

IP Watch List 2012

India Report

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1. Legal background

Copyright legislation	Copyright Act, 1957 ("ICA")
Patent legislation	Patents Act, 1970 ("IPA")
Other relevant laws	<ul style="list-style-type: none">• Copyright Rules, 1958 ("ICR")• Information Technology Act, 2000 ("ITA")• Constitution of India, 1950 ("Constitution")• Civic Chandran v. Ammini Amma (Kerala High Court, 1996 PTR 142 (Kerala High Court, 1996) ("Civic Chandran"))• Penguin Books v. India Book Distributors (Delhi High Court, 1984) ("Penguin Books")

	<ul style="list-style-type: none"> • Warner Bros. v. V.G. Santosh (Delhi High Court, 2009) ("Warner Bros.")
Copyright treaties	Berne Convention; Rome Convention; Berne Appendix; TRIPS; WIPO Internet treaties; Paris Convention
Other treaties and trade agreements	<ul style="list-style-type: none"> • 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 (and Additional Protocol) • Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations

2. Scope and duration of copyright

Question	Response	Reference
Does copyright end immediately after the minimum period mandated by the Berne Convention?	No. 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. (This is sought to be extended to life of the photographer plus 60 years through an	ICA ss.22-29, TRIPS

Question	Response	Reference
	<p>amendment currently underway.) For cinematographic works, India provides protection for 60 years from the beginning of the calendar year after publication. For sound recordings (a separate and additional category to the "musical works" described in the Berne Convention, and equivalent to "phonograms" in TRIPS), India provides protection for 60 years from publication.</p>	
<p>Has a court or tribunal ever limited the exercise of IP rights under competition law, for example by imposing compulsory licensing or regulating royalties charged by dominant rights holders?</p>	<p>Yes. 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.</p>	<p>ICA ss.31, 31A</p>
<p>Has a court or tribunal ever limited the exercise of IP rights pursuant to a bill of rights or similar human rights instrument, for example by preventing copyright from being used to stifle protected speech?</p>	<p>In part. 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</p>	<p>Constitution Arts. 19(1) (a), 19(2), Civic Chandran case</p>

Question	Response	Reference
	<p>on it. In one case the Kerala High Court ruled against an injunction on a parody of a play on freedom of speech grounds, without explicitly invoking Article 19(1)(a) of the Constitution or performing constitutional analysis. In that case, it said: "the injunction ordered will really interfere with the freedom of expressing those ideas in an accepted art form. As the matters dealt with are of current importance, the prevention by injunction of the printing and publication and staging would be illegal and unjust."</p>	
<p>Can databases of non-original material be reproduced without infringing a copyright or sui generis database right?</p>	<p>Yes. 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.</p>	<p>ICA s.2(o)</p>
<p>Are rights holders prohibited from excluding user rights under copyright law?</p>	<p>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.</p>	

Question	Response	Reference
Is computer software excluded from the scope of patentable subject matter?	In part.	

3. Freedoms to access and use

3.1. By Home Users

Question	Response	Reference
Is there any general user right that is based on a set of balancing criteria, such as a "fair use" right?	In part. While a "fair use" with a set of balancing criteria is not present in the Act, 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.	ICA ss.52(1)(a)
Is time, space and format shifting allowed (such as ripping music from CD to an MP3 player)?	In part. 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 cover sound recordings and 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 adapta-	ICA s.52(1)(a), 14(d), 14(e)

Question	Response	Reference
	<p>tion 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.</p>	
<p>Can consumers reproduce copyright material for their own use in the original format, for example for backup purposes?</p>	<p>In part. 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. It may be argued that reproduction is included in "fair dealing" as long as it is for purposes such as back-up, etc. This is explicitly stated in case of computer programs. One is allowed to "make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer programme for the purpose for which it was supplied", and to make "copies or adaptation of the computer programme from a personally legally obtained</p>	<p>ICA ss.52(1)(a) and 52(1)(ab)</p>

