

Whose Copyright is Right?

Introduction

In determining how India should shape and modify its copyright policies, examining international, as well as individual nations' policies, can provide guidance. Of course, India has its own Copyright Act, 1957 ("**Act**"), but its age demonstrates an ongoing need for modification. With changes such as the arrival of digital technology, the internet, and widespread piracy of intellectual property, updates to the Act are in order. The question then becomes how the original Act should be changed in order to achieve the benefits, or avoid the pitfalls, of non-Indian copyright legislation.

Internationally, the World Intellectual Property Organization ("**WIPO**") and the Berne Convention for the Protection of Literary and Artistic Works ("**BCPLAW**") are two of the most significant ways in which nations have attempted to create uniformity in international protection of intellectual property. Because India is a signatory of these treaties, they may provide a good model for India's own changes. Although the United States ("**US**") certainly wields an enormous amount of power in today's world, such success does not necessarily imply that its copyright laws and practices are the best model for India. The recent economic turmoil in the US demonstrates that its policies should not be followed blindly. This newsletter provides a comparative analysis of the prevailing Indian copyright policy, and some aspects of the 2010 Copyright Bill ("**Bill**") notably relating to persons protected, limits of protection (including fair dealing, works for the disabled, and personal backups) as well as length of protection. While the primary focus is on the entertainment industry, but much copyright can have important implications in other industries as well.

1. Who is protected by copyright

The Bill enlarges protection of musicians and performers by bringing the "performer's right" referred to in the Act¹ into the ambit of actual copyright assignment. This proposed change made by the Bill has the effect of granting royalties on subsequent performances by other musicians or performers of the original work,² as well as prohibiting other musicians and performers from replicating their work without admitting that the new work is not the work of the original artist.³ This happens to align quite neatly with US copyright law. There too, an emphasis is put on the protection of the authors' original works, and royalties follow from sales of work's in which the performer has been assigned copyright for either 70 years beyond the death of the musician/performer or 95 years or their product was made as part of their employment.⁴

1 Section 38(1) of the Act

2 Section 38A(2) of the Bill

3 Section 38B of the Bill

4 Copyright Term Extension Act, 1998 amending Title 17 U.S.C. Section 302(a)

This move towards the American model of copyright protection has been resisted by India's entertainment industry. Under the Act, royalties were generally paid to the production company, and musicians and performers received only a lump sum, up-front payment for their work.⁵ Although each economic model has its costs and benefits, the adoption of the American model helps ensure that musicians and performers, the actual producers of intellectual property, get a fair share of future profits. This protection of musicians and performers similarly parallels the US model⁶ by expanding protection to works merely converted to a new medium or context.⁷ By defining electronic reproduction of a copyright protected work as infringement,⁸ individuals cannot upload works to websites such as youtube without being guilty of a crime. If individuals could upload such works to youtube, the work would be available for free, and nobody would earn any royalties, thereby defeating the professed goal of protecting musicians and performers.

2. The Limits of Copyright Protection: Fair Dealing, the Disabled and Personal Backups

2.1 Fair Dealing

In the US, the concept of "fair use" is a highly significant limit to the powers of protection created by copyright, just as "fair dealing" has been in India. In the US, one can use copyrighted works without permission of the copyright holder for such purposes as commentary, criticism, news reporting, research, teaching or scholarship⁹ so long as it meets the requirements of a four part balancing test. The factors analyzed under US law in determining whether or not unauthorized use of a copyrighted work may be permitted include the purpose and character of the use (including whether such use is of a commercial nature or is for nonprofit educational purposes), the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work.¹⁰ The purpose of this exemption from copyright in the US is to advance human knowledge (including education) and progress in the arts, which seem quite laudable goals not just in the US but universally.

