Copyright amendment Act, 2012

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Abstract
The modern copyright law is a creation of statute. The history of Indian copyright jurisprudence reflects constant legislative revisions of statutory law to address technological developments. The Indian Copyright Act, 1957 has been amended six times, since its inception, in the years 1983, 1984, 1992, 1994, 1999 and 2012. Subsequent to the 2012 amendments which came into effect on June 21, 2012 the copyright rules have been notified on March 14, 2013. The 2012 amendments have received overwhelming appreciation with many progressive changes. To name a few, introduction of provisions for digital rights management, strengthening of border measures, special provisions for persons with disabilities, conferment of affirmative rights for performers, extension of fair dealing to all categories of works covered under section 13, compulsory licensing in respect of foreign works, recognition of moral rights of performers, provisions to streamline the functioning of the copyright societies are examples of welcome amendments. There are certain unwelcome amendments including the removal of parallel importation. Non-inclusion of provisions for multimedia works, non- specification of status of remixes and parodies, non-inclusion of the concepts ‘unicast’ and ‘narrowcast,’ lack of guidelines for fair dealings etc. are some instances of missed opportunities. This paper, thus aims at (i) analyzing the welcome changes brought about by the 2012 amendments, (ii) commenting on the regressive changes and (iii) highlighting the missed opportunities.

Keywords: Amendment Act, Copyright Law, Cinematograph Film, Communication

1. Introduction
ALTHOUGH THE British Parliament enacted the first modern copyright law in 1710 [1], it was only in 1847 that India introduced statutory copyright by the then Governor General of India. Subsequently, with the enactment of Copyright Act, 1911 of England, it became automatically applicable to India, India being a colony of Britain. The Copyright Act of 1914 was essentially an extension of the British Copyright Act, 1911 which governed the country till independence. After India’s independence, the Copyright Act, 1957 came into force which has undergone several amendments, from time to time to meet the challenges posed by technological developments, the latest being the 2012 amendments.

The 2012 Amendments to the Copyright Act, 1957 were introduced by way of the Copyright (Amendment) Bill, 2010. The bill was referred to the Standing Committee on Human Resource Development after its introduction in Rajya Sabha in 2010. The bill as revised by the standing committee was passed by both the Houses in 2012. The bill received the Presidential assent on June 7, 2012 and came into force on June 21, 2012. [2] The Copyright Rules, 2013 were notified on March 14, 2013.

2. Technology and copyright
As stated earlier, there is an interrelationship between the technological development and growth of copyright law. New technologies constantly expand the scope and subject matter of copyright. As new technology emerges, new revision is made to copyright law. The invention of printing press, sound recording, cinematography, internet etc. thus has considerably modified the copyright regime adding new subject matters into its fold. More significantly, the last three decades represent unforeseen acceleration in technological innovation with the advent of World Wide Web and ICT (Information Communications Technology). These developments necessitated sea changes in the world copyright law requiring similar modifications in the national laws.

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development took place in the global copyright scenario: the Internet treaties were adopted by WIPO (World Intellectual Property organization). The then existing treaties on copyright such as Berne Convention, 1883 date back more than a quarter of a century. Hence, to adequately address the challenges of the new digital technologies, new standards and clarifications were indeed needed in the global copyright law. The WCT and WPPT were concluded updating and improving the protection of the already existing copyright and related rights treaties. The new treaties became a milestone in the history of world copyright law, by modernizing the international system of copyright and related rights in the digital age. India has not yet ratified the Internet treaties - WCT and WPPT -, albeit the 2012 Amendment Act tries to harmonise the Indian copyright law with the internet treaties, In fact, the amendments go much beyond the Internet treaties addressing the challenges relevant to the dissemination of protected material over the Internet as evidenced from various amended provisions.