Question	Response	Reference
	copy for non-commercial personal use".	
Can works be communicated to a limited public (for example, family and friends) without infringing copyright?	<p>In part. 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."</p> <p>It doesn't cover cinematograph films. But friends and family may possibly not be considered "public".</p>	ICA ss.52(1)(f) and 52(1)(k)

3.2. For Education

Question	Response	Reference
May students copy works for private research or study?	Yes. 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.	ICA s.52(1)(a), s.52(1)(aa), and s.52(1)(p)
Does any such research and study provision cover distance and on-line education?	In part. 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".	ICA s.52(1)(a)
May translations of works be made for educational purposes?	In part. Not under the education fair dealings provision, since that only sanctions "reproduction" and not adaptation/translation. But if the translation is for educational or scholarly purposes, an application may be made to the Copyright Board after three years from the	ICA s.32, s.52(1)(h)

Question	Response	Reference
	<p>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.</p>	
<p>May educators copy works for use in the classroom?</p>	<p>In part. Only to a limited extent. Literary, dramatic, musical or artistic works (though not sound recordings or cinematograph films) may be reproduced by a teacher or a pupil in the course of instruction. However, publication would come under a separate provision, which requires that the matter to be included in the publication be primarily "non-copyright matter" and "bona fide intended for the use of educational institutions". In such a case, "short passages from published literary or dramatic works, not themselves published for the use of educational institutions" may be use fairly, "provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years".</p>	<p>ICA s.52(1)(g) and 52(1)(h)</p>

3.3. Online

Question	Response	Reference
<p>Are temporary or transient copies, incidental to a lawful use, excepted from copyright?</p>	<p>Yes. This would presumably be covered by the "fair dealing for private use" exception and the exception covering the temporary backing-up of a copy of software.</p>	<p>ICA ss.52(1)(a), 52(1)(aa)</p>
<p>Does the law exclude or limit the liability of intermediaries such as ISPs for copyright infringements carried out on their network?</p>	<p>In part. This is a very complex issue. While the Information Technology Act has a provision for exemption of intermediary liability under specific circumstances, it excepts that provision from restricting any person from exercising any right conferred under the Copyright Act. That having been said, India's copyright law itself does not impose liability on third parties, unless they infringe wilfully or with reasonable reasons to believe that they are infringing. Given the number of contradictory viewpoints, for the time being it may be presumed that ISPs are protected from liability. However, non-ISPs may not be. In a recent case, a single judge of the Delhi High Court ruled that MySpace will be liable for user-uploaded content, even though it removed infringing</p>	<p>ITA s.79, 81; ICA s.50</p>

Question	Response	Reference
	content promptly upon complaint of infringement (even without a court order). This case is currently in the appeals stage.	
Is Internet access free of ISP filtering or monitoring for potential copyright-infringements?	In part. There have been a spate of cases in the past year which have aimed at getting ISPs to block websites. Most of these have resulted in John Doe orders, which do not permit or require ISPs to block websites, but have been used by entertainment companies to get ISPs (in some cases a subsidiary of a single parent company) to block websites. In a case that is still ongoing, the Calcutta High Court has ordered multiple ISPs to block Songs.pk. In another case that is in the appeals stage, a single judge of the Delhi High Court held MySpace guilty of copyright infringement for content uploaded by its users, even though it removed the content upon complaint, with the court noting that proactive pre-screening of content would be require.	

3.4. By content creators

Question	Response	Reference
Is there any protection for consumers who non-commercially remix or mash up copyright works?	In part. 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.	ICA ss.52(1)(a)(i), 14(d), 14(e)
May computer software be reproduced or transformed for the purpose of reverse-engineering interoperable software?	Yes. The requirements for reverse-engineering of software are that: a) the person be legally in possession of such software; b) such information is not otherwise readily available.	ICA ss.52(1)(ab), 52(1)(ac)
Is the incidental inclusion of a work in other material permitted?	Yes. Since copyright is defined as meaning certain exclusive rights "in respect of a work or any substantial part thereof", it follows that incidental (non-substantial) inclusion of one work in any other would be permitted. Further, the statute explicitly mentions such a permission in the making of a cinematograph film by allowing "the inclusion in a cinematograph film of any artistic work permanently situate in a public place or any	ICA s.14, s.52(1)(u)

