



INPUTS ON PROPOSED AMENDMENTS IN THE INDIAN COPYRIGHT ACT, 1957

The office of the Registrar of Copyrights vide its email in October 2020 invited industry inputs regarding proposed amendments to the Indian Copyright Act, 1957. The communication stated that due to the changes brought about by COVID-19 pandemic, the creative industries were now performing and evolving with the increased use of the internet, digitalization, and a growingly globalized market for digital contents. In this altering scenario, the Copyright Office had sought comments and suggestions from industry on whether there was a need for revisiting some of the existing provisions of under the Copyright Act 1957, and for due amendments in the act.

FICCI had subsequently reached out to its members seeking their inputs on the proposed amendments in the Copyright Act. Based on the responses received, a document has been developed, drawing attention of the Government on certain provisions of the Act that need to be amendment/changed, and recommendations on provisions that are required to be included in the existing act.

Importantly, in the era of digitization, creation of digital contents enabled by artificial intelligence is an important development to study and assess in the context of the Indian Copyright Act. The act should be enabled to address the emerging challenges related to authorship, ownership, originality and infringement of copyrights in the backdrop of changing paradigms of copyright protection.

FICCI supports the Government's effort to bring about necessary amendments in the Copyright Act for the sake of clarity, to make the legislation forward-looking and thus further strengthen the Indian IP ecosystem. We thank the Copyright Office for the opportunity to engage on this important subject matter and place below our recommendations for consideration of the Government.

RELEVANT PROVISIONS OF THE ACT, CURRENT CHALLENGES & INPUTS/RECOMMENDATIONS

Section 2(d) – Definition of “Author”

An author under the existing Act is defined as to mean –

- i. in relation to a literary or dramatic work, the author of the work;
- ii. in relation to a musical work, the composer;
- iii. in relation to an artistic work other than a photograph, the artist;
- iv. in relation to a photograph, the person taking the photograph;
- v. in relation to a cinematograph film or sound recording, the producer; and

- vi. in relation to any literary, dramatic, musical, or artistic work, which is computer-generated, the person who causes the work to be created;

It is important to note that under the current business scenario there is a lot of ambiguity surrounding ownership of the work developed with the help of Artificial Intelligence. It cannot be disputed that with or without human involvement, AI can generate potentially a large of creative work such as software programs, training data sets, images etc. In a situation where there is direct human involvement, natural persons enable AI and bots to develop and generate creative work. The ambiguity surrounding the ownership of copyrights is an issue to be addressed.

In digital space, visual designers are collaborating with AI systems to create a variety of user interface designs which support and front end a lot of software applications. Therefore, in the present business scenario, following key questions arise –

- i. Whether a work generated by an AI algorithm be protected under the Indian copyright act?
- ii. Who would be considered to be an author in scenarios where a natural person would have contributed to design of algorithms or any other contributions, how can a natural person claim authorship?
- iii. Can AI be termed as an author under the Act?

It is implied that the potential of AI will continue to grow in the upcoming future. Hence, it becomes essential that the Act addresses the issues that are being debated in light of the rise of new of new technologies like AI. The Indian Copyright Act must be prepared to address the challenges related to authorship, ownership, originality, and infringement of copyrights. It is respectfully submitted that the current Copyright Act provisions do not align to address these questions.

FICCI recommends that the government should come up with a clarification/amendment on the concept of “authorship” in terms of work generated with the assistance of AI algorithm or work generated by natural person in collaboration with AI where the natural person would have contributed to the AI algorithm.

Section 13 - Works in which copyright subsists

The section reads as under –

(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say, –

- (a) original literary, dramatic, musical and artistic works;*
- (b) cinematograph films; and*
- (c) sound recording.*

The Indian courts through several judgments have now and then interpreted the concept of “originality” of copyrighted work. It must, however, be noted that in the changing business

scenario there is immense potential for AI-related works to generate potential ambiguity in the interpretations of “originality” of copyrighted work.

FICCI recommends that Section 13 should be amended or should clarify through proviso the remedy for a situation where AI is involved in the creation of potential “original” work.

