

The Proposed Indian Copyright Amendment Rules and Suggestions for Further Amendment

Lynn Lazaro, Partner, Kochhar & Co.

The Copyright Office of the Department for Promotion of Industry and Internal Trade (DPIIT) has invited comments and suggestions to amend the Copyright Act before November 30, 2020. Mid last year, the DPIIT proposed a set of amendments to the Indian Copyright Rules. While these amendments sought to increase transparency and provide clarity for right holders, many other essential modifications were overlooked. This raised questions and concerns in the industry of the gap between the rule makers and the current global climate. Not only the Rules but the Act itself in India requires precision on many of its provisions with new well drafted provisions to ensure a comprehensive updated Act. Therefore, the invitation to provide our comments for further amendments is an opportunity to discuss the real concerns of the Copyright Act and its corresponding Rules.

Highlights of the Proposed Rules

According to the Ministry of Commerce and Industry, the “Copyright Amendment Rules have been introduced to ensure smooth and flawless compliance of Copyright Act in the light of technological advancement in digital era and to bring them in parity with other relevant legislations.”¹ The key amendments include:

1. Replacement of the words “by way of radio broadcast or television broadcast” with “for each mode of broadcast”, thereby including statutory licensing for internet broadcasting as well.
2. Permitting electronic means for the payment of fees, communication with the office and license holders.
3. Only the source code to be submitted for registration of a computer program as opposed to the requirement for both the source and object code to be submitted.
4. Increased accountability of Copyright Societies by requiring the Societies to create an Annual Transparency Report (65A) to include financial information of the rights revenue and refusals to grant licenses among others, and publish this report on their websites.
5. The words “The Copyright Board” amended to “Appellate Board” and the qualifications of the chairman of the Board and its members amended to be consistent with the Trade Marks Act 1999.

Suggestions for Further Amendment

The Indian Copyright Act in its current form, requires far more edits than proposed by the DPIIT. There is a lack of clarity and the right holders are not being adequately represented under the Act. Technology has always been a few steps ahead and our laws have been unable to anticipate and catch up. Some suggestions in this regard are,

1. An AI Author

The Act has no provision to regulate disruptive technology, in particular, artificial intelligence that is capable of creating content protectable by copyright. The common

¹ Press Release dated June 3, 2019.

argument that AI belongs to a human author and hence the rules and protections of copyright pertain to the human involved with the AI's creation, does not hold weight. With AI developing content on its own without human interference, it is apparent that there needs to be amendments to the Act and Rules to regulate this IP. Contrary to popular belief AI while revolutionary is not new. In the 1900s, Leonardo Torres y Quevedo, a Spanish civil engineer and mathematician built El Ajedrecista an automaton capable of playing chess². It was considered the first computer game in history. Inventions like the original calculator and El Ajedrecista incorporate at the foremost, elements and concepts of artificial intelligence, although it was still early years then. Today, we have autonomous cars, Siri, Alexa and Sophia. Sophia is the world's first humanoid robot and the UNDP's innovation champion. Sophia is the first non-human to be given a title by the United Nations³. She is also the first non-human to be given citizenship. Sophia is a citizen of Saudi Arabia⁴. Interestingly, Sophia has the capability to create and innovate. This android has proven capable of having a conversation with human beings, making jokes and providing creative works. In the year 2019, Sophia learnt how to sketch drawings and portraits⁵ and she sketched the portrait of the Prime Minister of Malaysia as a gift to him on his 94th birthday⁶. All of this raises the questions of who owns the copyright and who takes responsibility. Regulation is the need of the hour to ensure accountability and transparency.