3. Copyright industry in India

Indian copyright industry treats copyright law as an effective mechanism to protect the fruits of creativity, labour and skill from annexation by other people. Apart from protecting creative potential of the society, copyright system substantially contributes to a nation's economy. Copyright industry has an important place in the Indian economic arena. The copyright industries generate huge employment opportunities. From the production and sale of copyrighted products they contribute to the exchequer. A considerable quantity of copyrighted products are traded internationally which reflect in Indian exports and imports trading. A study on copyright sponsored by the Government of India states thus: Given its rich cultural heritage, India had always remained a powerful force in the field of copyright. The activities that come under the subject of copyright are largely prevalent in the country and they are growing. India is counted among the top seven publishing nations of the world with a sizeable portion of her publications being in English. It constitutes the largest market for audio cassettes and films produced in the country exceed 600 per annum. India has a huge potential in the field of computer software. The software industry has been growing at an amazing rate of above 50% for consecutive years since the beginning of the current decade. On the legislation front, copyright laws in India are comparable to those of many developed countries. In order to keep a pace with the contemporary technological developments, India's copyright legislation had been amended from time to time. Copyright thus plays a very important role in India's economy among the various forms of intellectual property rights (IPRs) and as the technology advances the copyright law adapts itself to keep pace with the technological developments.

4. Major amendments

Right for commercial rental

Copyright law primarily confers economic rights on the owners of copyright. The international copyright treaties require the member countries to grant economic rights on a non-discriminatory basis. Economic rights entitle the copyright holders to make commercial gain from the exploitation of copyrighted work. Economic rights of authors mainly consist of rights to reproduce, publish, perform, make translation, make adaptation; right to communicate etc., Right to rental is a facet of economic right. Article 11 of TRIPs Agreement, article 7 of WCT and article 9 of WPPT require member countries to grant commercial rental rights for computer programs and cinematograph films.

In India, section 14 of the Copyright Act confers economic rights to the owners of copyright. By following the mandate of international treaties, in India, the 1994 Copyright Amendment Act introduced in section 14 the right of bier. However, keeping in view the possibility of interpreting this term to include non-commercial hire and lending by libraries and educational institutions, the term 'hire' in section 14(b) for computer program was replaced with the term 'commercial rental' by virtue of amendments in the year 2012. Hence a corresponding amendment is inserted in the definition clause to define what is commercial rental? The 2012 amendments defines the term 'commercial rental' under section 2(fa) as: Commercial rental does not include the rental, lease or lending of a lawfully acquired copy of a computer programme, sound recording, visual recording or cinematograph film for non-profit purposes by a non-profit library or non-profit educational institution;

Explanation- For the purposes of this clause, a 'non-profit library or non-profit educational institution' means a library or educational institution which receives grants from the Government or exempted from payment of tax under the Income Tax Act, 1961.

Commercial rental has also been incorporated under section 14(d) (ii) and section 14(e) (ii) for cinematograph film and sound recording respectively. Moreover, the right to commercial rental has been conferred on broadcasting organization during the continuance of a broadcast reproduction right in relation to any broadcast under section 37(3)(e). By incorporating the term 'commercial rental', the amendments aims at distinguishing between rental of copyrighted works with profit motive and nonprofit motive thereby facilitating free flow of knowledge and art for social and educational purposes.

5. Cinematograph film and visual recording

The definition of 'cinematograph film' in the erstwhile Act read under section 2(f) as: "Cinematograph film means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and 'cinematograph' shall be construed as including any work produced by any process analogous to cinematography including video films". This definition has been amended in 2012 and it now reads as "...any work of visual recording on any medium and includes a sound recording accompanying such visual recording and 'cinematograph' shall be construed as including any work produced by any process analogous to cinematography including video films". The condition with respect to the medium and the process of creation of a visual recording are thus omitted by the amendment. The earlier definition necessarily required the visual recording to be on a medium and to be made through a process of producing a moving image. The newly inserted section, section 2(xxa) defines 'visual recording' as, "...the
6. Exhaustion of copyright

Till 2012 amendments, the doctrine of exhaustion was applicable only to the literary, dramatic and artistic works. Exhaustion basically means that after the first sale by the right holder or by his exhaustion authorization, his right comes to an end and he is not entitled to stop further movement of goods. Thus, once an intellectual property right holder has sold a physical product to which its intellectual property rights are attached, he cannot prohibit the subsequent resale of that product. The right is exhausted by the first consensual marketing. A third party may, after legitimately purchasing these goods, sell them in any of the country-markets.

