

India Report - IP Watch List 2009

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Pranesh Prakash

Jeremy Malcolm

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1. India

1.1. Legal background

- **Copyright legislation:** Copyright Act, 1957 (“ICA”); Copyright Rules, 1958 (“ICR”)
- **Other relevant laws:** Information Technology Act, 2000 (“ITA”); Constitution of India, 1950 (“Constitution”)
- **Case Law:** Civic Chandran v Ammini Amma (1996 PTR 142 (Kerala High Court)); Penguin Books v India Book Distributors (1984)
- **Copyright treaties:** Berne Convention; Berne Appendix TRIPS; WCT; WPPT
- **Other relevant treaties:** Universal Copyright Convention; Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms; Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties; Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations

1.2. Scope and duration of copyright

- **Is the period of protection of each type of copyright work limited to the minimum duration mandated by the Berne Convention?**
 - NO (ICA ss.22-29). In case of literary, dramatic, musical or artistic works (other than a photograph) India provides protection for 60 years from the beginning of the calendar year next following the year in which the author dies (if published within the lifetime of the author). In case of photographs, India provides protection for 50 years from the next calendar year after. For cinematographic works, India provides protection for 60 years from the beginning of the calendar year after publication. For sound recordings, India provides protection for 60 years from publication - this is a separate and additional category to the “musical works” described in the Berne Convention.
- **Must a work be fixed in some material form before copyright attaches?**
 - YES (ICA s.2(f), (ffc), (h), (o), (p), (xx)). There is no single provision requiring this, but by implication, as the definition of literary, dramatic, musical and artistic works; cinematograph films; sound recordings; and computer programmes are all such that fixation is implicit. Also, such a requirement has been read in through case law.
- **Is the exercise of copyright subject to competition law, for example by compulsory licensing or regulation of royalties in the case of copyright holders who misuse their monopoly power?**
 - YES (ICA ss.31, 31A). While not directly subject to a statute of “competition law”, there are two provisions in the Copyright Act, ss. 31 and 31A, that provide for compulsory licences in works withheld from the public and in unpublished Indian works, if the Copyright Board so deems, after hearing both sides.
- **Is the exercise of copyright subject to compliance with a bill of rights or similar human rights instrument, for example by preventing copyright from being used to stifle protected speech?**
 - LIMITED (Constitution Arts. 19(1)(a), 19(2)). While the Freedom of Speech and Expression is guaranteed by Article 19(1)(a) of the Indian Constitution, the interface between copyright and the Constitutional right to free speech has not been tested in court, nor are there any authoritative pronouncements on it.
- **Does the compilation of a database of non-original material fall outside the scope of copyright?**
 - YES (ICA s.2(o)). Or rather, a non-original compilation of a database of materials falls outside the scope of copyright, even though a “literary database” (which satisfies the requirement of originality) is within the scope of copyright.
- **Do exceptions and limitations in national copyright law prevail over contracts purporting to limit or override them?**

- ▶ YES. There is no such ruling directly on copyright law, but there are cases which state that statutory rights may not be limited by contract, unless the statute indicates otherwise.

1.3. Freedoms to access and use

1.3.1. By Home Users

- **Is time, space and format shifting allowed (such as ripping music from CD to an MP3 player)?**
 - ▶ YES (ICA ss.52(1)(a), 14(d), 14(e)). There is a broad exception covering fair dealing of literary, dramatic, musical or artistic work for the purposes of private use, including research. This exception doesn't cover sound recordings or cinematograph films. If format shifting is taken to be an adaptation of format, then sound recordings and cinematograph films will be considered as allowed, since the right of adaptation is not a right vested in the copyright holder of sound recordings and cinematograph films. Further, in other areas of law (like tax), the authorities have accepted time-shifting equipment, and in everyday life time/space/format-shifting continues unabated.
- **Can consumers reproduce copyright material for their own use in the original format, for example for backup purposes?**
 - ▶ LIMITED (ICA s.52(1)(a)). There is a broad exception which states that fair dealing of literary, dramatic, musical or artistic work for the purposes of private use, including research, is not copyright infringement. This doesn't seem to cover sound recordings and cinematograph films.
- **Can works be communicated to a limited public (for example, family and friends) without infringing copyright?**
 - ▶ LIMITED (ICA ss.52(1)(f) and 52(1)(k)). While no such broad exception is mentioned in the statute, a number of different provisions exist. The statute includes all of these as fair dealing: "the reading or recitation in public of any reasonable extract from a published literary or dramatic work; the causing of a recording to be heard in public by utilising it, in an enclosed room or hall meant for the common use of residents in any residential premises (not being a hotel or similar commercial establishment) as part of the amenities provided exclusively or mainly for residents therein; or as part of the activities of a club or similar organisation which is not established or conducted for profit; as part of the activities of a club, society or other organisation which is not established or conducted for profit." It doesn't cover cinematograph films. But "friends and family" may possibly not be considered "public".
- **In any other cases may reproductions be made on a private, non-commercial basis, for example through peer-to-peer file sharing?**
 - ▶ LIMITED (ICA s.52(1)(a)). The exception allowing fair dealings for private use is wide. But whether it would cover peer-to-peer file sharing is not clear.

