

# COPYRIGHT LAW AND JUSTICE IN INDIA

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## I Introduction

COMPARED WITH the many-sided initiatives taken by India in the reformulation of the international legal regime of copyright, and with the phenomenal growth since Independence in the number and quality of literary, dramatic and artistic works, the law of copyright in India has received scant juristic attention. This fact becomes even more puzzling when we further recall that Independent India accorded high priority to formulation of her own law on copyright. The Indian Copyright Act 1957 (hereinafter referred to as the 1957 Act) repealed the Indian Copyright Act 1914 (hereinafter referred to as the 1914 Act) which virtually incorporated the Imperial Copyright Act 1911. The revision of the 1914 Act occurred within seven years of Independence, alongside with the great codification of the Hindu law. Even this last development did not unfortunately focus attention of jurists to this vital area of the law, in its manifold bearings on the social and cultural development of India. The, somewhat acrimonious, dialogue between reputed authors and intellectuals and the government (the former vehemently *opposing* the Stockholm charter)<sup>1</sup> did not involve either lawyers or jurists at that time. And judicial decisions of great signifi-

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1. See, N.N. Gidwai (ed.), *Copyright: Legalised Piracy?* (1968). This monograph is mainly a collection of newspaper articles by eminent authors and intellectuals. T.S. Krishnamurthy, the Registrar of Copyrights, hailed the Stockholm revision as a "brave and understanding measure, calculated to spread knowledge and remove illiteracy." But, in response, *The Statesman* editorialised that the revision was nothing more than "a prelude to licensed larceny."

cance adversely affecting the rights of creative artists in last twenty-three years did not disturb the lawpersons.

The search for reasons for this juristic inadvertence to this branch of law belongs to the domain of sociology of knowledge, as also to sociology of legal education and legal profession. This theme cannot be pursued here. We may note here briefly some signs of change in recent times. Leading universities now offer optional and compendious courses on the law of intellectual property; there has been established, at long last, a specialist Chair in the field of intellectual property law at the University of Delhi in 1979-1980. An Indian academic has held the WIPO fellowship. The *Annual Survey of Indian Law*,<sup>2</sup> since 1985 includes a survey on the developments in the field of intellectual property law.<sup>3</sup> This writer's own chance encounter with Arpad Bogsch, and his distinguished colleagues from the WIPO some ten years ago, enabled him to relate more sharply his concern with the sociology of law and development with the regime of the intellectual property law. Indian scholars, it appears, would, from now on, be deeply involved in the future of the law of copyright and its revision. The future holds promise for the emergence of mature scholarly concern with the law of copyright in particular and the law of intellectual property as a whole.

## II A brief historical overview

### (1) Introductory

It is customary to commence historical accounts of copyright law with enactment of the 1914 Act which (as we shall see later) did nothing more than extend in all vital respects the United Kingdom Copyright Act to India. The then Indian legislature, under section 26, had the power to modify the provisions of this Act.

The question whether or not India, as a civilised nation had prior to the colonisation any notions or institutions for legal protection of creative artists has not even been asked so far; this makes even tentative approaches to answers quite ambitious at this stage. Legal and social historians of ancient and medieval India have yet to attend to this aspect. Similarly, we lack knowledge about systems of copyright protection, and indeed of the total legal systems, of about six hundred odd ex-princely states which

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2. A publication of the Indian Law Institute, New Delhi, which reviews judicial and legislative developments in various area of Indian law. Regrettably, its quarterly *Journal*, the authentic organ of professional legal criticism, has in twenty-five years of existence not yet touched upon copyright law. But with this major publication on the Berne Convention volume this lack is somewhat happily redressed.

3. As noted, there is no scholarly commentation on copyright law. There were a handful of professional treatises on the subject written by practitioners. Almost all of them are heavily derivative of English and American treatises: the leading Indian decisions are not analysed, and not even all decisions mentioned. See Upendra Baxi, *The Law of Intellectual Property: Copyright Law in India* (forthcoming, 1988).

never became, legally, a part of British India and continued their 'sovereign' existence till 26 January 1950, when India became a free Republic. But there is some evidence that some such states elected to adopt basic features of English statutes on copyright, modifying them in some respects to suit local conditions. For example, the State of Hyderabad retained, till its merger with Independent India, its own copyright law which followed earlier British statutes, unaffected by the 1911 or 1914 Acts. An understanding of the interplay of received and indigenous ideas of law and administration of copyright in these states awaits labours of legal and social historians. In much the same way, an adequate history of copyright law in India must take note of the systems developed in the Portuguese and French enclaves in India, which persisted about a decade or so, after attainment of the Indian Independence.

Even otherwise, it is mistaken to begin an account of copyright law in India with the British Act of 1911 and its organic transplantation into Indian law. It appears that the first statute on copyright was enacted during the East India Company's regime in 1847. Its preamble recites several doubts which exist or which "may exist" concerning recognition and enforcement of copyright as a part of the common law or administration of justice on the basis of "justice, equity and good conscience" or as regards the application of British statutes to territories then administered by the East India Company. The term of copyright was for the lifetime of the author plus seven years post-mortem. But in no case the total term of copyright was to exceed the period of forty-two years. The government was empowered to licence publication of the book if the owner of copyright upon the death of the author refused to allow its publication. Unauthorised printing of copyright work for (or as a part of attempt of) "sale hire, or exportation", or "for selling, publishing or exposing to sale or hire" constituted infringement. Suit or action for infringement was to be instituted in the "highest local court exercising original civil jurisdiction." The Act provided specifically that under a contract of service copyright in "any encyclopaedia, review, magazine, periodical work or work published in a series of books or parts" shall vest in the "proprietor, projector, publisher or conductor." Infringing copies were deemed to be copies of the proprietor of copyrighted work. Registration of copyright with the Home Office was mandatory for the enforcement of rights under the Act; but the proviso to section 14 specifically reserved the subsistence of copyright in the author, and his right to sue for its infringement to the extent available in law other than the 1847 Act.

We do not have much information on how this legislation operated during the period 1847 to 1911. Given the state of art, in what follows we survey *faute de mieux* the developments from and since the 1914 Act.

## (2) The 1914 Act

The 1914 Act was a short statute of fifteen sections which annexed virtually the whole of the UK Copyright Act 1911 (hereinafter referred

to as the 1911 Act) as its first schedule. It made a few minor omissions. The major changes made by the 1914 Act were, in this writer's opinion, two. *First*, it introduced criminal sanctions for copyright infringement (sections 7 to 12). *Second*, it modified the scope of the term of copyright; under section 4 the "sole right" of the author to "produce, reproduce, perform or publish a translation of the work shall subsist only for a period of ten years from the date of the first publication of the work." The author, however, retained her "sole rights" if within the period of ten years she published or authorised publication of her work a translation in any language in respect of that language. Vesting violations or property rights with criminal sanctions can probably be understood as a part of general colonial legal and political policies which sought to protect, generally, right to property over rights to personal freedom.<sup>4</sup>

The modification of term of copyright for translation rights cannot be explained by any reference to dominant characteristics of colonial policy. The language of the Act might suggest a laudable policy of promoting wider diffusion of Indian works in one language into other Indian languages, a consideration which might have appeared distinctive to India as compared with UK. There might also have been the desire to promote the growth of publication industry in numerous Indian languages. But whatever be the intention, the impact was disadvantageous to the authors and a boon to publishers. This can be seen from the following observations in a note of dissent when the continuation of the same provision was urged by the Joint Select Committee of the Indian Parliament in 1956 (a recommendation which did not ultimately prevail). R.D. Sinha "Dinker" argued that this provision has "worked to the utter detriment of the authors." Referring to the two distinguished Bengali authors he observed:

Most of the novels by Sarat Chandra Chatterjee...were translated in Hindi, while the author was yet alive. The author's novels, in translation sold thousand of copies, but the author did not get a pie out of the sale-proceeds.... Something like this happened in the case of Gurudeva (Tagore). Publishers in Hindi and other languages were making good money out of the translations of his works, but the poet, revered by the nation, was in his extremely old age touring the country for money to support the Shanti-Niketan.<sup>5</sup>

It appears that mostly the Hindi language publishers benefited a great deal from the modification of the term of copyright regarding translations.

4. This observation is borne out also by the general approach to protection of property rights in the great Indian Codes in the late nineteenth century.

5. See, for the Report of the Joint Select Committee, *The Gazette of India Extraordinary*, pt. 2, s. 2, p. 907 (1956).

This is not entirely devoid of political significance as Hindi was emerging as a dominant language in Northern India. But it is idle to conjecture. A socio-political history of colonial copyright law must probe this aspect further.

The early phases of the transplanted copyright law generated decisions like *Macmillan v. Suresh Chunder Deb*<sup>6</sup> and *Macmillan v. R.C. Cooper*<sup>7</sup> which have become *locus classicus* of the law of copyright. At the same time, it also generated a *juristic dependencia*.<sup>8</sup> Indian judicial decisions as well as forensic styles have had perforce to rely on United Kingdom (UK) precedents. The heavy hand of UK law still lies on Indian creative works despite the reformulation of the law in 1957. Judicial interpretation is perhaps most heavily influenced by UK precedents in the area of copyright law than in any other. The slavish imitation of foreign precedents has occasionally led intrepid Indian justices to remind the Bar and the Bench that the 1957 Act is made by "a sovereign legislature of this land" and its interpretation "must be based upon the object of the legislation and the language used" and that the "historical roots" of the Indian law in the UK law of copyright should have no higher function than that of providing an "aid to thinking."<sup>9</sup> It is hoped that this approach will prevail in course of time; and that the umbilical cord with the British judicial law would be severed.

### (3) The 1957 Act

The 1914 Act was continued with minor adaptations and modifications till the 1957 Act was brought into force on 24 January 1958.<sup>10</sup> The bill seeking to revise the entire law was introduced in the *Rajya Sabha* (the Council of States) on 1 October 1955; the bill was enacted in about eighteen months time (which included its processing by the joint select committee of both the Houses of Indian Parliament) on 4 June 1957. The expedition and priority with which the law revision was accomplished is indeed remarkable, especially when we recall that the bill was introduced within a few

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6. I.L.R. 1890 17 Cal. 951.

7. A.I.R. 1924 P.C. 75.

8. See, for the notion of *juristic dependencia*, Upendra Baxi, *The Crisis of the Indian Legal System* 41-51 (1981).

9. *J.N. Bagga v. A.I.R. Ltd.*, A.I.R. 1969 Bom. 302.

10. As in Ireland in 1922, so in India in 1959, it was unsuccessfully argued that the Imperial Copyright Act 1911 can have no application upon their becoming "self-governing dominions" under section 26(1) and (2) of that Act. The Madras High Court preferred to adopt the view of the Privy Council overruling the Irish Supreme Court decision (*The Performing Rights Society v. Bray Urban District Council*, 1930 A.C. 377). The Privy Council decision was not binding on the High Court. The real basis for the decision was article 372 which continued "existing laws" in force, unless altered by competent legislature. The policy justification for the decision was that "India was and continues to be the member of copyright convention", that copyrights were "rights in property, recognised the world over" and certainly "not repugnant to her (India's) ideas". *Blackwood and Sons Ltd. v. Parsuraman*, A.I.R. 1959 Mad. 410 (per Rajgopala Iyengar J.).

years of attainment of Independence and passed in the seventh year of the Republic. Equal priority was attached to other domains of the intellectual property law; but their reformulation proved difficult and time consuming.<sup>11</sup>

A number of factors impelled this early revision. *First*, it was clear that continued existence of the 1911 Act through the 1914 Act was unbecoming to "the changed constitutional status of India." *Second*, the 1914 Act did not accord with the 1948 Brussels Act of the Berne Convention and the 1952 Universal Copyright Convention. *Third*, new "and advanced method of communications" rendered modernisation of the law necessary. *Fourth*, the need for an "independent self-contained law" was also felt in the light of the experience of the "working" of the 1911 Act, and more important, of "the growing public consciousness of the rights and obligations of the authors."<sup>12</sup>

The Indian legislators had before them the report of the English Copyright Committee and legislative proposals based thereon; they had also before them the models provided, in their optional and obligatory features, by the relevant international conventions; the Select Committee had evidence of twelve organisations, including the International Confederation of Societies of Authors and Composers (Paris), the Performing Right Society (London), British Copyright Council and the Columbia Gramophone Company Ltd.<sup>13</sup> The Report of the Select Committee appears to be among the briefest in the annals of the Indian Parliament;<sup>14</sup> but, in many senses, it made major innovations which were ultimately enacted.<sup>15</sup> Perhaps the only significant matter on which its proposals were not accepted, in view of powerful dissents referred to earlier, pertained to a ten-year term of copyright for translations; the original proposal in the bill prevailed here over the committee's formulations. But the committee's views prevailed on other vital matters. For example, the original proposal of the bill to reduce the term of copyright for life of the author and twenty-five years post-mortem was vetoed by the committee (despite a note of dissent) on the ground that India must fall in line with international conventions. The committee also negated the bill's proposal, on similar

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11. Equally high priority was attached to revision of the Patent Act 1911; the law was revised only in 1970. See Upendra Baxi, "Role of Industrial Property Law in promoting Indigenous Inventive and Creative Activity" in *Inventive Activity in the Asian and Pacific Region* 95 (WIPO 1980).

