

COPYRIGHT AMENDMENT ACT, 2012: A REVISIT

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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.

I 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,

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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 distribute 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.

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.

II 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.

Correspondingly, to address the revolutionary challenges posed by ICT and digitalization, the Indian Copyright Act was amended in 1994 and to make the Indian copyright law compatible with TRIPs (Agreement on Trade Related Aspects of Intellectual Property Rights) regime, the Act was again amended in 1999. Meanwhile, another significant development took place in the global copyright scenario: the Internet treaties³ 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

2 Vide S.O. 1393(E), dated June 20, 2012, published in the Gazette of India.

3 The WIPO Copyright Treaty, 1996 (WCT) and the WIPO Performances and Phonograms Treaty, 1996 (WPPT).

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.

III Copyright industry in India

Indian copyright industry⁴ treats copyright law as an effective mechanism to protect the fruits of creativity, labour and skill from annexation by other people.⁵ Apart from protecting creative potential of the society, copyright system substantially contributes to a nation's economy.⁶ 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:⁷

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,

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.

5 *Sulamangalam R. Jayalaxmi v. Meta Musical Chennai*, 2000 PTC 681.

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.

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.

IV Major amendments

Right for commercial rental

Copyright law primarily confers economic rights on the owners of copyright.⁸ 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,⁹ article 7 of WCT¹⁰ and article 9 of WPPT¹¹ 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

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 (i) 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.

Copyright Amendment Act introduced in section 14 the right of *hire*.¹² 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 2012.¹³ 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 non profit motive thereby facilitating free flow of knowledge and art for social and educational purposes.

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

12 Before the 2012 amendment, s.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) x x x

(b) in the case of a computer programme- to do any of the acts specified in clause (a) and to sell or give on hire, or offer for sale or hire, any copy of the computer programme, regardless of whether such copy has been sold or given on hire on earlier occasions.

13 Zakir Thomas, "Overview of Changes to the Indian Copyright Law" 17(4) *JIPR* 326 (2012).

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...’¹⁴ 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(xx) defines ‘visual recording’ as, ‘...the recording in any medium, by any method including the storing of it by any electronic means, of moving images or of the representations thereof, from which they can be perceived, reproduced or communicated by any method.’ Section 2(xx), thus broadens the omitted portion of the definition of cinematographic work under section 2(f).

In the Copyright Amendment Bill of 2010 there was a proposal for making the principal director in a cinematographic work to be a co-author since at present, the principal director is only paid fee for his work and his creativity goes unrecognized in spite of his intellectual contribution in the creation of the film. While noticing that such a provision does not exist in most of other jurisdictions like the US, the parliamentary standing committee endorsed its apprehensions that the proposed amendments would create a lot of uncalled and unnecessary problems in the Indian cinema. Thus the committee dropped the recommendation citing that the time was not ripe in India to make the principal director co-author of cinematograph film as “the producer is the kingpin who invests substantive money, raises finance through institution, utilizes persons/expertise and takes such initiative and responsibility for making the work and chooses the director on certain offer.”

However, it is to be noted that in countries like the US, the film industry tackles this issue through ‘union contracts’ under which royalties are shared with all the stakeholders in the filmmaking. Further article 2 of the European Union Council Directive No. 93/98/EEC of October 29, 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights provides that “the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States shall be free to designate other co-authors.” This directive is broad enough to treat cinematograph film as a ‘work of joint authorship’ by making principal director, script writer, dialogue writer and music composer as joint owners unlike the producer who only initiated the process of film making. Hence

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.

there is no justification in denying recognition to the directors of Indian films whose brain child the films are.

Further, the economic rights in respect of cinematographic film are expanded. The exclusive rights of owners of a cinematographic work and sound recording under section 14(d) and section 14(e) respectively are widened to include 'the right to store' the work in any medium by electronic or other means. Similarly, the right to store the work in any medium by electronic or other means is included in respect of artistic works under section 14 (c).

The expansion of economic rights by covering 'the right to store' thus addresses technological issues of 'storing'. The right to store the work assumes great importance in a digital environment where copyrighted work can be reproduced flawlessly and inexpensively and instantaneously transmitted worldwide. The words 'any medium by electronic or other means' are wide enough to address the possibility of evolution of new technologies.