The Bill has strengthened its "fair use"-type aspects. First, non-profit organizations such as libraries and other educational organizations can now lend out a copyrighted movie or sound-recording so long as the work is legally acquired.¹¹ This aligns with the US concept of "first sale" which limits the authors copyright protection after first sale of the work, particularly important is the right this doctrine establishes to resale a lawfully purchased, but

5 <http://timesofindia.indiatimes.com/entertainment/bollywood/news-interviews/CreativeConcerns/articleshow/5906727.cms> visited on June 9, 2010

6 Title 17 U.S.C. Section 106 which gives the exclusive right of the copyright holder to copy or distribute his work.

7 Section 38A(1)(a) of the Bill

8 Section 38A(1) of the Bill

9 Copyright Act of 1976, 17 U.S.C. Section 107

10 *Folsom v. Marsh*, 9 F.Cas. 342 (1841)

11 Section 14 (d)-(e) of the Bill

copyrighted, work without the author's permission.¹² Some groups have challenged this right in the US with regard to computer software and e-books. Such challenges should not be allowed to succeed in either India or the US, as they are premised on the notion that software and e-books are easy to copy and distribute as pirated copies. The US's cases are divided on these issues.¹³ Such an argument ignores the fact that print books can also be copied and distributed as pirated copies.

This policy of fair use or fair dealing allows more effective and efficient dissemination of information, and its parallel usage in India will undoubtedly speed and enhance the education of its vast population. Of course other industries, especially web-based technologies depend on fair use and fair dealing as well. In 2007, it was reported that industries dependent on fair use had a value of \$4.7 trillion, which amounted to one sixth of the US Gross Domestic Product.¹⁴

2.2 Disability

Another exemption from copyright protection is prompted by the public policy goal of supporting disabled individuals. In the US, the Copyright Act removed many copyright restrictions on the production of works designed for the physically disabled.¹⁵ As the law stands now, any authorized agency can, for example, publish a braille version of a copyrighted book without having to overcome the obstacle of getting permission first. India's new Bill similarly supports the disabled by adding a section,¹⁶ which states that making a work which is "specially designed only for the use of persons suffering from a visual, aural or other disability that prevents their enjoyment of such works in their normal format," shall not constitute copyright infringement. This provision is more beneficial than the US's slightly more restrictive equivalent with regard to both the disabled, and the economy, as it creates business opportunities for entrepreneurs willing to create products for the disabled.

2.3 Backup Copies

Another way the new Bill differs from the old Act is that it allows consumers to create backup copies of any copyrighted product in the form of electronic storage for personal or private use.¹⁷ So long as you are only using the work yourself, not pirating it by reselling, it is legal to copy the work. While this change has been opposed by India's entertainment industry,¹⁸ claiming that it will lead to widespread piracy and destroy the financial viability of the entertainment industry, such has not been the case in America. The piracy made possible

12 Title 17 U.S.C. Section 109

13 *Softman v. Adobe*, 171 F. Supp.2d 1075 (2001) applied first sale doctrine to computer software, but *Davidson & Associates v. Internet Gateway Inc*, 334 F. Supp. 2d 1164 (2004) challenged the application of this doctrine in dicta

14 Thomas Rogers & Andrew Szamoszegi, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use* (CCIA: 2010) available online at

http://www.wired.com/images_blogs/threatlevel/2010/04/fairuseeconomy.pdf visited on July 22, 2010

15 US Copyright Act, 1996, Section 108A

16 Section 52(1)(za)

17 Bill Section 52(1)(b)(ii)

18 <http://timesofindia.indiatimes.com/india/Indian-Copyright-Act-Whose-copy-is-it/articleshow/5906123.cms> visited on June 9, 2010

by the internet has not killed the entertainment industry, who benefits the most from restrictive copyright policies. Analogous resistance by the entertainment industry can be found in the US, where similar arguments were made by the entertainment industry when the VCR was first marketed: that the ability to record a television program at home would kill, or at least severely harm the television industry. In *Sony Corp. of America v. Universal City Studios, Inc.*, US courts disagreed.¹⁹

Furthermore, the Bill does not legalize piracy. If one makes a copy of a copyrighted work and then sells or distributes it beyond personal use or private backup, they would still be in violation of the Bill. One might argue that the Bill will make piracy more easy, but there are ways to control this problem more effectively than banning the personal/private use of a copy of a copyrighted work. Consumers will understandably have a strong desire to backup validly purchased copyrighted materials, so banning such acts will be difficult to enforce. The Bill wisely allows this, and merely tries to prevent similar acts that are intentionally done in furtherance of piracy. While questions of intent are notoriously difficult for courts to decide, bright-line rules could easily be developed that might hold, for example, that using a camcorder to record a movie in a theater demonstrates per se intent to pirate.