- **Are blank media and computer hardware sold free of compulsory levies collected for copyright owners?**
 - YES.

1.3.2. For Education

- **Is reproduction permitted for the purposes of research or study?**
 - YES (ICA s.52(1)(a), s.52(1)(aa), and s.52(1)(p)). There is a broad exception which states that fair dealing of literary, dramatic, musical or artistic work for the purposes of private use, including research, is not copyright infringement. There is also a specific exception for reverse engineering of software for purposes of study and research.
- **Is it permissible to copy an entire work and to make any number of copies?**
 - LIMITED (ICA s.52(1)(a)). If such activity comes within the judicial reading of the phrase “fair dealing in. . .”, and that would depend on the facts of the case. Multiple copies would be more difficult to substantiate as fair dealings.
- **Does any such research and study provision cover distance and online education?**
 - LIMITED (ICA s.52(1)(h) and 52(1)(i)). Literary, dramatic, musical or artistic work may be reproduced by a teacher or a pupil in the course of instruction. “Course of instruction” doesn’t seem to be limited statutorily. But for cinematograph films and sound recordings, “the audience [must be] limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution”.
- **May translations of works be made for educational purposes?**
 - LIMITED (ICA s.32). If the translation is for educational or scholarly purposes, an application may be made to the Copyright Board after three years from the date of publication of the source material. If the language is not one in general use in “developed countries”, the application may be made in one year from the date of publication.
- **May works be reproduced and published by educational institutions in connection with systematic instructional activities?**
 - YES (ICA s.52(1)(h), and s.52(1)(i)). Literary, dramatic, musical or artistic work may be reproduced by a teacher or a pupil in the course of instruction. “Course of instruction” doesn’t seem to be limited statutorily. But for cinematograph films and sound recordings, “the audience [must be] limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution”.

1.3.3. Online

- **Is hyperlinking to a Web site allowed without permission of the site’s owner?**

- YES. No provision in the Copyright Act covers this within rights of the copyright holder, so it is presumably allowed.
- **Are temporary or transient copies, incidental to a lawful use, excepted from copyright?**
 - YES (ICA ss.52(1)(a), 52(1)(aa)). This would presumably be covered by the “fair dealing for private use” exception and the temporary back-up copy of software exception.
- **Is caching of Web content permitted?**
 - LIMITED (ICA s.52(1)(a)). If it is not for private use or for research, it would not be allowed. So, caching by third-parties is presumably not allowed. But caches on one’s own computer may presumably be deemed non-infringing use.
- **Are ISPs protected from liability for infringements by third parties, because the law either does not impose liability upon intermediaries or limits their liability in certain circumstances?**
 - LIMITED (ITA s.79). Under the Information Technology Act, 2000, a network service provider is not liable if the “offence or contravention was committed without his knowledge” or if it “had exercised all due diligence to prevent the commission of such offence or contravention”.
- **Do ISPs provide Internet access without conducting filtering or monitoring for potential copyright-infringing material?**
 - YES.
- **Are the names and personal information of customers who are alleged to have engaged in copyright-infringing behaviour protected from disclosure by their ISPs?**
 - NO.

