31D) is welcome, this however needs to be extended beyond ‘broadcasting organizations’ because broadcasting and especially webcasting (which is very different from broadcasting) technologies are now cheap enough for even smaller universities and NGOs, etc., to use. This licensing provision should thus be expanded. Being limited to special cases (broadcasting organizations, universities, non-profit organizations, etc.), not in conflict with a normal exploitation of the work (not restricting primary sales) and do not unreasonably prejudice the legitimate interests of the right holder (since licensing fees are still paid), even such additions should be valid under our international obligations.

3.3.8. Online intermediary liability

- To be effective, the provisions (ss.52(1)(b) and (c)) should be ‘transient *or* incidental’ instead of ‘transient *and* incidental’. Cache storage may happen not only on RAM, but on hard drive as well, and courts may interpret such copies as non-transient, even if incidental. Further, to be effective, the provision should go beyond the incidental also. For instance, it is well agreed that an online encyclopedia such as Wikipedia or a blog provider such as Blogspot should not be held liable for what its users write on it, since they only provide a platform. However, it can hardly be contended that text on Wikipedia or on Blogspot is ‘incidental’ since the very purpose of those sites is to provide such a facility.
- The exception must apply not only to storage (and hence, the right of reproduction), but also to the right of communication to the public.

3.3.9. Fair dealing and a fair use provision

- The fair dealing provision (s.52(1)(a)), though generally praised, has a number of anomalies that ought to be rectified.⁹
 - The provision for ‘criticism and review’ should be expanded to also include satire, parody and pastiche. This would bring us in line with the best

⁸T.G. Agitha, *Compulsory Licence of Copyright Works*, p.16 (National Conference on Copyright Law: Limitations and Exceptions, 2009)

⁹Nikhil Krishnamurthy, *Fair Dealing of Copyright Works*, p.12 (National Conference on Copyright Law: Limitations and Exceptions, 2009)

practices in other countries, and would recognize the importance of satire, parody and pastiche in our culture while also recognizing that such practices are regularly indulged in online in the form of user-generated content.

- ▶ It is unclear why computer programmes are completely outside the ambit of this provision.
- Currently there is a provision for fair dealings, and a number of specific exceptions are provided for. Still, there are a number of activities that fall within the *spirit* of the exceptions in s.52(1), but not within the *wording* of those provisions. An example, for instance, would be the use of a five-second clipping from a motion picture DVD for purely educational use in an academic conference. Such use might make a criminal out of the professor who made that clipping both for violating copyright as well as for breaking the technological protection measures on the DVD. This is clearly not the intention of the Copyright Act. It is thus proposed that a blanket provision be included (possibly as s.52(1A)) for guidance on what would constitute fair use of a copyrighted work in absence of any specific provision in s.52(1). The structure of the US copyright law is not dissimilar, as it both has a provision on fair use, as well as more narrow and specific exceptions covering other cases. Such a general clause on guiding principles will not derogate from the existing exceptions, but will aid in the cases where a particular activity may be ‘fair’, but is not covered by the more specific provisions.

4. Detailed Analysis of Specific Provisions

4.1. Technological protection measures

Technological Protection Measures (TPMs) are specialized electronic tools (both software and hardware) that try to restrict access and/or use of a work.¹⁰ TPMs sometimes do not actually protect an underlying copyrighted work: they can be deployed even on public domain material, for instance, and indeed, have been,¹¹ and are often used to prevent interoperability.¹²

¹⁰As per the WIPO’s website (www.wipo.int/enforcement/en/faq/technological/faq03.html): “In general, right holders seek to control the use of their works in the online environment by utilizing specialized technologies. Technological protection measures take various forms and their features are continually changing. These measures can broadly be grouped into two categories: first, measures that are deployed to limit access to protected content to users who are authorized to such access. Common access control features are, for example, cryptography, passwords, and digital signatures that secure the access to information and protected content. The second major group of technologies aims at controlling the use of protected content once users have access to the work. According to the corresponding license agreement, certain uses of protected content may be allowed for certain purposes. To make sure that these obligations are complied with and no unauthorized reproductions are made, the respective technological measures attempt to track and control copying, and thus prevent the user from surpassing the right he has been granted. Examples of such copy control measures are serial copy management systems for audio digital taping devices, and scrambling systems for DVDs that prevent third parties from reproducing content without authorization.”