Ownership and authorship are two different notions under copyright law. An author need not necessarily be the first owner of copyright. Section 17 provides for ownership of copyright. A combined reading of sections 17(b) and 17(c) clarifies that in case of commissioned cinematograph work, the commissioning party and in case of employer – employee relationship, the employer is considered to be the first owners of the work. The 2012 amendments have inserted a new proviso stating that: "in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub section (1) of section 13."

Hence the general provisions in section 17 (a) will not apply in relation to the rights of the authors of literary, musical, dramatic and artistic works, which have been incorporated in cinematograph film and the respective authors will continue to be considered as the first owners of the said works. When a work is incorporated in a cinematograph film, the ownership of such work reverts back to the author even when such work was commissioned or was created under employment.

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.¹⁵ 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.¹⁶ 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. Entertainment Inc. v. Santosh V.G.*,¹⁷ 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

15 For the position in various countries and different viewpoints see, *Jap Auto Products, K. K. v. BBS Kraftfahrzeug Technik AG*, No. 3272 of 1994, Mar. 23, 1995; *Silhouette International Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft*, Case C-355/96 E.C.R. 1998, I-676; *Sebago Inc. v. GB-Unic S.A.*, Case C-173/98, [1999] All ER (D) 706; *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982, 987 (9th Cir.2008); *Jazxx Photo Corp. v. Int’l Trade Comm’n*, 264 F.3d 1094, 1105 (Fed.Cir.2001); *Fuji Photo Film Co. Ltd. v. Jazxx Photo Corp.*, 394 F.3d 1368, 1376 (Fed.Cir.2005); *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617 (2008); *LG Electronics, Inc. v. Hitachi Ltd.*, 655 F. Supp. 2d 1036, 1044-45 (N.D.Cal.2009) and *Kapil Wadhwa v. Samsung Electronics Co. Ltd.*: 194 (2012) DLT 23.

16 J.K. Das, *Intellectual Property Rights* 11(Kamala Law House, Kolkata, 2008).

17 2 MIPR 175 Del (2009).

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:

- i. making a copy of the film;
- ii. 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;
- iii. 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:

- i. to reproduce the work in any material form including the storing of it in any medium by electronic means;
- ii. to issue copies of the work to the public not being copies already in circulation;
- iii. to perform the work in public, or communicate it to the public;
- iv. to make any cinematograph film or sound recording in respect of the work;
- v. to make any translation of the work;
- vi. to make any adaptation of the work;
- vii. to do, in relation to a translation or an adaptation of the work, any of 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-à-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 recording respectively.¹⁸ Further, the words, ‘regardless of whether such copy has been sold or given on hire on earlier occasions’ as used under sections 14(d)(ii) and 14(e)(ii) prior to amendments are omitted by the 2012 amendments making the doctrine of exhaustion applicable to cinematograph films and sound recordings.

Copyright term of photographs

Prior to the 2012 amendments, the copyright term for photographs were only 60 years from the calendar year following the year of publication, whereas other artistic works enjoyed protection for the life of the author plus 60 years. With the amendments the term of copyright protection in a photograph is made at par with the artistic work, *i.e.*, until 60 years after the death of the author by omitting the word ‘other than a photograph’ in section 22¹⁹ and by deleting section 25 which provided a term of sixty years from the beginning of the calendar year next following the year in which the work is first published. After amendments section 22 reads as under:

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 published within the lifetime of the author until sixty years from the beginning of the calendar year next following the year in which the author dies.

Explanation.-In this section the reference to the author shall, in the case of a work of joint authorship, be construed as a reference to the author who dies last.

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. S.14(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.

The Berne Convention, 1886 and the TRIPs Agreement, 1994 to which India is a signatory require a copyright term of 25 years for photographs. The WCT, 1996 which is not yet acceded by India requires lifetime of the author plus fifty years protection for photographs. In the amendments, India has gone even beyond the WCT requirement to provide a life time plus 60 years term for photographs. The reason to enhance the term remains unanswered. It is also apprehended that this enhanced term would be prejudicial to movements which aim at archiving and making historical photographs available publicly. Further section 22 will also create practical difficulties in determining from when the extension be effective? Does it cover all photographs in which copyright subsists now? Or does it cover only future photographs? The amendments are silent on this issue.