1.3.4. By content creators

- **Can a recording or performance of a musical work be made under compulsory license from the composer?**
 - LIMITED (ICA s.39). Only when the work has been withheld from the public.
- **Can copyright works be non-commercially remixed or mashed up into new works?**
 - LIMITED (ICA ss.52(1)(a)(i), 14(d), 14(e)). In the case of literary, artistic and musical works, only if it is for “private use”, since adaptation rights belong exclusively to the copyright holder. For sound recordings and cinematograph films, “adaptation” is not one of the rights granted to the rights-holder.
- **May computer software be reverse engineered for the purpose of creating interoperable software?**
 - YES (ICA ss.52(1)(ab), 52(1)(ac)). But with the requirements that: a) the person be legally in possession of such software; b) such information is not otherwise readily available.
- **Is the incidental inclusion of a work in other material permitted?**

- LIMITED (ICA s.52(1)(u)). The statute explicitly mentions such a permission only in the making of a cinematograph film. However, courts would be reluctant to include incidental inclusion as “infringement” where in the context of the entirety of the impugned work, the “infringed” part is small.
- **Is there a copyright exception for parody or satire?**
 - YES (ICA s.52(1)(a)). While there is no exception directly for “parody” or “satire”, case law (Civic Chandran) reveals that the fair dealing provision for criticism is read widely by the courts to enable it to encompass parody also.
- **Is there a copyright exception for professional advice?**
 - NO.
- **Do creators who license their work retain the moral right of attribution?**
 - YES (ICA s.57(1)(a)).
- **Does copyright law contain provisions regarding traditional knowledge/folklore?**
 - LIMITED. Through case law, “common stock ideas” are excluded from being deemed original, and hence folklore will not be copyrightable.

1.3.5. By the press

- **Is there a copyright exception for the news of the day?**
 - YES (ICA ss.52(1)(b), 52(1)(m), 52(1)(n)).
- **May copyright material be reproduced for the purposes of review and criticism?**
 - YES (ICA s.52(1)(a)(ii)). “Fair dealing” for the purposes of review and criticism would probably include partial reproduction, but might not include complete reproduction.
- **May political speeches, speeches in judicial proceedings and/or other public speeches be used for any purpose?**
 - YES (ICA ss.17(cc), 39, 52(1)(b), 52(1)(n), 52(1)(q)(iv)). While speeches in judicial proceedings may be freely reproduced, only fair dealings are allowed of other public speeches.
- **May quotations be used for any purpose?**
 - NO (ICA s.52). Only for purposes laid down in the extensive fair dealings provision.

1.3.6. By Libraries

- **May libraries copy works that cannot reasonably be obtained commercially?**
 - LIMITED (ICA s.52(1)(o)). Only public libraries may do so, and may make up to three copies of such works.
- **May libraries copy works for users for the purpose of research or study?**

- ▶ LIMITED (ICA s.52(1)(a)). While no explicit rule exists for this, this would probably fall under the fair dealings for private-use/research exception.
- **Is the reproduction of unpublished works by libraries permitted?**
 - ▶ LIMITED (ICA ss.52(1)(p), 31A). The unpublished work must be kept in a library, museum, or other public institution, and only after sixty years from the death of any known author. Libraries may also apply for a compulsory licence under s.31A.
- **Are libraries allowed to make preservation or archive copies of materials in their collections?**
 - ▶ NO (ICA s.52(1)(a)). No provision directly covers this, though some argue that it would come under s.52(1)(a) as being for the purposes of “private use, including research”.

1.3.7. By disabled users

- **Is it permissible to copy or adapt work for the use of those with disabilities?**
 - ▶ LIMITED (ICA s.52(1)(a)). If it is for private use, yes, as it would be fair dealing.

1.3.8. In public affairs

- **Are laws excluded from copyright?**
 - ▶ LIMITED (ICA s.52(1)(q)(ii)). They are under copyright of the Government of India, but they may be freely reproduced, provided some original commentary is added.
- **Are other governmental works excluded from copyright?**
 - ▶ LIMITED (ICA s.52(1)(q)). No, they are not excluded from copyright, but wide fair dealings rights are granted with respect to a variety of governmental works.
- **Is there a copyright exception for use of material in judicial proceedings?**
 - ▶ YES (ICA s.52(1)(c)).

