

India 2011

Submitted by Pranesh Prakash on Wed, 11/02/2009 - 12:53

Legal background

Copyright Copyright Act, 1957 ("ICA") [1]

legislation Patent legislation

Other Copyright Rules, 1958 ("ICR") [1]

relevant laws

Information Technology Act, 2000 ("ITA") [2] Constitution of India, 1950 ("Constitution") [3]

Civic Chandran v Ammini Amma (1996 PTR 142 (Kerala High Court)) ("Civic

Chandran") [4]

Penguin Books v India Book Distributors (1984) ("Penguin Books")

Warner Bros. v. V.G. Santosh (2009) ("Warner Bros.")

Copyright <u>Berne</u> **Rome** Berne **TRIPS** [7] <u>WCT</u> [8] and <u>Paris</u>

treaties Convention Convention Convention **Appendix** <u>WPPT</u> [9]

> [10] [5] [6]

Other <u>Universal Copyright Convention</u> [11]

relevant treaties

Convention for the Protection of Producers of Phonograms Against Unauthorised

<u>Duplication of Their Phonograms</u> [12]

Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties

ICA ss.22-29, TRIPS

(and Additional Protocol) [13]

Rome Convention for the Protection of Performers, Producers of Phonograms and

Broadcasting Organisations [14]

Scope and duration of copyright

Does copyright end immediately No

after the minimum period mandated by the Berne

Convention?

In case of literary, dramatic, musical or artistic works (other than a photograph) India

provides protection for 60 years

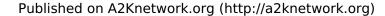
from the beginning of the

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 amendment currently underway.) For cinematographic works, India provides protection for 60 years from the beginning

of the calendar year after



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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 - .

Are works that are not fixed in

Yes

ICA s.2(f), (ffc), (h), (o), (p), (xx)

some material form excluded

from copyright?

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.

Has a court or tribunal ever limited the exercise of copyright While not directly subject to a under competition law, for

licensing or regulating royalties charged by dominant rights holders?

Yes

ICA ss.31, 31A

statute of "competition law", example by imposing compulsory 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.

Has a court or tribunal ever limited the exercise of copyright While the Freedom of Speech and pursuant to a bill of rights or similar human rights instrument, Article 19(1)(a) of the Indian for example by preventing copyright from being used to stifle protected speech?

In part

Constitution Arts. 19(1)(a), 19(2)

Expression is guaranteed by 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.

Are databases of non-original material excluded from

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.

Are rights holders prohibited from excluding user rights under There is no such ruling directly copyright law?

Yes

on copyright law, but there are cases which state that statutory rights may not be limited by contract, unless the statute indicates otherwise.

Is computer <u>software</u> [15] excluded from the scope of In part



patentable subject matter?

Freedoms to access and use

By Home Users

Is there any general user Yes

ICA ss.52(1)(a)

right that is based on a While a "fair use" with a set of balancing criteria, set of balancing criteria such as a "fair use [16]" is not present in the Act, riaht?

there is a broad exception covering fair dealing [17] 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. In part format shifting allowed

ICA s.52(1)(a), 14(d), 14(e)

from CD to an MP3

(such as ripping music

Is time, space and

player)?

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 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?

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

ICA ss.52(1)(a) and

52(1)(ab)

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 copy for non-commercial personal use". In part

While no such broad

exception is mentioned

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

club or similar

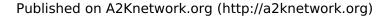
establishment) as part of the amenities provided exclusively or mainly for residents therein; or as part of the activities of a

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

in the statute, a number

Can works be communicated to a limited public (for example, family and friends) without infringing copyright? ICA ss.52(1)(f) and 52(1)(k)





For Education

cover cinematograph films. But friends and family may possibly not be considered "public".

May students copy worksYes

for private research or

study?

ICA s.52(1)(a), If such activity comes s.52(1)(aa), and within the judicial

s.52(1)(p)

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 In part

and study provision cover distance and online education?

ICA s.52(1)(a)

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?

In part

ICA s.32, s.52(1)(h)

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 date of publication of the source material. If the language is not one in general use in

Not under the education

"developed countries", the application may be made in one year from

the date of publication.

May educators copy works for use in the classroom?

In part

Only to a limited extent. 52(1)(h)

Literary, dramatic, musical or artistic works (though not sound

ICA s.52(1)(g) and



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 vears". Yes

Online

Are temporary or transient copies, incidental to a lawful use, excepted from copyright?

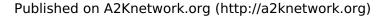
Does the law exclude or Yes limit the liability of This intermediaries such as ISPs for copyright Info infringements carried Act out on their network?

ICA ss.52(1)(a), would presumably 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.

ITA s.79, 81; ICA s.50

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





By content creators

number of contradictory viewpoints, for the time being it may be presumed that ISPs are

protected from liability.

Is Internet access free of In part

ISP filtering or

monitoring for potential copyright-infringements?

Is there any protection

for consumers who non-commercially remix artistic and musical or mash up copyright

works?

In part

In the case of literary, 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 copied for the purpose of

reverse-engineering

Yes

that: a) the person be interoperable software? such software; b) such

otherwise readily

available.

Is the incidental inclusionYes

of a work in other material permitted?

The requirements are legally in possession of information is not

ICA s.14, s.52(1)(u)

ICA ss.52(1)(ab),

52(1)(ac)

ICA ss.52(1)(a)(i), 14(d),

14(e)

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 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

ICA s.52(1)(a), Civic

Chandran

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

While there is no

also.

Yes

By the press

Is there a copyright exception for the news

of the day?

May copyright material be reproduced for the purposes of review and

criticism?