Assignment of copyright

Intellectual property laws confer exclusive rights to the owners of intellectual property to exploit their work. Like other major forms of intellectual property, copyright can be transferred by license or assignment. A license permits the licensee to make use of copyrighted work under a given set of terms and conditions mutually agreed upon by the licensor - the copyrighted holder and the licensee. Whereas an assignment confers full rights in the underlying copyrighted work. By assigning the copyright, the copyright owner transfers his titles to the assignee. Once assigned, then the original owner no longer owns any control in relation to the work.²⁰ An assignment permits greater freedom to the assignee in marketing of a work than could be a case with a license.²¹

Assignment can be effected in respect of an existing work or in respect of a future work.²² Similarly assignments may be in respect of whole rights or partial rights.²³ Assignments can either be general or subject to limitations. 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

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).

21 Also see, *Deshmukh & Co. Publishers (P) Ltd v. Avinash Vishnu Khandeekar*, 2006 (32) PTC 58 (Bom).

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

23 *Ibid.*

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.

Hence, subsequent to the 2012 amendments, no assignment will 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. Further, the author of the literary or musical work included in a cinematograph film should not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilisation 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. Moreover, the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film will not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilisation 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.

To address the technological advancement that may take place in future, it is common in many copyright licenses to include a language that covers 'all media not known or hereafter developed' or 'all formats presently existing or hereafter invented'. Regarding the 'future technology' issues, countries have adopted various interpretations. For example, way back in 1988, the matter came up in India, in *Raj Video Vision v. K. Mohanakrishnsn*,²⁴ wherein the producer had assigned to the original

assignee in the year 1961 all negative rights in a Tamil talkie picture titled “*Pasamalar*”. The defendant had derived right from the original assignee in respect of the film. However, the producer as original owner continued to be the author of copyright in the film. The main issue was whether the owner has while assigning all rights had also assigned video and television rights which were relatively unknown in 1961. The court answered the issue by stating that the right given under any assignment should be specified and definite. The defendant cannot claim a right which was not contemplated at the time of original assignment, which was not contemplated when neither party could have dreamt of the later scientific advancement of video, satellite etc. But in *Hospital for Sick Children v. Walt Disney Productions Inc.*,²⁵ it was held that a licence which granted Walt Disney the sole and exclusive rights to produce Peter Pan in “cinematograph and motion picture films to be sufficiently broad enough to grant rights to both silent and the new technology of “talkie” films. However, the amendments settles the issue in India forever.

Still the amendments fail to answer certain questions. While one may agree that the new technology will require future negotiation in assignment, a crucial question that crops up is that why ‘any medium or mode of exploitation’ clause is missing in respect of licenses? This could create anomalous situation because by referring only to the assignment, the proviso leaves licenses.

One may also wonder why dramatic works are excluded from the third proviso of section 18. Why the copyright holders of dramatic work are not allowed for equitable remuneration as in the case of literary or musical work incorporated in a cinematographic film? This proviso leaves the artist with no right of equitable remuneration if any pantomime, puppet show or dumb show is incorporated in a film. The exclusion of dramatic work from the purview of this proviso is thus unjustifiable.

Further, under section 19 of the Act which relates to the mode of assignment, certain changes have been incorporated. Section 19(3) has been amended to provide that the assignment of copyright in any work shall specify the amount of royalty and any other consideration payable. Further three sub-sections, *i.e.*, 19(8), 19(9) and 19(10) have been inserted. Section 19(8) provides that the assignment of copyright in any work contrary to the terms and conditions of the rights already assigned to a copyright society in which the author of the work is a member shall be void. Section 19(9) and section 19(10) provide that no assignment of copyright in any work to make a cinematograph film or sound recording (which does not form part of a cinematograph film) shall affect the right of the author to claim an equal share of the royalties and consideration payable for any utilization of such work, respectively.

25 [1967] All ER 1005 (CA).

Licenses

The copyright owner alone has the exclusive right to deal with the copyrighted subject matter. If a third party does, without authority from the copyright owner, anything that falls under the exclusive domain of the latter that would amount to infringement. An infringement thus occurs, when the exclusive rights of the copyright owner are exercised without a 'license'. A license makes the act lawful that which would otherwise be unlawful. A license passes no proprietary interest since the licensor retains ownership.