12. See the statement of objects and reasons to the bill, *supra* note 5.

13. The Indian organisations were: All India Centre of PEN; The Indian Council For Cultural Freedom; The Indian Institute of Education and Cultural Freedom; The All India Hindi Publishers Association; Indian Phonographic Industry and All India Radio. A religious organisation (the Satsangis of Radhaswami Faith), curiously, also gave evidence.

14. It comprises ten pages of majority report, and six notes of dissent totalling seven pages.

15. It provided new definitions of 'artistic works', 'authors', 'dramatic work' (as excluding films); it redefined civil jurisdiction for infringement proceedings; it provided enhanced prison sentences; and it provided for independence of the Copyright Board with a retired justice of the Supreme Court or a High Court as its chairman.

grounds, making registration of copyright a pre-condition for infringement proceedings.<sup>16</sup>

The Act, as it emerged, was not in any sense a replication of the English legislative proposals. In this sense, the 1957 Act was the first truly Indian legislation after well over two centuries of the subjection to the 'imperial' law. The Act was not sufficiently far-sighted; it, for example, does not protect the right of the performers adequately. In many respects (as demonstrated later) it is drafted in ways which make it meaningful only to judges and lawyers and sometimes not even to them. But the fact remains that the country had its *own* law of copyright for the first time in contemporary history; and, for weal or woe, it represented the law-policy choices made by its independent legislature. This then is the net historical significance of the 1957 Act. In what follows, we explore the principal features of the law and administration of the Act for the past twenty-three years.

The general scheme, and the principal features, of the 1957 Act are as follows. Chapters I, III, IV and V deal with copyright and its ownership; chapter XI with infringement; chapter IX with international copyright; chapter X with registration of copyright; chapter XII to XIV with civil and criminal remedies and chapters II, VI, VII and X with powers and functions of the registrar of copyrights and the Copyright Board. A short special chapter VIII deals with the rights of broadcasting authorities. The Act is divided into fifteen chapters and contains seventy-nine sections. In addition, the government has enacted copyright rules under section 78 of the Act. The rules deal with matters of procedure primarily in matters like applications of licences for translations, performing rights societies, relinquishment and registration of copyright and related matters. In addition to the Act and the rules, we must note that the government is empowered to make an order directing that any or all the provisions of the 1957 Act may apply to copyright in foreign works and in works of certain international organisations. The orders are to be laid before Parliament and subject to modification by it. The orders have to be published in the government gazette.

The 1957 Act makes certain administrative arrangements for implementation. It creates, for the first time, two distinct institutions: the Copyright Office and the Copyright Board. The Copyright Office is headed by a registrar of copyrights and the office is under the superintendence and direction of the Government of India. The Ministry of Education and Social Welfare is the administrative ministry overseeing the Copy-

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16. Despite this, the Madhya Pradesh High Court regarded, as late as 1970, the Act as requiring mandatory registrations: see *Misra Bandhu Karyalaya v. S.Koshal*, A.I.R. 1970 M.P. 261 at 267. This dictum created a lot of misguided contention and litigation. Fortunately, other High Courts repudiated, not without some embarrassment, this misinterpretation of the Act. See, *M.C. Production v. A. Sudarsan*, A.I.R. 1976 Mad. 22; *Satsang v. Kiron Chandra*, A.I.R. 1972 Cal. 533; *Radha Krishna v. State of Bihar*, 1979 Cr. L.J. 757; *Deepak Printers v. Forward Stationery Mart*, 17 Guj. L. Rep. 338.

right Office. A principal function of the office is to maintain, in all relevant particulars, a register of copyrights (contemplated by the bill to be mandatory, but rendered optional by the Act as it emerged); to entertain and deal with applications for compulsory licences and to inquire into complaints of importation of infringing copies. The registrar performs judicial functions in relation to these tasks; and an appeal is provided from his decision to the Copyright Board.

The board has a number of essential functions under the Act. All of them involve determination of claims of rival rights and liabilities; the Joint Select Committee on the Bill was right to insist that the board should be headed by a chairman who is or has been a "Judge of the Supreme Court or a High Court" or is so qualified to be a High Court judge. The principal functions of the board are to consider and determine:

- (i) whether any literary, dramatic, musical or artistic work, or records, are issued in "sufficient quantities" within the meaning of section 3 (section 6(a));
- (ii) whether the term of copyright is shorter in any other country as compared to the term provided under the Act (section 6(b));
- (iii) application for licences to produce and publish a translation of literary or dramatic work in any language (section 32);
- (iv) complaints that certain copyrighted works are unreasonably withheld from public (section 31);
- (v) objections to tariff of fees, charges and royalties announced by performing rights societies (sections 33-36);
- (vi) rectification of the register of copyrights (section 50).

In relation to items (i) and (ii) above, the Act declared that the decision of the board shall be "final." The board as well as the registrar are endowed, by section 74, with certain powers of civil courts (in respect of summoning witnesses, ordering discovery of documents, receiving and examining evidence, etc.) and every order either by the registrar or the board for payment of any money is rendered executable in the same way as if it was the decree of a civil court (section 76). The board is required to circuit in zones in various parts of India; and individuals may file proceedings in the appropriate zones where they voluntarily reside or carry on business or work for personal gain.

An empirical investigation of the workload, and characteristics of its decision-making processes, is overdue, because both institutions have been specifically created with a view to assisting authors; it is important in any design of revision of the law to ascertain to what extent this objective has been actually attained in practice.

#### (4) The 1983 and 1984 Amendments

Although India played a leading role in the revision of the Berne Convention and Universal Copyright Convention leading to the Paris Act



of 1971, it was not until 1983 that the Indian Parliament could revise the legislation to take full benefit of the Paris Act. The new sections 32A and 32B now provide for 'compulsory licences' for publication of copyrighted foreign works in any Indian language for the purposes of systematic instructional activities at a "low price" with the permission of the Copyright Board on certain conditions. The other crucial change affected by the amendment, through the insertion of section 19A, in the teeth of heavy opposition by copyright industries, relates to the conferral of power in the Copyright Board, upon a due complaint to it, to order revocation of the assigned copyright where either the terms are 'harsh' or where the publication of the work is unduly delayed; the board is also competent to issue certificates of royalties recoverable by the owner. In addition the 1983 Amendment provides for power in the Copyright Board to publish unpublished Indian works, and for the protection of 'oral works.' Certain other administrative 'lacunae' have also been redressed by the amendment. The 1984 Amendment, following in the wake of vociferous concern about piracy of copyrighted works, provides for stringent punishments for piracy and effective procedures to inhibit it. We shall consider these amendments in some detail in the analysis that follows. But we may note here that the 1984 Amendment has generated substantial challenges. It has been impugned before the Supreme Court of India and before the Madras High Court as well on constitutional grounds. While the Supreme Court has allowed the Film Federation of India (in the business of running video cassette library for home-viewing) to join as a respondent, the Madras High Court has denied standing to it, to intervene with interesting implications on the trend liberalising *locus standi*.<sup>17</sup>

### III Meaning of copyright

Section 14 of the 1957 Act defines copyright as an "exclusive right, by virtue of, and subject to, the provisions of this Act" to do and authorise doing of any number of prescribed acts in relation to literary, artistic, and dramatic works, and to cinematograph films and records. Despite this clear formulation, judges and jurists often speak of copyright as a kind of "negative right," which is both inaccurate and misleading. It bears reiteration that the set of rights subsumed under the rubric "copyright" is primarily defined in affirmative and positive sense; copyright constitutes property rights *in personam* and *in rem*, violation of which can be redressed under the provisions of the Act. It is also important to stress at the outset that copyright is defined as a statutory right, owing its existence and stature within the four corners of the Act. Section 16 of the Act makes it amply clear that no person is entitled to copyright "or any similar right in any work" "otherwise than under and in accordance with the provisions of this Act or of any other law for the time being in force." No customary

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17. See *Film Federation of India v. Union of India*, A.I.R. 1986 Mad. 43; and Upendra Baxi, "Locus Standi and Copyright Law" in *J.I.L.I.* (forthcoming).

rights in the nature of copyright may, therefore, be pleaded.<sup>18</sup> At the same time, this section does not abrogate "any right or jurisdiction to restrain a breach of trust or confidence."

The rights of authors of literary, artistic, dramatic and musical works, of artistic works, and of cinema films and records, are in some respects similar; they are reproduced below in Table 1 (which also incidentally illustrates the pitfalls and artificiality of legal language).

The meaning of copyright, for each category of work, is quite extensive, especially when we note (as we do in the next section) that the definitions of most *genres* of work is inclusive rather than exhaustive and that copyright protection extends to all kinds of work including those which represent "originality at vanishing point."<sup>19</sup> Even so, the Act by section 15 specifically excludes copyrights in designs which is capable of being registered under the Indian Patents and Designs Act 1911.<sup>20</sup> This exclusion is understandable. What is not so readily understandable is the fact that by necessary implication it is legally permissible to register or claim a copyright in a trademark, which is also capable of registration as a trademark, receiving thus dual protection. Since the registration of copyright is relatively a simple and expeditious process as compared with trademarks, the office of the registrar of copyrights is inundated with registration applications for copyright in marks as "literary" or "artistic" works.<sup>21</sup> Besides, concurrent registration of both trademark and copyright in relation to the same matter often causes understandable, but avoidable, judicial confusion where, for example, standards apt for judging passing-off action for marks tend to rub off to the determination of copyright infringement in the same proceedings.<sup>22</sup> Time is certainly ripe for Indian Parliament to provide for exclusion of trademarks from the scope of section 15 of the Act.

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18. The expressive "and similar right" in section 16 is not self-explanatory. The gloss in T. R.S. Iyenger, *The Copyright Act 1957*, 101 (3rd ed. 1977) does not advance understanding.

19. *Govindan v. Gopalkrishnan*, A.I.R. 1955 Mad. 391 at 393.

20. "Copyright in a design capable of being registered under the Patents and Designs Act shall cease as soon as the article to which the design is applied has been reproduced by any industrial process more than fifty times by the owner, licensee, or any other person." (Section 15(2)).

21. This impression arises out of this writer's discussion with the registrar, and deputy registrar, of copyrights. A statistical analysis is now under way which should give us the exact percentages.

22. See e.g., *Khemraj v. Garg & Co.*, A.I.R. 1975 Delhi 135. The case upheld both the passing off action in the mark as well as infringement of copyright. The latter, received scant attention. And standards for determination got mixed up. For example the doctrine of 'fading memory' is apt for the former, but unknown to the latter, domain of law.

Table I

Column	Genre	Rights
<i>A</i>	<i>Literary, dramatic or musical work, artistic work</i>	<p>(i) Right to reproduce the work in any material form (s. 14(a)(i); (b)(i)).</p> <p>(ii) Right to publish the work (s.14(a)(ii); (b)(ii)).</p> <p>(iii) Right to make any adaptation of the work (s.14(a)(vii); (b)(iv)).</p>
<i>B</i>	<i>Literary, dramatic or musical work (see also column (A))</i>	<p>(i) Right to perform the work in public (s.14(a)(iii)).</p> <p>(ii) Right to produce, perform, or publish any translation of the work (s.14(a)(iv)).</p>
<i>C</i>	<i>Oral works</i>	<p>(i) Right to ownership of an address or speech delivered in public vests in the speaker (s.17(cc)).</p> <p>(ii) Right to make an cinematograph film or a record in respect of the work (s.14(o)(v)).</p> <p>(iii) Right to communicate the work by radio diffusion or of public communication through amplifier (s.14(a)(vi)).</p>
<i>D</i>	<i>Artistic work (see also column A)</i>	<p>(i) Right to include the work in any cinematograph film (s.14(b)(iii)).</p>
<i>E</i>	<i>Cinematograph film</i>	<p>(i) Right to make a copy of the film (s.14(c)(i)).</p> <p>(ii) Right to 'cause the film, in so far as it consists of visual images, to be seen in public'.</p> <p>(iii) Right to 'cause the film, in so far as it consists of sounds, to be heard in public'. (s.14(c)(ii)).</p> <p>(iv) Right to communicate the film by radio diffusion (s.14(c)(iv)).</p> <p>(v) Right to make any record "embodying the recording in any part of the sound track associated with the film by utilising such sound track" (s.14(c)(iii)).</p>
<i>F</i>	<i>Records</i>	<p>(i) Right to make any other record embodying the same recording (s.14(d)(i)).</p> <p>(ii) Right to "cause the recording embodied in the record to be heard in public" (s.14(d)(ii)).</p> <p>(iii) Right to "communicate the recording embodied in the record by radio diffusion" (s.14(d)(iii)).</p>
<i>G</i>	<i>In respect of all genres of work</i>	<p>(i) Right of total or partial assignment (s.18), testamentary disposition (s.20) and relinquishment (s.21).</p> <p>(ii) Right to "paternity" (that is, "right to claim authorship of the work" despite assignment, total or partial).</p> <p>(iii) Right to "integrity" in works (that is, right to object to distortions, mutilations of work, which prejudice author's honour or reputation) (s.57).</p>

#### IV Copyright in literary, dramatic, musical and artistic works

##### (1) Introductory

Copyright subsists, under section 13, in three classes of work: (a) "original" literary, dramatic, musical and artistic works; (b) cinematograph films; and (c) records. At first sight, the requirement of originality seems not to attach to films and records; but this omission is infelicitously made good by the language of clause (3).<sup>23</sup> Literary, dramatic and cinematographic works are defined inclusive by the Act whereas artistic, musical works and records are exhaustively defined by section 2.<sup>24</sup> These differences in the way in which the definition clause has defined different category of works have led (as we shall note later) to some crucial differences in respect of the range of copyright protection. The requirement of 'originality' in Indian law, as elsewhere, does not refer to ideas but rather to the manner and material forms of their expression.<sup>25</sup> The objective of copyright, it has been stressed in India, is not to "create monopoly in ideas;" rather, the protection aims at prevention of unlawful reproduction of dealing with the manner and material form in which ideas are expressed.<sup>26</sup> Consequently, 'originality' also refers not to novelty or creativity in ideas but only to the manner and material form of their presentation. What is protected is the expression of thought—the form, formulation, order, plan or arrangement of presentation—as testifying to the investment by the author of mental faculties, skills, competence, craftsmanship, knowledge, labour and capital in the production of any work.<sup>27</sup> In other words, the requirement of originality is an elliptical way of expressing the idea that the work should not be a substantial copy of another work; or, more colourfully (but less precisely) it should not amount to piracy (or, to vary the usual metaphor a little, hijacking) of another's skill, competence, craftsmanship, labour and capital.<sup>28</sup> In a sense, copyright law protects the author against dishonest and wilful misappropriation or theft of the author's efforts.