A byproduct of Section 52(1)(b)(ii) of the Bill is that it makes breaching Digital Rights Management ("**DRM**") legal. DRM is a widely used acronym²⁰ for embedded technology that prevents the copying of a work. In the US the entertainment industry has repeatedly attempted, with no ultimate success, to make circumvention of DRM per se illegal. However, DRM is still incredibly pervasive in American electronics and media, and are often illegal to circumvent due to contractual obligations. The most common way to enforce DRM in the US is via "click through" terms and conditions licensing agreements, which may be ruled unconscionable and thus unenforceable due to the fact that many DRM contractual obligations are unintentionally entered in to by consumers.²¹

In its Bill, India has avoided this possibility of contractually based DRM enforcement by specifically allowing its circumvention for personal/private use and backup.²² This decision upholds the rights of ordinary consumers over the unsubstantiated fears of media companies. Much like the VCR, DRM-free media will not likely destroy the entertainment industry through piracy, and will allow consumers more choice of electronics and media formats they wish to purchase. This diversity is not only optimal from the consumers viewpoint, but will benefit the economy by creating a broader range of legal business opportunities for creating consumer-oriented backup systems.

19 464 U.S. 417 (1984), in which it was ruled that using VCR to make a backup copy to view at another time did not constitute infringement

20 *The American Heritage Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004.

21 While *Bragg v. Linden Research*, 487 F.Supp.2d 593 found the click through agreement "unconscionable and thus unenforceable," *Feldman v. Google*, 513 F.Supp.2d 229 upheld a clause that was contained in a "click through" agreement

22 Section 52(1)(b)(ii) of the Bill

3. Lengths of Copyright Protection

The new Bill is growing to resemble the US copyright laws in others ways as well. Generally, the Indian legislature appears to extend the time limits under which an author's work is protected by copyright. For example, in terms of photography, the copyright term has changed from 60 years commencing with the publication of the photograph,²³ to 60 years commencing with the death of the artist.²⁴ Although this practice of tolling the term of protection at the death of the artist follows the American model, it also reflects the dubious worldwide trend of extending copyright seemingly ad infinitum. In early US history, for example, protection of copyrighted material was 28 years only before a renewal was possible but certainly not guaranteed. Now it has grown to at least 70 years after the author has died.

Generally, copyright term extension is only beneficial for large corporations who wish to continue generating revenue without creating new products, rather than the musicians and performers that copyright is supposedly designed to protect. This special interest of the entertainment industry has been so blatant that copyright term extension has often been referred to as "Micky Mouse" legislation, because it was thought to be motivated by the desire to protect the aforementioned Disney character.

Reducing the term of copyright protection may be an economic boon for India as it forces companies to more frequently produce new movies and music, which in turn creates jobs for musicians and performers. Furthermore, less restrictive copyright laws can create an economic advantage. International copyright regulation such as WIPO²⁵ and BCPLAW have less stringent regulations than the US or India, and as a signatory, India has only committed to a 50 year period beyond the artist's death, rather than 60 years as required by the Bill.²⁶ They can produce works that would be illegal in more restrictive countries, and often export them legally (to other nations of minimal copyright protection) generating revenue streams unavailable in more restrictive nations.

Conclusion

Although many will undoubtedly worry that the Bill is economically harmful and encourages piracy, those concerns may be shortsighted and merely prevalent due to the influence of the entertainment industry. Some might also worry that if piracy is prevalent, then investors will be less likely to fund artworks of high quality. While this funding issue may apply to pharmaceuticals, where strong patent laws are necessary to protect intellectual property during the extremely expensive development phase, art seems easily distinguishable. The entertainment industry now requires less investment of capital to create high quality products. The world needs pharmaceuticals much more than entertainment. While a life

23 Section 25 of the Act

24 Section 25 of the Bill

25 http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html#duration visited on June 22, 2010, also note that these international treaties are largely unenforceable, so India could actually have even less restrictive copyright law.

26 Section 25 of the Bill



without art would be dreary indeed, people will make art no matter how financially risky it might be as a career.

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