In actual practice, it is mainly through licenses that the copyright owner commercially exploits a work for financial gains. A license can be voluntary or involuntary – as in the case of compulsory licenses; or exclusive or non exclusive.²⁶ Copyright Act stipulates the formalities to be complied with in order to enter into legally enforceable licenses. Section 30 of the Copyright Act, prior to the recent amendments required licenses to be in writing and signed. The 2012 amendments have simplified the procedure by requiring copyright licenses to be only in writing. Further, by amending section 31, compulsory licensing has been made applicable to foreign works as well. Earlier this provision was applicable only in respect of 'Indian works withheld from public.' Now compulsory licenses apply to all works, whether Indian or not with an object of making foreign works capable of being licensed compulsorily in case it is published elsewhere but withheld in India. The amendments also widened the scope of section 31A to provide for compulsory license in the case of published work. Before the amendments the section applied only to unpublished Indian works. The amendments enable the copyright board to grant compulsory licenses to more than one person provided the board is of the opinion that the applicant(s) is qualified to do so.

Before the 2012 amendments, the most common forms of licenses were voluntary and compulsory licenses. The amendments have introduced a new form of license - the statutory licenses. Section 31C has been inserted by virtue of the 2012 amendments to provide for statutory licenses for cover versions. In the pre-amendments regime, the right to make cover versions was treated as a part of fair dealing under section 52(1)(j). However, time period after which a cover version can be made has increased from two years to five years. Under section 31A, any person desirous of making a cover version, being a sound recording in respect of any literary, dramatic or musical work with the licence or consent of the owner of the right in the work, can do so. Conditions for making cover versions are stipulated in the Act itself. All cover versions need to state that they are cover versions. The amendments confers no right to alter the original song. Only note-for-note and

²⁶ For a detailed discussion, see, *Penguin Book Ltd. v. Indian Book Distributors*, 1984 (4) PTC 285.

word-for-word covers are allowed by the amendments. Alterations are allowed if it is technically necessary for the purpose of making of the sound recording. Sound recording in the cover version must be in the same medium. Prior notice of the intention to make the sound recordings must be given to the owner. Advance copies of all covers or labels with which the sound recording are to be sold to be provided or royalties to be paid in advance. One royalty in respect of such sound recordings shall be paid for a minimum of fifty thousand copies of each work during each year.

Section 31D has been inserted to provide for statutory license for broadcasting of literary and musical works and sound recordings. Any broadcasting organization, desirous of communicating published work to the public by way of broadcast (by way of television broadcast or radio) or a performance of any published musical/lyrical work and sound recording, can do so by giving prior notice of this intention to the owners. The notice must specify the duration and territorial coverage of the broadcast. The broadcasting organisation has to pay royalties to the owners of such rights for each work at the rate and manner fixed by the copyright board. The rates fixed for television broadcasting shall be different than that fixed for radio broadcasting. In fixing the manner and the rate of royalty, the copyright board may require the broadcasting organization to pay an advance to the owners of rights.²⁷ No fresh alteration to any literary or musical work, which is not technically necessary for the purpose of broadcasting, other than shortening the work for convenience of broadcast, shall be made without the consent of the owners of rights. The names of the author and the principal performer will have to be announced with the broadcast (except in case of the broadcasting organisation communicating a work by way of the performance).²⁸

Relinquishment

Apart from assignment and licenses, the copyright owner has also the right to relinquish his copyright. A relinquishment is a formal legal procedure by which the owner abandons his copyright and consequent of which the work passes into public domain. It is an unconditional act. Amendments are made in 2012 in the manner by which the author can relinquish his copyright. Under section 21, now the author of a work can relinquish all or any of the rights in the copyright in the work by way of a simple public notice. Prior to this, the author could relinquish all or any of his rights in his work only by giving notice to the registrar of copyrights.

Copyright society

Chapter VII of the Copyright Act providing for copyright societies has been

27 The Copyright Act, 1957 as amended in 2012, s. 31D (4).

28 *Id.*, s. 31D (6).

substituted in the year 1994. Various amendments have been carried out in section 33, 34 and 35 of the Act dealing with registration and functioning of copyright societies. The newly inserted proviso to section 33 states that the business of issuing or granting licenses in respect of literary, dramatic, musical and artistic works incorporated in a cinematograph film or sound recordings shall be carried out only through a registered copyright society.²⁹ The existing copyright societies will be deemed to be treated as copyright society under the new amendment Act but they need to re-register within a period of one year from the date of commencement of the Copyright (Amendment) Act, 2012.³⁰ The period will be for a initial term of five years which can be renewed.³¹ The Central Government can suspend the registration of a copyright society *inter alia* in the interest of authors and owners of copyright.³²

Copyright societies are required to have governing bodies consisting of equal number of authors and owners of work for the purpose of administration of the society. All members of the copyright society shall enjoy equal membership rights and there shall be no discrimination between authors and owners in the distribution of royalties.³³ Amendments in this regard has been made to protect the interest of the authors.