Obviously, then, the notion of 'originality' does not even entail a modicum of novelty or creativity. The extent or amount of 'originality' in expression or material form may be very small but that small amount is

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23. According to clause (3) if a substantial part of the film is an infringement of copyright in *any other work*, and if a record made in respect of literary, dramatic or artistic work infringes such work, then no copyright shall subsist in such film or record.

24. See *infra*, parts (3) and (4).

25. See, *Deb and Cooper*, *supra* notes 6, 7; Govindan, *supra* note 19; *N.T. Raghunathan v. A.I.R.*, A.I.R. 1971 Bom. 48; *J.N. Bagga*, *supra* note 9; cases cited in *supra* note 16; *R.G. Anand v. Delux Films*, A.I.R. 1978 S.C. 1613 at 1627.

26. *Ibid.*

27. *Ibid.*

28. See for a more recent reiteration *Deepak Printers*, *supra* note 16 (per M.P. Thakkar J.).

protected by law.<sup>29</sup> The law of copyright, it has been well said, protects originality even at "its vanishing point."<sup>30</sup>

## (2) Meanings of works protected by the 1957 Act

Like the requirement of 'originality' the expression 'literary work' does not mean what it at first sight suggests. Indian courts have clearly ruled that the inclusive definition of 'literary work' in the Act enlarges this *genre* of works to include "all works expressed in writing, whether they have any literary merit or not."<sup>31</sup> Indian courts have held, as others have, that copyright can subsist in law books and reports, dictionaries and gazettes, grammars and maps, almanacs and encyclopaedias, guidebooks and compilations.<sup>32</sup> Indian decisions have, like the English decisions, held that copyright can subsist in examination papers.<sup>33</sup> Ready reckoners of prices of various commodities at given rate of mathematical calculations constitute literary work;<sup>34</sup> so do works of religious preachers or compilations of discourses or teaching.<sup>35</sup>

A dramatic work, under section 2(b), includes "any piece of recitation, choreographic work of entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise but does not include a cinematograph film."<sup>36</sup> The Bombay High Court has recently ruled in *Fortune Films v. Dev Anand*,<sup>37</sup> in view of the specific exclusion of the cinema films from the definition of a dramatic work, that an actor in a cinema film may not claim any copyright in his acting. Moreover such acting, the court held, does not fall within categories "pieces of recitation", "choreographic work" or "scenic arrangement in a dumb show...."

The definition of "artistic works" at first sight appears exhaustive, in the sense that it uses the expression 'means' rather than 'includes'. Clause (i) defines it to mean a painting, sculpture, drawing of any kind, (including diagram, map, chart or plan), engraving or photograph. This clause makes it very clear that it is not necessary for any such work to "possess artistic quality." A picture of Mahatma Gandhi produced by combining two other pictures of him was held entitled to copyright.<sup>38</sup> Similarly, there may be

29. *Govindan*, *supra* note 19 at 393.

30. *Ibid.*

31. See, e.g., *Agarwala Publishing House v. Board of H.S. & I. Education*, A.I.R. 1967 All. 91.

32. See *supra* note 25. We must note though that maps and drawings are included now in the category of "artistic works": section 2(c).

33. See *Jagdish Prashad v. Parmashwar Singh*, A.I.R. 1966 Pat. 33; and *supra* note 28

34. A.I.R. 1971 All. 192.

35. *Satsang*, *supra* note 16.

36. This definition is virtually the same as in the 1911 Act. The UK Act of 1956 has made some significant changes.

37. A.I.R. 1979 Bom. 17; for a critique see part V (iii) of this paper.

38. A.I.R. 1961 Mad. 114 at 117-19.

copyright in photographs or images of deities in calendars.<sup>39</sup> But not all artistic works need be devoid of artistic quality. Clauses (ii) and (iii) also define artistic work as meaning "an architectural work of art" and "any other work of artistic craftsmanship." This last clause, for all intents and purposes, makes the definition of artistic work inclusive rather than exhaustive; in other words, the determination that a work is an artistic one under the Act will have to be made on the facts and circumstances of each case as any work can be subsumed, *arguendo*, under the rubric "any other work of artistic craftsmanship." Given the fact that originality does not necessarily mean creativity in ideas but the manner and material form of expression, the protection rendered to artistic work by the law is quite extensive.<sup>40</sup>

A single judge of the Delhi High Court has recently held<sup>41</sup> that in the absence of proof that a human author actually invested labour and skill in producing a multi-colour design on a carton, no copyright may subsist in a "mechanically reproduced printed carton." If this decision is accepted as an aspect of copyright law, computer produced designs, unless proved to emanate somehow from human author's efforts, will not receive copyright protection as "artistic works".

The Act defines a cinematograph film as inclusive of soundtrack and cinematograph as including any work produced by any process analogous to cinematography.<sup>42</sup> The owner of the film at the time of its completion is the author of the film<sup>43</sup>. The Act does not define film exhaustively; and the definition has to be read along with that of "dramatic work", "record" and "photograph", each one of which excludes films from its ambit. A soundtrack associated with film is excluded from the definition of a record; photograph is so defined as to exclude "any part of cinematograph film." We have already noted the exclusion of films from the definition of "dramatic work." The definition of "infringing copy" under section 2(m), and of the rights of the author of a film under section of performance under section 2(r) and of the rights of the author of a film under section 14(4)(c), all read together, make it crystal clear that what is protected are both the soundtrack and the visual sequence in a film. The Act could have instead provided a more systematic definition of films.<sup>44</sup>

39. *D.C.S. Bureau v. United Concern*, A.I.R. 1967 Mad. 381; *Lallubhai v. Laxmishankar*, A.I.R. 1945 Bom. 51.

40. Copyright in an architectural plan as a literary work, although the plaintiff could not execute it because of rejection of the tender, has been recognised. However, what is held protected is the design as literary work. A building in three dimensions based on a plan in two dimensions and amounting only to a literary work is not protected by copyright in an architectural plan: *The Braithwaite Burn & Jessop Construction Company Ltd. v. Trustee of the Port of Madras*, I.L.R. 1956 Mad. 1347.

41. *Camlin Private Ltd. v. M/s National Pencil Industries*, A.I.R. 1986 Delhi 444 (per Mahinder Narain J.). This decision requires careful review.

42. S.2(f).

43. 2(d)(y)

44. The set of interconnected inclusions and exclusions produces, or has built in, a marked asymmetry between authors of a film, on the one hand, and all other authors of protected works on the other.

It is interesting that the term "soundtrack" has not at all been defined, unlike the UK Act of 1956 (see sections 9 and 10). The definition of a record, to be examined later, specifically excludes soundtrack in a film. In the absence of a suitable definition of "soundtrack" and in view of this exclusion of it from the definition of record it is possible to maintain that soundtrack would otherwise have fallen within the notion of a record. The implications of this indeterminacy are crucial for the proper judicial construction of the Act and adequate protection of authors of musical work, an aspect we examine in section (4) below.

Section 2(r) modernises the conception of record (which the 1911 Act defined in terms of a "mechanical contrivance") as "any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable of being reproduced therefrom." The definition, as noted above, excludes soundtrack of a cinema film. Clause (x) further defines recording as meaning the "aggregate of sounds embodied in and capable of being reproduced by means of a record." These definitions are the same as provided in sections 12(9) and 13(1) of the UK 1956 Act.

### (3) Copyright in literary and dramatic works

We have noted in Table 1 the rights conferred upon the owner of the copyright for this *genre* of work. Unless validly assigned, the author of literary and dramatic work—and all types of protected works—is the first owner of copyright. Literary works include works in the nature of adaptations, abridgements, annotations, translations, compilations, selection and even titles. Some of these notions have been defined in section 2; others, but not all, not so defined have received judicial exposition in India. Broadly, the position at law appears to be substantially similar to the British law on the subject.

In *Macmillan v. Cooper*<sup>45</sup> it was held that copyright could exist in notes to North's translation of Plutarch's life of Alexander. As to the text, the Privy Council held that there was not a sufficient investment of knowledge, judgment, labour or literary skill to entitle the appellants to copyright in the text. At the same time, the Privy Council also refused to characterise both the appellants' and respondents' work as "abridgements." Copying of certain passages or reduction of bulk would not, by itself, constitute abridgement. For, a true abridgement is a literary work in its own right. To constitute an abridgement, it was held, there should be "a statement designed to be complete and accurate of the thoughts, opinions and ideas" of the author in the "much more compressed language of the abridger."

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45. See *supra* note 7. In *Marshall v. Ram Narain*, A.I.R. 1934 All. 922, the Allahabad High Court preferred a quantitative criterion of 'abridgement'. It ruled that an abridgement should not be a "substantial reproduction" of the original.

Similarly, *Macmillan v. Suresh Chandra Deb*<sup>46</sup> decided that there existed copyright in selection of songs and poems in Palgrave's *Golden Treasury*. Copyright in selection may exist when there is evidence that the author has done "extensive reading, careful study and comparison" and has exercised "taste and judgement in selection." This is a more certain test than the other also enunciated in this case, namely, that two men may make same selection but that it "must be by resorting to the original author."

As regards compilations, Indian courts have held that a compilation which may be derived from "a common source falls within the ambit of literary work." Mere similarity between two compilations would not automatically constitute infringement. That determination (or whether, in terms of the 1914 Act, there has been a 'colourable imitation') will have to be decided as a question of fact in the circumstances of each case.<sup>47</sup>

Headnotes in law reports have posed problems in India as elsewhere; but Indian courts have held them to be copyrightable, even though in many cases the substance of the headnotes does no more than verbatim reproduce certain passages from the texts of judicial decisions.<sup>48</sup> Ultimately, the determining standards of *Cooper* and *Deb* continue to guide assessment of how far copyright can exist in works of this nature which manifest the vanishing point of originality.

There has been no major pronouncement on adaptation, which has been rather elaborately defined in relation to many kinds of work by section 2(c). Insofar as adaptation in relation to the literary and dramatic work is concerned (section 2(c)(iv)(a)), it is clear that the criteria in *Cooper* will still hold the field. In relation to literary and dramatic works Indian courts have been confronted with the problem whether conversion of these works into films would violate the author's copyright. We look at some of these decisions later. But it is important to note that section 2(c) nowhere explicitly refers to films. Clearly, clause (i) which defines adaptation as conversion of dramatic work into non-dramatic work can be invoked if a play has been substantially used by the owner of a film. A film would be non-dramatic work in the sense in which dramatic work has been defined in the Act. If this is so, then, unless the work is in the public domain, the author's consent would be a prerequisite for adaptation.

#### (4) Copyright in musical works and films

The Act designates the composer of a musical work as the author of copyright and the owner of film at the time of its completion as the author of a film (section 2(d)(ii) and (vi)). In relation to records, the author is designated as "the owner of the original plate from which the record is

46. See, *supra* note 6.

47. See, e.g., *Govindan*, *supra* note 19; *Misra Bandhu Karyalaya*, *supra* note 16; *Omar Ali v. Inan Niranian*, 39 Cal. W.N. 945; *Kattar Singh v. Ladha Singh*, A.I.R. 1933 Lah. 777.

48. E.g., *Govindan*, *id.* at 394; *N.T. Raghunathan v. A.I.R. Ltd.*, *supra* note 25; but see *Marshall v. Ram Narain*, *supra* note 45 at 926 which holds that if headnotes are abridgements, they would infringe copyright in government work as defined in section 2(k).



made, at the time of making of plate" (section 2(d)(vi)). Section 13(4) specifically provides as follows:

The copyright in a cinematograph film or record shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the record is made.