1.4. Freedoms to share and transfer

- **May copyright works be freely offered for commercial rental?**
 - ▶ LIMITED (ICA ss.14(d)(ii), 14(e)(ii)). While literary, musical, and artistic works may freely be rented out, the copyright owners of cinematographic films and sound recordings have the sole right to commercial rental.
- **May a person in lawful possession of a copyright work distribute, communicate or make it available without reference to the copyright owner?**
 - ▶ NO (ICA s.14).
- **May works be dedicated to the public domain without legal formality besides an overt act of relinquishment?**

- NO (ICA s.21). A notice has to be given to the Registrar of Copyright in a prescribed manner.
- **Are orphaned works treated differently in the law to other copyright works?**
 - YES (ICA ss.31, 31A). Sections 31 read with 31A of the Copyright Act allow for compulsory licensing of works that aren't currently in publication.
- **Is parallel importation permitted?**
 - LIMITED (ICA ss.51(b)(iv), 53, 14(a)(ii)). Importation of “copies made out of India of the work which if made in India would infringe copyright” is not permitted. Thus, by a plain reading of the statute, only infringing copies are prohibited from being imported. Since parallel imports are non-infringing copies, they are perfectly legal. However, some court rulings have complicated this.
- **Are there incentives for the use, production and dissemination of free and open source software?**
 - LIMITED. It is not uniform. There are things such as the e-Courts project that encourages usage of FOSS in the judiciary.
- **Are there incentives for the use, production and dissemination of open access material?**
 - LIMITED. The University Grants Commission has mandated a policy under which masters and doctorate theses must be published online in an e-repository.

1.5. Administration and enforcement

- **What is the maximum penalty for copyright infringement for an individual?**
 - Rs. 200,000 and a maximum imprisonment of 3 years (ICA ss.63, 63A).
- **What is the maximum penalty for copyright infringement for a corporation?**
 - Same as above (ICA s.69).
- **Is registration of copyright required before it may be enforced in court?**
 - NO (ICA s.48). Registration only creates a (rebuttable) prima facie presumption of validity.
- **Is there a distinction between personal versus (large-scale) commercial use?**
 - YES (ICA ss.52(1)(a), 63(b) proviso). Fair dealings for the purposes of private use are not treated as copyright infringement.
- **Is the creation or distribution of devices that can circumvent technological protection measures (TPM) permitted?**
 - YES. There is no statutory bar on circumvention devices.
- **Is the use of such devices by consumers permitted for any purpose that would not infringe copyright?**
 - YES. Since there is no bar, it is presumably allowed.

- **Are the operations of copyright collectives subject to public oversight?**
 - YES (ICA ss.33(4), 33(5), 36, 52B, and ICR rules 14A-P). The Central Government has oversight and societies must submit financial returns.
- **Is copyright enforced only through mechanisms provided by law, rather than through private intermediaries?**
 - YES. Intermediaries such as ISPs are not formally involved in the enforcement of Indian copyright law.
- **Is the enforcement of copyright restricted to civil or private law, rather than attracting criminal sanctions?**
 - NO (ICA ss.55, 63-70).
- **Are damages for copyright infringement based on the loss sustained, rather than by a preestablished or statutory damages award?**
 - YES (ICA s.55). It is up to the discretion of the court.
- **Is there provision to penalise the wrongful allegation of copyright infringement?**
 - YES (ICA s.60).

1.6. Conclusions

India's Copyright Act is a relatively balanced instrument that recognises the interests of consumers through its broad private use exception, and by facilitating the compulsory licensing of works that would otherwise be unavailable. Neither has India rushed to accede to WIPO Copyright Treaty, which would expose India's consumers to the same problems experienced in other jurisdictions which have prohibited the use of circumvention devices to gain access to legally-acquired copyright material.

It is true that copyright infringement, particularly in the form of physical media, is widespread in India. However this must be taken in the context that India, although fast-growing, remains one of the poorest countries in the world. Although India's cultural productivity over the centuries and to the present day has been rich and prodigious, its citizens are economically disadvantaged as consumers of the culture to which they have contributed.

To take just one example, for two decades the law of the Philippines provided: "Whenever the price of any textbook or reference book duly prescribed by the curriculum... has become so exorbitant as to be detrimental to the national interest... such book or other written material may be reprinted by the government or by a printer," on terms which included the payment of royalties to the copyright owner.¹ In 1997, this provision, which represented a balance between the national interest of the citizens of the Philippines and the economic interest of rights holders, was repealed. As even the Special 301 Report acknowledges,

¹"Presidential Decree 1203 of 1977" (n.d.), http://www.lawphil.net/statutes/presdecs/pd_1977/pd_1203_1977.html.

the result has not been to the benefit of rights holders. Rather, the copying of textbooks has simply been driven underground and become a 'pirate' activity.

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Presidential Decree 1203 of 1977 (n.d.). http://www.lawphil.net/statutes/presdecs/pd1977/pd_1203_1977.html.