Section 33A has been inserted by the 2012 amendments providing for tariff scheme by copyright societies. Every copyright society has to publish its tariff scheme and any person who is aggrieved by such scheme has the right to appeal to the copyright board. The copyright board after holding an enquiry has the power to make orders to remove any unreasonable element, anomaly or inconsistency in the tariff scheme.³⁴ However, the aggrieved person has to pay all his dues to the copyright society before making an appeal to the copyright board. Further, the copyright board may after hearing the parties fix an interim tariff and direct the aggrieved parties to make the payment accordingly pending disposal of the appeal. The new amendments thus safeguard the copyright societies from being mismanaged and ensures that the interest of both the authors and owners are protected.

Authors' special rights

Moral rights of authors are distinct facets of copyright. While economic rights aim at encouraging the authors to engage in creative activity and compensating the authors for their creativity, moral rights aim at protecting the personality and reputation of authors. In French copyright jurisprudence, the special rights of authors

29 *Id.*, s. 33 (1) proviso 2.

30 *Id.*, s. 33 (3A) proviso 2.

31 *Id.*, s. 33 (3A).

32 *Id.*, s. 33 (5).

33 *Id.*, s. 35.

34 *Id.*, s. 33(2).

are known as *droit moral*. Almost all jurisdictions have embraced the notion of moral rights and they mainly consist of right of paternity, integrity, attribution, and privacy. In India, the moral right concept received legal sanctity only in 1994. However, the 1994 amendments preferred the term special rights instead of moral rights. Section 57 of the Act as amended in 1994 recognized two special rights of the authors: (i) Right to claim authorship of the work; and (ii) right against distortion - right to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation. This section also provided that such moral rights (except the right to claim authorship) could be exercised by legal representatives of the author. Further, right against distortion was available only before the expiration of the term of copyright.

However, pursuant to the 2012 amendments, the right to claim authorship and the right against distortion can now be exercised by legal representatives of the authors. Prior to this, the legal representatives had no right to claim authorship. Under the 2012 amendments, the right against distortion is available even after the expiry of the term of copyright. Earlier the right against distortion had limited scope only in respect of distortions that took place during the existence of copyright. This bar has been removed by virtue of 2012 amendments.

As stated elsewhere, the concept of moral right is wider than the authors' special right concept prevailing in India. Even the recent amendments failed to broaden the content and scope of moral rights. The ambit of moral rights notion as it exists in foreign countries is still wider recognizing the authors' privacy rights, right to withdraw publication, right against false attribution *etc.* Moreover, while the 2012 amendments use the term moral right under section 38B in respect of performers, what prevented the legislatures from using the same terminology in respect of authors under section 57 defies logic. In legal parlance, different terminologies are not generally used unless they connote different meaning.

One may also wonder, does the amendments in section 57(2) confer on the legal representatives the right to claim authorship? Or does the amendments confer on the legal representatives the right to ensure that the original author's name continues to remain in all the copies of his work. A logical reasoning would only conclude that the legal representatives cannot claim any authorship for themselves, but the legislatures must have intended to confer the right on legal representatives to the effect that there is no removal of the original author's name from the work.

Rights of performers

The 1994 amendments defined the term performer under section 2 (qq) as including an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance. The

2012 amendments Act modified the definition of ‘performer’ by inserting a proviso to section 2 (qq):

Provided that in a cinematograph film a person whose performance is casual or incidental in nature and, in the normal course of the practice of the industry, is not acknowledged anywhere including in the credits of the film shall not be treated as performer except for the purpose of clause (b) of section 38B.

Hence, in a cinematograph film a person whose performance is casual or incidental in nature and if he is not acknowledged in the credits of the film, then he shall not be treated as a performer except for the purpose of attributing moral rights.