This provision would clearly sanction possibilities of multiple rights in a film or record. These possibilities are further reinforced by the specification of rights in section 14 (see Table I) especially, clause (a)(iii) of section 14(1) which, *inter alia*, endows the author of musical work with the exclusive right to perform the work in public.

However, section 14(1)(c)(ii) also endows the owner of copyright in cinema film to cause the film to be seen and heard in public. Clearly, two exclusive rights are here in conflict. This conflict became a subject matter of major and protracted litigation between the Indian Performing Rights Society (IPRS) and the Exhibitors Association of India.<sup>49</sup>

The IPRS announced a tariff of fees, charges and royalties for public performance of composers of musical works and others on 29 September 1969. The litigation arose before the Copyright Board under section 35 of the Act. Its decision on 16 May 1973 was reversed on appeal by the Calcutta High Court on 13 February 1974. The Supreme Court affirmed the decision on 14 March 1977. The board held the view that the composers of music retained their copyright in their musical works embodied in the soundtrack of the film provided that such lyrical and musical works were written and that the authors had not validly transferred their rights to the owners of the film. The High Court reversed this decision. It held that, under proviso to section 17(b), the owner at whose instance the film is made becomes the first owner of copyright and, in terms of that clause when valuable consideration exists "the composer can claim a copyright in his work only if there is an express agreement" to that effect between him and the owner of the film. It accordingly held that there was no copyright of the authors of the musical works in the first place which could be validly assigned to IPRS.

Since the matter raised substantial questions of law of general importance the High Court certified an appeal to the Supreme Court on two questions. *First*, is an "existing and future" right of "music...composer, lyricist capable of assignment?" *Second*, can the producer of a film defeat the same right by engaging such persons?<sup>50</sup>

On the first question, the Supreme Court had no hesitation in ruling that an existing and future right of a music composer and lyricist is capable of assignment under sections 18 and 19 of the Act. To this extent, this reaffirmation is welcome as the error of assuming that there just cannot be any such right when a film is produced, and all such rights pass on (because of valuable consideration) to the owner of the film has been

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49. *I.P.R. Society v. E.I.M.P. Association*, A I.R. 1977 S.C. 1443.

50. *Id.* at 1447.

authoritatively rectified. The High Court's decision on this issue was clearly negated.

On the second issue, the court conceded that there was a possibility of *prima facie* conflict between various provisions of the Act noted above but held that the conflict was more apparent than real. The apparent conflict would disappear, said the court, if a "harmonious and rational" instead of a mechanical construction were adopted.<sup>51</sup> The "harmonious and rational" construction led it to find the key to the solution of the problem in sections 17(b) and (c). When a film producer commissions a composer or lyricist "for reward or valuable consideration" "to compose music or lyric therefore, i.e., the sounds for incorporation or absorption in the soundtrack associated with the film... he becomes the first owner of the copyright".<sup>52</sup> The ownership comes into existence when the film is complete; the film is said to be complete "when the visual portion and audible portion are synchronised."<sup>53</sup> The same result follows, held the court, if the composer and the lyricist were, under section 17(c) bound by a contract of service. Thus, the answer to the second question was "crystal clear"; the court held that the film producer can defeat the rights of composers and lyricists by recourse to section 17. Towards the end, it sought support from a 1867 decision of a UK court.<sup>54</sup>

This is an extraordinary decision in many ways. The court which at the outset expressed uneasiness at the "fairly complicated" nature of the 1957 Act and at its "involved language" ultimately finds crystal-clarity in the very language and nature of the Act! The decision dissolves a real conflict into an apparent one by "verbal magic;" it invokes the doctrine of harmonious construction, a doctrine which is usually invoked by the Supreme Court in constitutional interpretation as a fairly standard device for camouflaging the choices which are actually being made by it.<sup>55</sup>

Be that as it may, it is clear that the decision is misconceived. Had the court actually resorted to the "close analysis" and "rational approach" it so emphatically advocates, this would have revealed many more complexities than it actually cognised. For example, it would have found that the Act had an implicit scheme whereby its declaration of multiple co-existing rights in a film assumed real meaning. The Act makes a crucial distinction between a work and its carrier in many of its definitions. Musical work has been defined as a "combination of melody or harmony, or either of them" which is printed in musical notation. What the Act clearly protects is the "combination of melody or harmony," or either and not the material on which it is printed or graphically reproduced. Similarly, the Act (as noted) distinguishes between "record" and "record-

51. *Id.* at 1450 at 1452.

52. *Id.* at 1451-1452.

53. *Id.* at 1451.

54. *Wallerstein v. Herbert*, (1867)164 T. 453.

55. See A.R. Blacksheild, "Fundamental Rights and the Institutional Viability of the Supreme Court", 8 *J.I.L.I.* 139 (1966). Blacksheild aptly describes technique as "verbal magic."

ing", the latter is, essentially, an "aggregate of the sounds embodied in and capable of being reproduced by means of a record." No doubt that the protection is given to both; but the crucial conception here is the "aggregate of sounds," without which there can be no record.

It is clear that the Act endeavours to protect multiple claims to copyright. For example, in the case of record there may exist the owner of copyright in the recorded work and the owner of copyright in the record. Anyone wishing to perform the musical work in which these two sets of copyright exist must take permission from both owners (say, a jukebox operator). The same may be said about copyright in musical work and the copyright in film; they are distinct and co-existing. The author of a film has the copyright in the soundtrack of the film and in that particular and specific recording of musical work in the film. Section 14(1)(c)(iii) specifically protects the owner of the film against infringement of her rights.

Indeed, there is clear indication in the Act that literary, dramatic and musical works have such distinct and co-existing copyrights. Section 52 which declares acts which shall not amount to infringement of copyright states in clause (1)(v) that the exhibition of the film after the expiration of the term of copyright therein shall not constitute an infringement "in relation to a literary, dramatic or musical work recorded or reproduced in any cinematography film." Obviously, such a provision would have been redundant if the interpretation placed now by the court were correct.

The invocation of section 17 proviso (b) is wrong and of proviso (c) is clearly unjustified. Clearly analysed, proviso (b) applies not in relation to a producer of the film engaging composers and lyricists, as the court has interpreted. The proviso does not speak of *producers* of film for valuable consideration engaging *other* people to help them *complete* the film. The proviso only speaks of "a cinematograph film made, for valuable consideration to another *to make the film*." The language of this proviso is not really "involved," either. Proviso (c) could apply only if there is clear evidence that composers or lyricists were under "contract of service" with the employer. Whether in all cases, where the IPRS was assigned copyrights in musical work, the composers were under contracts *of* service (as distinct from contracts *for* service) is a matter requiring appraisal of hard evidence in each case. There is nothing in the Supreme Court or High Court decision disclosing this kind of finding.

Finally (without being exhaustive) the decision in *Wallerstein v. Herbert*<sup>56</sup> was not on all fours with the present case. That was a case involving dramatic work and there was a finding that the plaintiff had "in pursuance of his engagement" rendered certain musical composition. The statutory contexts, facts, the time and circumstance were strikingly different. That case had no vital bearing in the fact-situation and the legal framework in India in 1977; it could, and should, have been distinguished if it was at all necessary to advert to it in the first place.

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56. See *supra* note 54.

The IPRS case marks unfortunately a beginning of an overall trend of consistent misapplication of the law. *Fortune Films v. Dev Anand*,<sup>57</sup> which followed the Supreme Court decision, illustrates this rather painfully well. There the question was whether a cine artist had a separate and co-existing copyright in his work in the film. The producers of the film "Darling, Darling" in fact acknowledged by an agreement that the copyright in the film vested in Dev Anand (a veteran actor of Hindi movies). The copyright was to be transferred to the producers after certain conditions, including payment of Rs. 7,00,000 was made to the artist (by way of annuity policies with the Life Insurance Corporation of India).

The Bombay High Court held that the cine artist had no copyright because his 'work' did not fall under any of the categories of works specified in section 2(y). An actor's work was, rightly, held to be neither literary nor artistic work, within the specific meanings given in section 2. But the court also declined to recognise it as a "dramatic work" for the strange (and hilarious) reason, that on "a plain reading of the definition of 'dramatic work' it is not possible to accept the submission...that the motion picture could be regarded as a piece for recitation or a choreographic work or entertainment in a dumb show." Obviously, it could not be so regarded; nor, as the report of the decision itself shows, was *this* the contention of the cine artist. His contention rather was that a cine actor's performance should be "regarded as dramatic by the very nature of things;" and the definition section by using an inclusive definition permitted recognition by the court of such work as dramatic work.

The court's reluctance to recognise a cine actor's work as dramatic is astounding. It observed that not "all cases where the work can be popularly described as exertions or efforts of a dramatic nature" can be called "dramatic" within the law. But the denial of recognition of actor's performance as dramatic work is not total. There is the tentative, and partially incomprehensible, observation that: "It is debatable whether the record of the acting or scenic arrangement made on a film after the scene is arranged, or acting done, or contemporaneous therewith, would be covered by the definition of dramatic work."<sup>58</sup>

The real reason why the court did not accept this sensible contention was that section 2(h) excluded cinematograph film from the definition of dramatic work. But clearly what the definition excludes is cinematograph film as an entity, as a whole, from the definition of dramatic work. There are strong arguments for the view that the Act explicitly and implicitly supports multiple co-existence of different rights in a film. The film as a whole may be (in Justice Krishna Iyer's evocative words) a "felicitous blend, a beautiful totality, a constellation of stars;" it is certainly more than "long strips of celluloid, more than miracles in photography, more than song and dialogue, and, indeed, more than dramatic story, gripping

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57. *Supra* note 37.

58. *Id.* at 24.

situations, and marvellous acting.”<sup>59</sup> But as the High Court itself stated, after quoting this passage from the IPRS decision, these words do not answer the crucial question as to whether the cine artist has any copyright in his work.<sup>60</sup> As it happened, the High Court having posed this question itself failed to answer it, as it should have been. The reason is revealing. The court was at a total loss: it stated that, apart from the IPRS decision, no Indian or English decision was cited at the Bar in support of the cine artist’s contention. This is clearly a reflection on the state of art in the area of intellectual property law. But assuming that it is a case of first impression, surely, both the Bar and Bench should have had a more clear idea of the law under which rights were claimed and denied. Even this, lamentably, was not the case.

It is high time that the projected revision of copyright law ensures that creative artists do not any more suffer by such decisional mishaps.

#### (5) Video as “cinematograph”

The 1984 Amendment now expressly states that “‘video films’ shall also be deemed to be work produced by a process analogous to cinematography.” The Indian Parliament arrived at this enunciation after legislatures and High Courts of Bombay, Karnataka, Madhya Pradesh and Tamil Nadu had already so declared through either legislative or judicial law-making processes that the expression ‘cinematograph’ extended to video films.<sup>61</sup> The 1984 Amendment was, of course necessary, given the fact that entry 33, list II of the seventh schedule conferring upon state legislatures the power to make laws with respect to films was held not to extend to protecting the rights of owners of copyright, with respect to which only the Indian Parliament had the powers of legislation.<sup>62</sup>

### V Rights of broadcasting authorities

Chapter VIII, an altogether new chapter in Indian copyright law, deals with the rights of broadcasting authorities. Although section 37 speaks of any programme broadcast by radio-diffusion defined in section 2(v) by the government “or any other authority,” the broadcast reproduction right really applies only to the Government of India which is the sole broadcasting authority in the country. Broadcast reproduction right (BRR) has a term of twenty-five years; and the government is declared to be the owner of BRR. The BRR can be infringed in three ways: (i) by unauthorised re-broadcast of the programme (or any substantial part

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59. *Ibid.*

60. *Ibid.*

61. See, B.V. Gopal, “Video Piracy and the Law”, unpublished LL.M. dissertation, University of Bangalore (1984) as the material cited in the case judgment cites, *infra* note 62.

62. See *Entertaining Enterprises v. State*, A.I.R. 1984 Mad. 278.

thereof); or (ii) by causing it to be heard in public (whether in whole or in substantial part); or (iii) finally, by making a record, in whole or part, of the programme. It has been declared by section 39, for the removal of doubts, that BRR shall not affect the copyright in any literary, dramatic or musical work which is broadcast by the authority or in any record recording such work. Provisions regarding assignment of BRR, licensing, infringement by importation of copies, civil remedies, and criminal sanctions and processes for infringement are made applicable, *mutatis mutandis*, to BRR.

Although chapter VIII does not in terms refer to television broadcasts, which is also a government monopoly, the definition of radio-diffusion should extend the same rights to the owner. Radio-diffusion is inclusively defined to cover "communication to the public by any means of wireless diffusion whether in the form of sounds or visual images or both."