2. Data Mining

Data Mining or data analysis driven by AI, machine learning and deep learning is now the go to technology to automate research. Essentially, large packets of data are mined to generate patterns and solve complex problems. While this has transformed the access to information, there needs to be more clarity within regulations to protect the owners/ authors of such data. Again, some may argue that this becomes a privacy and data security issue but there are elements of copyright ownership that are being forgotten and must be policed. If prior permission from the copyright owner has not been taken, there may be a clear case of infringement. For example, if a published work has been mined to extract certain data or information, and then the work is circulated, the distribution rights of the copyright owner are being infringed if due permission has not been granted. The argument of fair use for research and educational purposes in such a situation is often called upon as a defence but this is open ended since there are no clear regulations to govern these types of situations.

3. Co-ownership

While the Act provides for a "work of joint ownership", the Act is silent on the workings of such co-ownership of copyright. We are thus forced to look at the courts for an

² McCorduck, Pamela (2004), *Machines Who Think* (2nd ed.), Natick, MA: A. K. Peters, Ltd., ISBN 978-1-56881-205-2, pp. 59–60.

³ UNDP in Asia and the Pacific Appoints World's First Non-Human Innovation Champion". UNDP Asia and the Pacific. Retrieved July 29, 2020.

⁴ "Meet the first-ever robot citizen — a humanoid named Sophia that once said it would 'destroy humans'". Business Insider. October 27, 2017. Retrieved July 29, 2020.

⁵ <https://www.hansonrobotics.com/the-making-of-sophia-how-sophia-draws/>, Hanson Robotics, Nov 11, 2019. Retrieved July 29, 2020.

⁶ "<https://www.thestar.com.my/news/nation/2019/07/17/dr-mahathir-tonguetied-yes-when-he-met-sophia-the-social-humanoid-robot>", The Star, July 20, 2019. Retrieved July 29, 2020.

interpretation. The courts of Mumbai⁷ and Allahabad⁸ have provided that in India a joint owner cannot exploit the copyright individually. They require the permission of the other copyright owner(s) before assigning, transferring, licensing or sub-licensing any part of the product so jointly owned. This is contrary to the laws in other jurisdictions and serves as a hindrance in doing business in India. Many are of the view that this issue can be contractually taken care of, however, there is no clarity in the Act or subsequent Rules and it would be interesting to see if this addressed in the amendments to the Act.

4. Intermediary liability

The degree of liability for intermediaries has been a question of great debate. Under Section 79 of the Information Technology Act, intermediaries are given safe harbour. However, apart from the “Fair Use” exception, the Copyright Act has no clarity on this. In addition, with regard to user generated content websites such as networking sites like Facebook, Instagram, Twitter, Tumblr, Snapchat, TikTok, etc., the blanket safe harbour exemption needs to be looked at again. Many are also of the view that intermediaries should be given higher responsibility including the obligation to restore the content once removed if no proof of copyright infringement is provided within a time frame.

5. Statutory Licensing and Fixed Royalties

By way of a public notice last month, the Intellectual Property Appellate Board (IPAB) intends to fix the royalties for communication of Sound Recordings to the public by way of broadcast through Radio under section 31D of the Copyright Act, 1957 and has invited suggestions from the public in this regard. While this move could be considered arbitrary and an overreach of the government’s role in what should essentially be a contractual decision, Section 31(D) of the Act requires a broadcasting organisation to obtain a statutory license to communicate any literary or musical work and sound recording works to the public and pay the royalties to the copyright owner at the rate fixed by the IPAB. The copyright owner consequently has no say in their royalty amount. A suggested amendment would be that the IPAB fix a minimum rate and allow the parties to negotiate a tangible amount to avoid rock bottom prices.

Many are also against statutory licensing in general and strongly of the view that it should not apply to streaming services. However, the proposed amendment to the rules, as mentioned earlier includes “each mode of broadcast” thereby bringing internet streaming services firmly within its gambit.

⁷ Angath Arts Private Limited v. Century Communications Ltd. and Anr. 2008(3)ARBLR197(Bom) | 2008(4)BomCR838.

⁸ Nav Sahitya Prakash v. Anand Kumar, AIR 1981 All 2000