

THE COPYRIGHT (AMENDMENT) ACT 2012: A FAIR BALANCE?

With the recent passage of the Copyright (Amendment) Act 2012, India traversed yet another milestone in her intellectual property (IP) history. As with most other amendments, this too came with its fair share of controversy and contestations. Indeed, in many ways, it played out like a Bollywood script, complete with larger than life heroes, melodramatic plots, twists and shakes at every turn that required one to suspend logic, routine song and dance sequences and a happy ending (well, at least for some).

This was not too surprising, given that a significant part of the amendments focused on the Bollywood industry and its inequitable practice of denying a fair share of royalties to underlying authors, namely lyricists, music composers and script writers.

Prashant Reddy's paper provides an excellent narrative of this historical injustice, starting with the infamous Supreme Court decision that stripped music composers and lyricists of their ownership over Bollywood songs and handed them on a platter to film producers. Deploying an investigative talent for which he is now famed in the Indian IP firmament, Reddy unearths sordid dealings of two copyright societies and paints a shocking picture of a concerted attempt to disembowel Bollywood artists systematically over time. He showcases the stellar role played by Javed Akhtar in bringing the issue to national attention and campaigning tirelessly to see the amendment through. Reddy's narrative is very useful in helping us appreciate the *raison d'être* behind the amendments that now mandate an equitable sharing of royalties with music composers and other authors.

Udit Sood then focuses on the actual text of the amendments (popularly known as the "Bollywood amendments"). He begins by acknowledging that the drafting of the provision leaves much to be desired and asks (perhaps rhetorically) whether a law can be struck down for lack of clarity. He goes on to proffer a cogently reasoned interpretative perspective. His astute analysis will no doubt be of tremendous significance to practitioners and judges faced with such disputes in future.

Outside of the entertainment industry, the Bill tackles a host of other issues. While some of the amendments deserve accolades, other opprobrium.

Given India's efforts in projecting itself as an Information Technology superpower, a sizeable number of the amendments address the so-called "digital" economy. The paper authored by Latha Nair and Rajendra Kumar does a stellar job of focusing on intermediary liability and asking if the copyright amendments exempting intermediaries draw the right kind of balance between the interests of content owners, users and intermediaries. They constantly warn that in our zeal to protect content owners from the rapid proliferation of copied content on the internet, we must take care not to shoot the messenger, as they constitute a critical component of the very DNA of the internet. The comparative perspective provided by them in terms of US and EU law will be of great utility to our readers.

Swaraj Paul Barooah's perceptive paper focuses on what are now commonly labelled "anti-circumvention measures". These are measures to prevent circumvention of a technology protection measure introduced by a copyright owner to prevent copying or distribution of her work. He highlights how the amendment did not stem from any international obligation and was therefore not really needed. However, he rightly notes that when compared with its international counterparts, the Indian version was more moderate, in that it penalized only an act of circumvention that was executed with a view to otherwise infringe copyright. Notwithstanding this watered down anti-circumvention norm, Barooah opines that in view of the large transactional costs and the potential for abuse, we would have been better off without this amendment.

That copyright is to be seen not only from the right owner's perspective but also from a broader public interest perspective is now a well-accepted truism. Indian law endorses this sentiment by outlining a wide array of copyright defences in § 52. The amendments add to this repertoire and we are fortunate to have unique perspectives on many of these amendments from erudite copyright scholars, activists and thinkers.

Mention must first be made of the newly introduced copyright exception for the disabled which provides that any conversion of a copyrighted work into an "accessible" form for the differently abled would be exempt from copyright infringement. The only limitation is that if the said conversion is done on a for-profit purpose, then a compulsory license needs to be sought and royalties paid.

This amendment was celebrated by the disability community world over as one of the most liberally worded and progressive exceptions. It also provided great support to campaigners advocating for an international treaty on this count. The treaty materialized at Marrakesh just as this issue was being finalized. As with most other revolutionary provisions, the Indian amendment did not materialize overnight, but was the result of passionate and concrete advocacy for many years by a group of dedicated campaigners. Chief

among them was the inimitable Rahul Cherian who unfortunately passed away just as this issue was nearing completion. It is fitting then that the paper outlining the advocacy efforts is dedicated in his memory. In fact, our wonderful team of editors deemed it appropriate that this entire issue be dedicated to Rahul's exceptional legacy.

If there was any provision that courted as much controversy as the Bollywood amendments, it was the one dealing with "parallel imports" (a term broadly referring to the import of copyrighted goods which are legitimately purchased in the export country by third parties engaging in price arbitrage). The government sought to legalise such imports by amending § 2(m) of the Copyright Act. However, in a strange volte face, they dropped this amendment at the last minute, succumbing to pressure from the publisher lobby which had vocally opposed any kind of provision that reduced their ability to partition markets. In a persuasive paper, Pranesh Prakash forcefully argues that even absent this purported amendment, Indian law as it currently stands recognizes international exhaustion and parallel imports. He critiques a number of Indian decisions for having misunderstood the statutory framework in this regard.