Yes ICA ss.52(1)(b),

52(1)(m), 52(1)(n)

ICA s.52(1)(a)(ii)

"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".

May quotations be used In part

for any purpose?

ICA s.52

Only for purposes laid down in the extensive

fair dealings provision.

By Libraries

May libraries copy works In part

if they cannot

reasonably be obtained

commercially?

ICA s.52(1)(o)

ICA ss.52(1)(p), 31A

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".

May librarians copy works for users for the purpose of research or study?

In part

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.

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.

By disabled users Is it permissible to copy In part

ICA s.52(1)(a)

ICA s.52(1)(q)

or adapt work for the uself it is for private use, of those with disabilities? 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 (perhaps only to a limited extent, with a requirement of "special formats") change the law

in this regard.

copyright?

In part ICA s.52(1)(q)(ii), EBC v.

They are under copyrightModak

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 [18]".

Are other governmental In part

works excluded from

copyright?

in part

No, they are not

excluded from copyright, but some fair dealings rights are granted with respect to some varieties of governmental works.

Are the results of No

publicly funded research Some public

required to be published organizations that fund under an <u>open access</u> research may have such [19] license? requirements, though.

Freedoms to share and transfer

Does the law permit a work to be No

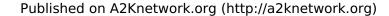
ICA s.21

released to the public domain before the copyright term expires, without any formality other than an overt act of A notice has to be given to the Registrar of Copyright in a

prescribed manner.

relinguishment?

Can public domain works be used Yes without the need for any payment or registration of the use?



ICA ss.31, 31A



Does the law make special provision for the legal use of orphaned works?

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

made in India would infringe copyright" is not permitted. Thus, by a plain reading of the statute,

prohibited from being imported.

only infringing copies are

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. That said, a single-judge bench of the Delhi High Court ruled in 1984 that only licensees have the right to import copyrighted material into India. Further, 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 recordings are not covered by the doctrine of first sale as per s.14 of the ICA.

Is parallel importation of copyright works permitted? owner cannot be found. In part ICA ss.51(b)(iv), 53, 14(a)(ii), Importation of "copies made out Penguin Books, and Warner Bros. of India of the work which if

Are there national programmes or policies to promote the use, production or dissemination of free and open source software or a few others. There are also open educational resources?

No There have been some initiatives at the level of various states. openly-licensed material such as including Tamil Nadu, Kerala, and some FOSS [20] 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. See http://kvtrust.blogspot.com/2007/ 07/new-chapter-in-judiciary-and.h tml [21] and http://itforum.kerala. gov.in/site/modules/content/?id= 1

Yes

ICA ss.69, 63, 63A

ICA ss.52(1)(a), 63(b) proviso



or policies that specify or promote the use of open document formats?

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 draft

e-Government Interoperability Framework, which is in the process of being finalized.

Administration and enforcement

What is the maximum penalty for Rs.200000 (around USD 4000), ICA ss.63, 63A

copyright infringement for an

and a maximum imprisonment of individual? 6 months (for first offence) and 3

> years (for second and subsequent offences)

What is the maximum penalty for Same as above. Rs.200000

copyright infringement for a corporation?

(around USD 4000), and a maximum imprisonment of 6 months (for first offence) and 3

vears (for second and subsequent offences).

Is innocent infringement of copyright 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.

Is the creation or distribution of devices that can circumvent

technological protection measures (TPM [22]) permitted,

where such devices can be used

for legal purposes?

Yes

There is no statutory bar on the creation or distribution

circumvention devices. However.

this is subject to change depending on the proposed amendments to the copyright

law.

Nο

Is the use of such devices by consumers or intermediaries permitted in the legal exercise of allows for consumers to use user rights?

Yes Even the proposed amendment

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 Since there is no bar, this is not that the use of TPMs on copyright required. Even the proposed



works be disclosed to amendments would not require

consumers? such disclosure.

Are there cases in which the availability of injunctive relief for copyright infringement is limited by the law on public policy grounds?

Have major ISPs resisted In part

requests from copyright owners Intermediaries such as ISPs are to pass on allegations that their not formally involved in the users have engaged in copyright enforcement of Indian copyright

infringement? law.

Are criminal sanctions limited to No ICA ss.63, 63A

cases of large-scale commercial

counterfeiting?

Are damages for copyright In part ICA ss.63, 63A

infringement limited to the loss sustained, rather than a pre-established or statutory damages award?

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.

Is there provision to penalise the Yes ICA s.60

wrongful allegation of copyright infringement?
Is there provision to penalise the No obstruction of consumers'

Conclusions

exercise of user rights?

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.

While India has not acceded to the WIPO [23] 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. These amendments 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. These amendments also propose a substantial increase in the copyright term for photographs (from 50 years to life plus 60 years), and a conditional increase of ten years for cinematograph films to 70 years if a special agreement is entered into by the producer with the director.

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. Physically challenged persons 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 in a suitable format.



Over the last year, the Standing Committee tasked with review of the Copyright Amendment Bill has held hearings and presented its findings and recommendations to the HRD Ministry. However, not a single consumer rights organization was called by the Standing Committee, and no civil society engagement was sought except for the issue of access for persons with disabilities. This was despite a number of civil society organizations sending in written submissions to the Standing Committee. The government is going to re-table the Bill in this session of Parliament (February-April).

Source URL: http://a2knetwork.org/reports2011/india

Links:

- [1] http://copyright.gov.in/Documents/CopyrightRules1957.pdf
- [2] http://www.commonlii.org/in/legis/num_act/ita2000258/
- [3] http://www.commonlii.org/in/legis/const/2004/index.html
- [4] http://mail.sarai.net/pipermail/commons-law/2004-September/000824.html
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