Prior to the 2012 amendments, the performer’s right was articulated as a negative right. The performers had the right to prevent third parties from making use of the performance without due consent of the performer. The amendments grants exclusive positive rights to the performers: Right to do or authorize for doing any of the following acts in respect of the performance or any substantial part thereof, namely:³⁵

to make a sound recording or a visual recording of the performance, including-

- a) reproduction of it in any material form including the storing of it in any medium by electronic or other means;
- b) issuance of copies of it to the public not being copies already in circulation;
- c) communication of it to the public;
- d) selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording;
- e) to broadcast or communicate the performance to the public except where the performance is already broadcast.

The definition of the term ‘communication to the public’ under section 2(ff) has been amended to include within its ambit ‘performance’ by any performer and extending ‘communication to the public’, ‘simultaneously or at places and times chosen individually’.

Once a performer has, by written agreement, consented to the incorporation of his performance in a cinematograph film he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer’s right in the same film. However, the performer shall be entitled for royalties in case of making of the performances for commercial use.³⁶

³⁵ *Id.*, s. 38A (1).

³⁶ *Id.*, s. 38A (2).

The amendments introduced the moral rights for the performers by virtue of section 38B, which provides as follows:

The performer of a performance shall, independently of his right after assignment, either wholly or partially of his right, have the right-

- a. to claim to be identified as the performer of his performance except where omission is dictated by the manner of the use of the performance; and
- b. to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.

Further explanation to section 38B clarifies that mere removal of any portion of a performance for the purpose of editing, or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the performer's reputation.

However, this section leaves two doubts: (1) are the performers entitled for moral rights in respect of their performance only after assignment of their rights? (2) and why the legal representatives of the performers are not allowed to exercise the right to claim moral rights just like the legal representatives of the authors.

Exceptions and limitations for persons with disabilities

By way of 2012 amendments, sections 51(1)(zb) and 31B are inserted which carve out exceptions and limitations for persons with disabilities. Section 52(1)(zb) allows the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format by any person to facilitate access to persons with disabilities to the copyrighted works without any payment of compensation to the copyright holder, and any organization³⁷ working the benefit of persons with disabilities to do so as long as it is done on a non-profit basis and with reasonable steps being taken to prevent entry of reproductions of the copyrighted work into ordinary channels of business.

Under section 31B of the Act, any person working for the benefit of persons with disability on a profit basis may apply to the copyright board for a compulsory license to publish any work in which copyright subsists for the benefit of such persons. Such application is required to be disposed of expeditiously and an endeavour is required to be made to dispose it of within 2 months. After conducting

³⁷ *Id.*, s. 52(1)(zb) Explanation- ...“any organization” includes an organization registered under section 12 A of the Income-tax Act, 1961..and working for the benefit of persons with disability or recognised under Chapter X of the Persons with Disabilities (Equal Opportunities, Protection or Rights and Full Participation) Act, 1995 or receiving grants from the government for facilitating access to persons with disabilities or an educational institution or library or archives recognised by the Government.

an inquiry including inquiry into the credentials and good faith of the applicant and after hearing the owner of rights, the copyright board may pass the order for compulsory license, if it is satisfied that a compulsory license needs to be issued to make the work available to the people suffering from disabilities. The compulsory license issued should specify the means and format of publication, the period during which it may be exercised and, in the case of issue of copies, the number of copies that may be issued. The copyright board may specify the number of copies that may be published without payment of royalty and may fix the rate of royalty for the remaining copies. A further application and consequent order may be made to extend the period and allow the issue of more copies.

This is a welcome provision. With these amendments India became amongst the few countries to have most progressive exception for persons with disabilities.

Broadening of the doctrine of fair dealing

The doctrine of fair use recognizes that certain uses of copyrighted works do not require permission from the copyright holder and there are exceptions and limitation attached to the exclusive rights of copyright holder. In India the notion is termed as fair dealing instead of fair use. The Act before the 2012 amendments, dealt with fair dealing rights with regard to 'literary, dramatic, musical or artistic works' under section 52(1)(a). Now it covers all works (except computer programs), in effect covering sound recordings and video as well. This will help make personal copies of songs and films, to make copies for research, to use film clips in classrooms, *etc.* Fair dealing exception under section 52(1)(a) has been extended to the reporting of current events, including the reporting of a lecture delivered in public. Earlier, fair dealing exception was limited for (i) private use, including research, and (ii) criticism or review, whether of that work or of any other work. Further, it has been clarified that the storing of any work in any electronic medium for the purposes mentioned in this clause, including the incidental storage of any computer program which is not itself an infringing copy, does not constitute infringement.