Exhaustion may be either domestic or international. Under domestic exhaustion, once the goods have been put on the domestic market by the right holder or by third party with his consent, his right is exhausted in the domestic territory. The authorized first sale leads to consumption of rights within the border of national jurisdiction. Domestic exhaustion is generally provided for in almost all countries. In international exhaustion when the goods are put into the market, by the right holders or with his consent, in any country, the rights are exhausted for other national jurisdictions as well. As-per the doctrine, the owner of an intellectual property right who consents to the marketing of his products in one member state cannot use that right to prevent the importation of the products into another member state. The characteristic of non-exhaustion by consumption is an important feature of intellectual property.

In the Indian copyright regime, subsequent to the decision in Warner Bros. Entertainmentmrc. Santosh VG, the application of the doctrine of exhaustion was limited to literary, musical, dramatic and artistic works. The doctrine of exhaustion had no applicability to cinematographic films and to sound recordings. In Warner Bros. the High Court of Delhi was confronted with the question whether a cinematograph film, in which copyright subsisted in India, once put in the market by the owner of the copyright was subject to the doctrine of exhaustion.

The case deserves a detailed analysis in this context. The plaintiffs therein claimed copyright in India under the International Copyright Order, 1991 in films which were first published in the US. The defendant legally bought these DVDs from the US, and imported them into India. They then made available the particular DVDs (which had been legally bought by them) to their Indian customers. The plaintiffs alleged that these acts of import and hiring out amounted to an infringement of their copyright. The defendant stated that "the DVDs were bought legally — there was no copy of those particular DVDs. That being the case, it was contended that no infringing copy had been made". Further, relying on the "first-sale doctrine", the defendant argued that once a DVD has been legally sold to them by the plaintiffs, the plaintiffs' rights in that particular DVD were exhausted. The defendant also argued that once the plaintiffs placed their copies in the US market, and they were purchased legitimately, 'long arm' restrictions expressed on the concerned copies are of no consequence; it lost or "exhausted" the right to control further sale or commerce in that copy. Accordingly, the plaintiffs could not exercise control over the particular DVDs after the first sale had been completed. The defendant also raised the explanation to section 14 of the Copyright Act which states, "For the purposes of this Section, a copy which had been sold once shall be deemed to be a copy already in circulation". It was urged that the doctrine of first sale applies in India, and there was no case of infringement.

The court noted that under section 14(d) "copyright" in respect of cinematographic works means, right for:

1. making a copy of the film;
2. selling or giving on hire or offer for sale or hire any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;
3. communicating the film to the public.

Whereas the copyright in respect of a literary, dramatic or musical work would mean under section 14 (a) the right:

1. to reproduce the work in any material form including the storing of it in any medium by electronic means;
2. to issue copies of the work to the public not being copies already in circulation;
3. to perform the work in public, or communicate it to the public;
4. to make any cinematograph film or sound recording in respect of the work;
5. to make any translation of the work;
6. vi, to make any adaptation of the work;
7. to do, in relation to a translation or an adaptation of the work, any of
8. the acts specified in relation to the work in sub clauses (i) to (vi).

Thus, as per the court the content of copyright in case of cinematographic works is different from that in the case of literary works, dramatic works etc. The phrase "copy in circulation" was found in describing the copyright vis-d-vis literary, musical and dramatic works. It found no application in cinematographic works. On a plain reading of section 14, the phrase was used to limit the copyright in the case of literary, musical and dramatic works only. "This limited exhaustion negates the applicability of the principle in regard to other classes of copyrights. Thus, Parliament having intervened in one category of copyrights to grant a limited kind of 'exhaustion' and consciously chosen not to extend it to others, sleight of judicial reasoning cannot extend its application."

The court further stated thus:

Section 14(1) (d) provides that the copyright owner has, in case of cinematographic films, the exclusive right to sell or give on hire or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasion. The copyright owner therefore continues to be entitled to exercise rights in a particular copy of the film regardless of whether it has been sold previously— in express contrast to literary works, which are "already in circulation."