Many questions in this area await empirical investigation; the subject does not yield itself to archival research, particularly in the lawyers' sense as there are no judicial decisions. One such question is: how far does the BRR system ensure fair terms to performing artists? Despite section 37, it needs to be ascertained how in actual practice, rights of independent performing artists in radio and television are protected: are they, for example, required to assign their copyright (if any is, in the first place, recognised) for a programme for standard (and relatively inadequate) payments? Do they receive payment for each re-broadcast of the programme? Are any licensing proceedings initiated before the Copyright Board? What measures are taken, if any, to ensure that authors of any work participating in radio and television programmes are made conscious of their rights under copyright law? What are the relations between Performing Rights Societies and the state-owned electronic media? Are the film owners and owners of copyright in sound recordings in a more favoured position than other authors? It is also interesting to find that section 52 which specifies acts which do not constitute infringement is not made applicable to chapter VIII by section 38. There should be a provision allowing recording, re-broadcasting and using in related ways radio and television programmes for educational, research and related purposes. It has also been suggested that the Act should be amended to take full advantage of article 11 *bis* (3) of the Berne Convention.<sup>63</sup>

## VI Ownership and assignment of copyright

### (1) Ownership of copyright

Sections 17 to 19 deal with ownership and assignment of copyright. Section 17 declares that subject to the provisions of this Act "the author of a work shall be the first owner of a copyright." It is important to stress

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63. See, M.L. Chopra, *Copyright and International Conventions* 33-34 (1978).

that this section does not deal with *creation* of copyright or its scope but only with its *ownership*. The same section provides five categories of exceptions. The first three categories deal, generally speaking, with situations where the author of the work produces the work under contract of service, or apprenticeship or for valuable consideration. In all the three situations, the first owner of copyright is the person who commissions the work. However, an agreement to the contrary is recognised, in which case the author herself can be the owner of copyright. The fourth situation is one where, in case of a government work, the government is declared to be the first owner of copyright, in the absence of an agreement to the contrary. Finally, for works to which provisions of section 41 apply the ownership of copyright is vested in international organisations.

Indian courts have evolved some general principles concerning assignment of copyright. The common law distinction between "contract of service" and "contract for service" operates fully in India. For example, in *Agarwala Publishing House v. Board of Higher Secondary Education*,<sup>64</sup> the Allahabad High Court ruled that examination paper-setters function, as independent contractors and cannot be regarded as doing their work under any contract of service. Section 17(d) was held inapplicable as paper-setters were not "servants" of the board; it provided no more than "initial impetus;" nor did it direct "the whole process of preparation of papers." Incidentally, the court also determined in this case that paper-setting was not government work. And in the absence of agreement to the contrary they were, and remained, the first owners of copyright.

Similarly, it has been held that if a permanent employee does some special work for the proprietor "entirely on his own time... and outside his ordinary duties" the work would be his own and it cannot be brought within the category of work done in the course of employment.<sup>65</sup> Nor does the act of a publisher engaging an author to write a book for fixed remuneration "warrant any legal presumption that the intention of the parties was that the copyright should belong to the publisher."<sup>66</sup>

These general, and rather liberal, rules in favour of the author have suffered setback only in relation to the rights in musical works and dramatic works analysed by us earlier.

## (2) Assignment

The owner of a copyright is entitled to assign her copyright. Copyright thus assigned may be in an existing work or in a future work. It may be assigned either wholly or partially, and either generally or with conditions and limitations for the whole or partial term of copyright

64. A.I.R. 1969 All. 91.

65. *P.N. Thankappon v. Vidyarambhom Press*, 1968 Ker. L.J. 440.

66. *Id.* at 449. The right of an author of a play written for a society is held to vest in the author, in the absence of a clear contrary agreement: *Gama Prasad v. Nabashah*, A.I.R. 1967 Ass. 70.

(section 18). Assignment has to be in writing and signed by the assignor or her duly authorised agent (section 19).<sup>67</sup> Of course, whether copyright has been in law validly assigned by an agreement has to be proved by close analysis of the agreement; there is a grey area between licence to publish on the one hand and assignment of copyright on the other.<sup>68</sup> The burden of proving that an assignment is *benami* (a proforma and not a real assignment) is on the party averring it and the decision of the court should not be based on "mere suspicion but only on legal evidence including testimony of witnesses".<sup>69</sup>

Often, tricky questions arise in case of partial assignments. For example, when the assignment was of the right to exhibit a Hindi film in Karnataka (a Kannada-speaking area), the exhibition of Kannada film similar to the Hindi film was not regarded as infringement of rights thus assigned, when similarities in the film were held ultimately "traceable to a common film."<sup>70</sup>

Finally, although retrograde and misconceived, it is the law of the land declared by the Supreme Court that musical composers and lyricists contributing music and lyric in films may not assign any copyright because they have no distinct and coexisting copyright in these works, incorporated in the soundtrack, to assign.<sup>71</sup> A solitary High Court, situated in Bombay, the 'Hollywood' of India, has also held that a cine artist has no copyright in her acting in the film even if there is an agreement between the producer and the actor acknowledging the copyright of the artist in his work, and a future assignment of copyright by the artist to the producer contingent upon fulfilment of certain conditions.<sup>72</sup>

The Act also provides for transmission of copyright in manuscript by testamentary disposition (section 20). In the absence of a contrary indication in the testamentary instrument(s), bequest of an unpublished literary, dramatic, musical or artistic work "shall be construed as including copyright in the work."

The 1984 Amendment provides for (through section 19A) the settlement of disputes with respect to the assignment of copyright. On a complaint by either party to an assignment, the Copyright Board now stands empowered to decide disputes either in regard to the entire range of assignment or any terms of it. Upon due enquiry, the board is authorised to

67. E.g., *Susiah v. Munniswamy*, A.I.R. 1966 Mad. 175; *Srimgal & Co. v. Books India Pvt. Ltd.*, A.I.R. 1973 Mad. 49. Copyright, being incorporeal property, can be assigned by an unregistered deed. Section 54 of the Transfer of Property Act does not apply to copyright assignment.

It seems however that the deed of assignment may attract provisions of the Indian Stamp Act, section 35 as the Act is altogether silent on such matters. Cf. T.R.S. Iyenger, *supra* note 18 at 132-33.

68. E.g., *Misra Bhandhu*, *supra* note 16.

69. See, *ibid.* Indian courts have, in some cases, recognised "equitable assignment" of copyright: *Vishwanath v. Muthukumarajwami*, A.I.R. 1948 Mad. 139.

70. *Janata Pictures v. A.V.M. Productions*, (1973)2 Mys. L.J. 28.

71. See part III(4) of this paper.

72. *Ibid.*



make two kinds of orders. *First*, the board may permit the revocation of assignment if it finds that their terms of assignment are "harsh" or when the publisher unduly delays publication of the assigned work. *Second*, the board may issue a "certificate of royalty due to the owner." Of course, the power of the board is "inclusive". It may thus pass other orders as well. But the situations calling for its intervention are otherwise well defined.

Although the section enables both parties to make a complaint, it is unlikely, though conceivable, that the assignee, usually a copyright industry will come before the board protesting the whole assignment or any of its terms as harsh. Clearly, the other kinds of orders that the board is empowered to pass are such that only the assignor may invoke. Indeed, even the order of revocation or variation of a harsh assignment is more to be invoked by the assignor. Understandably, there was a howl of protest from the copyright industries during the consideration of section 19A in Parliament; the industries felt, obviously, that such a legislative proposal was itself "harsh" on them. Clearly, this section by itself does not injure the interests of copyright industries; it only addresses the more crudely exploitative interests among such industries to keep away from unconscionable exercise of their dominance in the market. If there were adequate impulses towards collective self-regulation among these industries, such a legislative intrusion would be condemnable. The provision now testifies to parliamentary perception that such self-regulation, despite adequate time, was not even nascent among such industries—a perception which more than justifies the empowerment of the Copyright Board.

### (3) Right to relinquish copyright

The authors of literary, dramatic, musical or artistic works (but *not* others) may relinquish copyright in their works, wholly or partially. The relinquishment can occur only by sending a notice in the prescribed form to the registrar of copyright who is under a duty to have it published in the official gazette (or in any other form). The rights thus relinquished will cease to exist from the date of the notice. However, such relinquishment shall have no effect on the rights subsisting in favour of third persons. We do not know the number of philanthropic persons who have availed of the provisions of section 21 described thus far. Not many authors normally know that the copyright in published or unpublished works generally subsists in them. In this situation, not many are likely to know that copyright can be relinquished by the simple device of a notice.

One assumes, although the Copyright Act does not specify it, that relinquishment should be an act of free will and that like the requirement of consent in contract, it will be vitiated if it can be shown that the Act of relinquishment was a product of coercion, undue influence, fraud or misrepresentation. Indeed, since the mere giving of the notice produces cessation of copyright in whole or part, it might be desirable to provide

an explanation to section 21 clarifying that the act of relinquishment must be a product of free will of an author in sound mind: and that ordinarily the registrar should satisfy herself that this is the case before the cessation becomes operative. Although cases of relinquishment may be rare, the need to adequately protect the author relinquishing copyright justify the suggested changes.

#### (4) The problem of joint ownership

So far the notion of owner, used in singular, was unproblematic. But it is clear that copyright is a bundle of rights and several rights comprising copyright may be owned by different persons. There might be several co-owners of 'copyright', each having a specified or specifiable extent of a right. Similarly, there may be joint owners of copyright in any work. Section 13(4) recognises, as discussed earlier, plurality of rights in copyrighted works; so does section 56 in relation to civil remedies, providing for protection of separate rights.

It is in the context of joint ownership in any work (say, a literary or musical work) that the general problem of assignment, testamentary disposition, assignment and relinquishment arises most acutely. In this situation, no problems exist of course if "extent of right" of each of the joint authors can be satisfactorily delineated; and notionally sometimes it may be possible to do just this. But at other times it may be impossible or very difficult to establish the extent of right in a joint work.

The 1957 Act almost altogether ignores this tough problem. One must assume, logically, that in case of a work of 'true' joint authorship, no transfer of copyright (in any of the four ways mentioned above) should be possible without the consent of the concerned authors. But, to invoke Justice Holmes yet once again, the life of law is not logic but experience. In the absence of a clear prohibition in the Act, a joint author of a literary work may seek to assign her copyright to a purchaser, who may, in good faith believing that whatever is not prohibited by law is permitted, buy and exploit the copyright. Since in this scenario it is impossible to specify the extent of her right from co-author, what is assigned thereby is copyright in an indivisible, whole work. Under the Act, especially sections 13 and 14, it remains possible for that joint author *qua* author to continue to exercise her rights as she wishes. This then may create a conflict situation between the purchaser of an inseparable copyright work on the one hand and one of the joint authors. In certain cultural contexts, like India's, the possibility of such situations occurring cannot be ruled out.

*Susiah v. Muniswamy*<sup>73</sup> presented, for example, just this type of situation. The joint author had purported to assign copyright in a book for consideration. The Madras High Court ruled that in the case of infringement of a copyright in a literary work of two joint authors, one of

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73. *Supra* note 67.

the aggrieved authors "is entitled to maintain a criminal action for the offence." One should suppose, by the same token, that the aggrieved author can also take recourse to civil proceedings. But what happens in case of relinquishment or testamentary disposition? Can a joint author at all relinquish her copyright, when it is not possible to specify the extent of 'her' right in copyright? Can she bequeath it in whole? Or only that part of which comprises royalties and fees? Would a purported bequest of the whole of copyright be void? What happens in the case of unpublished joint works in which copyright subsists and which can be transmitted by testamentary disposition?

The fact that these questions have not arisen frequently in practice is no ground for saying that they are, at best and at worst, academic. Perhaps, there is need for ample clarification of these issues in regard to all ways in which ownership and transfer of copyright in joint works can (or cannot) be accomplished.

#### (5) Author's special rights

The Act reaches out, in its solicitude for author's rights, even after part or whole assignment, and "independently of author's copyright" to confer upon her certain special rights. An author will have the special right to claim the authorship of the work as also the right to restrain, or claim damages in a situation where there occurs any "distortion, mutilation or any other modification" of the work and "any other action in relation to the said work which would be prejudicial to his honour or reputation." This right is also made exercisable by the legal representative of the author.

This is a salutary provision, unfortunately obviously unknown to most authors. But it is not clear from the text of section 57 whether the author's special rights subsist during her life or for the full term of copyright with which she might have otherwise parted, in all or some respects. The conferral of the right on the author's legal representative does not solve this particular puzzle. The nature of the rights is such that arguments can be presented cogently to favour either interpretation of the section, both in terms of exegesis and of policy. The Act having so clearly recognised the author's special rights needs to go further and authoritatively resolve this kind of puzzle.

In *Manu Bhandari v. Kala Vikas Pictures Ltd.*,<sup>74</sup> a very sensitive issue involving the moral rights of the assignor author and the right of the director of the film based on the novel were amicably and imaginatively resolved by Justice S.B. Wad. The agreement assigning filming rights contained a special clause allowing the director of the film to make "certain modifications" necessary to convert the novel into a film. The author, an internationally acclaimed writer, objected to the modifications; even when at the end of the legal contest the film maker accepted all the objec-

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74. 30 (1986) *Delhi Law Times* 502.

tions, she insisted on a full judgment on principles embodied in section 57, thus rendering a great service to the cause of copyright justice.