Section 15 - Special provision regarding Copyright in designs registered or capable of being registered under the Designs Act, 2000

The section reads as under –

- (1) Copyright shall not subsist under this Act in any design which is registered under the Designs Act, 2000;*
- (2) Copyright in any design, which is capable of being registered under the Designs Act, 2000 but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright or, with his license, by any other person.*

Protection of copyright is vested in artistic and literary works. There is, however, a lack of awareness in most designers that they need to get their design registered in order to ensure protection when the products are commercially applied.

It must be noted that due to this lack of awareness of protecting their designs under the Designs Act, 2000, many designers opt for the protection of their work under the Copyright Act, which is a secondary level of protection. However, since section 15(2) of the Copyright Act says that copyright in an unregistered design shall cease, as soon as the article to which the design has been applied, has been reproduced more than fifty times by an industrial process, therefore, the industry loses both the rights in their intellectual property i.e. the design and copyright protection.

In other words, there is lack of protection for artisans, designers and the fashion industry as a whole under the existing act specially pertaining to Section 15(2).

FICCI recommends that for safeguarding the rights of the fashion industry, the government should make amendment in this section by providing an exception to the fifty times rule considering the fact that most fashion labels do not obtain the statutory registration under Designs Act, 2000 and thus are unable to enforce any right in lieu of design registration.

Section 17 – First Owner of Copyrights

This section says that Subject to the provisions of the Copyright Act, the author of a work shall be the first owner of the copyright.

In light of the growing use of AI in business operations, ambiguity is bound to arise to ascertain who is the first owner of the copyright work where a computer programmer is involved with AI

to generate a machine created creative work like a music, visuals or any other creative work or in scenarios where a company invests and trains the AI to create content, can the company claim ownership on the content.

FICCI recommends that the government should clarify by inserting a proviso in Section 17 of the Copyright regarding the vesting of ownership in copyrights where AI is involved in creation of the work.

Section 18 - Assignment of Copyright

Section 18(1) reads as under –

The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof.

It is submitted that a sound recording or cinematograph film for promoting a product or service (such as an advertisement film or jingle) are often created for a third-party client by a service provider. In such situation, the rights in the film or sound recording are typically assigned to the client by the authors, including the producer and composer.

Such arrangements are different from the arrangements between composers, lyricists and producers for literary and musical works or sound recordings included in feature films, where there is scope for utilizing such works beyond their inclusion in the film or sound recording (such as in the form of ringtones etc.).

However, the proviso to Section 18(1) prohibits authors from assigning or waiving their rights to royalties in literary or musical works incorporated in cinematograph films or sound recordings, except to specific persons.

In view of the above, the following explanation could be added to the proviso to Section 18(1) of the Copyright Act.

“Explanation. – The provisos shall not apply to any cinematograph film or sound recordings which are meant for advertisement of products or services.”

Proviso 3 & 4 to Section 18 (1)

Proviso 3 and 4 read as under:

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

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

Section 19

It should be noted that apart from vaguely stating that royalties are to be shared “on an equal basis”, these provisos do not shed any light whatsoever as to how these royalties are to be calculated, collected, distributed and most importantly by whom.

Section 51(a)(i)

The section states as under –

1. Copyright in a work shall be deemed to be infringed –

(a) when any person, without a license granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act –

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or.....

The key question that arises through this section is - Are the current provisions in the copyright sufficient to establish infringement on works which have been created by AI?

According to FICCI, the infringement liabilities for the creators, users, and distributors of technologies (particularly in a scenario where an AI related work has potentially infringed a digital work) has to be properly established.

Section 62

The section states as under –

“(1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district court having jurisdiction.

(2) For the purpose of sub-section (1), a “district court having jurisdiction” shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, include a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain.”

It is submitted that as per the decision of the Hon'ble Supreme Court in *Indian Performing Rights Society Ltd. v. Sanjay Dalia And Ors.* (2015) 10 SCC 161, it was held that if the cause of action of the suit arises in the jurisdiction where the proprietor has their principal place of business, the proprietor must necessarily file a suit in such jurisdiction. In this case, a proprietor cannot file a suit in another jurisdiction where the proprietor had a branch office.