However, with the 2012 amendments the position has changed. As stated earlier, the amendments replace the term 'hire' with 'commercial rental' in section 14(d)(ii) and 14(e)(ii) which relate to cinematograph film and sound
Under section 18 of the Copyright Act which provides for assignment of copyright, three provisos have been inserted by virtue of 2012 amendments to safeguard the author from new modes of exploitation which may arise in the future by way of technological advancements and which were not contemplated at the time of assignment. The provisos read thus:

Provided further that no such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made, unless the assignment specifically referred to such medium or mode of exploitation of the work:

Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void:

Provided also that the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilization of such work except to the legal heirs of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void.

9. Conclusion

The 2012 amendments have brought more clarity in interpretation of several provisions, removed certain operational difficulties and also addressed certain newer issues that have emerged in the context of digital technologies and the Internet. The amendments have also harmonized the Copyright Act, 1957 with the WIPO Internet Treaties. It has also strengthen the economic and moral rights of authors, confers positive rights to performers and makes provisions to facilitate better access of copyrighted work. It is hoped that the amendments with respect to assignment and licenses would streamline business practices by protecting original authors’ interest. However, it also leaves many questions unanswered inviting judicial intervention for a clear import of law. One important issue that has been left unresolved is parallel imports. This pending issue can only be resolved by a legislative amendment.

10. Reference

1. Statute of Anne, 1709 which passed into law on Apr. 10, 1710. It introduced the principle of a fixed term of protection for published works giving authors an exclusive right, for 14 years, to copy and distributes their works. Since Statute of Anne provides the foundation upon which the concept of modern copyright is built, it is also known as the mother ship of copyright law.


3. The WIPO Copyright Treaty, 1996 (WCT) and the WIPO Performances and Phonograms Treaty. 1996 (WPPT)
4. The copyright based industries comprise primarily the print and publishing industry, music industry including audio cassettes and CDs industry, film and video industry and computer software industry.


6. In developed countries like the US, UK, Germany, Sweden and Australia copyright based industries contribute significantly to their GDP. No systematic studies have been undertaken in India to show the exact percentage of copyright based industries' contribution to GDP, though it is estimated that they contribute significantly to our economy.

7. Study on Copyright Piracy in India undertaken by the National Productivity Council (NPC) for the Department of Education Ministry of Human Resource Development, Government of India.

8. Economic rights are the rights of the owners of copyright whereas moral rights are the special rights of the authors. The authors need not be the first owner of the copyright in all cases. For instance, if the work is created under a contract of employment, the employer will be the first owner of copyright, in the absence of agreement to the contrary.

9. Art 11 - Rental Rights: In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

10. Art. 7(1) - Right of Rental: Authors of computer programs; (ii) cinematographic works; and (iii) works embodied in phonograms, as determined in the national law of Contracting Parties, shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.

11. Art. 9 (1) - Right of Rental: Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.

12. Before the 2012 amendment, a.14(b) as amended by the 1994 amendment read so: section 14 (a): For the purposes of this Act, 'copyright' means the exclusive right subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely (a) xxx (b) in the case of a computer programme to do any of acts specified in clause (a) and to sell or give hire, or offer for sale or hire, any copy of the compute programme, regardless of whether such copy has been sold or given on hire on earlier occasions.


14. The words "on any medium produced through a process from which a moving image may be produced by any means" have been omitted by the Amendment Act, 2012.


17. 2 MIPR 175 Del (2009)

18. The Copyright Act, 1957 as amended in 2012, s.14(d)(ii)- to sell or give on commercial rental or offer for sale or for such rental, any copy of the film. SA4(e)(ii)- to sell or give on commercial rental or offer for sale or for such rental, any copy of the film.

19. S. 22 prior to 2012 amendment read as: Term of copyright in published literary, dramatic, musical and artistic works — Except as otherwise hereinafter provided, copyright shall subsist in any literary, dramatic, musical or artistic work (other than a photograph) published within the lifetime of the author until sixty years from the beginning of the calendar year next following year in which the author dies.

20. For a detailed discussion on intellectual property licenses and assignments, see, Raman Mittal, Licensing Intellectual Property: Law and Management 61-71 (Satyam International, 2011),


22. The Copyright Act, 1957 as amended in 2012, s. 18.

23. Ibid.