Justice Wad, perceptively, held that the section protects a "social interest" in the "enrichment of culture;" it "lifts the author's status beyond the material gains of copyright and gives it a special status."<sup>75</sup> Accordingly, section 57 "clearly overrides the terms of the contract of assignment;" the contract has always to be read "so as to be consistent with section 57."<sup>76</sup> Put another way, the assignee of a copyright "cannot claim any rights or immunities based on the contract which are inconsistent with the provisions of Section 57."<sup>77</sup> This is indeed a very major and welcome enunciation of the protection of moral rights both in its rationale and provenance. Further, the learned judge, rightly, holds that the words "any other modification" should be read *ejusdem generis* with the words "distortion" and "mutilation." Modification which makes the work look "quite different from the original" or constitutes its "perversion" is forbidden by the section, whose sole purpose is to provide "inviolability to an intellectual work."<sup>78</sup>

This landmark decision, which we hope will be followed by all other High Courts, elevates the cultural, over the merely proprietorial and industrial, aspects of copyright protection. Section 57 stands now interpreted in ways which redeem the Indian law of copyright as an authentic protector of the author's moral stature. In this case, the author who was also extolled as a feminist, objected to a dialogue inserted in the film which celebrates what one of the characters calls "rape by mutual consent." Although Justice Wad was troubled by the fact that the court "does not sit as a sentinel of public morals or super-censor in exercise under its powers under section 57,"<sup>79</sup> he could not quite equate assignment of copyright merely with the sale of goods<sup>80</sup> and had no further hesitation in ordering deletion of this scene in the film. Clearly, this deletion was ordered as an aspect of protection of moral rights of the author; the court is clear that if there is suggestive potential in the novel itself the director of the film may well be at liberty to introduce modifications under an assignment contract and the author may not be wholly in a position to object.<sup>81</sup> For, what is here protected is not social morality from intrusion by corrupt and corrupting exercise of the right to freedom of speech but the immunity, provided by section 57, to the author from "mutilation" or "distortion" of her work. The protection of the "moral rights" of the author under copyright law is thus a different task than the one involved in regulating free speech on the grounds of public morality. This distinction makes the decision all the more luminous.

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75. *Id.* at 507.

76. *Ibid.*

77. *Ibid.*

78. *Id.* at 508.

79. *Id.* at 511-12.

80. *Id.* at 513.

81. *Id.* at 513-14.

## VII Infringement

### (1) The basis of liability

Section 51 of the Act defines the varieties of acts which infringe copyright and all other rights created by the Act. Copyright in a work "shall be deemed to be infringed," *first* when any person who without due authority either from the owner of the copyright or, in appropriate cases, from the Copyright Board "does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright." The five other varieties of behaviour described by the section constitute no more than a massive footnote to this clear and comprehensive assertion. These comprise:

(i) permission to use any place for the performance of copyrighted work in public for profit; unless "he was not aware and had no reasonable ground for believing that such performance would be an infringement of copyright";

(ii) making infringing copies for sale or hire; or selling or letting them for hire;

(iii) distribution either for purposes of trade or to such an extent as to effect prejudicially the owner of copyright;

(iv) public exhibition by way of trade;

(v) importation of infringing copies into India, except for private or domestic use of the importer.

The explanation to the section further provides that the reproduction of dramatic, literary or musical works in the form of cinematograph film shall be deemed to be an "infringing copy."

The language of this section by itself creates the misleading impression that unlike the UK 1956 Act the infringement behaviour arises out of a "deeming" clause, not requiring generally any knowledge on the part of the infringer that the work was copyrighted. This impression is further reinforced by the way in which an "infringing copy" has been defined in section 2(m). A leading Indian professional treatise on copyright categorically states that in India "knowledge of the infringing nature of the work is not necessary to subject the defendant to the penal consequences of the infringement."<sup>82</sup> One also has the same impression about civil proceedings for infringement.

This, however, is not just the case. Sections 63, 65 and 67 clearly prescribe that only persons who knowingly infringe copyright are committing penal offences. It is perhaps true to say that the full requirement of *mens rea* (knowledge and intention) are not prescribed. But, on the other hand, these offences are not strict liability offences either.

As regards civil liability, however, it would be true to say generally that the Indian law does not, barring one exception, regard knowledge

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82. See Iyengar, *supra* note 18 at 28-29.

of infringement on the part of the defendant as a basis of liability. If a defendant permits for profit the use of any place for public performance of copyrighted work, she can under section 51 (a)(ii) show that she was unaware of subsisting copyright or that she had reasonable grounds to believe that such copyright did not subsist at the relevant time. If this is proved, the plaintiff is only entitled to injunction and account of profits but to no other remedy. But in all other cases defined by section 51, and the chapter providing for civil liability, the defendant who does anything to infringe copyright or deals in specified manner with infringing copies remains liable for damages for infringement. In this sense, the Indian law does not distinguish between "direct" and "indirect" infringement of copyright for purposes of civil remedies. All that has to be proved is the fact of infringement; from that the liability follows. The Indian law, subject to the above mentioned solitary exception, no longer cognises the possibility of an "innocent infringer."

## (2) Criteria for determination of infringement

The definition clause of the 1957 Act does not define infringement as such; but the definition of an infringing copy in section 2(m) provides some standards and criteria for the determination that an infringement has occurred. As regards literary, dramatic, musical or artistic work an infringing copy is that copy which is a "reproduction thereof otherwise than in the form of cinematograph film." Sub-clause (ii) defines infringing copy in relation to film as a "copy of the film or a record embodying the recording in any part of the soundtrack associated with the film;" and sub-clause (iii) similarly defines infringing copy of a record as "any such record embodying the same recording." Much of the Indian decisional law on this aspect has derived considerable support from English and American decisions.<sup>83</sup>

The familiar question with regard to unauthorised reproduction of copyrighted work raises in India the standard issues regarding meaning of originality, copying, and extent of reproduction.

On the last issue, a leading professional treatise in India on that subject maintains that, "In India, the expression 'infringing copy' without doubt means copies which reproduce the whole of the infringed work."<sup>84</sup> The reasons for this view are that the term 'infringing copy' has been for the first time defined in India by the 1957 Act. The 1914 Indian Act, which followed the 1911 UK Act, did not define the term. But a position had emerged, both in India and the UK, under these Acts that a copy was an infringing copy if it reproduced a substantial part of the original work. Whereas the UK Act of 1956 made this position crystal clear by its section 49(1), the 1957 Indian Act chose not to define the extent of reproduction as an aspect of the meaning of the 'infringing copy.' It is further argued

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83. See *supra* note 25 (per Fazal Ali J.; this case is hereafter cited as *Anand*).

84. *Supra* note 18.

that section 14 which defines the meaning of the 'copyright' in its clause (1) refers to the whole work and section 2(m) in its definition of 'infringing copy' refers to "reproduction thereof;" meaning the reproduction of the whole work. The key policy argument in support of this view is that certain sections of the Act (sections 58, 64, 65 and 66) are "of penal nature" and, therefore, have to be construed strictly, not liberally.<sup>85</sup>

Such an approach to construction is indeed plausible. But this indicates that the Act is not as well drafted as it should be. To leave room for such possibility would have the effect of dramatically reducing the scope of copyright protection, which is clearly not what Parliament could have intended. For, in case of literary and dramatic works, and even for cinematograph films, only a luckless adventurer would want to reproduce the entire work. And indeed, crafty pirates would get away with loot and plunder by so devising a copy as to reproduce very substantial parts of the work while circumspectly altering it in some marginal respects. As to the argument based on penal policy endorsing strict construction of penal sections, the relevant sections prescribe knowing infringement. No unfairness or undue hardship would attach an accused in criminal proceedings for violation of copyright were the meaning of reproduction to be substantial, rather than total, reproduction.

Although it was suggested in 1983<sup>86</sup> that it would be desirable to clarify that infringing copy means not just reproduction of the work as a whole but also reproduction of a substantial part thereof, such a clarification did not emerge in the 1983 and 1984 Amendments.

We examine below the available decisional law on infringement in respect of each *genre* of protected work.

#### (i) *Literary works*

As regards books and literary works, "a literal imitation of the copyrighted work with some variations here and there" would undoubtedly constitute infringement.<sup>87</sup> But most cases involved situations and contexts where the criterion of "substantial reproduction" requires to be explicated. Ever since the landmark *Deb* and *Cooper* cases, Indian courts have held that quantitative criteria should not be held decisive. In other words the number of words, paragraphs or pages copied is not decisive; even a small amount of copying may infringe copyright.<sup>88</sup> Some decisions apply the criterion of "external" features ("get up and the overall scope of publication") and "internal" features ("the general layout", "the manner of treatment" of subject matter, and "the amount of material contained in the book in question") as relevant to determination of infringement.<sup>89</sup> The criterion of "colourable imitation" or "colourable variation" is also often used.

85. *Anand*, *supra* note 25 at 1627.

86. See Upendra Baxi, "Letter from India", 19 *Copyright* 91 at 106 (1983).

87. *Govindan*, *supra* note 19.

88. *S.K. Dutt v. Law Book Co.*, A.I.R. 1954 All. 570.

89. *J.N. Bagga*, *supra* note 9.

The Bombay High Court was confronted with a thorny issue of interpretation concerning infringement of copyright in a book by virtue of section 51(b)(1), making display "by way of trade" or offer to sell a copyrighted work.<sup>90</sup> The accused advertised in a law journal a list of books, including a book published by the complainants which was allegedly an infringing copy. The question arose whether the words "any person... offers to sell" should be construed in a generic or restricted sense. The generic view would compel the conclusion that "offer to sell" means a proposal for sale; it is a way of soliciting orders for the publication. The restricted view would treat an "offer for sale" through an advertisement as "merely an invitation of an offer or invitation of a proposal", and not as "offer" itself. An advertisement in a newspaper or a law journal would, on this view, "never become an offer for sale."<sup>91</sup> The High Court preferred the generic construction on the ground that the makers of the 1957 Act had before them the provisions of the Indian Contract Act which treat such offers as invitation for proposals rather than an 'offer.' Moreover, the history of the legislation, both in contract and copyright, was known to the Indian Parliament; and yet it elected to define the relevant term without any reference to the law of contract. Above all the legislative intention to "guard the copyright" was decisive for judicial interpretation; accordingly, it was held that the expression "offers for sale by way of trade" or "offering for sale" must "include the newspaper advertisement where the traders merely solicit customers...."<sup>92</sup> This decision is also notable for its approach which in effect maintains that Indian copyright law must be construed in Indian terms (of text and contexts and overreliance on overseas precedents should be scrupulously avoided, lest it may frustrate the objectives of copyright protection in India).

(ii) *Paintings and pictures*

Questions about infringement in paintings and pictures require somewhat different criteria of "substantial reproduction." Clearly, insistence on exact reproduction would limit the range of copyright protection. If a painting or a picture in its "plan...design...arrangement of all important component parts which help an artist to obtain a representation of the idea... on plastic material" are all substantially similar to the copyrighted work, then there would be substantial reproduction.<sup>93</sup> Some decisions have adopted, what might be called, the doctrine of total effect or impact as a criterion of infringement in such works. If a "copy comes so near to the original" that anyone seeing it is reminded of the original or when the impression of "seeing the original" arises in the mind of the

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90. *Id.* at 305-306.

91. *Id.* at 307.

92. See, *id.* text accompanying the footnote.

93. *D.C.S. Bureau, supra* note 39.



viewer when one is seeing merely a copy, then there exists infringement.<sup>94</sup> This is clearly a highly subjective test; and its perils are disclosed when the same court propounding further observes that "a bad copy does not cease to be a copy."<sup>95</sup> But, obviously, a bad copy may not evoke the feeling of seeing the original in the mind of the viewer. Ultimately, then, we fall back, as is usual in the area of infringement, not just on the facts of the case but also the forensic ability of the copyright lawyer and the cultural sensitivity of a judge dealing with the case.

(iii) *Infringement of copyright by film producers of literary and dramatic works*

The assymetry between film producers and authors of other protected works becomes accentuated when the author of a dramatic or literary work has established infringement. This is so also because of the fact that "a film has a much broader perspective, wider field and bigger background" and it is always possible for the film maker to give "a colour and complexion" which distinguishes in many ways the story or dramatic theme from the film. The Supreme Court of India, whose above-quoted words<sup>96</sup> testify to the considerable difficulties in this area, however, adopted in *R.G. Anand v. Delux Films* the doctrine of dominant impact even as regards this question. The test was formulated thus: "If the viewer after seeing the film gets a total impression that the film is by and large a copy of the original play, violation of copyright may be said to have been proved."<sup>97</sup>

There were a large number of similarities between the play and the film<sup>98</sup> but the court held that similarities do not constitute infringement. As regards themes, the court found that the film dealt with the themes of provincialism, evils of a caste-ridden society and the evils of dowry whereas the play only dealt with the first theme.<sup>99</sup> The court which heard the script of the play and saw the movie came to the conclusion that "from scene to scene, situation to situation, in climax and anti-climax, pathos and bathos, in texture and treatment and purpose and presentation is materially different from the play."<sup>100</sup>

However, the decision was not entirely unanimous. Justice Pathak (as he then was) did not think that there was any need for the court to examine "all the several themes embraced within the plot of the film" to decide infringement if "the treatment of the theme in the stage play has been made the basis of one of the themes in the film story and the essential structure of that treatment is clearly and distinctly indentifiable in the film story." The pirate can appropriate the labours of another by ensuring that "his own product...covers a wider field than the area included within

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94. *Id.* at 390.