Question	Response	Reference
	premises to which the public has access; or any other artistic work, if such inclusion is only by way of background or is otherwise incidental to the principal matters represented in the 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 are copyright exception for parody or satire?	Yes. While there is no exception directly for "parody" or "satire", case law reveals that the fair dealing provision for criticism is read widely by the courts to enable it to encompass parody also.	ICA s.52(1)(a), Civic Chandran

3.5. By the press

Question	Response	Reference
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. "Fair dealing" for the purposes of review and criticism is permitted. The extent of reproduction allowed is not specified in the statute, thus stress is given by courts to the dealing being "fair".	ICA s.52(1)(a)(ii)

Question	Response	Reference
May quotations be used for any purpose?	Yes. Quotations may only be used for purposes laid down in s.52 of the Copyright Act, unless the quotation is 'non-substantial', in which case it may be used for any purpose.	ICA s.14, 52

3.6. By Libraries

Question	Response	Reference
May libraries copy works if they cannot reasonably be obtained commercially?	Yes. Only 'public libraries' may do so, and may make up to three copies of such works, only if "such book is not available for sale in India".	ICA s.52(1)(o)
May librarians copy works for users for the purpose of research or study?	In part. While no explicit rule exists for this, this would probably fall under the fair dealings for private-use/research exception.	ICA s.52(1)(a)
Are libraries allowed to make preservation or archive copies of materials in their collections?	In part. 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 of the unpublished work under s.31A. Additionally, a clause is proposed to be added that allows libraries to create digital copies for preservation.	ICA ss.52(1)(p), 31A
Can lending libraries operate without incurring	Yes. But this is so only for literary, dramatic, and artistic works. Lending	s.14(a), ICA

Question	Response	Reference
public lending rights fees to copyright owners?	libraries for videos and for songs are technically illegal if the copyright owners' permissions are not taken, though they are extremely widespread and common.	

3.7. By disabled users

Question	Response	Reference
Is it permissible to copy or adapt work for the use of those with disabilities?	In part. If it is for private use, yes, as it would be fair dealing. But generally persons with disabilities are not in a position to copy or adapt a work by themselves. Amendments that have been proposed will change the law in this regard.	ICA s.52(1)(a)

3.8. In public affairs

Question	Response	Reference
Are laws excluded from copyright?	Yes. They are under copyright of the Government of India, but they may be freely reproduced, provided some original commentary is added. However, a judgment of the Indian Supreme Court refers to laws and judgments as being in the "public domain".	ICA s.52(1)(q)(ii), EBC v. Modak
Are other governmental works either excluded from copyright, or routinely shared under permissive licences?	In part. No, they are not excluded from copyright, but some fair dealings rights are granted with respect to	ICA s.52(1)(q)

Question	Response	Reference
	some varieties of governmental works.	
Are the results of publicly funded research required to be published under an open access licence?	No. Some public organizations that fund research may have such requirements, though.	

4. Freedoms to share and transfer

Question	Response	Reference
Do copyright owners have the right to release their works to the public domain, without any limitation on how those works may be used?	Yes. A notice has to be given to the Registrar of Copyright in a prescribed manner.	ICA s.21
Can public domain works be used without the need for any payment or registration of the use?	Yes.	
Does the law make special provision for the legal use of orphaned works?	No. Sections 31 read with 31A of the Copyright Act allow for compulsory licensing of works that aren't currently in publication, even if they aren't orphan works. Also, the prescribed procedure (under s.31A) must be followed to establish that the copyright owner cannot be found.	ICA ss.31, 31A
Is parallel importation of copyright works permitted?	In part. Importation of "copies made out of India of the work which if made in India would infringe copyright" is	ICA ss.51(b)(iv), 53, 14(a)(ii), Penguin Books case, Eurokids case and Warner Bros. case