¹¹See, e.g., <http://www.lessig.org/content/standard/0,1902,22914,00.html>

¹²See the Chamberlain and Lexmark cases, for instance.

The proposed provisions are s.65A and s.65B. Section 65A deals with technological measures, while 65B deals with rights management information. These provisions quite unnecessary.¹³ India is not a signatory to the WIPO Copyright Treaty (WCT) which requires such provisions.¹⁴

TPMs have been shown to be harmful for consumers, creators, and publishers.¹⁵ There is also sufficient evidence that TPMs do not really decrease copyright infringement, and perversely enough, through unintended consequences, end up increasing piracy. The lack of TPMs was one of the factors for Consumers International's ranking of India as the the fairest of the copyright regimes they surveyed (in both 2009 and 2010).

4.1.1. Positive aspects of the proposed amendments

It must be mentioned that this provision clearly takes care of three major problems with the way TPMs have been implemented by the Digital Millennium Copyright Act (DMCA) in the United States:

- In s.65A(1) it makes co-extensive the protection offered by TPMs to that offered by copyright law itself (since it has to be “applied for the purpose of protecting any of the rights conferred by this Act”). Thus, presumably, TPMs could not be used to restrict access, only to restrict copying, communication to the public, and that gamut of rights.
- In s.65A(1) and 65A(2) it makes co-extensive the exceptions granted by copyright law with the exceptions to the TPM provision. Section 65A(1) states that the act of circumvention has to be done “with the intention of infringing ... rights”, and s.52(1) clearly states that those exceptions cannot be regarded as infringement of copyright. And s.65A(2)(a) states that circumventing for “a purpose not expressly prohibited by this Act” will be allowed.
- It does not criminalise the manufacture and distribution of circumvention tools (including code, devices, etc.).

Furthermore, the definition of RMIs in s.2(xa) specifically excludes “any device or procedure intended to identify the user ”, and hence protects privacy of users.

¹³There has been no public demand in India for TPMs to be introduced, and the pressure has come mostly from the United States in the form of the annual “Special 301” report.

¹⁴As has been pointed out earlier, the way that the WCT responds to digital technologies has come under severe criticism, and they do not reflect deeper questions about the political economy of copyright and culture in the digital era when production, distribution and reproduction are all cheaper than before. The WCT insists on viewing the digital technologies in general and the Internet in specific as a threat. That completely disregards the huge opportunities presented by the such technologies for equitable access to knowledge (including access to the print impaired and other persons with disabilities, as pointed out below in the next section).

¹⁵Unintended Consequences of the DMCA: <https://www.eff.org/wp/unintended-consequences-under-dmca>

4.1.2. Negative aspects of the proposed amendments

This provision, despite the seeming fair-handed manner in which it has been drafted, still fails to maintain the balance that copyright seeks to promote:

- The Bill presumes that every one has access to all circumvention technology.¹⁶ This is simply not true. In fact, Spanish law (in Article 161 of their law) expressly requires that copyright holders facilitate access to works protected by TPM to beneficiaries of exceptions of copyright. Thus, copyright holders who employ TPMs should be required to:
 - Tell their customers that circumvention of the TPM for a legitimate purpose is permissible, and how they can be contacted if the customer wishes to do so
 - Upon being contacted, aid their customer in making use of their rights / the exceptions and limitations in copyright law
 - Uphold fair use and the public domain on their own, with penalties if they do not.¹⁷
- The Bill criminalises both circumvention of TPMs as well as removal of Rights Management Information (RMI), which is highly disproportionate to the nature of the offence, and especially when most circumvention of TPMs and removal of RMI, even if infringing as per the law, are for legitimate purposes.¹⁸
- Burdensome record-keeping requirements have been placed on those ‘facilitating’ circumvention, without any clear guideline on what such facilitation involves, and thus could unwittingly implicate those who seek to ensure interoperability (which is in fact protected and promoted under s.52(1)(ab) and 52(1)(ad)) and especially who do so using distributed and collaborative models of software development (which is how most software is created).