It is recommended that an explanation be added to Section 62 of the Copyright Act clarifying that a place where a person carries on business includes a place where a person has a registered office or a branch office. The following explanation may be added –

Explanation. – The place where a person ‘carries on business’ under this section includes a place where a person has a registered office or a branch office.”

Section 63(a)

This section states as under -

Offence of infringement of copyright or other rights conferred by this Act. —

Any person who knowingly infringes or abets the infringement of—

(a) the copyright in a work, or

(b) ...

It is submitted that the Government of India has taken various steps to decriminalize the actions for which civil remedy is sufficient relief. Chapter XII of the Act provides civil remedy which may provide sufficient relief to the copyright owner and a disincentive to any infringer.

In cases like cinematograph films, there are divergent claims from the producers, composers and singers making claims in respect of the same work. It would be difficult for the criminal courts to adjudicate on such rival claims. Civil court is the appropriate forum to adjudicate on such matters.

FICCI recommends that Section 63 may be amended as follows:

Any person who knowingly infringes or abets the infringement of—

(a) the copyright in a work (except section 13(1)(b) and 13(4)

Section 69(1)

The section states as under -

Where any offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for, the conduct of the business of the company, as well as the company shall be deemed to be guilty of such offence, shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

It is recommended that the section be amended as below -

“69. (1) Where any offence under this Act has been committed by a company, every person who at the time the offence was committed was **directly** in charge **of the actions that caused the offence**, and was responsible to the company for, the conduct of the business of the company, and, as well as the company shall be to be guilty of such offence and shall be liable to be proceeded against and punished accordingly. **Provisions of this section shall not apply for any actual or alleged infringement under section 51(a)(ii), when such infringement is attributed to a company that does not generate revenue from a business that involves usage of music or sound recording.**”

ADDITIONAL SUBMISSIONS FROM FICCI

Enhancement of Damages especially in case of Habitual Infringers

In today’s world, enforcement has become an expensive exercise more so due to the nature it is done. Investigations need to be done physically, in the sense that one needs to follow the protocol, lodge complaint with the police and follow the due and extensive course.

But in the case of counterfeit when the gravity of crime is very large, this cumbersome approach is not very ideal. For example, counterfeit products can be found in abundance even on roadsides, and initiation of an action against one infringer who may just be selling two counterfeit products is not economically viable.

There has to be greater deterrence, which cannot just be limited to imprisonment of two years or minimal fine or even both. When it comes to enhanced penalties for second and subsequent convictions, it also falls short as it does not increase the maximum jail term or the fine. Due to this, further provisions under the Indian Penal Code needs to be invoked making it a cumbersome process and allowing the counterfeiters to evade.

Any counterfeiter to stop his/her activities should be scared of detention, which can only happen when the punishment is enhanced and made mandatory. The current 3 years of imprisonment for habitual infringers is too less a time for any lawbreaker to dread.

Strengthening Technology Protection Measures (“TPM”) under the Copyright Act

India acceded to the WIPO Internet Treaties, namely, the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”) in 2018, and therefore has an obligation to update its domestic laws to comply with its international mandates under these instruments. While the *Statement of Objects and Reasons* to the 2012 Amendments to the Copyright Act state that they were largely made keeping in mind adherence to these Treaties, there is a discrepancy in our domestic law with regard to the way the provisions on TPM (currently under Section 65A of the Copyright Act) have been introduced.

Article 11 of the WCT and Article 18 of the WPPT (which are *in pari materia* with each other) deal with TPMs. In a scholarly text by celebrated authors Jorg Reinbothe and Silke Von Lewinski¹, the authors highlight that the 'minimum standards' for TPM that right-holders enjoy under the Internet Treaties include preparatory activities as well, such as manufacture and sale of devices that have the sole function and purpose of infringement. The Copyright Act does not comply with this interpretation of the TPM provisions in the Internet Treaties.