Ujjwala Uppaluri does a commendable job of analyzing a newly introduced exception that permits non-commercial public libraries to store their works in "digital" format so as to help preserve them for posterity. She however notes that the Indian copyright provisions on libraries are woefully inadequate and that the government lost out on a significant opportunity to redress this gap.

Lawrence Liang in his inimitable style interrogates the amendment pertaining to the expansion of the fair dealing defence to include films and sound recordings (the earlier defence covered only literary, dramatic, artistic and musical works). Liang asks if a statutory provision catering primarily to the print media and exempting fair dealing for the purpose of "criticism and review" can appropriately address the audio-visual world, where creative artists constantly appropriate large amounts of existing video and sounds to re-contextualise them and proffer a different meaning.

Speaking of copyright exceptions, a group of us continue to fight an ill-fated copyright dispute brought by leading publishers against Delhi University.¹ While we had initially thought of including it in the special issue in view of its contemporaneity, we decided against it owing to the fact that

¹ Lawrence Liang, *Of Gandhi and a Godfatherly Copyright Offer: Shamnad Basheer and Lawrence Liang*, May 27, 2013, available at <http://kafila.org/2013/05/27/of-gandhi-and-a-godfatherly-copyright-offer-shamnad-basheer-lawrence-liang/> (Last visited on July 9, 2013); Lawrence Liang, *Of Gandhi and a Godfatherly Copyright Offer- Part 2: Shamnad Basheer and Lawrence Liang*, May 28, 2013, available at <http://kafila.org/2013/05/28/of-gandhi-and-a-godfatherly-copyright-offer-part-2-shamnad-basheer-and-lawrence-liang/> (Last visited on July 9, 2013).

the “education” exception in § 52(1) (i) did not specifically form part of the amendments.

Last, but certainly not the least, is a compelling paper from Ananth Padmanabhan focusing on the infamous Copyright Board and its blatant illegality. Padmanabhan skillfully takes us through the various constitutional nuances that have marred this tribunal. He takes issue with the fact that the government lost an opportunity to secure this tribunal on firmer constitutional moorings. He advocates specific changes to the Board’s structure and composition which would enable compliance with the norms for tribunalisation laid down by the Supreme Court in *R. Gandhi v. Union of India* (popularly referred to as the *NCLT* case).

All of the above papers examine these amendments in careful detail and investigate if the competing stakeholder interests were appropriately balanced in the final text of the amendments. They also delve into whether or not the government used the legislative opportunity well enough or had missed the bus.

These papers originated out of a copyright conference held at NUJS on the 27th and 28th of November, 2012.² I want to thank each of the contributors for their astute analysis and their sagacious ruminations. They were extremely receptive to the editorial changes we suggested and this co-operation helped us to a large extent.

We have a lot of people to thank for this special issue. First among them is our Vice Chancellor and Editor in Chief, Professor Ishwara Bhat for encouraging, supporting and guiding this effort throughout. Being an IP law scholar himself, this special issue was of immense importance to him.

It bears mention that the genesis of this special issue lay in the desire of a very dedicated group of students who are a part of the NUJS Law Review and were keen on having an issue dedicated to intellectual property. Given that the copyright amendments were revolutionary in their scope and ambit, what better theme to address than this. Their efforts effectively set into motion the first serious scholarly body of work to examine the amendments. So, a big thank you to all of them for getting this started.

My heartfelt appreciation to Sai Vinod and to an exemplary set of students from the Intellectual Property and Technology Law Society (IPTLS) and from the Class of 2013 at NUJS who worked around the clock to organize the above mentioned copyright conference. Their hard work and meticulous

² NUJS-CUSAT Conference, Copyright Amendments, 2012: A Fair Balance?, available at <http://spicyip.com/docs/Conference/NUJS-CUSAT-Conference-2012.pdf> (Last visited on July 9, 2013).

organisation ensured that we had a wonderfully stimulating discussion over two days.

I want to thank Arnab Roy and Manab Ghosh who are part of the IP Chair at NUJS and who played a critical role in co-ordinating the conference.

I want to specially thank Professor N. S. Gopalakrishnan at the Cochin University of Science and Technology in providing financial assistance and co-hosting this conference with us at NUJS. Given the significant role that he played in shaping the amendments, his insights at the conference proved immensely valuable.

My gratitude again to all the speakers at the conference. Many of them were not able to submit papers to us on time, but we hope that we are able to capture their fine contributions when we bring out a book on this theme by Eastern Book Company (EBC). Special thanks to Mr. Sumeet Malik of the EBC for immediately agreeing to the idea of the special issue and a book and for providing us with all the logistical support.

I want to thank the Ministry of Human Resource Development, Government of India and particularly Mr. Raghavender, the current Registrar of Copyrights for his tireless efforts in supporting the cause of IP education in the country. Mr. Raghavender was one of the keynote speakers at the conference, and we do hope to capture his percipient thoughts in the forthcoming book.

It was a great privilege for me to guest edit this issue and review the insightful writings of a diverse array of discerning thought leaders. I hope our readers will find these articles as stimulating as I did.

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