The following new exceptions inserted in section 52 are in consonance with recent and on-going technological advancements:

1. The transient and incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public.³⁸
2. The transient and incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy: Provided that if the person responsible for the storage of a copy, on a complaint from which any person has been prevented,

³⁸ *Id.*, s. 52(1)(b).

he require such person to produce an order within fourteen days from the competent court for the continued prevention of such storage.³⁹

3. The storing of a work in any medium by electronic means by a non commercial library, for preservation if the library already possesses a non digital copy of the work.⁴⁰ This provision is a step forward to foster an Indian Internet Archive, or help spread the idea of the open library or digital library in India
4. The importation of copies of any literary or artistic work, such as labels, company logos or promotional or explanatory material that is purely incidental to other goods or products being imported lawfully.⁴¹

Through the amendments India became one of the very few countries to extend fair use right to digital domain through legislative amendment. Further, section 52 (1)(w) inserted by 2012 amendments states that the making of a three-dimensional object from a two-dimensional artistic work, such as a technical drawing, for the purposes of industrial application of any purely functional part of a useful device is a fair dealing and the same will not constitute infringement of the copyright. Whereas in section 14(c), the depiction in three dimensions of a two-dimensional work and depiction in two dimensions of a three dimensional work are conferred as exclusive rights of the copyright owners. These two sections do not synchronise in a comprehensive analysis of the amendments.

Border control measures

Border control measures, in the contemporary world of global trade and international market, are necessary to prevent importation or exportation of infringing intellectual property products. TRIPs agreement in section 4 (articles 51 to 60) generally and under article 51 particularly specifically provides for special requirements related to border measures. Member countries are required to adopt procedures to enable the copyright holder to suspend importation of pirated copyright goods.⁴²

To implement the TRIPs border control obligations, by way of 2012 amendments, specific provisions have been incorporated in the Indian Copyright Act.⁴³ Section 53 as substituted by 2012 amendments incorporates detailed border

³⁹ *Id.*, s. 52(1)(c).

⁴⁰ *Id.*, s. 52(1)(n).

⁴¹ *Id.*, s. 2(1)(zc).

⁴² Pirated copyright goods means any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted infringement of a copyright or a related right under the law of the country of importation.

⁴³ To know about the border control measures in other countries, see, Michael Blakeney(ed.), *Border Control of Intellectual Property Right* (Sweet & Maxwell 2010).

control measures to strengthen enforcement of rights by making provision to control import of infringing copies by the customs department, disposal of infringing copies and presumption of authorship under civil remedies. It provides that the owner of copyright of any work or any performance embodied in such work, or his duly authorized agent, may give notice in writing to the commissioner of customs, or to any other officer authorized in this behalf by the Central Board of Excise and Customs requesting the commissioner for a period specified in the notice, not exceeding one year, to treat infringing copies of the work as prohibited goods, and that infringing copies of the work are expected to arrive in India at a time and a place specified in the notice. After examination of evidence so furnished, the commissioner may pass an order treating the infringing goods as prohibited goods. When any such goods are detained, the customs officer shall inform the importer as well as the person who gave notice of the detention of such goods within forty-eight hours of their detention. The customs officer shall release the goods, and they shall no longer be treated as prohibited goods, if the person who gave notice does not produce any order from a court having jurisdiction as to the temporary or permanent disposal of such goods within fourteen days from the date of their detention. This provision is applicable to broadcasting organization as well.

Technological protection measures

Article 11 of WCT⁴⁴ and article 18 of WPPT⁴⁵ oblige member countries to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors and performers in connection with the exercise of their rights. This is to prevent digital piracy. Hence section 65A has been inserted by way of 2012 amendments to recognize technological protection measures (TPMs).

Copyright content in digital environment can be protected by technological protection measures. Technological protection measures are different types of technologies used to control access to copyright content and prevent users from copying protected content. These may include access control technological protection

44 Art. 11: Obligations concerning Technological Measures - Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

45 Art. 18: Obligations concerning Technological Measures - Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

measures (examples are cryptography, passwords, digital signatures, digital water marks *etc.*) and copy control technological protection measures (examples are serial copy management systems for audio digital taping devices, scrambling systems for DVDs to prevent third parties from unauthorized reproduction). Circumvention devices are technologies that are used to remove, disable or circumvent technological protection measures.