95. *Anand*, *supra* note 25 at 1627.

96. *Ibid.*

97. *Id.* at 1631-32.

98. *Ibid.*

99. *Id.* at 1633.

100. *Id.* at 1634.

the scope of the earlier product" and in "the common area covered by two productions to introduce changes in order to disguise the attempt at plagiarism."<sup>101</sup>

Justice Pathak felt that it was not open for the Supreme Court to interfere with the findings of fact; but he indicated that were it so open he would have had no hesitation in holding that copyright was infringed on the facts of this case. He took pains to issue a clarification towards the end of his opinion which is worth reproducing in full:

In another, and perhaps a clearer case, it may be necessary for this Court to interfere and remove the impression which may have gained ground that the copyright belonging to an author can be readily infringed by making immaterial changes, introducing insubstantial differences, and enlarging the scope of the original theme so that a veil of apparent dissimilarity is cast around the work now produced. The Court will look strictly at not only blatant examples of copying but also at reprehensible attempts at colorable imitation.<sup>102</sup>

One hopes against all hopes that film producers in India will heed this warning. More important, one hopes that the Bar and the Bench will take due note of this viewpoint at a stage when factual determinations of infringement are made. Otherwise, judicial rectitude expressed by Justice Pathak might yet once again triumph over copyright justice. The formulation of criteria adopted by Justice Pathak really deserve to become operative law—a point that those engaged in the revision of copyright law ought to bear in mind.

But for the present it would appear that film producers are virtually immune from the discipline of copyright law, as is poignantly illustrated by the decision we now examine. *A.L.S. Productions v. Jayalakshmi*<sup>103</sup> shows that even if an author of literary or dramatic work can successfully prove infringement, it may be very difficult for the author to get any of the effective civil remedies provided by the Act. The trial court had in this case awarded the author all available reliefs: *first*, the possession of infringing copies; *second*, damages for infringement; *third*, decree for proportion of profits earned by the film; and *finally*, a preventive injunction. The High Court reversed all the three first reliefs on grounds which betray not even a marginal sensitivity to copyright justice.

Section 58 provides that the author shall be the owner of all infringing copies. But section 2(m) excludes the reproduction of literary, dramatic, musical works in form of cinematograph films from its definition of infringing copies. The High Court conceded that the author of a literary work also had the right to make a cinema film under section 14(i)(a)(v); and that the film owner had clearly plagiarised a key dramatic sub-plot

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101. *Ibid.*

102. *Ibid.*

103. (1972) 85 Mad. L.W. 58.

in the literary work. But it took the view that section 2(m) prevented it from ordering relief under section 58.

The decision may appear technically correct but can be assailed on both exegetical and policy grounds. The definition and interpretation clause begins, typically, that the works defined therein shall have the meaning assigned to them "unless the context requires otherwise." Section 58 in terms applies to "all infringing copies of any work in which copyright subsists." The question then is for the purposes of section 58: Is there *any* work in which copyright subsists and is infringed? If the answer is in the affirmative, the context requires that the term "infringing copy" be so interpreted as a copy that violates the subsisting copyright. Section 2(m) definition is not designed to frustrate the few effective remedies available for infringement of copyright; section 58 provides one such remedy. If the definition is very strictly construed, even for purposes of a remedial or redressive section like section 58, the result would be that the violator of valid copyright would remain the proprietor of works which violate copyright. And the author of a literary, dramatic and artistic work will never be in a position to take ownership of films which violate his copyright. Such result is not intended by the Act in view of the explanation to section 51 which clearly provides that for the purposes of the section the reproduction of literary, dramatic, musical or artistic works in the form of a film shall be deemed an infringing copy. Given the approach of the Madras High Court in this very case, the only remedy would be a preventive injunction against exhibition, which may not be much of a remedy given the long delays in disposal of cases.<sup>104</sup>

Of course, it is possible on a similar strict construction to argue that under section(2)(m)(ii) the owner of copyright in a cinematographic work can also not avail of section 58 remedy because an infringing copy of a film means only copy of the film or recording of its soundtrack. But if literary, dramatic or artistic works were made in a manner infringing the copyright of the film maker (owner), she too cannot effectively urge that she is the owner of infringing copies. In practice, it is more likely that the film maker will plagiarise from other *genres* of work rather than *vice versa*. But in theory section 58 process would remain applicable only to the same classes of work but not across different classes of work provided by the statute. Notionally, and in reality, this limitation of section 58 remedy, which enhances inhibition against easy infringement, should remain available in all situations.

The High Court also reversed the award of damages. It seems necessary in Indian law, as in English law, for the author to prove

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104. The only redeeming feature of this decision is that the High Court allowed the preventive injunction to operate. The film was distributed for exhibition in 1962 and the decision was delivered in June 1963. This was because the original suit was itself filed in the High Court. But if there, had been characteristic long delays (often six to seven years) attending the proceedings this relief might have amounted to pyrrhic victory for the petitioner.

depreciation of the value of copyright in order to successfully claim damages. The High Court reversed the trial court's ruling awarding a damage of Rs. 2,500, despite the finding of infringement. The petitioner, said the court, was not able to prove any actual damage nor was even able to suggest the manner in which the damage should be evaluated. A general statement that she had suffered a mental setback at piracy was not considered adequate.

What is strange is that the decree for Rs. 10,000 awarded to her was also set aside by the High Court on the ground that the petitioner was unable to prove the "proportion of profits made by the film ... attributable to profits made through the infringement of her copyright." The court even held that there was no evidence to show "that the side plot did at all account for any part of the profits of the appellant"; there was, therefore, no notional basis even for apportioning profits. This aspect of the decision provides in our view a good example of "mechanical jurisprudence" and merrily sacrifices the rights of the author at the altar of the law of pleadings.

The Bombay High Court (*per* Jamadar J.) in the *Kamala* case<sup>105</sup> seems to have continued this trend. The case is unusual both for its facts and the law it seems to have generated. In late April—early May of 1981 the *Indian Express* carried a series of shocking stories concerning flesh trade in the state of Madhya Pradesh; its team of reporters actually bought a young girl named Kamala on payment of Rs. 2,300, for "half the price one pays for a buffalo in Punjab."<sup>106</sup> Vijay Tendulkar, among India's foremost playwrights, adopted the story in a play which was staged "about 150 times in 32 cities in 7 languages."<sup>107</sup> The script of the play was published in book form and was on sale. Apart from the issue of libel successfully urged by the plaintiffs against the film maker, it appears that the case raised a question of, as it were, double infringement of the copyright of the newspaper. Interestingly, the playwright denied having read the articles in the *Indian Express* but acknowledged having read similar stories in a leading fortnightly *India Today*; the film maker admitted having read the newspaper articles but claimed that the film was an adaptation of the play! Did then the play infringe the 'copyright' of the newspaper and the film infringe that of the playwright?

The court ruled, following *Anand*, on the one hand that there cannot subsist any copyright in "ideas, information, natural phenomena and events" which are common property and on the other that the film significantly differs (as it almost *always* does) from the newspaper articles, assuming that these provided "the materials on which one claiming the copyright has worked."<sup>108</sup>

On the first proposition, one well settled in copyright jurisprudence, there is, of course, not much room for criticism. But on the second the

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105. *Indian Express Newspapers Ltd. v. Jagmohan*, A.I.R. 1985 Bom. 229.

106. *Id.* at 230.

107. *Id.* at 231.

108. *Id.* at 233.

formulation for holding infringement of copyright as "misconceived" does afford plenty of room for anxiety. For, the learned single judge holds, in so many words, that:

The form, manner or arrangement of a drama and movie are materially different from a newspaper article and *by very nature of the media there is a fundamental and substantial dissimilarity in the mode of expression of the idea in a newspaper article and in a stage play or in a movie.*<sup>109</sup>

This "nature of media" test, if one may so call it, makes it virtually impossible the task of proving what the court earlier calls the distinction between "the materials upon which one claiming copyright has worked and the product of the application of his skill, judgement and labour and literary talent to these materials."<sup>110</sup> If it is the *nature of the media* which determines the *prima facie* claim of validity of the plea of infringement no further enquiry into similarities or dissimilarities is relevant. Indeed, given this orientation, any purported enquiry would, as happens in Indian decisions, simply end up in a massive demonstration of dissimilarities!

In ways which puzzle us further, the court holds that the fact that the plaintiffs did not protest against the play thereby "indirectly and impliedly, consented to or acquiesced in, the production of a film based on the play."<sup>110a</sup> On first principles, whatever be the fact situation here, it would be singularly unwise to acquiesce in this holding. If any literary work is transformed into a dramatic work to which the author does not cry 'infringement' does that estop her from claiming infringement when it is made into a film? Does it matter whether or not the film maker has widely advertised or let it be known that she intends to produce the film?

### (3) Importation and infringement

The Act of 1957 enables the owner of a copyright to prevent importation of infringing copies from being 'imported' into India; the owner has to apply to the registrar of copyright who has the requisite powers of enquiry and search and to declare such copies to be prohibited imports under the relevant provisions of the Sea Customs Act 1871 with the salient difference that the property in the goods confiscated under that Act does not pass to the government but to the owner of the copyright.

This section lay, more or less, dormant until the eighties. The first major pronouncement on the section emanated in the Calcutta High Court which held that certain cassettes allegedly infringing the copyright of the India Gramophone Company in transition from Singapore to Nepal *via* Calcutta did not constitute 'importation' under the section.<sup>111</sup> Invoking

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109. *Ibid.* (emphasis added).

110. *Ibid.*

110a. *Id.* at 237.

111. *Birendra Bahadur v. Gramophone Co. of India Ltd.*, A.I.R. 1984 Cal. 69.

the American 'original package doctrine'<sup>112</sup> the High Court ruled that since there was no mixing up or incorporation of goods in transit with the mass of property in local area, no importation can be said to have taken place. On appeal,<sup>113</sup> the Supreme Court of India held otherwise; importation, both under sections 51 and 53 of the Act of 1957 was held to occur as soon as it was shown that certain goods were brought from outside into India, even when it took place undeniably for the purpose of transit.<sup>114</sup> It also held that, unlike the powers of confiscation under the Sea Customs Act, which it described as "quasi-legislative," the power under section 53 was "quasi-judicial" in character, and attracts all the rules and principles of natural justice.<sup>115</sup> The registrar has to act judiciously, taking all relevant circumstances into account, bearing in mind that her order is reviewable by the Copyright Board.<sup>116</sup>

The importance of this decision really lies not so much in the interpretation of the term 'import' but the imaginative way in which Justice Chinnappa Reddy, for the court, brings to bear the principles and recent development of international law relating to copyright protection to this question of interpretation. The court first decided that there is an "obligation" of the Indian judiciary to decide, "within legitimate limits", questions of interpretation of municipal legislation in ways which will avoid "confrontation with the comity of nations or the well established principles of international law."<sup>117</sup> The question of interpretation only arises when the legislative intent is ambiguously expressed; this was the case, the court ruled, with section 53 in relation to the meaning of "import." The court is thus enabled to look at the 1965 Convention on Transit Trade of Land-locked States; the convention contained what has come to be known as the "dirty pictures and rotten fish clause" which, *inter alia*, empowers the transit state to interfere with such trade as may violate "protection of industrial, literary or artistic property or protection of trade names."<sup>118</sup> The India-Nepal Treaty of Trade contains assurance of similar power in relation to "general conventions intended to prevent infringement of industrial, literary or artistic property or relating to false marks, false indications or other methods of unfair competition."<sup>119</sup> A Treaty on Transit between the two countries also achieves the same result.<sup>120</sup>

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112. *Id.* at 77-78. The Supreme Court traces the "original package doctrine" to *Brown v. State of Maryland*, 6 Law. Ed. 419 (1827).

113. *Gramophone Co. of India v. Birendra Bahadur Pandey*, A.I.R. 1985 S.C. 667.

114. *Id.* at 680.

115. *Ibid.*

116. *Ibid.*

117. *Supra* note 113 at 671.

118. Article 11 of the convention, cited *supra* note 113 at 673.

119. *Id.* at 74-675 (citing article 10 of the treaty).

120. *Id.* at 675. The Calcutta High Court looked at the two treaties signed between India and Nepal for guidance in interpreting the term 'import'; but the guidance they derived was to rule in favour of the "original package doctrine." Justice Sabaysachi Mukharji observed that, keeping the two treaties in view, "it would be wrong to say that the moment goods crossed the customs barrier or entered into the Indian territorial waters,

The court held that under both these latter treaties, the Berne Convention and the Universal Copyright Conventions are examples of the "general conventions" referred to in the treaties. The interpretation of the Act of 1957 has to be approached only in light of these considerations; and they mandate what otherwise appears to be a very legalistic definition of 'import' in other contexts.<sup>121</sup> For the purposes of copyright protection the more liberal "original package doctrine" as imparting meaning to the term "import" has to be abandoned.