Extended Collective Licensing (ECL) model for copyright societies should be brought in to address the fragmentation of rights owners

The current fragmented rights owners landscape has meant increased transactions costs for platforms in securing licenses as well as enhanced legal exposure due to the fragmented nature of rights. While collective licensing via copyright societies is a welcome effort to minimise this fragmentation and shift to a one-window system, the copyright society system also needs to look at other models of collective licensing. The concept of multiple copyright societies may not be the most conducive of models because this only enhances the challenges posed by fragmentation of rights owners.

Currently, the scheme for collective licensing under the Copyright Act is contained in Chapter VII, which lays out the role of copyright societies and the procedures by which they must operate. The system works on an 'opt-in' model, whereby authors and owners may choose to become members of a copyright society for a particular class of works, which would then carry out the business of issuing or granting licenses. This system has encountered bottlenecks when stakeholders contest the ability of a copyright society to collect and distribute royalties, leading to prolonged litigation.

Further clarity on the role and powers of copyright societies (also known as collective management organisations (CMOs) in the statute, would go a long way in clearing the legal landscape and making the system effective as intended, for both right-holders as well as users/platforms.

In this context, it is submitted that the model of 'extended collective licensing' ("ECL") that is followed in the Nordic countries, would be a good fit for India, to supplement the existing system of 'single-window licensing, where there is a single copyright society for each class of works. As elaborated in a paper by Anna Yuopala and published by the Finnish Copyright Society², such a model is a perfect fit for the digital environment, where in addition to individual users, there is a growing need for mass licensing of works, where individual licensing becomes cumbersome and impractical.

The essence of the ECL system is that, through appropriate provisions in the law, it *extends the effect* of an agreement concluded between specified parties in a manner that allows the user to

¹ Reinbothe, Jorg and Silke Von Lewinski, 'The WIPO Treaties on Copyright, A Commentary on the WCT, the WPPT, and the BTAP', *Oxford University Press*, 2nd Ed., 2015, pgs 170 – 174 and 429 – 430

² Vuopala, Anna, 'Extended Collective Licensing', *Finnish Copyright Society, Finnish Copyright Institute*, ISSN 1799-8166, FCS Articles and Studies No. 2- January 2013

use, on conditions laid down in the agreement, works by authors/owners whom the organisation does not represent. Importantly, safeguards are built in, in favour of right-holders that are not represented by the organisation, *i.e.* 'outsiders', who have the option to receive royalties at the rate collected by the CMO, or to 'opt-out' of the system, for example, by prohibiting the uploading of their works to the collection, or in other ways.

This system retains the idea of 'free negotiations' in the market, by basing itself on terms freely negotiated in the original agreement between the CMO (which is an expert body representing right-holders' interests) and the user (eg: a streaming platform) wishing to license use of works on a mass scale. Thus, it is preferable to a system of statutory licensing, where rates are fixed by regulators who may not have the same intricate knowledge of the industry. On the other hand, any disagreement on issues such as the representativeness of a CMO, or any unconscionable terms in the original agreement, could be taken up by the IPAB. From a users' perspective, they would not have to deal with claims from individual right-holders, and any outsiders who wish to make claims could address them directly to the CMO.

Statutory Damages

The Indian Copyright Act, 1957 requires a Statutory Damages remedy. This is because a general damages remedy requires a detailed enquiry into damages which is often avoided by defendants and accordingly due to a lack of information, courts often have no choice then to draw up sub-optimal damages decrees. A statutory damages clause will on the other hand allow courts to measure damages basis instances of infringement ascertained for example during an Anton Pillar search and seizure actions. Looking to the US which has incorporated statutory damages in its copyright law, the Indian Government should incorporate a statutory damages clause in the Copyright Act, 1957. The Government could also mandate that copyright registrations would be mandatory for claiming statutory damages in India. This would mean that while the public exchequer would benefit from registrations, statutory damages as an (elective) remedy would provide a distinct remedy which would have a real deterrent effect on infringement.