Question	Response	Reference
	<p>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. There is no exclusive right given in India to sell copies of a literary, dramatic or artistic work: only one to issue copies (not already in circulation) to the public. In 1984, when the copyright covered the exclusive right 'to publish' a work, a single-judge bench of the Delhi High Court ruled that only licensees have the right to import copyrighted material into India as that is 'publishing'. The law was changed in 1994, yet in 2005 a single judge of the Delhi High Court upheld the 1984 decision, without realizing that the law had changed. On videos and sound recordings, a Delhi High Court case in 2009 ruled that importation of a DVD and subsequent rental of that DVD was not permitted by the Act because cinematograph films and sound record-</p>	

Question	Response	Reference
	ings are not covered by the doctrine of first sale as per s.14 of the ICA.	
Are there national programmes or policies to promote the use, production or dissemination of openly-licensed material such as free and open source software or open educational resources?	No. There have been some initiatives at the level of various states, including Tamil Nadu, Kerala, and a few others. There are also some FOSS research centres that have been funded by the Central government. Some projects (such as the e-Courts project) also promote the usage of FOSS. However, there is no national-level law/policy on the usage of FOSS.	
Are there national programmes or policies that specify or promote the use of open document formats?	Yes. There is a 'National Policy on Open Standards in e-Governance' that mandates the use of (royalty-free) open standards for all e-governance purposes (while providing for exceptions in case such standards aren't available). There is also a technical standards list (Interoperability Framework for E-Governance), which is in the process of being finalized, in the drafts of which open document formats have been mentioned.	National Policy on Open Standards in e-Governance

5. Administration and enforcement

Question	Response	Reference
What is the maximum penalty for copyright infringement for an individual?	Rs.200000 (around USD 4000), and a maximum imprisonment of 6 months (for first offence) and 3 years (for second and subsequent offences)	ICA ss.63, 63A
What is the maximum penalty for copyright infringement for a corporation?	Same as above. Rs.200000 (around USD 4000), and a maximum imprisonment of 6 months (for first offence) and 3 years (for second and subsequent offences).	ICA ss.69, 63, 63A
Is innocent infringement of IP treated differently by the law?	In part. Only for criminal sanctions, since mens rea is required to be proven for criminal sanctions. The proviso to s.63(b) allows for a jail term of less than six months and a fine of less than INR 50,000 in cases where the wilful infringement was not for gain in the course of trade or business. But innocent infringement is not condoned insofar as civil penalties are concerned. Though, fair dealings for the purposes of private use are not treated as copyright infringement.	ICA ss.52(1)(a), 63(b) proviso
Is the creation or distribution of devices that can circumvent technological protection mea-	Yes. There is no statutory bar on the creation or distribution circumvention devices. How-	

Question	Response	Reference
sures (TPM) permitted, where such devices can be used for legal purposes?	ever, this is subject to change depending on the proposed amendments to the copyright law.	
Is the use of such devices by consumers or intermediaries permitted in the legal exercise of user rights?	Yes. Even the proposed amendment allows for consumers to use anti-circumvention devices if done for the purposes of legal exercise of copyright exceptions (such as fair dealing).	
Does national copyright or consumer protection law require that the effect of TPMs distributed with copyright works be disclosed to consumers?	No. Since there is no bar, this is not required. Even the proposed amendments, which bring about a TPM regime, do not require such disclosure.	
Are there cases in which the availability of injunctive relief for IP infringement is limited by the law on public policy grounds?	In part. There is no uniformity in court cases in this regard. In one case the Kerala High Court ruled against an injunction on a parody of a play on freedom of speech grounds, without explicitly invoking Article 19(1)(a) of the Constitution or performing constitutional analysis. In that case, it said: "the injunction ordered will really interfere with the freedom of expressing those ideas in an accepted art form. As the matters dealt with are of current importance, the prevention by	Civic Chandran case