Under section 65A any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred under the Act with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine. Exceptions to TMPs are provided in sub-section 2 enabling enjoyment of fair use provisions. The prohibition shall not prevent doing anything for a purpose not expressly prohibited by the Act. Any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated. Other exceptions include (a) doing anything necessary to conduct encryption research or conducting any lawful investigation, (b) doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner or operator, (c) doing anything necessary to circumvent technological measures intended for identification or surveillance of a user and (d) taking measures necessary in the interest of national security.

Rights management information

Article 12 of WCT⁴⁶ and article 19 of the WPPT⁴⁷ provide for protection of

46 Art. 12: Obligations concerning Rights Management Information-

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

47 Art. 19: Obligations concerning Rights Management Information - (1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this

rights management information (RMI). Rights management information means information which identifies the work, the author/performer of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public. The amendments have inserted a new clause in section providing definition for rights management information. Section 2 (xa) defines RMI as:

- (a) the title or other information identifying the work or performance;
- (b) the name of the author or performer;
- (c) the name and address of the owner of rights;
- (d) terms and conditions regarding the use of the rights; and
- (e) any number or code that represents the information referred to sub-clauses (a) to (d), but does not include any device or procedure intended to identify the user.

Section 65B as inserted by the 2012 amendments prevents the removal of the rights management information without authority and distributing any work, fixed performance or phonogram, after removal of rights management information. According to section 65B(i) any person, who knowingly (i) removes or alters any rights management information without authority, or (ii) distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine. If the rights management information has been tampered within any work, the owner of copyright in such work may also avail of civil remedies against the persons indulging in such acts.

Referring to TPMs and RMIs, though the amendments are progressive, these sections have provisions for punishment and sanctions within it. They do not create or confer any positive right in strict legal sense, they are merely providing for civil or /and criminal remedy for infringement.

Treaty: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority. (2) As used in this Article, "rights management information" means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

V Lacunae and missed opportunities

There are many areas which are left out by the amendments. For instance, multimedia works are of great importance in the contemporary digital environment. Multimedia rights generally differ from work to work. The amendments are silent as to the content and scope of the multimedia rights. The legislatures have to answer, in the copyright jurisprudence as it stands today, where the multimedia works fits in, what are the rights protected under multimedia works and what constitutes infringement of multimedia rights. Similarly, the status of remixes continues to be a gray area. Parodies enjoy copyright protection under the fair use doctrine in many countries like other forms of comment and criticism.⁴⁸ Justifying on the same argument, remixes may also be protected provided there is substantial creativity and originality.

Another aspect that deserves a reexamination is the definition of dramatic work under section 2(h). A combined reading of section 2(h) and section 2(f) indicates that a dramatic work does not include a cinematographic film by virtue of the interpretation of section 2 (h). This indicates that once a drama is recorded it no longer remains as a drama but a film, although a cinematograph film is different from dramatic work as a film may not contain the stage directions and other instructions which are normally found in a drama.

The practice in the copyright office also shows that to register a work as a drama it must be submitted in the written format, if it is in CD the copyright office treats it as a cinematographic film and not as a drama. On the contrary, in the US, choreography and pantomimes *etc.* are being treated as drama which can be submitted in a film or video recording, or a phonorecord. Now it is the task of judiciary to give a harmonious interpretation of these provisions keeping in view the adaptation rights of the copyright holder of a drama.

Section 63B⁴⁹ provides punishment for knowing use of infringing copy of a computer program. Section 63 provides general provisions of punishment for all other offences of infringement under which an offender may be imprisoned for a term which shall not be less than six months and which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakhs. However, section 63B provides for punishment which is not less than seven days' imprisonment and fine which shall not be less than fifty thousand rupees. There is no justification in providing lesser punishment for knowing use of infringing copy of a computer program.

48 *Campbell v. Acuff-Rose Music, Inc.*, 510 US 569 (1993).

49 Inserted by the 1994 amendment.

Similarly, while in some aspect the amendments goes beyond the international obligation and addresses the high technological issues, it failed to address the issues of 'unicast' and 'narrowcast.'

VI 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 strengthened 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.