Establishment of a central authority for tackling Piracy

Presently there are several platforms whose business model is Piracy. Piracy has become a parallel economy, especially for media creating huge loss of revenues to all stakeholders. Sec. 63 of the Copyright Act is inadequate to deal with Piracy as it was legislated to deal with infringement at local levels. Piracy has transformed from being local where content used to be distributed through CDs on roads to global where the infringing website/service is registered and hosted in one place while it is available throughout the world. Under Sec. 63 the machinery which is required to take action is the police which is a state machinery that is limited by jurisdictional issues. There is no adequate mechanism to block infringing Pirate websites across India due to which the content owners are presently required to approach courts for injunctions. This also increases the load on judiciary which is already overburdened.

So, FICCI proposes that a central authority with the power to deal with Piracy and issue orders to ISPs and other intermediaries to block infringing Pirate websites and deal with Piracy more effectively needs to be established under the Act itself. This central authority should also have

the mandate to establish working relationships with authorities in other countries to tackle Piracy originating from such countries.

De Minimis Usage

While it has been subject matter of several litigations and courts have taken a view that De Minimis usage will not amount to infringement, Sec. 52 of the Act does not cover such usage. It is recommended that De Minimis usage of works is also made part of Sec. 52 and clear principles laid down so that it will help avoid litigations and burden on courts.

Bringing fair dealing into line with the global trend toward a more flexible regime

India's fair dealing provision was derived from that of the UK. Yet, in court decisions, the courts have applied factors identical to those in the US fair use provision (17 USC 107). For example, in *Civic Chandran v. Ammini Amma*, 1996 PTC 670 (Ker HC) 675-677, the court noted that fair dealing is not defined in the copyright act, and that in determining whether in a specific case a use was fair dealing, one would take into consideration "(1) the quantum and value of the matter taken in relation to the comments or criticism; (2) the purpose for which it is taken; and (3) the likelihood of competition between the two works." These three factors are those in the US statute, omitting only the second US factor, the nature of the copyrighted work.

As helpful as this application of flexible factors is in coming to a reasoned decision, the India statute, based on its UK history, still contains a closed list of potential fair dealing uses, and no statutory enumeration of the quoted factors. The global trend – seen most recently in the RCEP trade agreement and in Singapore, Korea, Israel, and South Africa -- is to match the statute with the reality of the flexible nature of creativity. This is accomplished by inserting "such as" before the enumerated list of potential fair dealing uses, and by including the factors quoted by the court in *Civic Chandran*. India's current law, as applied by the courts, gives one a fair way toward this goal, but is limited in as much as it is based on the discretion of the court and the applicability of the decision is limited in its precedential scope by the constraints of territorial jurisdiction. The legislature should amend the law to get fully there, in line with the most innovative countries in the world which have recognized the need for flexibility in dealing with this subject matter.

Greater Flexibility for Cover Recordings

Cover recordings of a song play an important role in the music ecosystem. They boost the popularity and influence of the underlying work, introduce the work to new audiences, generate additional streams of revenue for the original author(s), and provide a vehicle to showcase the creativity of artists who take a different approach to the work. The current Copyright Act, unfortunately, stifles these benefits to cover songs by making it overly burdensome (including in comparison to other regimes) for creators to obtain statutory licences to record a cover song.

In an effort to promote the use of musical compositions and creativity among recording artists, the government should reduce the barriers to statutory cover version licencing currently found in Section 31C. Specifically, the government should:

- Remove the “same medium” requirement. In a made-for-streaming environment, it is not practical for artists to make, press, and distribute physical copies simply because the original version was released in that medium;
- Revise the limitation of “alteration” to allow for more creative arrangements. See [17 USC 115\(a\)\(2\)](#) as an example.
- Remove the five-year rule. The statutory licence should promote the creation and distribution of cover versions for current songs. When shared on platforms like YouTube, cover songs can increase the popularity of current hits.
- Provide clear rates/tariffs that are consistent with a digital environment (e.g., remove the advance payment provision and 50,000 copy threshold) and a centralised site for locating the copyright holder, filing notice, and paying the tariff.

The government should reform Section 31C to make it easier for creators to obtain a licence and record their favourite songs, which would serve to promote the original and new works.