Question	Response	Reference
	injunction of the printing and publication and staging would be illegal and unjust."	
Does the law protect a user's Internet access from being suspended for alleged copyright infringement, except after a hearing in court?	In part. Intermediaries such as ISPs are not formally involved in the enforcement of Indian copyright law.	
Are criminal sanctions limited to cases of large-scale commercial counterfeiting?	No.	ICA ss.63, 63A
Are damages for copyright infringement limited to the loss sustained, rather than a pre-established or statutory damages award?	In part. While for civil proceedings, damages are on the basis of loss, and in criminal proceedings there is a statutory cap on the fine that may be imposed.	ICA ss.63, 63A
Is there provision to penalise the wrongful allegation of copyright infringement?	Yes.	ICA s.60
Is there provision to penalise the obstruction of consumers' exercise of user rights?	No.	
Does the patent system allow for pre-grant opposition?	Yes.	s.25, Patent Act

6. Recent or upcoming changes

While India has not acceded to the WIPO Copyright Treaty or the WIPO Performers and Phonograms Treaty, yet a set of amendments have been proposed which would bring the Indian law in compliance with both the WCT and the WPPT.

This amendment covers a large variety of provisions, however, what is glaring is the lack of many pro-consumer provisions, with the a pro-consumer provision

that was there when the Bill was first introduced (allowing for parallel import of books) apparently having been removed from the final version. These amendments would also 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. These amendments also propose a substantial increase in the copyright term for photographs (from the current '50 years' to 'life plus 60 years').

On the positive side, the provision on fair dealings is being extended to sound recordings and video as well, and an exception is being brought about for persons with disabilities, and some small but positive changes have been made with respect to educational and library exceptions as well.

What is worse than the harmful amendments are the amendments that are needed but haven't been made, including broad amendments to safeguard internet intermediaries such as Wikipedia, provisions for user-generated content like mash-ups, etc., decriminalising individual non-commercial infringement, etc.

This amendment to the Copyright Act that has been sought to be re-introduced to the Upper House of Parliament (for the second reading, after many of the changes suggested by the Standing Committee have been made), and will presumably be laid before the house for consideration and passing in the coming Budget Session of Parliament (which will start on March 12, 2012).

7. Summary of position

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. However, the compulsory licensing provision have not been utilized so far, because of both a lack of knowledge and more importantly because of the stringent conditions attached to them. Currently, the Indian law is also a bit out of sync with general practices as the exceptions and limitations allowed for literary, artistic and musical works are often not available with sound recordings and cinematograph films. There are numerous other such inconsistencies. Positively retrogressive provisions, such as criminalisation of individual non-commercial infringement also exist.

It is unfortunate that the larger public interest in copyright-related issues are never foregrounded in India. For instance, the Standing Committee tasked with review of the Copyright Amendment Bill has held hearings without calling a single consumer rights organization, and without seeking any civil society engagement, except for the issue of access for persons with disabilities. This was despite a number of civil society organizations, including consumer rights organizations, sending in a written submission to the Standing Committee.

This lopsidedness in terms of policy influence is resulting in greater imbalance in the law, as evidenced by the government's capitulation to a handful of influential multinational book publishers on the question of allowing parallel importation of copyrighted works. Furthermore, pressure from the United States and the European Union, in the form of the Special 301 report and the India-EU free trade agreement (FTA) that is being negotiated are leading to numerous negative changes being introduced into Indian law, despite us not having any legal obligation under any treaties. Such influence only works in one direction: to increase the rights granted to rightsholders, and has so far never included any increase in user rights.

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 knowledge and cultural productivity over the centuries and to the present day has been rich and prodigious, its citizens are economically disadvantaged as consumers of that same knowledge and culture. Indeed, most students, even in the so-called elite institutions, need to employ photocopying and other such means to be able to afford the requisite study materials. Visually impaired persons, for instance, have no option but to disobey the law that does not grant them equal access to copyrighted works. Legitimate operating systems (with the notable exception of most free and open source OSes) add a very high overhead to the purchase of cheap computers, thus driving users to pirated software. Thus, these phenomena need to be addressed not at the level of enforcement, but at the level of supply of affordable works.