4.1.3. Recommendations

- Since India is not bound by the WCT, we should not implement TPMs, nor RMIs if there are associated penalties, which in essence seek to provide legal protection to what are essentially extra-legal powers in the hands of publishers and distributors. They are harmful because technology cannot

¹⁶Thus while a Film & Television Institute of India professor who wishes to use a video clip from a Blu-Ray disc can legally do so, practically she might not be able to because of the TPM. Nothing in the law compels TPM beneficiaries to ensure that the blind student who wishes to circumvent TPMs because she has no other way of making a document work with her screen reader is actually enabled to take advantage of the leeway the law seeks to provide.

¹⁷Brazil seeks to introduce such an amendment to its law. See Nate Anderson, *US Could Learn from Brazilian Penalty for Hindering Fair Use*, <http://arstechnica.com/tech-policy/news/2010/07/us-could-learn-from-brazilian-penalty-for-hindering-fair-use.ars>.

¹⁸In an earlier part of this response document, it has been noted that some acts, while within the spirit of the Act, are not excepted by s.52(1). An instance would be usage of a very short clip from a copyrighted film by a professor at an academic conference for purely educational purposes. That is surely not meant to be criminalised, but under the current Act, it is.

differentiate between legitimate (non-infringing) infraction of copyright laws (namely, fair dealings) and illegitimate (infringing) infraction of the law.

- Without prejudice to the above, at a minimum, provisions should be incorporated to address the three shortcomings pointed out above (i.e., (1) introducing obligations on TPM-beneficiaries, including the obligation to safeguard fair use and the public domain; (2) de-criminalization of circumvention; and (3) removal of burdensome record-keeping).

4.2. Provisions for persons with disabilities

4.2.1. Positive aspects of the proposed amendments

- There is finally an attempt at addressing the difficulties that copyright law presents for persons with disabilities because of the frequent inaccessibility of most copyrighted works.

4.2.2. Negative aspects of the proposed amendments

- The exception in s.52(1)(zb) specifically requires that the formats be ‘specially designed only for the use of persons suffering from a visual, aural or other disability’. Such a requirement might have worked around three decades ago, but since then, along with the fascinating advancement of technology (such as screen readers) many formats that are not specifically designed for persons with disabilities have also been made accessible. Thus audio books, large font books, electronic books, can all be used by persons with disabilities. But they have not specially designed for persons with disabilities (with the exception of the DAISY e-book format).
- For instance, there are no specially designed formats to enable the reading of a book by persons with cerebral palsy, dyslexia, or for watching of a video by a person with hearing impairment.
- The proposed clause might well violate Art. 14 of the Constitution, since it discriminates between persons who know Braille and sign language, and those who do not, as well as Art. 21A (free and compulsory education) since the Copyright Act doesn’t sufficiently provide for the education of children with disabilities, and Art. 41 which requires the State to provide for the right to work, to education and to public assistance in certain cases, including in case of disablement.
- By contrast, the Chilean copyright law, for instance, allows acts “for the benefit of people with visual, hearing, or other disabilities that prevent normal access to the work, provided that such use is directly related to the disability in question”. Such a provision, based on the purpose of use instead of the format, is much more beneficial.
- There is a separate provision for compulsory licensing for formats which are not specially designed for the use of persons with disabilities. However, this provision has many problems.
 - It requires that any organizations wishing for such licences be registered charities and have to be disability organizations registered under the

Persons with Disabilities Act. Needless to say, there are hardly any organizations that qualify. Furthermore, many organizations that assist in making copyrighted works accessible would not be registered as charities nor disability organizations. Many schools dealing with children with disabilities, for instance would not qualify. Furthermore, many individuals (from teachers, parents and siblings, owners of cybercafes with scanners) often help in making books accessible but wouldn't fulfil the requirements of this section.