The Delhi High Court added a series of twists to the interpretation of 'import' under sections 51 and 53 in *Penguin Books*.<sup>122</sup> It ruled that the owner of copyright does not necessarily have to resort to the registrar of copyrights under section 53 in order to prevent infringement. That section, observed the court somewhat contemptuously, provides for the "godown situation"<sup>123</sup> where the registrar is empowered to enter ships, docks and premises where the infringing copies are held; the reference in the Supreme Court decision calling the registrar's action as "quasi-judicial" also does not improve, in the eyes of the Delhi High Court, the status of the registrar of copyrights. Indeed, the court goes so far as to say that section 53 does not amount to a "civil remedy" under the Act; merely quasi-judicial process is not the same as judicial process, which the courts alone can provide and, therefore, constitutes, in a sense, a civil remedy!<sup>124</sup> And in so doing the court ignores even section 74 which confers, extensively, the powers of the civil court on the registrar of copyrights. The court thus enables the owner of the copyright to resort to civil remedies under chapter XII of the Act of 1957.

In the present opinion, this aspect of the decision constitutes what might be called over-zealous approach to the protection of copyright. The court misdirected itself, despite a contemporaneous Supreme Court decision expounding the quasi-judicial nature of the power of the registrar of the copyrights, in denying it a status of a "civil remedy." Section 53

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they should have been construed to have been imported into India...." A.I.R. 1984 Cal. 69 at 80. He then proceeded to observe that if this construction were to be adopted "all goods which are prohibited in India but which are not prohibited in Nepal could not have transit as such through India." (*Ibid*). In that case, the landlocked state would be denied the very facility of transit which it was the object of the treaty to serve. What the learned justice overlooked, with respect was the precise significance of article IX of the Treaty on Transit which expressly provided for the transit state's jurisdiction, to prevent, *inter alia*, the transit of those goods which violate the "general conventions intended to prevent the infringement of industrial, literary or artistic property ...." The 1965 Convention on the Landlocked States appear not to have been at all invoked before the High Court; nor is there any reference to the Berne Convention as an illustration of precisely the kind of general convention to which the Treaty of Transit between the two countries refers.

121. *Id.* at 670.

122. *Penguin Books Ltd., England v. India Book Distributors*, A.I.R. 1985 Delhi 29 (per A.B. Rohatgi J.).

123. *Id.* at 29. The court here adopted the argument of Fysh, appearing on behalf of Penguin Books!

124. *Ibid.*

is designed by the Indian Parliament as a way of dealing with a specific type of infringement through importation, for which it contains the complete code. Section 55 in chapter XII of the Act provides for the remedies of injunction, damages and accounts for the infringement of copyright "except as otherwise provided by the Act." In section 53, the Act precisely provides *otherwise*. Moreover, on sheer institutional grounds, there is no need for Indian High Courts, overworked as they are in ways that stagger imagination, to provide a second channel of recourse, especially when the legislature has provided an effective alternative agency for redress. Moreover, the High Courts will need, if this approach holds, to hear complex arguments on where the "balance of convenience" lies for the purposes of issuance of an injunction and to continue with the hearing of the suit for long years if to decide the factual issues.<sup>125</sup> Section 53, in contrast, provides a fairly expeditious and efficient remedy.

#### (4) The 1984 Amendment and video piracy

In deference to the assurance given at the time of the passage of the 1983 Amendment, the government swiftly introduced the 1984 Amendment to deal with the growing problem of video piracy. The 1984 Amendment achieves four specific results: definitional modernisation, expansions of the notion of infringement, special procedures for the expeditious handling of alleged piracy and enhanced punishments.

##### (i) Definitional modernisation

Under section 2(f) considerable interpretative effort was necessary to include video films in its definition of "cinematograph film". The 1984

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125. See *supra* note 122 at 38. the case also provides a distinction of perhaps first impression between "primary" and "secondary" infringement. Since the defendants were not publishing the foreign books in India, but only distributing them, the infringement is described a "secondary". Is there any warrant for this distinction in the Act of 1957? Is the distinction viable? What consequences ensue which are distinct and different from this distinction?

The judicial discourse is also perplexing in its insistence that "Copyright law is a territorial concept." (*Id.* at 33). One view thought that it was a universal concept on the eve of the centenary of the Berne Convention! This observation *can*, and must be contextualised as elucidating why the consent order, in an anti-trust proceeding in the United States, cannot create any binding obligations outside that foreign jurisdiction.

Equity lawyers will also find much to quarrel with Justice Rohagti's holding that Penguin had come to court with clean hands, having in the first place denied the existence of a consent order in the United States! And, from the present standpoint, for extravagant reiteration of undimensional idea that copyright is merely a 'property' and 'pecuniary' right, one would have to look hard for a judicial discourse as complete in itself as this decision! For a critical review of the courts holding that "publication" under section 3 of the Act of 1957 constituted 'import', see K. Ponnuswami "Law of Intellectual Property", XXI *A.S.I.L.* 342 at 354-55 (1985). Ponnuswami's recommendation for a legislative clarification on the issue of parallel imports warrants serious consideration.



Amendment now adds an explanation to that section clarifying that "video films shall also be deemed to be works produced by a process analogous to cinematography." The lack of proper definition of duplicating equipment, crucial to cope with video piracy, has now been remedied by the addition of section 2 (hh). The definition of literary work in section 2(o) also stands enlarged to include "compilations and computer programmes . . . recorded on any disc, tape, performed media or other information storage device, which if fed into or located in a computer based equipment, is capable of reproducing, any information."<sup>126</sup>

As the definition of computer programme, the Amendment is clumsy and not adequate to address all the relevant problems which arise in the protection of computer software.<sup>127</sup> And as a measure in aid of combating video piracy the definition's reliance on the notion of "information" may well create interpretational problems. In what ways, excepting the most advanced cybernetics, is the reproduction of a song or dance sequence on television screen a "reproduction" of any information? The point is not that these problems could not be solved eventually by courts but only that definitional enterprise should be more adequately planned.

#### (ii) *Expansion of the notion of infringement*

Under section 51(b)(iv) import of infringing copies for the private and domestic use of importer was not deemed to be infringement. The 1984 Act deletes this exception altogether in relation to cinematograph film and records. Two copies of any other *genre* of works can still be imported for the private and domestic use of the importer.

A new section—section 52A—now provides that video film shall not be published unless three conditions are fulfilled. *First*, if it is a cinematograph film which requires certification under provisions of the Cinematograph Act 1952, such certification should be inscribed both on the container and in the video film. *Second*, the person making it must display a declaration that she has done so under licence or consent of the owner of the copyright in the film. *Third*, the name and the address of the person making the video film and of the owner of copyright in it shall be similarly inscribed. Similar requirements also attach to publication of records, except that the requirement of consent or licence are not explicitly applicable as in the case of video films.

#### (iii) *Special procedures*

Section 64 confers power on the police to seize copies of the infringing work without a warrant once the magistrate had taken cognisance of any offence under it. The Amendment now deletes the requirement of magisterial cognisance of the offence and empowers the police, with the

126. The definition of 'plot' in section 2(t) has also been amended.

127. See Upendra Baxi, *supra* note 3.

rank of sub-inspector and above, to seize all copies of infringing work as well as plates. And such seizure without warrant and cognisance extends not just to completed processes of infringement. The police may seize such materials in the process of copying or even when they think that infringement is "likely" to be committed. They are thereafter, of course, required to produce the material before the magistrate. These are admittedly very wide powers. But it does not require much imagination to say that unless special piracy cells or units are constituted within the police force, enforcement will have to be random.

Video piracy has been declared as an economic offence under the Economic Offences (Inapplicability of Limitation) Act 1974. The effect of limitation prescribed under the Criminal Procedure Code 1973, for certain offences shall not apply to offences created to combat piracy under the 1984 Amendment.

(iv) *Enhanced punishments*

Under section 63 knowing infringement or abetment of any copyright or any other right conferred by the Act was punishable with a fine or a year's imprisonment or both. The Amendment of 1984 revises this section in ways which indicate both minimum and maximum punishments. The fine to be imposed shall now be not less than Rs. 50,000 and may extend to Rs. 2,00,000; and the term of imprisonment shall not be less than six months and may extend to three years. Lest the imposition of minimum fine and period of imprisonment be impugned as unconstitutional violation of the right of life and liberty under article 21 or the right to equality and equal protection of the law under article 14 (which has really come to mean the right against arbitrariness), the Amendment wisely provides that less than the minimum sentence can be awarded by the court for special reasons to be recorded in writing. Obviously, in fit cases appeals for the enhancement of sentence could lie on such a judicial declaration.

The new section 63A provides for enhanced punishment on second and subsequent convictions in very much the same terms as section 63. And the new section 68A now provides punishments for violation of the new section 52A.<sup>128</sup>

Overall, the 1984 Amendment represents a new but conventional beginning. The Amendment does not, for example, prescribe the imposition of a levy on blank tapes and hardware, a portion of which could be provided to owners-producers of records and films, as an indirect way of curbing excessive home taping. Nor does the Amendment provide for regulation of sound and video tape libraries, which continue to provide a potent source of infringement. The extreme measure of criminalising unauthorised video-recording for home viewing has still to be legislatively

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128. The minimum term of imprisonment is one year, and the minimum fine Rs. 1,00,000 for second and subsequent years. Curiously, the maximum term of imprisonment remains three years!

considered even if to be rejected. One hopes that over a period of time the Amendment will be comprehensively reconsidered in the light of comparative exercises in regulation of piracy.

### (5) Acts not amounting to infringement

The Indian Act provides, in accordance with international usage and requirements, description of acts which do not constitute infringement. Section 52 describes these acts in bewildering details; it lists 25 act-descriptions (clauses (1)(a) to (y)) with numerous sub-clauses explanations and provisos. The objection to such elaboration is relatively easily met by saying that brevity is not necessarily the soul of wit, as indeed American lawyers wrestling with simple brevity of the "fair use" provisions in section 107 of their 1976 Act well know.<sup>129</sup> The need for reordering and reclassification in section 52 cannot, however, be gainsaid. We may classify the fair use exemptions of section 52 as under:

Table II

Sr. No.	Description of acts	Relevant clauses of section (52)(1) of the Act
1.	Fair scholarly use	(a), (p)
2.	Educational uses	(g), (h), (i)
3.	Media reporting uses	(b), (m), (n)
4.	Uses of state produced materials	(c), (d), (e), (g), (r)
5.	Making of records of literary, dramatic, or musical works	(i)
6.	Performance of such works	(f), (k), (l)
7.	Use by public libraries	(o)
8.	Use of engraving, etc.	(s), (t), (x)
9.	Cinematograph films—uses by makers, and exhibitors	(u), (y)
10.	Uses relating to artistic works	(v), (w)

There is not much notable case law, raising worthwhile issues concerning the limits of "fair use" and of "public domain." It seems that authors are generally either ignorant or tolerant of legal limits of "fair use."

## VIII Conclusion

Given the recent thirty years of experience of copyright law and justice, how does one evaluate the Indian experiment? The question is important and adequate knowledge has to be developed to respond to it. *First*, we

129. *Eg.*, L.E. Seltzer, *Exemptions and Fair Use in Copyright: The Exclusive Rights Tensions in the 1976 Copyright Act* (1978).

need close empirical examination of the work and functioning of the office of the registrar of copyrights and the Copyright Board. *Second*, we need to know more fully the *ratio*, and the rationale, of copyright litigations settled out-of-court as compared with those fully litigated. *Third*, we need some assessment of probable copyright infringements which go unredressed at law for a whole variety of reasons—ignorance of rights, difficulties of access to courts, the slow growth of copyright bar, associational weaknesses among producers of different *genres* of protected works and bureaucratic styles of administration of copyright legislation.

Pending such knowledge-bases, all one has in the slender corpus of decisional law on which to rest one's assessment. On this basis, all one could say is that the copyright industries have been more active initiators of litigation than the authors of protected works. And, on the whole, the decisional law generates greater protection for the copyright industries than for the original authors. Even these are sobering conclusions.

Much more, obviously, is needed to increase copyright consciousness as an aspect of the Indian social and cultural development and justice. Clearly, as a priority task, the obstacles imposed by the crisis of the Indian adjudicatory system, especially enormous delays, staggering costs and wavering decisional law, have to be redressed and access to adjudication improved.<sup>130</sup> The present structural disincentives to the use of protective provisions of copyright legislation have to be removed. And this can, perhaps, be best done through a network of easily accessible copyright, or intellectual property, tribunals throughout the country.

But this will only be a first, albeit a major step. And the series of next steps would involve a perspectival shift in the understanding of the social purposes or the mission of copyright law and justice in a developing society like India's with an enormously rich history of spiritual and cultural creative traditions. For example, there is no reason why we should amend copyright law in this part of the century to provide for protection of computer software and still not amend it to protect the rights of small creative people whether they may be potters, tapestry or carpet makers, or to collectively protect copyright the folklore.<sup>131</sup> Time has certainly come in India for a more mature appreciation of the fact that copyright law and justice are more than market and property categories primarily protecting copyright industries. Copyright legislation must be so designed as to protect as well the rights of intellectual and cultural labourers, upon which ultimately the social interest in cultural progress depends.<sup>132</sup>

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130. See, Upendra Baxi, *supra* note 8 at 58-83

131. See *supra* note 3.

132. See Upendra Baxi, "Weaknesses of the Copyright Law as it affects Creative People", a paper presented at a seminar on Asian Authors and Copyright Law, organised by the Indian Performing Rights Society, held at New Delhi (1985, mimeo).

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