- ▶ There is no absolute time limit imposed on the Copyright Board to make a decision. The provision requires the Copyright Board to dispose of the applications "as expeditiously as possible" and to endeavour to do so "within a period of two months". Given that the Board meets few times, the requirement of expeditious decision is not sufficient. Even if it is assumed that all applications are dismissed within two months, that is an unacceptably long delay, for schoolchildren with disabilities (for instance) who have to remain without study materials not only for the period it takes to get the licence, but also wait for the conversion. This delay would be greatly reduced by following a statutory licensing model, while still enabling rightsholders to be remunerated equitably.

4.2.3. Recommendations

- The fair dealing exception should cover all non-commercial reproduction, adaptation, communication to the public, specifically meant for persons with disabilities without regard to the format, and should be exercisable by all as long as sufficient care is taken to ensure that the beneficiaries of the reproductions, adaptations, communications, etc., resulting from this provision are persons with disabilities.
- Statutory licensing be introduced to cover all commercial adaptation, reproduction, communication to the public, for the purpose of persons with disabilities that prevent their equal or similar enjoyment of the work. This should apply to anyone with an interest in making such works available to persons with disabilities, regardless of whether they do so as organizations or as individuals.

4.3. Version recording

4.3.1. Positive aspects of the proposed amendments

- The provision has now been moved out of s.51 (on fair dealing and specific exceptions to the law), and has made into a statutory licence in s.31C, where it logically belongs.
- Clarity has been brought in as to whether the requirements of sound recording having been made with licence/consent of the owners and of notice/payment, etc., are to be read disjunctively (separately) or conjunctively (together). Now the provision no longer divides those requirements as it did

earlier, and makes it clear that each of the requirements of s.31C have to be met individually.

4.3.2. Negative aspects of the proposed amendments

There are now new requirements such as:

- The increase of the waiting period (from time of release of the original sound recording) from two years to five years.
- The need for the medium of recording to be the same as the previous medium.
- The allowance for alterations that were ‘reasonably necessary for adaptation’ has now changed to ‘technically necessary for the purpose of making of the sound recording’. Furthermore, the amendments make it clear that the underlying ‘literary or musical work’ cannot be altered. This would greatly limit the scope of the provision.

4.3.3. Recommendations

- It must be made clear that courts must not decide whether something is a cover version or not depending on aesthetic judgment of the artistic merits of an “adaptation”. Whether this changes under the amended law is unclear.
- The prohibition on any alteration in the literary or musical work which has not been made previously by or with the consent of the owner of rights should be removed, along with restrictions on media of the sound recording.

5. Annexure I: Details of Signatories

5.1. All India People’s Science Network

AIPSN integrates voluntary organizations committed to the use of science for promoting equitable and sustainable development in over 20 states of India. Currently, the network has 40 organizations from over 20 states, reaching an estimated 18, 000 villages spread over 300 districts of the country. *Dr. Amit Sen Gupta (ctdds@vsnl.com), D-158, Lower Ground Floor, Saket, New Delhi – 110017*

5.2. Alternative Law Forum

ALF was started in March, 2000, by a collective of lawyers with the belief that there was a need for an alternative practice of law. It recognizes that a practice of law is inherently political, and is committed to a practice of law which will respond to issues of social and economic injustice. ALF perceives itself simultaneously as a space that provides qualitative legal services to marginalized groups, as an autonomous research institution with a strong interdisciplinary approach working with practitioners from other fields, as a public legal resource using conventional and unconventional forms of creating access to information, as a centre for generating quality resources that will make interventions in legal education and training, and as finally a platform to enable collaborative and creative models of knowledge production. *Siddharth Narrain*

(sid@altlawforum.org), 122/4 Infantry Road, Bangalore – 560001, Phone: +91 80 22865757

5.3. Centre for Internet and Society

Founded in 2008, the Centre for Internet and Society seeks to critically engage with concerns of digital pluralism, public accountability and pedagogic practices, in the field of Internet and Society, with particular emphasis on South-South dialogues and exchange. Through multidisciplinary research, intervention, and collaboration, CIS attempts to explore, understand, and affect the shape and form of the internet, and its relationship with the political, social, and cultural milieu of our times. *Pranesh Prakash (pranesh@cis-india.org), 194, 2-C Cross, Domlur 2nd Stage, Bangalore – 560071, Phone: +91 80 40926283*

... [rest of signatories details] ...

6. Endnotes